THE

FEDERAL REPORTER.

VOLUME 153.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

JULY 4—AUGUST 15, 1907.

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

ST. PAUL:
WEST PUBLISHING CO.
1907.

153 F.

JUDGES

OF THE

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

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FRANCIS C. LOWELL, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. WILLIAM K. TOWNSEND, Circuit Judge [1].....New Haven, Conn.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge [2].....New York, N. Y.
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Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT.

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

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

Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. NATHANIEL EWING, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

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Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
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FIFTH CIRCUIT.

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Hon. OSCAR R. HUNDLEY, District Judge, N. D. Alabama.....Birmingham, Ala.
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Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
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Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT.

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Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. ROBERT W. TAYLER, District Judge, N. D. Ohio.....Cleveland, Ohio.
Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee....Chattanooga, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

[3] Died July 5, 1907.

SEVENTH CIRCUIT.

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

EIGHTH CIRCUIT.

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

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. FRANK H. DIETRICH, District Judge, Idaho.....Pocatello, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....Helena, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....Seattle, Wash.

CASES REPORTED.

CASES ON REHEARING.

CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED.

Consolidated Ice Co. v. Hygeia Distilled Water Co.....151 Fed. 10
Rehearing denied.

Pittsburgh Gas & Coke Co. v Goff-Kirby Coal Co.....151 Fed. 466
Rehearing denied.

CASES

ARGUED AND DETERMINED

IN THE

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

ARMOUR PACKING CO. v. UNITED STATES. SWIFT & CO. v. SAME. MORRIS & CO. v. SAME. CUDAHY PACKING CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 29, 1907.)

Nos. 2,471, 2,472, 2,473, 2,474.

1. REBATES—CARRIERS — REGULATION OF RATES — ELKINS ACT — JURISDICTION WHEREVER TRANSPORTATION CONDUCTED THEREUNDER.

The giving or receiving of a rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, denounced by the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), is a continuous crime judicable in any court of the United States having jurisdiction of crimes through whose district the transportation is conducted.

2. CRIMINAL LAW—CONTINUING CRIME PUNISHABLE IN EACH JURISDICTION TO WHICH IT EXTENDS.

A continuing crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long it may occupy.

Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each.

Though complete in the jurisdiction where first committed, it may continue, be committed, and punished in another jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 220.]

3. CARRIERS—REBATES—CONCESSION FROM PART OF RATE RENDERS TRANSPORTATION THEREUNDER ILLEGAL.

A rebate or a concession from a part of a single rate, whereby property is transported thereunder at a less rate than the established rate, is a concession from the entire rate, and renders all transportation thereunder illegal.

4. SAME—REBATES—INLAND RATES ON THROUGH EXPORTS AND IMPORTS REQUIRED TO BE FILED AND PUBLISHED.

The rates of transportation from places in the United States to ports of transshipment, and from ports of entry to places in the United States, of property in foreign commerce carried under through bills of lading, are required to be filed and published by the amended interstate commerce act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]).

If carried under an aggregate through rate which is the sum of the ocean rate and the rate from or to a place in the United States to or from

the port of transhipment or of entry, the latter rate is required to be filed and published.

If carried under a joint through rate by virtue of a common control, management, or arrangement of the inland and ocean carriers, the joint rate is required to be filed and published.

5. COMMERCE—REBATES—INTERSTATE COMMERCE ACT NOT VIOLATIVE OF CONSTITUTION.

The amended interstate commerce act of 1887, thus construed, neither lays a tax or duty on articles exported from any state, nor gives a preference to the ports of one state over those of another, within the meaning of paragraph 5 of section 9 of article 1 of the Constitution, and it is not obnoxious thereto.

6. CARRIERS—REBATES—"DEVICE" OF ELKINS ACT IMMATERIAL—INDICTMENT SUFFICIENT WITHOUT PLEADING IT.

The giving or receiving of the rebate or concession, whereby property in interstate or foreign commerce is transported at less than the established rate, is the essence of the offense denounced by the pertinent paragraph of the Elkins act.

The "device" by which the concession or transportation is brought about is not an essential element of the crime, and it is unnecessary to plead it in an indictment.

The meaning of the clause "by any device whatever" in that paragraph is directly or indirectly, in any way whatever.

7. CRIMINAL LAW—INDICTMENT—REQUISITE AVERMENTS.

An indictment must set forth facts which the pleader claims constitute the transgression, and every essential element of it, with such clearness and certainty as (1) to advise the accused of the charge he has to meet, and to give him a fair opportunity to prepare his defense, (2) to enable him to avail himself of the judgment thereon in defense of another prosecution for the same offense, and (3) to qualify the court to determine whether or not the facts there stated are sufficient to support a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 180–182.]

8. CONTRACTS—LAWS READ INTO.

The laws upon the subject of a contract are read into and become a part thereof to the same extent as though they were written into its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 750.]

9. CARRIERS—REBATES—CONTRACT TO MAINTAIN ESTABLISHED RATE INEFFECTIVE AFTER HIGHER RATE ESTABLISHED—NO DEFENSE TO CHARGE OF RECEIVING LESS THAN FILED AND PUBLISHED RATE.

A contract between a carrier and a shipper to transport the latter's goods in interstate or foreign commerce at the then established rate for a definite time is ineffective after a higher rate has been filed and published as required by law.

The time during which a rate different from the agreed rate is established by filing and publishing is excepted from the term of such a contract by virtue of the national acts to regulate commerce which are a part thereof.

Such a contract constitutes no defense to a charge of giving or receiving a rebate or concession from the filed and published rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 94.]

10. CRIMINAL LAW—INTENT—SIMPLE PURPOSE TO DO FORBIDDEN ACT WHICH IS NOT MALUM IN SE IS SUFFICIENT.

The only criminal intent requisite to a conviction of an offense created by statute, which is not malum in se, is the purpose to do the act in violation of the statute. No moral turpitude or wicked intent is essential to a conviction of such a crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 22.]

(Syllabus by the Court.)

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

In the statement and opinion in these cases the Armour Packing Company's case alone will be treated, because the four cases were tried upon agreed statements, and their facts are so similar that the questions of law they present are identical.

The packing company was indicted and tried for, and was convicted of, a violation of the Elkins act to further regulate commerce of February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) in the District Court for the Western District of Missouri upon these agreed facts: The Chicago, Burlington & Quincy Railroad Company, a corporation, was a common carrier engaged in the transportation of property through the states of the nation and for export to foreign countries by rail over its own road and over other railroads under contracts and arrangements with connecting carriers from Kansas City, in the state of Kansas, into and through the Western district of Missouri, to the city of New York. The packing company was a corporation engaged at Kansas City, in the state of Kansas, in packing meat products and shipping them throughout the United States and to foreign countries. Its shipments to foreign countries were delivered to the Burlington company at Kansas City, were delivered by one of the Burlington company's connecting carriers to an ocean steamer at New York, and were handled exclusively by the carriers, rail and steamship, from the time they were delivered to the Burlington company at Kansas City until they were delivered to the shipper at the export destination. The shipment which is the subject of this prosecution was thus shipped, handled, and delivered.

From May 9, 1905, until August 6, 1905, tariffs and schedules and joint tariffs and schedules duly filed, published, and posted, showed that the proportion of the rate on provisions of the character described herein shipped as export shipments from Kansas City, Kan., to foreign countries, was 23 cents per 100 pounds from all points on the Mississippi river to New York.

On June 16, 1905, the proprietors of the Wilson line of ocean steamers agreed with the packing company to carry these provisions from New York to Christiania, Norway, for 19.93 cents per 100 pounds, and a copy of this contract was delivered to the Burlington company.

On June 17, 1905, the Burlington company agreed with the packing company to carry for it until December 31, 1905, products of this character shipped for export at the then filed and published rate, the proportional part of which from the Mississippi river to New York was 23 cents per 100 pounds.

On August 6, 1905, the Burlington company and its connecting railway carriers filed with the Interstate Commerce Commission an amendment to their tariffs and schedules, which was duly published and posted, and which made a tariff or rate from Kansas City, Kan., to New York, for these products, the proportional part of which for their carriage from the Mississippi river to New York was 35 cents per 100 pounds.

Prior to August 6, 1905, shipments were made by the packing company for export and were carried by the Burlington company and its connecting carriers according to the terms of the contract of June 17, 1905, and at the then filed and published rate. After the amendment of the schedules of August 6, 1905, and on August 17, 1905, the packing company delivered at Kansas City, Kan., to the Burlington company, under the contract of June 17, 1905, for transportation to Christiania, Norway, by way of the latter's railroad and via railroads of its connecting carriers to New York, and thence by the Wilson line of steamships to Christiania, under the contract of the packing company with the owners of that line, 67 tierces of oleo oil, which weighed 29,365 pounds, and the Burlington company received, agreed to deliver this oil to the order of the packing company at Christiania, Norway, and issued to it a through bill of lading therefor for 52.93 cents per 100 pounds, which included the 19.93 cents per 100 pounds agreed by the packing company to be paid to the Wilson line, and left 33 cents per 100 pounds for the transportation from Kansas City, Kan., to New York. The Burlington company and its connecting railway carriers thereupon transported this oil over their railroads from Kansas City, Kan., through the Western district of Missouri,

to New York, where they delivered it to a steamship of the Wilson line. The packing company paid to the Burlington company the full 52.93 cents per 100 pounds for the entire carriage from Kansas City, Kan., to Christiania, Norway. This 52.93 cents per 100 pounds was made up so that the proportionate part of this rate for the carriage from the Mississippi river to New York was 23 cents per 100 pounds. The packing company did not at any time know how the rate was apportioned or made up or divided among the respective railway carriers or points, but it knew that the agreed steamship rate was 19.93 cents per 100 pounds, and hence that 33 cents per 100 pounds was the aggregate amount paid and received for the transportation of the property from Kansas City to New York, and it knew the filed, published, and posted rate for this product established by the amendment of August 6, 1905, the proportional part of which from the Mississippi river to New York was in fact 35 cents per 100 pounds.

The oleo oil was one of the products which the Burlington company agreed to carry, and which it did carry under its contract of June 17, 1905; "the defendant company shipper contending and insisting that said amendment increasing the tariff rate did not and could not abrogate or impair the terms of said contract." One of the connecting carriers objected to transporting this oil at the rate specified in this contract, but the Burlington company insisted that it should be so carried. The result was that the property was transported at a rate the proportional part of which for the carriage between the Mississippi river and New York was 12 cents per 100 pounds less than the part of the rate established by the amendment of August 6, 1905, which was proportionate to that part of the carriage. The packing company was indicted and tried for, and was convicted of, accepting and receiving this concession of 12 cents per 100 pounds in respect of the transportation of this oleo oil in foreign commerce by the Burlington company and its connecting carriers, whereby this property was transported from Kansas City to New York, through the Western district of Missouri, at a less rate than that named in the tariffs published and filed by the Burlington company and its connecting carriers.

Frank Hagerman and John C. Cowin, for plaintiff in error in each case (A. R. Urion, on the brief in No. 2,471, Henry Veeder, on the brief in No. 2,472, and M. W. Borders, on the brief in No. 2,473).

A. S. Van Valkenburgh (Leslie J. Lyons, on the brief), for the United States.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

1. The shipper delivered its goods to the Burlington company, the carrier, obtained its through bill of lading from Kansas City to Christiania, Norway, received its concession, and paid the through rate, less than that named in the tariffs filed and published by the carriers, in the city of Kansas City, in the state of Kansas. By these acts the transportation of this property at this less rate by the Burlington company and its connecting carriers from Kansas City into and through the Western district of Missouri to New York was caused, but the carriage was conducted by the railroad companies alone.

Counsel for the shipper insist that the District Court of the Western district of Missouri was without jurisdiction of its offense, because its crime was not committed in that district, but was complete in the district of Kansas, and because no concession from that part of the rate filed and published which was proportionate to the car-

riage through the Western district of Missouri was charged in the indictment or proved.

If the shipper's offense was complete in the state of Kansas, it may nevertheless have continued and have been committed in the Western district of Missouri also. It is not essential to a continuing crime that every element requisite to its commission in the second jurisdiction wherein it continues shall exist in the jurisdiction in which it is first committed. Larceny is a continuing crime. One who steals in one jurisdiction and carries the stolen property into another may be indicted, tried, and punished in the latter under statutes to that effect, notwithstanding the constitutional requirement that the accused shall be tried in the county or district in which the crime is committed, and this because the carrying into the second jurisdiction is a continuance of the effect of the original taking. Commonwealth v. Macloon, 101 Mass. 1, 5, 6, 100 Am. Dec. 89; People v. Burke, 11 Wend. (N. Y.) 129; Hemmaker v. State, 12 Mo. 453, 51 Am. Dec. 172; 2 Wharton on Conflict of Laws (3d Ed.) §§ 826, 826a. It is said that this rule is based on the legal assumption that where the property has been feloniously taken every act of removal may be regarded as a new taking and asportation. Commonwealth v. Uprichard, 3 Gray (Mass.) 434, 436, 63 Am. Dec. 762; State v. Smith, 66 Mo. 61, 62. But this assumption is only a legal fiction, and, whether made or not, the fact remains that the offense is complete where the felonious taking occurs, and the subsequent asportation to another county or state is not an essential ingredient of the crime in the first jurisdiction, while the felonious taking and its continuing effect are indispensable elements of the offense in the jurisdiction to which the stolen property is carried. Embezzlement is a continuing crime. It may be prosecuted and punished in any jurisdiction where there is liability and failure to account for and pay over the money. In re Richter (D. C.) 100 Fed. 295, 298; Commonwealth v. Parker, 165 Mass. 526, 43 N. E. 499; State v. Bailey, 36 N. E. 233, 236, 50 Ohio St. 636. But the offense is complete in the jurisdiction in which the original conversion is committed, and no subsequent acts in any other jurisdiction are essential elements thereof. The general principle that one who commits a criminal act in one county, state, or district may be held liable for its continuous operation in another to which its effect extends, is established by these and many other authorities, such as those involving the maintenance of a nuisance in one county which affects property in another (Bulwer's Case, 7 Co. 2b, 3b; 2 Hawk. c. 25, § 37; Com. Dig. "Action," N, 3, 11; Abbott, C. J., in King v. Burdette, 4 B. & Ald. 175, 176; Thompson v. Crocker, 9 Pick. [Mass.] 59; Stillman v. Mfg. Co., 3 Woodb. & Min. 538, Fed. Cas. No. 13,446) and those involving the publication of a libel in a newspaper in one jurisdiction which circulates in another (Commonwealth v. Blanding, 3 Pick. [Mass.] 304, 15 Am. Dec. 214), and yet in all these cases the offense may be complete in the jurisdiction in which it is first committed, and still be indictable and punishable in those to which its continuing operation and effect extend.

A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent

force, however long a time it may occupy. Where such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each. Wharton's Criminal Pleading & Practice (9th Ed.) §§ 473, 474; People v. Sullivan, 33 Pac. 701, 702, 704, 9 Utah, 195. The transportation of the goods in this case into and through the Western district of Missouri, at the illegal through rate, was the continuing operation and effect in that district of its primary cause, the receipt of the concession and the delivery of the oil by the shipper to the carrier thereunder for transportation in foreign commerce, and even if the shipper's offense was complete in Kansas, it may have been committed in Missouri also, where its operation continued and took effect.

Nor did the fact that no concession was charged or proved from the part of the established rate proportionate to the carriage through the Western district of Missouri extract from that part of the transportation the vice of illegality. The entire transportation from Kansas City to New York was procured by the packing company by accepting a single unlawful concession from that part of the through established rate proportionate to the carriage east of the Mississippi river, but the transportation from Kansas City to New York, and the rate paid therefor, were each single, undivided, and through, and the vice of the illegality in any part of either was unavoidably a vice in the whole and every part of it, so that the carriage into and through the Western district of Missouri under this entire unlawful through rate was as illegal as the transportation over any other part of the route.

Counsel invoke the sixth article of amendments of the Constitution and the inviolable rule of the common law that every accused person shall enjoy the right to a trial in the jurisdiction in which the offense was committed, and the court freely concedes and confirms the position that, if the offense of the packing company was not committed in the Western district of Missouri, the court below was without jurisdiction of this case, and its judgment must be reversed. If the offense was not there committed, the Congress was undoubtedly without power to make it there judicable. They cite: U. S. v. Fowkes, 3 C. C. A. 394, 398, 53 Fed. 13, 17, in which a railroad claim agent in Philadelphia was indicted in Missouri for charging, and receiving from a shipper for the transportation of goods from Philadelphia to Missouri, less than the established rates under the tenth section of the act to regulate commerce approved February 4, 1887 (chapter 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3161]), and an application was made to the court in Pennsylvania for his removal to Missouri for trial on the ground that his case was triable there, under section 731 of the Revised Statutes [U. S. Comp. St. 1901, p. 585], because his offense was begun in the Third circuit and completed in the Eighth circuit, although nothing was done in the latter, save that the transportation was there completed, and the court held that the offense was commenced and finished in the state of Pennsylvania and that the court in Missouri was without jurisdiction of it. Davis v. U. S., 43 C. C. A. 448, 104 Fed. 136, in which the defendant was indicted in Texas for committing the fraud of

obtaining by false billing and false representation at Cincinnati in the state of Ohio the transportation of goods from that city to Dallas, in the state of Texas, at less than the established rates, in violation of section 10 of the interstate commerce act, as amended by Act March 2, 1889, c. 382, 25 Stat. 858 [U. S. Comp. St. 1901, p. 3160] and an application for his removal to Texas for trial was presented to the court in Ohio on the ground that the offense was begun in that circuit and ended in the Fifth circuit, under section 731, although nothing occurred in the latter but the completion of the transportation, and the Circuit Court of Appeals of the Sixth Circuit held that the fraud was begun and completed in Cincinnati, and that the offense was not judicable in Texas. Judge Day, now Mr. Justice Day of the Supreme Court, in delivering the opinion of the court, said of the provision, amendatory of the act, denouncing the fraud of false billings: "It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct, which is the gist of the offense. What is it, then, to obtain transportation in the sense of this statute? We think that false billing or other misrepresentation of the goods, as stated in the act, which results in their being received by the carrier under a contract of carriage thus fraudulently obtained, is the obtaining of transportation within the meaning of the statute. Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete." 43 C. C. A. 451, 104 Fed. 139. But he also said: "If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one." Page 453 of 43 C. C. A., page 142 of 104 Fed. In re Belknap (D. C.) 96 Fed. 614, 616, in which, on an indictment for a violation of the same paragraph of the statute, the District Court of Kentucky reached the same conclusion. U. S. v. Conrad (C. C.) 59 Fed. 458, 462, 463, where the court held that the offense of depositing a lottery ticket or sending it in the mails is complete in the district in which it is deposited or sent, and is not indictable in the district where it is delivered; but that the offense of delivering it by mail may be prosecuted in the district in which it is delivered to the addressee. Dealy v. U. S., 152 U. S. 539, 547, 14 Sup. Ct. 680, 38 L. Ed. 545, in which the Supreme Court held that the offense of conspiracy is complete where the conspiracy is formed, although the overt act is done elsewhere, and many cases in which statutes of states which by their terms authorized the indictment and trial of offenses, which were not continuing, in jurisdictions in which they were not committed, have been held unconstitutional and void. Ex parte Slater, 72 Mo. 102; State v. McGraw, 87 Mo. 161; State v. Hatch, 91 Mo. 568;[1] State v. Anderson, 191 Mo. 134, 144, 145, 90 S. W. 95; Craig v. State, 3 Heisk. (Tenn.) 227; State v. Smiley, 98 Mo. 605, 12 S. W. 247; Dempsey v. State, 22 S. E. 57, 94 Ga. 766; Dougan v. State, 30 Ark. 41; Armstrong v. State, 41 Tenn. 339; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; Kirk v. State, 41 Tenn. 345; State v. Denton, 46 Tenn. 539; Wheeler v. State, 24 Wis. 52.

[1] 14 S. W. 502.

On the other hand, in Re Palliser, 136 U. S. 257, 267, 10 Sup. Ct. 1034, 34 L. Ed. 514, in which the offense was an offer of money or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut to induce him to violate his official duty, the Supreme Court said:

"But there can be no doubt at all that, if any offense was committed in New York, the offense continued to be committed when the letter reached the postmaster in Connecticut, and that, if no offense was committed in New York, an offense was committed in Connecticut."

And in Re Huntington (D. C.) 68 Fed. 881, and in Griffee v. Burlington, etc., R. R. Co., 2 I. C. C. R. 301, it was held that the offense of giving an undue preference or advantage to a particular person, in violation of section 3 of the interstate commerce act (24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]) was not complete where a free pass had been delivered, unless there was also actual transportation upon the pass.

The opinions in these numerous cases are instructive and interesting; but they are neither controlling nor very persuasive upon the issue it is necessary for us to determine here, because none of the courts which delivered them considered or treated of the act or of the offense here under consideration, and arguments by analogy should always be indulged with caution. In the light of these authorities, two questions condition the jurisdiction of the court below: Was the offense here charged a continuing crime? If it was not, was the actual transportation of the goods an indispensable element of the offense? We turn to the Constitution and to the acts of Congress for the answers. The act which denounces this offense was passed in 1903, six years after the offense of the giving of concessions from the lawful rates by carriers had been created, and four years after the offense of fraudulently obtaining transportation by shippers at less than the regular rates by false representations was established. It was enacted under the power to regulate commerce with foreign nations and among the several states granted to the Congress by article 1 of section 8 of the Constitution. The subject of the act was that part of this commerce which consisted of the transportation of property in it. Its object was to regulate this transportation. There is, there can be, no doubt that the Congress had plenary power, under this commercial clause of the Constitution, to prohibit the transportation of property in interstate or foreign commerce at any less rates than those filed and published under the interstate commerce act of 1887 and its amendments, to make such transportation a continuing crime, to prescribe the penalty for it, and to give to every federal court which had jurisdiction of crimes through whose district any part of this transportation is conducted complete jurisdiction to try, and, if convicted, to punish any person or corporation charged with it. Has the Congress exercised this power? It enacted that:

"It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier, subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any de-

vice whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. * * * Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted." 32 Stat. c. 708, p. 847 [U. S. Comp. St. Supp. 1905, p. 599].

The offense of the shipper here charged is receiving a concession whereby any property in interstate or foreign commerce shall be transported at less than the legally established rate. Every part of the transportation thus caused is unavoidably violative of this act and illegal, and is necessarily the continuing operation and effect of the unlawful receipt of the concession whereby the carriage is induced. The last clause of the portion of the act quoted above, which, in addition to the court in whose district the violation of the act is committed, confers jurisdiction upon every other court of the United States, which has criminal jurisdiction, through whose district the transportation is conducted, is unconstitutional and void if the offense is not a continuing crime, but valid and effective if it is, and that construction which validates and sustains must be preferred to that which strikes down and paralyzes so plain a provision of a statute. The transportation of the property in the case in hand from Kansas City to New York into and through the Western district of Missouri at a through rate less than that established under the law was the continuing operation and effect of the receiving of the concession and the delivery of the property thereunder by the shipper. These considerations convince that the Congress intended to make, and that by the provision of the act quoted it did make, the offense here charged a continuing crime indictable and punishable in every federal court having jurisdiction of crimes through whose district the illegal transportation is conducted, that the offense in this case is of this nature, that, if the charge in the indictment is true, this offense continued in the illegal transportation it produced into and through the Western district of Missouri, so that it was there committed, and that the court below had jurisdiction of this offense and of the packing company that was charged with its commission. This conclusion renders it unnecessary to determine whether or not the transportation is an indispensable element of the offense in the district in which the concession is received and the goods are delivered to the carrier. But the fact is noted in passing that the giving or receiving of a concession, whereby property is transported at a less rate than that established, is not the only offense created by this act, but also the giving or receiving any concession whereby "any other advantage is given or discrimination is practiced."

2. The concession denounced by the Elkins act is one whereby property in interstate or foreign commerce is transported at a less rate than that required to be filed and published by the amended interstate commerce act of 1887. One of the positions of counsel for the packing company is that no offense was charged or proved against it in this case because railroad rates in the United States upon property in foreign commerce transported from places in the United States to ports of transhipment and thence to foreign countries under through bills of

lading are not required to be filed or published under the act of 1887, and that, if that act contains such a provision, it is violative of article 1, § 9, par. 5, of the Constitution.

In Texas & Pac. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 16 Sup. Ct. 666, 40 L. Ed. 940, the Supreme Court said of this statute:

"The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. * * * Addressing ourselves to the express language of the statute, we find, in its first section, that the carriers that are declared to be subject to the act are those 'engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from 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, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.' It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a state), as well that between the states and territories, as that going to or coming from foreign countries. In a later part of the section, it is declared that 'the term transportation shall include all instrumentalities of shipment or carriage.'" Page 212 of 162 U. S., page 672 of 16 Sup. Ct. (40 L. Ed. 940).

The second, third, and fourth sections of the act forbid unjust discrimination, unreasonable preference, the receipt of greater conpensation for a shorter than for a longer haul by carriers engaged in inland transportation of property in foreign commerce as well as in interstate commerce.

The first sentence of the sixth section reads:

"That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act."

The first section of the act defines and subjects to its provisions the transportation by rail, and by rail and water combined, of property in foreign commerce shipped from any place in the United States to a foreign country and carried from such place in the United States to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry. And it expressly provides that all the provisions of the act shall apply to any common carrier engaged in such transportation and to every instrumentality thereof. It is contended that, although the act may apply to the carriage of property in foreign commerce when consigned from a place in the United States to the port of transhipment for export, to be there again consigned to its destination in the

foreign country, yet it has no application to the transportation of such property under a through bill of lading from the place of the origin of the carriage to the foreign destination. The proposition cannot be sustained. The act is general, comprehensive, includes within its express terms all transportation of property in foreign commerce from the place of origin in the United States to the port of transhipment, and it contains no exception of such carriage under through bills of lading. As the Congress made no such exception, the conclusive presumption is that it intended to make none, and it is not the province of the judicial department to do so. Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 13; Madden v. Lancaster County, 12 C. C. A. 566, 572, 65 Fed. 188, 194; Wrightman v. Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; Union Central Life Ins. Co. v. Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860.

The sixth section proceeds to require all common carriers subject to its provisions to file and publish schedules and tariffs and joint tariffs and schedules of their rates for all transportation, subject to the act, and closes with the declaration that if any carrier fails to file or publish its schedules or tariffs, as provided in that section, the commissioners may apply to the court "to restrain such common carrier from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transhipment and of entry and the several states and territories of the United States, as mentioned in the first section of this act until such common carrier shall have complied with the aforesaid provisions of this section of this act." The Congress was evidently of the opinion that this section required carriers engaged in the transportation of property in foreign commerce from places in the United States to ports of transhipment and from ports of entry to places in the United States to file and publish the rates under which this property moved. Otherwise, it would not have authorized the issue of an injunction to restrain them from receiving or transporting property between ports of transhipment and of entry and the several states and territories of the United States, as mentioned in the first section of the act, until they filed and published their rates in compliance with section 6. The Elkins act does not fail to recognize the fact that the interstate commerce act regulates the transportation of goods in foreign, as well as in interstate, commerce. It declares that it shall be unlawful to receive any concession "in respect of the transportation of any property in interstate or foreign commerce subject to such act to regulate commerce," whereby any property shall be transported at a less rate than that filed and published as required thereby.

Counsel argue with much force and great ability that the act does not apply to through export shipments (1) because it does not regulate all commerce or all carriers, but it regulates all carriers by rail, and by rail and water combined, who transport property in foreign commerce from or to places in the United States to or from ports of transhipment or of entry; (2) because ocean rates continually and greatly vary so that through export rates cannot have any permanency, and so cannot be established by filing and publishing, but, if such through

rates may not be thus established, the inland rates to and from the ports can and must be, and to these the ocean rates may be, added, as in the case in hand, and if the through export rates can be thus established, and they are so, they may be filed and published; (3) because the act of 1887 applies to foreign commerce between the ports of transhipment or of entry and the places of its origin or destination in the United States only, but the act requires the rates between those places to be established, filed, and published. If those rates are separate from the ocean rates, they may undoubtedly be separately filed and published, and the ocean rates may be added to make aggregate through rates, as was done in the case under consideration. If by agreement or arrangement between the inland and the ocean carriers or by common control the inland rates become parts of joint through rates, then the latter rates become the rates of transportation to or from the ports of transhipment from or to the places of the origin or destination of the traffic in the United States, and they thereby fall within the terms and the reason of the law.

The history of this legislation, the evils it was intended to remedy, the objects it was enacted to secure, the instability of the ocean rates, the inconvenience of establishing rates of transportation for property in foreign commerce, the necessary restraint upon this commerce which the subjection of its rates to this act will unavoidably impose and the conceded rule that "laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. * * * Before a man can be punished, his case must be plainly and unmistakably within the statute" (U. S. v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190)—have been ably and persuasively presented in support of the argument that the rates of through export traffic are not within these acts. But where the language of a law is clear, and the signification of its terms is certain, argument from its history and purpose, from its possible or even probable evil effects, and from the inconvenience of complying with it and attempted judicial construction of its expressions, serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute, and the legislative body must be presumed to have intended what it has expressed. Knox Co. v. Morton, 15 C. C. A. 671, 673, 68 Fed. 787, 789; Shreve v. Cheesman, 16 C. C. A. 413, 416, 69 Fed. 785, 788. The plain terms of the act of 1887, their certain meaning, and the lucid and authoritative interpretation of them by the Supreme Court, which has been quoted, leave no doubt upon this question, and our conclusion is that common carriers subject to the provisions of the act of 1887 to regulate commerce, who are engaged in the transportation of property in foreign commerce under through bills of lading, are required by that act to file and publish their rates for the carriage of the property from its place of shipment in the United States to the port of transhipment and from its port of entry to its place of destination in the United States. If it is carried under an aggregate through rate, which is the sum of the ocean rate and the rate from or to the place in the United States to or from the port of transhipment or of entry, the latter rate is required to be published. If it is carried under a joint through rate by virtue of a com-

mon control, management, or arrangement of the inland and ocean carriers, the joint rate must be filed and published. Texas & Pac. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 211, 212, 220, 16 Sup. Ct. 666, 40 L. Ed. 940; N. Y. Pr. Ex. v. N. Y. Cen. & Hud. Riv. R. R. Co., 3 Interst. Com. Com'n R. 137; New Orleans Cot. Exch. v. Louisville, N. O. & Tex. R. Co., 41 Interst. Com. Com'n R. 694, 699; In re Tariffs on Export and Import Traffic, 10 Interst. Com. Com'n R. 55, 63, 64, 66, 68, 76, 81.

In the case at bar the property was shipped under a through bill of lading at a through rate which was the sum of the ocean rate agreed upon between the proprietors of the steamship line and the shipper and a railroad rate from Kansas City to the point of transhipment, which was less than the established rate which was required to be and which in fact had been filed and published under the act of 1887. The shipper received a concession of 12 cents per 100 pounds from the part of the established and published rate proportional to the carriage between the Mississippi river and New York, and this constituted an offense under the Elkins act.

But it is said that, if this be the meaning of the amended act of 1887, it is in conflict with article 1, § 9, par. 5, of the Constitution, because it burdens exportation, and gives a preference to the ports of the states reached by the rivers, canals, bays, and sounds over those not thus situated. This burden is alleged to be imposed by the requirements that these rates shall be uniform, filed, and published, only increasable on 10 days' notice, and diminishable on 3 days' notice, and it is freely conceded that these provisions of the act perceptibly impede and restrain both foreign and interstate commerce. But the paragraph of the Constitution first invoked reads: "No tax or duty shall be laid on articles exported from any state." Do the restrictions of the amended interstate commerce act constitute a tax or duty on exports within the meaning of this prohibition? The argument in support of an affirmative answer is that freedom of exportation cannot be impeded in any degree by any legislation, and this contention is founded on these excerpts from the opinion of the Supreme Court in Fairbank v. U. S., 181 U. S. 283, 294, 295, 21 Sup. Ct. 648, 45 L. Ed. 862. In speaking of the earlier decision of that court in Almy v. California, 24 How. 169, 16 L. Ed. 644, to the effect that a tax or duty on a bill of lading was, in substance, a tax or duty on the article shipped, Mr. Justice Brewer, in delivering the opinion of the court, said:

"In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result."

And again, at page 295 of 181 U. S., page 648 of 21 Sup. Ct. (45 L. Ed. 862), he remarked:

"As the states cannot directly interfere with the freedom of imports, they cannot by any form of taxation, although not directly on the importation, restrict such freedom; Congress alone having the power to prescribe duties therefor. In like manner, the freedom of exportation being guarantied by the Constitution, it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance."

But the question under consideration in that case was whether or not a stamp tax on a foreign bill of lading was a tax or duty on the articles described in the bill, and hence a duty on exports, and in conflict with this constitutional provision. To that issue the remarks of the court were addressed, and upon it they were pertinent and authoritative. But they are neither relevant to, nor controlling upon, the question whether or not the Congress may impose incidental restrictions upon foreign commerce under its constitutional power to regulate it. If it may not, then it may not exercise that power, for there can be no regulation without some restriction.

It is a burden or restraint upon exportation by virtue of a tax or duty, and by that alone that is forbidden by the clause of the Constitution here under consideration. The interstate commerce act and its amendments impose no tax or duty upon either foreign or interstate commerce. They were not enacted by virtue of the power of taxation for the purpose of raising a revenue and they raise none.

Again, it is a tax or duty on exportation imposed either directly or indirectly on account of the fact that the articles taxed are exported or are intended for export, and that alone that is obnoxious to this constitutional inhibition, and the restraint of the interstate commerce acts was not imposed upon the transportation of property in foreign commerce because it is exported or intended for export, but upon articles in foreign and interstate commerce alike for the sole purpose of regulating both alike pursuant to the commercial clause of the Constitution. Turpin v. Burgess, 117 U. S. 504, 506, 6 Sup. Ct. 835, 29 L. Ed. 988; Cornell v. Coyne, 192 U. S. 418, 427, 24 Sup. Ct. 383, 48 L. Ed. 504.

The second clause of the paragraph of the Constitution called to our attention reads: "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Property in foreign commerce which may be transported entirely by water from and to places in the United States on its rivers, canals, sounds, and bays to and from ports of transhipment or of entry is free from, while property in foreign commerce which can be carried from and to the places in the United States to and from ports of transhipment or of entry by rail or partly by rail and partly by water only is subject to the restrictions and burdens of the amended interstate commerce law. Does that law thereby give a preference to the ports of one state over those of another? Counsel contend that this question should be answered in the affirmative, because ports reached by water routes from inland points reap the great and obvious advantage of the freedom of their shippers to contract for the entire carriage, while ports reached from inland places by rail or by rail and water only are deprived of this freedom for their shippers, who must transport their articles subject to the burdens of established uniform inland rates changeable only after ten or three days' notice. The argument might be forceful and persuasive, if addressed to the policy or the justice of the law; but these issues were within the competence of, and have been conclusively determined by, the Congress. The only question which the judiciary can consider is whether or not

the provisions of the act here assailed are unconstitutional. The paragraph of the Constitution before us was enacted for the purpose of preventing Congress from so exercising its power to regulate commerce as to give to one state an advantage over another state by the enactment of a regulation which would prefer the ports of the former to those of the latter. The purpose and the extent of its inhibition are clearly expressed in its terms. It does not forbid a preference of ports of various states reached by inland water routes over those reached by rail, or a preference of those reached by many, over those reached by few, railroads or steamboats, but only those of one state over those of another. It forbids the preference of the ports of one state because they are located in that state over the ports of another state because they are situated in the latter state. No such preference was intended or effected by the act of 1887 and its amendments, and for this reason these acts do not fall under this constitutional inhibition.

Moreover, the advantage of which complaint is here made is rather that of geographical position, than of legislation. Congress cannot by any law make the advantages of other ports equal to those of one at the mouth of a great river. The alleged preference was not created by any positive enactment for that purpose, nor was it either one of the objects or the chief effect of this legislation. It is but one of the remote and incidental effects of a general, comprehensive, and undoubtedly beneficial regulation of the transportation of property by rail in the foreign and interstate commerce of the nation under the plenary authority granted by the Constitution. Acts of Congress which are passed in the exercise, and which are within the scope, of one of its undoubted powers, may not be held unconstitutional on account of remote and incidental effects which are clearly within them. Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 434, 15 L. Ed. 435; South Carolina v. Georgia, 93 U. S. 4, 13, 23 L. Ed. 782.

The interstate commerce act of 1887 and its amendments are not in conflict with article 1, § 9, par. 5, of the Constitution, because they do not lay any tax or duty on articles exported from any state, nor give any preference to the ports of one state over those of another within the meaning of that paragraph.

3. The Elkins act declares the offense of which the defendant was convicted to be the receiving of any concession in respect of the transportation of any property in interstate or foreign commerce, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed," as required by the interstate commerce act and its amendments. The judgment of conviction is assailed on the inconsistent grounds that the device by which the property was transported at a less rate than that published and filed was not pleaded in the indictment, and that the court charged the jury that it was essential for them to find that the shipper secured the concession as the result of such a device before they could convict. The latter objection is based on general exceptions to portions of the charge, which declare that both the device and the guilty intent of the defendant are essential to conviction. These exceptions failed to specify or inform the court below whether counsel challenged this charge because in their opinion the guilty intent was

immaterial, or because they thought that the device was unimportant. They now insist, and for the purposes of this decision it is conceded, that a criminal intent on the part of the defendant was indispensable to its conviction, and that the proposition of law embodied in the portion of the charge assailed which declares that rule is correct. But a general exception to a portion of a charge which contains two or more propositions of law is insufficient, if any one of them is sound, because such an exception does not inform the judge which proposition is challenged and give him an opportunity to correct it. St. Louis, I. M. & S. R. Co. v. Spencer, 18 C. C. A. 114, 116, 71 Fed. 93, 95; New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 94, 97 Fed. 150, 155; Price v. Pankhurst, 3 C. C. A. 551, 53 Fed. 312. For this reason the second ground of objection is untenable and is here dismissed.

The gist of the shipper's offense under paragraph 3 of section 10, as amended by the act of 1889 (25 Stat. 858, c. 382 [U. S. Comp. St. 1901, p. 3160]), is the fraud of obtaining transportation at a rate less than the established rate "by false billing, false classification, false weighing, false representation of the contents of the package or false report of weight or by any other device." Under the familiar maxim, "noscitur a sociis," the device of this paragraph is a device of the same character as the false representations with which it is associated, a deceptive or fraudulent device. Davis v. U. S., 43 C. C. A. 448, 451, 104 Fed. 136, 139. Obtaining transportation at a rate less than the regular published rate, without committing any fraud or making any false representation to secure it, is not unlawful under this act of 1889. And an averment of the fraudulent device by which the transportation is secured is indispensable to an indictment founded upon that act, because the fraudulent device is the substance of the offense. U. S. v. Hanley (D. C.) 71 Fed. 672, 676.

But it is not so with the offense of the shipper denounced by the Elkins act upon which this indictment is based. That act did not repeal, modify, or amend the provision of the act of 1889, which made the obtaining of transportation at a less rate by a fraudulent device a crime. But it created a new offense, the acceptance or receipt of a concession whereby any property in interstate or foreign commerce should be transported by any device whatever at less than the regular filed and published rate. The substance of this offense is not the device, but the solicitation or receipt of the concession and the transportation thereby effected. It may be committed whether the concession is induced by a fraudulent or an honest device, by a shrewd or a simple one, by a secret or an open one. The true meaning of the phrase "by any device whatever" here is directly or indirectly, in any way whatever, and the evident purpose of its use was to emphasize the scope of the law so that it would clearly include the solicitation or receipt of every concession, however obtained, whereby property in interstate or foreign commerce should be transported at less than the regular filed and published rate.

It is conceded that, where a crime is a statutory one, the indictment must set forth with clearness and certainty every essential element of which it is composed. It must portray the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet and to give him a

fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or an acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. Ledbetter v. U. S., 170 U. S. 606, 609, 610, 18 Sup. Ct. 774, 42 L. Ed. 1162; U. S. v. Britton, 107 U. S. 655, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; U. S. v. Hess, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; U. S. v. Cook, 17 Wall. 168, 174, 21 L. Ed. 538; U. S. v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Miller v. U. S., 66 C. C. A. 399, 403, 133 Fed. 337, 341. The indictment in this case pleads the names of the carriers that transported the property, the date and place of the delivery of the goods to the initial carrier and of the receipt of the concession by the shipper, a description of the specific articles shipped, the filed and published rate, the less rate at which the goods were transported, and the amount of the concession, the place of shipment, and the point of destination of the property, and the route over which it was transported. Here were averments of facts sufficient to clearly advise the defendant of the offense with which it was charged, to give it ample opportunity to prepare its defense, to enable it to avail itself of a conviction or an acquittal in the case of another prosecution for the same crime, and to qualify the court to determine whether the facts stated constituted an offense. The particular device by which the concession and transportation were obtained was not an essential ingredient of the offense charged, because the latter might well exist, whatever the device, and whether or not there was one, and hence the indictment portrayed every material element of the crime without an averment of this device. U. S. v. Tozer, 37 Fed. 635, 637.[2] The substance of the crime of receiving a rebate or concession under the Elkins act is the solicitation, acceptance, or receipt thereof, whereby property in interstate or foreign commerce is transported at less than the regular rate. The device whereby the receipt and transportation are obtained is not an essential element of the crime, and it is unnecessary to plead it in the indictment.

4. On June 17, 1905, when the part of the filed and published rate on the article shipped proportionate to the carriage from the Mississippi river to New York was 23 cents per 100 pounds, the Burlington company agreed with the packing company to carry goods of this character for it until December 31, 1905, at this rate. But the shipment here challenged was made under this contract, and the concession of 12 cents per 100 pounds from the then established rate was received on August 17, 1905, 11 days after the Burlington company and its connecting carriers by an amendment to their tariffs and schedules filed and published, as required by law, had raised the part of the established rate proportionate to the transportation from the Mississippi river to New York to 35 cents per 100 pounds. Did the contract extract the

[2] 2 L. R. A. 444.

vice of illegality from the receipt of the concession and the transportation thereunder?

The amended act to regulate commerce requires carriers subject to its terms to cause tariffs and schedules of their rates to be filed and published, prohibits them from raising the rates thus established on less than ten, and from lowering them on less than three, days' notice, and the Elkins act declares that it shall be unlawful for any person or corporation to give or receive any rebate or concession, whereby any property in interstate or foreign commerce shall be transported at a less rate than that named in the tariffs thus filed and published. If the contract here presented legalizes the receipt of the concession obtained under it, then the courts must add to this provision of the Elkins act the clause, "except where the concession is given or received under a prior contract to transport the property at a less rate which was in force when the agreement was made," or a term of similar import. But the Congress made no such exception. Why should the courts do so? Madden v. Lancaster Co., 12 C. C. A. 566, 573, 65 Fed. 188, 195; Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 13.

The validity of the contract is exhaustively discussed; but that is not the test of the legality of the concession. It may be unlawful to perform a valid contract. A man and a woman may make a legal agreement to marry; but, if either marries another, the subsequent performance of the former contract is illegal.

Counsel invoke the conceded rule that carriers engaged in interstate and foreign commerce are free to make contracts relative to the rates and the traffic therein which are not prohibited by the acts to regulate this commerce. Cincinnati, etc., R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 16 Sup. Ct. 700, 40 L. Ed. 935; Interstate Commerce Commission v. Baltimore & Ohio R. Co. (C. C.) 43 Fed. 37; Interstate Com. Commission v. Chicago G. W. Ry. Co. (C. C.) 141 Fed. 1003; Laurel Cotton Mills v. Gulf, etc., R. Co., 37 South. 134, 84 Miss. 339, 66 L. R. A. 453; Southern Pac. Co. v. Interstate Com. Com., 200 U. S. 536, 554, 26 Sup. Ct. 330, 50 L. Ed. 585. But this principle and these authorities leave the question whether or not this contract was prohibited undecided.

The decisions in the early cases of Pond-Decker Lumber Co. v. Spencer, 30 C. C. A. 430, 86 Fed. 846, and Mobile & Ohio R. Co. v. Dismukes, 10 South. 289, 94 Ala. 131, 17 L. R. A. 113, to the effect that contracts for transportation at less than the established rates are valid and enforceable, have been called to our attention. But the rule that agreements by carriers, subject to the national acts to regulate commerce to transport property in interstate or foreign commerce for less than the legal filed and published rates are unlawful and void, has since been so conclusively established that it is no longer open to doubt or discussion. Gulf, etc., R. Co. v. Hefley, 158 U. S. 98, 105, 15 Sup. Ct. 802, 39 L. Ed. 910; Southern Ry. Co. v. Harrison, 24 South. 552, 554, 119 Ala. 539, 43 L. R. A. 385, 72 Am. St. Rep. 936; Texas & Pac. R. Co. v. Mugg, 202 U. S. 242, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011. It is true that in the cases last cited the contracts were made after the higher rates had been filed and published; but the El-

kins act declares the receipt of the concession from the rate filed and published after the execution of such a contract to be illegal in the same terms as it does that from a rate filed and published before the contract is made, since it declares the receipt of every concession from the filed and published rate illegal.

Counsel concede that the carrier and shipper can make no contract that would not be subject to a change in the rate by Congress or by the finding of the Interstate Commerce Commission; but they contend that this agreement was valid at its execution, because it stipulated for the maintenance of the rate then established, that the right of the carrier to raise that rate on 10 days' notice was a privilege which it might waive, that by its agreement to maintain the established rate until December 31, 1905, it waived this privilege until that time, that there is no prohibition in the acts of Congress of a contract to maintain a lawful rate for a reasonable time, that the legal effect of the agreement was to give, not only to the defendant, but to all persons similarly situated, the established rate of June 17, 1905, until December 31st in that year, and that this constituted a lawful contract. If all this were conceded, it would not destroy the baleful effect under the law of the breach of this contract and of the filing and publishing of the higher rate by the carrier. The denunciation as illegal of the giving and of the receiving of a less rate than that so filed and published would still remain. If the legal effect of the agreement was to give all shippers similarly situated the established rate of June 17, 1905, yet that agreement was secret, it was not filed and published, nor was the rate it specified, at the time of the shipment, so that it was not the established rate.

The laws under which the Burlington company is incorporated and the acts of Congress under which it conducts its interstate and foreign commerce constitute a contract between it and the public, whereby the latter have granted to it certain powers which it may not renounce, and imposed upon it certain duties which it may not lawfully disable itself from performing. One of these powers is the authority to establish rates in accordance with the terms of the acts of Congress, and one of these duties is to publicly establish, maintain, and change these rates in compliance with the terms of the acts to regulate this commerce, and the carrier may not lawfully disqualify itself from fully discharging this duty by any contract with a private person or corporation. If such a contract as that in hand were valid, it could not deprive the carrier of its legal right under the acts of Congress to break the agreement and to raise its rates upon 10 days' notice, and the utmost effect of its breach would be to vest in the shipper a cause of action for the damages the latter might sustain.

But the contention that the contract was valid, and that its performance was enforceable after the higher rates were filed and published, ignores a basic rule of the interpretation of agreements and a material part of the contract. That rule is that all laws in existence when an agreement is made necessarily enter into, and form a part of, it as fully as if they were expressly referred to or incorporated into its terms. Van Hoffman v. City of Quincy, 4 Wall. 535, 550, 18 L. Ed. 403; Rees v. City of Watertown, 19 Wall. 107, 121, 22 L.

Ed. 72; Edwards v. Kearzey, 96 U. S. 595, 601, 24 L. Ed. 793; Seibert v. Lewis, 122 U. S. 284, 295, 7 Sup. Ct. 1190, 30 L. Ed. 1161; Southern Ry. Co. v. Bouknight, 70 Fed. 442, 446, 17 C. C. A. 181, 185, 30 L. R. A. 823. And the portion of the agreement ignored is the provision of the amended interstate commerce act (25 Stat. 855, 856 [U. S. Comp. St. 1901, p. 3154]) that carriers subject to it shall file and publish their rates, and that no advance shall be made in them except by filing and publishing the new rates after 10 days' notice, and the provision of the Elkins act, which declares the receipt of every concession from the filed and published rates illegal. When these provisions are read into this agreement, as they must be under the law, its true interpretation is not that the carrier thereby covenanted to renounce until December 31, 1905, its rate-making power over the articles shipped, vested in it by the public, but that it contracted to maintain the existing rate until December 31, 1905, unless that rate was sooner changed in compliance with these provisions of the acts of Congress. This is the rational construction of this contract, because it renders the maintenance of the agreed rate under it enforceable while it was legal, and unenforceable while it was unlawful.

In opposition to these conclusions, counsel invoke the rules that in cases of doubt the interpretation which sustains and enforces a contract should be preferred to that which limits or destroys it, that a construction of a statute which works injustice or great inconvenience should be avoided in favor of a more reasonable interpretation if possible. They portray in vivid colors the great inconvenience, the intolerable restraint upon the freedom of contract, and the inevitable diminution of foreign commerce which will result from a decision that a common carrier may discharge itself from its contract to maintain a rate by changing it in compliance with the national legislation to regulate commerce. But the great purpose of this legislation is to destroy favoritism and to secure equality of rates to all. The authority of Congress, under its power to regulate commerce, to impose the necessary restriction upon the freedom of contract to accomplish this object, is no longer doubtful. It is to this end that carriers are required to file and publish their rates, that they are forbidden to change them except by filing and publishing the new rates after public notice, and that rebates, concessions, preferences, and discriminations are forbidden. If a carrier may lawfully make an enforceable contract with a shipper to maintain an established rate upon future shipments for a definite time, it may make such an agreement with a preferred patron, then file and publish an advanced rate, which will govern like transportation by others similarly situated, and the performance of its contract will give the concession and work the discrimination which the national acts to regulate commerce were enacted to prevent. All carriers may make similar agreements with their shippers and take like proceedings, and the national legislation against rebates, concessions, and discrimination will be futile. The acts of Congress may not be thus evaded. A contract between a carrier and a shipper engaged in interstate or foreign commerce to maintain a filed and published rate for a definite time excepts from

its term by virtue of the national acts to regulate commerce the time during which a different rate is filed and published under the laws. Such a contract constitutes no defense to a charge of giving or receiving a rebate or concession from the filed and published rate. The giving and the receiving of every rebate or concession, whereby property in interstate or foreign commerce is transported at a less rate than that legally filed and published, whether this rebate or concession was obtained under a previous contract or not, is illegal under the Elkins act. Congress made no exception, and it is not the province of the courts to do so.

These conclusions are the logical result of, and are sustained by, the opinion of the Supreme Court in New Haven & Hartford R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 398, 26 Sup. Ct. 272, 50 L. Ed. 515. In the course of the litigation in that case, it became necessary for the Supreme Court to consider and determine the validity of a contract made in 1896 between the Chesapeake & Ohio Company and the New Haven Company, whereby the former agreed to sell and deliver coal, which it bought in West Virginia, at New Haven, in Connecticut, at a fixed price per ton. The Chesapeake & Ohio Company transported the coal from the mines in West Virginia to Newport News and hired its carriage from that place to New Haven. The Interstate Commerce Commission claimed that this contract was illegal, because, when the purchase price of the coal in West Virginia and the cost of transportation from Newport News to New Haven were deducted from the selling price, the amount remaining was less than the filed and published rate from the mines in West Virginia to Newport News. The Chesapeake & Ohio Company answered, among other things, that, when the contract was made, the purchase price of the coal and the cost of the transportation from Newport News to New Haven were so low that their deduction from the selling price left an amount equal to the established rate from the mines in West Virginia to Newport News, and that if subsequently the cost of the coal and of the transportation from Newport News to New Haven increased, so that the compensation of the Chesapeake & Ohio Company for its part of the carriage was less than the established rate, the contract was valid in its inception and continued to be so. Of this contention the court said:

"Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so."

5. Finally, the judgment of conviction is assailed on the grounds that the facts stipulated do not support the charge, and that they disclose no evidence of any criminal intent on the part of the shipper. The charge was that, upon a through shipment from Kansas City to New York for export, the packing company received a concession of 12 cents per 100 pounds from the established rate of 35 cents per 100 pounds for that part of the route between the Mississippi river and New York. The agreed facts were that the tariffs filed and published prior to August 6, 1905, showed the rate for the carriage from the Mississippi river to New York upon products of the character shipped to be 23 cents per 100 pounds; that on June 17, 1905, the carrier contracted with the shipper to transport these products until December 31, 1905, at a rate the proportional part of which from the Mississippi river to New York was in fact 23 cents per 100 pounds; that on August 6, 1905, the Burlington company and its connecting carriers filed and caused to be published an amendment of their schedules and tariffs, which established a new rate the proportionate part of which for the carriage from the Mississippi river to New York was 35 cents per 100 pounds; that on June 16, 1905, the shipper contracted with the proprietors of the Wilson line for the transportation of property of this character from New York to Christiania, Norway, at the rate of 19.93 cents per 100 pounds; that on August 17, 1905, the packing company delivered the shipment to the Burlington company for transportation from Kansas City to Christiania, Norway, under a through bill of lading at the rate of 52.93 cents per 100 pounds, of which 19.93 cents was the agreed ocean rate; that "the full rate for the through carriage was in fact made up so that the proportionate part of the rate for the carriage from the Mississippi river to New York was 23 cents per 100 pounds. The packing company did not at any time know how the rate was apportioned or made up or divided among the respective carriers or points, except that it knew the steamship rate." But "it knew of the filed, published, and posted rate on the character of property embraced in the shipment established by the amendment" of August 6, 1905, and "shipments were made and carried according to the terms of said contract before August 6, 1905, and the provisions and products named in the indictment herein as shipped and carried were carried under said contract; the defendant company, shipper, contending and insisting that said amendment increasing the tariff rate did not and could not impair the terms of the contract." Counsel for the packing company insist that the last clause quoted means that the shipper was contending and insisting at the time of the trial, while the district attorney asserts that it refers to the time when the provisions and products were shipped and carried. The latter construction must prevail, because the paragraph in which this clause occurs relates to the time of the shipment, and not to the time of the trial.

The alleged defect in this proof is that the indictment charged a concession from a rate of 35 cents per 100 pounds shown on the filed and published schedules for the carriage from the Mississippi river to New York, while the agreed facts are that this rate of 35

cents did not appear on the filed and published tariffs and schedules, but it was the part of the rate from Kansas City to New York there published proportionate to the transportation from the Mississippi river to New York. But this was an immaterial variance, because the stipulated facts also show that this 35 cents was in fact the part of the published rate from Kansas City to New York proportionate to the carriage from the Mississippi river to New York: that the packing company knew this published rate, which must have been much more than 35 cents, the part of it proportionate to the carriage east of the river; that it also knew that it was paying 52.93 cents less the ocean rate, 19.93 cents, or only 33 cents, for the entire transportation from Kansas City to New York, a rate which was in fact 2 cents less than the rate proportionate to the carriage east of the river. It must therefore have known that it was receiving a concession from the published rate from Kansas City to New York, and hence a proportionate concession from every part of it, in the absence of proof that the entire concession was accepted from some specific part.

And here also is the evidence of criminal intent, the evidence that the shipper knew it was receiving, and that it intended to secure, a concession whereby its property was transported in foreign commerce at a less rate than that legally filed and published. "Contending and insisting that said amendment increasing the tariff rate did not, and could not, abrogate or impair the terms of said contract," the defendant knew it was receiving, and it intended to secure, a concession from the filed and published rate, knew that it was committing an act which the Elkins act declared to be illegal, and this is the only criminal intent requisite to convict of a statutory offense that is not wrong in itself. A corrupt purpose, a wicked intent to do evil, is indispensable to a conviction of a crime which is morally wrong. But no evil intent is essential to an offense which is a mere malum prohibitum. A simple purpose to do the act forbidden, in violation of the statute, is the only criminal intent requisite to a conviction of a statutory offense, which is not malum in se. Bishop on Statutory Crimes, § 596b; 1 Bishop's Crim. Law (8th Ed.) §§ 343, 345, par. 4.

No question of liability on account of a concession given or received under a mistake of fact or in ignorance of the established rate is presented in this case, because the defendant knew the filed and published rate, and that it was receiving a concession from it. The only mistake it pleads or proves was an error of law, its unfounded belief that by means of a contract with the carrier it could annul or evade the plain declaration of the statute that the concession it received was illegal, and such an error of law excuses no one. Wharton's Crim. Law (9th Ed.) § 84; U. S. v. Anthony, 24 Fed. Cas. 829, 831, 832, No. 14,459; State v. Zichfield, 46 Pac. 802, 805, 806, 23 Nev. 304, 34 L. R. A. 784, 62 Am. St. Rep. 800; State v. Hughes, 58 Iowa, 165, 169, 11 N. W. 706; Hoover v. State, 59 Ala. 57; Reynolds v. U. S., 98 U. S. 145, 167, 25 L. Ed. 244. The agreed facts were sufficient to sustain the judgment, and there was substantial evidence of the criminal intent of the shipper.

Counsel for the shipper have insisted, and the district attorney has denied, that any criminal intent was essential to a conviction of the statutory offense here charged. It has not been necessary to consider or decide, and the court has not considered, and does not decide, that question, because there was ample evidence that the shipper was guilty of the only criminal intent that could be requisite to such a conviction. The case has been determined on the assumption and concession, but not upon a decision that such an intent was indispensable.

A deliberate and patient consideration of the many and grave questions which have been presented in these cases has led to the conclusion that there was no error in their trial, and the judgments below must be affirmed.

JOHN D. PARK & SONS CO. v. HARTMAN.

(Circuit Court of Appeals, Sixth Circuit. March 14, 1907.)

No. 1,581

1. MONOPOLIES—CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLE MADE BY SECRET PROCESS.

   The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula.

2. SAME—PROPERTY RIGHTS—SECRET PROCESS OR FORMULA.

   While the owner of a patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work.

3. CONTRACTS IN RESTRAINT OF TRADE—SALE OF ARTICLES MADE BY SECRET PROCESS.

   The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not in itself an article of commerce, but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade.

4. SAME.

   The fact that an article of commerce is sold under a trade-name or in a trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

5. SAME.

   The sole manufacturer of a medicine made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesale dealers to whom alone he sold at uniform prices, by which they bound themselves to sell at a certain price

and only to retail dealers designated by him, and between him and such retail dealers, by which in consideration of being so designated they bound themselves to sell to consumers only and at a certain price. Such contracts had been entered into as the manufacturer alleged by a large majority of the wholesale and retail druggists in the United States. *Held*, that such system of contracts was prima facie illegal both at common law as in unreasonable restraint of trade and under the federal anti-trust act of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), where it affected interstate sales; its purpose and effect being to prevent competition between purchasers of the medicine both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant, who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit.

[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.]

6. SAME—SINGLE CONTRACT.

A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of contracts, and not merely ancillary or incidental to another and legitimate object.

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

For opinion below, see 145 Fed. 358.

The plaintiff below is a manufacturer of certain proprietary medicines, the chief of which is the well-known article called "Peruna." This, together with other preparations, he puts on the market through a system of contracts intended to maintain prices. Thus it is averred that he sells only to jobbers or wholesalers at uniform prices with a discount varying according to quantity. Each such jobber is required to sign a written agreement to sell only to retailers whose names shall be furnished by complainant, and who shall have signed a retailer's agreement with him obligating them to sell only to consumers at a price named by the complainant or found on his labels and wrappers. To enable him to discover violations of the agreement to sell only for consumption and only to consumers, each such retailer is required to stamp or write his name on each bottle or package sold, and, to insure against sales by wholesalers to unlicensed retailers, each sale must be reported to the complainant. The averment is that there has grown up a very large demand for "Peruna," and that such contracts have been made with jobbers and wholesalers all over the United States, and that "a majority of the retail druggists of the country have executed such contracts."

The defendant is a corporation organized under the laws of Kentucky, and is engaged in the jobbing or wholesale drug and proprietary medicine business. It is charged that the defendant company, with full knowledge of complainant's method of contracting the sales of "Peruna," has refused to enter into any contract with the complainant, and is not therefore entitled "to buy or deal in your orator's medicines and remedies." It is then averred that defendant company, in combination with other wholesalers and retailers, who have refused to sign complainant's contracts, has "unlawfully and fraudulently obtained and procured your orator's remedies and medicines, including 'Peruna,' from your orator's wholesale and retail agents, both directly and indirectly, by means of false and fraudulent representations and by surrepti-

tious and dishonest methods, and by persuading, directly or indirectly, your orator's wholesale and retail agents, under contract with your orator as aforesaid, to violate and break said contracts and sell and supply your orator's remedies and medicines, including 'Peruna,' to said defendant, and, after having procured" same, has advertised and sold same to dealers at less than the established price and less than the jobbing prices. It is also averred that, for the purpose of rendering it difficult to trace such purchases, the defendant, obliterates the serial number placed in such carton, and defaces and takes off the distinctive wrappers, etc., and in that condition sells the same. All of which conduct is averred to have resulted in "irreparable injury and damage" to complainant's system of trade, and that defendant gives out that it will continue its said conduct. The prayer of the bill is that the defendant be enjoined "from in any manner inducing or persuading, or attempting to procure, induce or persuade, directly or indirectly" any breach of any such sales agreement as stated, "and from procuring or attempting to procure in any way your orator's remedies and medicines, directly or indirectly, from any wholesaler or retailer who has executed such wholesale or retail agency contract with your orator in violation of same," and "from advertising, selling, or offering for sale the remedies and medicines of your orator obtained in or by any of the means aforesaid at prices less than the established retail price thereof, or to wholesale or retail dealers who have not entered into wholesale or retail contracts with your orator," and from mutilating or removing the cartons, wrappers, or labels upon the bottles, etc. The usual prayer for an accounting concludes the bill.

The defendant demurred for want of equity and specially to so much of the bill as sought to enjoin the defendant from mutilating labels, cartons, or wrappers, etc. The demurrers were overruled, and an injunction awarded pendente lite in the very terms of the bill.

From this interlocutory injunction this appeal has been perfected.

Alton B. Parker, William J. Shroder, and Henry T. Tay, for appellant.

Frank F. Reed, Edward S. Rogers, and Frederick W. Hinkle, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

The system of contracts by means of which the complainant proposes to retain control of all sales and resales of its goods is not unique. It was first applied to commodities made under patents or productions covered by copyright. According to one of the averments of the bill, the same system of contracts has been generally adopted by the wholesale and retail druggists of the United States. But this, we take it, means no more than it has been adopted as a plan for maintaining prices and controlling sales of proprietary medicines, a business which amounts to more than $60,000,000 annually. That the same plan has been extended to sales in respect to other commodities, not coming under the peculiar claims advanced for "patent" medicines, we may take notice. The question, in its shortest form, is whether the exemption from common-law rules against monopoly and restraints of trade, and the provisions of the federal anti-trust act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent or productions covered by a copyright, extend also to articles made under a secret process or medicine compounded under a private formula. The fundamental position of counsel for the complainant is that in principle there is no distinction between the monopoly secured to a patent or copyright and the monopoly of a trade secret, and they advance and defend the claim that articles made

under patents, copyrights, and trade secrets may lawfully be contracted for and sold under any conditions and limitations with respect to price and subsales which the vendor chooses to impose, and that "contracts relating to any such articles are not within the restraint of trade rules." If this contention is sound, the contracts under which the complainant conducts his business are legal, and no question remains but a consideration of the matter of the relief equity may give against one not a party to such contracts under the facts of this case.

That articles made under patents may be the subject of contracts by which their use and price in subsales may be controlled by the patentee, and that such contracts, if otherwise valid, are not within the terms of the act of Congress against restraints of interstate commerce or the rules of the common law against monopolies and restraints of trade, is now well settled. Heaton-Peninsular Button Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Dickerson v. Tinling, 84 Fed. 192, 28 C. C. A. 139; Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863; Rupp et al. v. Elliott, 131 Fed. 730, 65 C. C. A. 544; Victor Talking Machine Co. v. The Fair, 123 Fed. 428, 61 C. C. A. 58; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058. The patent grants an exclusive right to use, to make, and to sell. The patentee may grant, if he will, an unrestricted right to make and sell or use the device embodying his invention, or may grant only a restricted right in either the field of making, using, or selling. To the extent that he restricts either one of these separable rights, the article is not released from the domain of the patent, and any one who violates the restrictions imposed by the patentee, with notice, is an infringer. This is the ground upon which the cases stand which uphold restrictions upon either use or sale of a patented article where infringement is alleged. But, when a patentee imposes such restrictions, they may likewise constitute a contract between the patentee and his direct vendee or licensee. In such case the patentee would have a double remedy—an action in tort for infringement, or an action for the breach of the contract. The double remedy in such circumstances is noticed in Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, and in Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58. In Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, the action was one for breach of a contract by which the patentee had suffered his invention to be used on condition that the articles embodying it should not be sold below a certain price. In National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594, the bill was not to restrain infringement, but to enjoin sales by a vendee who was a jobber and who by direct contract had purchased phonographs made under the patent, agreeing to sell only at a named price and only to retailers who signed an agreement regulating retail sales. Whether a remedy is sought for the violation of restrictions placed by a patentee, upon either the use or the sale of an article made under the patent, is in tort or in contract, the rules of the common law in respect of monopolies and restraints of trade have no application, because the very object of

the patent law is to give to the patentee an exclusive monopoly in using, making, and selling the device which embodies the invention, and this exclusive right he may exercise by contracts under which he reserves to himself so much of his exclusive right as he does not elect to sell or assign or license. It follows therefore that contracts restraining subsequent sales or use of a patented article which would contravene the common-law rules against monopolies and restraints of trade, if made in respect of unpatented articles, are valid because of the monopoly granted by the patent. Bement v. National Harrow Co., 186 U. S. 70, 91, 93, 22 Sup. Ct. 747, 46 L. Ed. 1058; Edison Phonograph Co. v. Kaufmann (C. C.) 105 Fed. 960; Edison Phonograph Co. v. Pike (C. C.) 116 Fed. 863; Victor Talking Machine Co. v. The Fair, 123 Fed. 424, 61 C. C. A. 58. In the Bement Case, cited above, the action was at law to recover liquidated damages for the breach of a contract in respect of the price at which articles made under a patent should be sold. The court, among other things, said:

"The very object of these laws is monopoly, and the rule is, with very few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

In regard to the provision in respect to price the court said:

"The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property in, and providing for its value as far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

It was urged in the same case that the stipulations restricting the price at which sales might be made was in violation of the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), upon the subject of trusts and restraints of interstate trade, but the court held that the act did not apply to contracts in relation to patented articles, saying:

"But 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 licensee or assignee 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."

In National Phonograph Co. v. Schlegel, 128 Fed. 733, 64 C. C. A. 594, the same reasoning was followed and the validity of an agreement restraining prices held to be a valid contract, because it related to a patented article. There are such wide differences between the right of multiplying and vending copies of a production protected by the copyright statute and the rights secured to an inventor under the patent statutes that the cases which relate to the one subject are not altogether controlling as to the other. See Bobbs-Merrill Co. v.

Straus (C. C. A.) 147 Fed. 15, 23. Nevertheless, the statutory right to exclusively publish and vend copies of a copyrighted production would seem to take direct contracts between the publisher and his vendees in respect to the price at which subsequent sales shall be made outside of the rule as to restraints of trade which might otherwise apply. Murphy v. Christian Press Ass'n, 38 App. Div. 426, 56 N. Y. Supp. 597. But one who makes or vends an article which is made by a secret process or private formula cannot appeal to the protection of any statute creating a monopoly in his product. He has no special property in either a trade secret or a private formula. The process or the formula is valuable only so long as he keeps it secret. The public is free to discover it if it can by fair and honest means, and, when discovered, anyone has the right to use it. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St Rep. 740; Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664; Vulcan Detinning Co. v. American Contracting Co., 58 Atl. 290, 67 N. J. Eq. 243. In Chadwick v. Covell, Justice Holmes, speaking of the character of the title one has to a secret formula, said:

"Dr. Spencer had no exclusive right to the use of his formulas. His only right was to prevent anyone from obtaining or using them through a breach of trust or contract. Any one who came honestly to the knowledge of them could use them, without Dr. Spencer's permission and against his will. Peabody v. Norfolk, 98 Mass. 452, 458, 96 Am. Dec. 664; Morison v. Moat, 9 Hare, 241, 263; Williams v. Williams, 3 Meriv. 157. The defendant got his knowledge honestly, and therefore has a right to make and sell the medicines. Having the right to make and sell the medicines, the defendant has the right to signify to the public that the medicines are made according to the formulas used by Dr. Spencer."

In Tabor v. Hoffman, cited above, the New York court said:

"If a valuable medicine, not protected by patent, is put upon the market, any one may, if he can by a chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts."

But in the case of a patent the monopoly endures for the whole term of the patent. It gives the patentee the right to control the use of his invention during the entire period, and he may rightfully protect by contract his power to regulate all manufacture, sale, or use of things embodying his invention. It is this continuity of the right granted to the patentee which distinguishes it from the right to manufacture, sell, or use unpatented articles. If a man shall make a new invention or make a new discovery and it is useful, he may obtain a patent and thus secure a reward. But even then he must pursue the prescribed course in order to obtain it. He may keep his secret if he can. But, if he puts upon the market things embodying it, he forever loses his right to acquire a monopoly in it; i. e., to obtain a patent, either for manufacture, sale, or use. But it does not follow that because the owner of a secret formula cannot protect himself against discovery of his secret by fair means that he cannot protect himself against a betrayal of his secret by one who has received it through

confidential relations. Jarvis v. Knapp, 121 Fed. 34, 58 C. C. A. 1; Harrison v. Glucose Co., 116 Fed. 304, 311, 53 C. C. A. 484, 58 L. R. A. 915; Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12, 16 Am. St. Rep. 740; Morison v. Moat, 9 Hare, 241; Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. So also will the owner of a secret process or formula be protected against a breach of contract, when the secret is communicated in confidence and under restrictions as to its use. Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67.

In Fowle v. Park, the owner of the formula sold the right to make the remedy and sell it under its trade-name at a restricted price within a given territory. The court enjoined the breach of this agreement. The conclusion of the learned Chief Justice who wrote the opinion of the court seems to rest, not upon any notion that contracts touching the sale of a secret formula or trade secret were outside the rules of the common law in regard to restraints of trade, but rather upon the theory that such contracts were governed by the principle against restraints, but valid because the covenants were made in connection with the sale of a business and not larger than necessary to protect the reserved rights of the assignor to carry on the same business. In Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24, 53, 11 Sup. Ct. 478, 35 L. Ed. 55, Justice Gray seems to have rested the legality of such covenants upon the peculiar nature of the property which is the subject of the sale, saying:

"Upon the sale of a secret process, a covenant, express or implied, that the seller will not use the process himself or communicate it to any other person, is lawful, because the process must be kept secret in order to be of any value, and the public has no interest in the question by whom it is sold."

The most satisfactory ground upon which covenants restraining the use to be made of a trade secret may be said to not contravene the common-law rules against monopoly and restraints lies in the peculiar character of the property right which is concerned. So long as the owner of such a secret can preserve its secrecy he has necessarily a monopoly in its use, and there is no illegal restraint because he refuses to make it public. Neither is the public interest affected whether the process or formula is used by A. or B. or by both, for there can be no restraint of trade in respect of a method or formula which is known only to the discoverer and those to whom he chooses to communicate it under restrictions. Having no right to compel a publication, the public lose no right by respecting a restricted disclosure, for no freedom of traffic has been stifled. The language of Justice Holmes in Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, in respect of contracts limiting the right of those who receive the market quotations to a special use, is equally applicable to trade secrets in general. The learned justice said:

"But, so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly and no contract in restraint of trade, either under the statutes or at common law."

In Ammunition Co. v. Nordenfeldt, L. R. 1 Ch. Div. 630, 1894, Lord Justice Bowen said that the sale of a trade secret was not with-

in the mischief of restraint of trade, because, "unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture."

The basis of the common-law protection accorded to an author is the same. His legal rights grow out of the peculiar nature of the property. His composition is properly regarded as his absolute property. He need not disclose it. But the unrestricted offer of a single copy to the public operates as a disclosure or publication, and his exclusive right to make other copies is gone. But he may in confidence exhibit his work under restrictions, and this, like the confidential disclosure of a trade secret, will not amount to a dedication to the public, and he will be protected against a violation of the conditions imposed. The whole subject of the common-law rights of an author is so fully and carefully discussed by Judge Townsend in Werckmeister v. American Lithographic Co., 134 Fed. 321, 69 C. C. A. 553, 68 L. R. A. 591, and in Bobbs-Merrill Co. v. Straus (C. C. A.) 147 Fed. 15, that it would be a work of supererogation to again go over the subject. The cases relating to the distribution of news and information rest also upon the peculiar kind of property rights involved. So long as one who by his own industry has gathered together news or information, and does not disclose it, he cannot be compelled to make publication. The matter is his own in as true a sense as a trade secret or private formula, or the composition of an author. In such circumstances it is not illegal to protect the news gatherer against the piratical use of his news and prevent a public disclosure by one who has placed himself under obligation to respect a restricted use. In such case public disclosure is destructive of its value as property. Board of Trade v. Christie, 186 U. S. 236, 250, 25 Sup. Ct. 637, 49 L. Ed. 1031; Jewelers' Mercantile Agy. v. Jewelers' Pub. Co., 84 Hun, 12, 32 N. Y. Supp. 41; Id., 155 N. Y. 251, 49 N. E. 872, 41 L. R. A. 846, 63 Am. St. Rep. 666; National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198; Exchange Tel. Co. v. Gregory, etc., Co., 1 Q. B. Div. 147 (1896); F. W. Dodge, etc., Co. v. Construction Co., 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. In the Board of Trade Case, cited above, Justice Holmes, speaking of the protection granted to the business of distributing stock quotations, said:

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing it, to itself. * * * The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public."

The trading stamp and railroad ticket cases, such as Sperry & Hutchinson Co. v. Mechanics' Clothing Co. (C. C.) 135 Fed. 833, and Nashville, etc., Ry. Co. v. McConnell (C. C.) 82 Fed. 65, likewise rest upon the peculiar character of the property rights involved. Neither concern the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic. But it does not follow that because a secret process

or formula for a medicine or beverage will be protected against betrayal by employés or those to whom it has been communicated in confidence under a contract for a restricted use that a system of contracts for the control of all sales and subsales of the device, medicine, or beverage when once made will be outside of the rules in restraint of trade simply because the product of such secret process or formula. We have here to deal not with contracts which relate to the secret formula itself, or the right to use a trade-name or dress, as in Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67, but with the preparation when made by the owners of the process. The preparation when ready for the market and the formula are two separate and distinct things and may have distinct ownerships. Contracts in respect of a restricted use of the formula are not within the rule against restraint because of the character of the property right in such a secret. There can be no unrestricted use, before discovery by fair means, to which the owner does not consent, and then only at the expense of the destruction of its commercial value as a secret; but this is not the case with contracts which affect only traffic in the manufactured product of the secret formula. Freedom of traffic in that is consistent with its value and does not involve exposure of the formula.

Neither is there any such analogy between an article made under a patent and an article made under a secret formula as to require like exemptions from the rules which relate to articles made under neither. It is well at this point to notice that the exemption from the rule against restraint has never been extended to contracts in respect of articles made under a patent which have once passed beyond the domain of the patent by an original sale without restriction. The only reason which has ever been given for holding that a contract restricting the field of using, selling, or making of an article made under a patent is that the patent statute has granted an exclusive monopoly which cannot be cut down by the rule against restraint for that would be to grant a monopoly by law and then proceed to take it away by law.

But, if the owner of a secret process or a private formula does not or cannot bring himself under the protection of the patent statute by securing a patent upon his discovery, he cannot claim the advantage of the statute. The patent law, in consideration of a full and complete publication of the discovery or invention of the patentee, has granted to him a monopoly of his invention, including the making, selling, and using of devices embodying it, for a limited term of years. At the end of that time the disclosure made at the time he applied for his patent will enable the public to enjoy his discovery, and thus find compensation for the exclusive right temporarily conceded to the inventor. No statute grants any such monopoly to anyone who does not elect to avail himself of the benefits of the patent or copyright law. A trade secret or medical formula protects its owner only against those who acquire it under a confidential obligation to guard against disclosure, and, as we have already seen, one is free not only to use the process or formula if discovered by skill and investigation without breach of trust, but to make and sell the thing or preparation as made

by the process or formula of the original discoverer, if that be the truth. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442. To say that the owner of this secret need not make the medicine, nor sell it when made, unless it suits his convenience, is true. But the same thing may be said of the man who grows potatoes. He need not grow them, and need not sell them when grown. But, if something be conceded in favor of an article which no one can produce except the owner of the formula over one which any one can produce, what shall it be? There is no statute creating a lawful monopoly such as seems to take articles made thereunder without the rule against illegal restraint. Neither will the commercial value of the manufactured product vanish if subjected to the principles which apply to things not so made. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself apply to the product of the formula.

Without assenting to the claim that the making and selling of the preparation is a "publication" in the technical sense of that term, we are nevertheless unable to discover any legal or economic reason which justly exempts such articles when made from all of the rules of the common law which forbid unreasonable restraints in trade and from the anti-trust act of Congress in so far as trade in the prepared medicine is the subject of interstate commerce. Judge Cochran, who heard this case below, after considering the differences between a secret process and the article made, said:

"What is there, then, in the nature of the articles made under a secret process to occasion any difference between them and articles not so made or between them and articles which one may not have made at all, but simply owns, in the matter of the validity of restraining contracts entered into by the purchasers thereof from the owner? It is hard to conceive of any. It is true that the manufacturer and owner of the articles made under the secret process may refrain from making them and selling them to purchasers and thus putting them on the market. Equally so the manufacturer and owner of any other articles may refrain from so doing. So, also, the owner of articles that he has not made, but purchased or obtained otherwise from the manufacturer, may refrain from selling them to purchasers and thus putting them on the market. Suppose the owner of a patent should sell all the articles made under it to another with license to use or resell them, thus passing them outside of the monopoly of the patent hands of the purchaser, would the mere fact that they had been made under the patent lend any sanctioning force to a restraining contract entered into in reference thereto by a subpurchaser thereof? I must conclude, therefore, that the fact that the complainant's medicine has been made under a secret process has no effect whatever upon the validity of the system of contracts involved herein. He has no greater rights in relation thereto, as distinguished from the secret process under which it was made, than the owner of any other tangible personal property, whether made by him or not, would have in relation to such property."

Although Judge Cochran concluded that the complainant's preparations were no more exempt from the common-law rules against restraints of trade by reason of the fact that they had been prepared under secret formulas than if that had not been the case, he reached the ultimate conclusion that any vendor of an article might make similar contracts to those in suit, and that the control which was thereby secured over subsequent sales was not an unreasonable restraint

of trade. Most of the cases which he cites in support of his conclu sion are in conflict with the grounds upon which he rests his decision, and, indeed, the learned counsel for the Hartman Company have not assented to so much of Judge Cochran's opinion as holds that a trade secret remedy stands in no better plight than it would if the preparation had been disclosed upon the label. And so it has come about that the cases which have directly involved the Hartman system of contracts, and which are relied upon by counsel to sustain their legality, all stand upon the assumption that an article made under a secret formula may be the subject of contracts maintaining prices and controlling subsequent sales to as full an extent as an article made under a patent or a production secured by a copyright. The cases directly in point are all nisi prius decisions, except Jayne v. Loder, 149 Fed. 21, decided by the Circuit Court of Appeals, Third Circuit, and are all quite recent. They include three cases in which the Dr. Miles Medical Company was the plaintiff, namely, Dr. Miles Medical Company v. Goldthwaite (C. C.) 133 Fed. 794. The force of this case is weakened because the decree was not resisted. The next is Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838, decided by the same judge who decided the Goldthwaite Case. The next is Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606. This was followed by Wells & Richardson v. Abraham (C. C.) 146 Fed. 190, in which the legality of the contracts was not denied, thus lessening the value of the opinion as an authority. The ground upon which the two contested cases cited above was rested was the identity between the rights of a patentee and the owner of a mere trade secret or private formula with respect to the product or manufactured article. Thus, in Dr. Miles Medical Co. v. Jaynes, cited above, Judge Colt said:

"The contention of the defendants is that these contracts are unlawful because they are in restraint of trade. In support of this they do not rely so much upon the common-law rule as upon the federal statute (26 Stat. 209). The bill alleges that the complainant is the exclusive owner of these secret formulas, and the exclusive manufacturer of these remedies. It follows that, until voluntary disclosure or lawful discovery, the complainant has an exclusive property in these trade secrets and has the exclusive right to make and use and vend the articles made thereunder. The exclusive right of property in a trade secret is of necessity a monopoly, the same as a patent or a copyright. The complainant may make these articles, or refrain from making them. It may sell them, or refrain from selling them. It may sell them to one person, and not to another, and at such prices and upon such conditions as it may deem most advantageous. Contracts like those set out in the bill concerning articles made under trade secrets, the same as similar contracts concerning articles made under a patent or copyright, are outside the rule of restraint of trade whether at common law or under the federal statute. Hartman v. Park (C. C.) 145 Fed. 358; Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606; Wells & Richardson Co. v. Abraham (C. C.) 146 Fed. 190; Dr. Miles Medical Co. v. Goldthwaite (C. C.) 133 Fed. 794; Bement v. National Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; Board of Trade v. Christie, 198 U. S. 236, 252, 25 Sup. Ct. 637, 49 L. Ed. 1031; Garst v. Harris, 177 Mass. 72, 74, 58 N. E. 174; Fowle v. Park, 131 U. S. 88, 97, 9 Sup. Ct. 658, 33 L. Ed. 67; Park & Sons Co. v. National Wholesale Druggists' Association, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Standard Fireproofing Company v. St. Louis Company, 177 Mo. 559, 76 S. W. 1008; Victor Company v. The Fair, 123 Fed. 424, 61 C. C. A. 58; Heaton-Peninsula Company v. Eureka Company (C. C.) 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728;

Central Shade Company v. Cushman, 143 Mass. 353, 9 N. E. 629; Good v. Daland, 121 N. Y. 1, 24 N. E. 15."

In Dr. Miles Medical Co. v. Platt (C. C.) 142 Fed. 606, 610, Judge Kohlsaat says:

"These suits are brought for an infringement or violation of the property right of the complainants in the secret process owned or controlled by them. The right of a patentee, owner of a copyright, or owner of a secret process is merely the right of exclusion or debarment. The holder of such a property right, as said by the court in the Victor Talking Machine Case, cited above, is a czar in his own domain. He may sell or not, as he chooses. He may fix such prices as he pleases. He may sell at one price to one person, and another to another person. He is not required to give reasons or deal fairly with purchasers. Why is it material, then, in a suit to prevent infringement of complainants' rights in their secret processes, to inquire whether complainants have entered into a combination or conspiracy to control the very thing they are lawfully entitled to control?"

Jayne v. Loder, cited above, was decided by the Third Circuit Court of Appeals. It was an action under the seventh section of the anti-trust act against a combination of three distinct national associations, one that of the wholesale druggists, another that of the retail druggists, and the Association of Manufacturers of Proprietary Medicines. The object of the combination was to exclude every dealer from trading in proprietary medicines at all who would not consent to sell to members of the combine only and at prices named by it. Arguendo Judge Archbald did say that an individual proprietor might enforce his own terms in respect to his own goods. But this was not involved. The combination was in the teeth of the law whether an individual proprietor could or could not enforce such a system as that there involved.

If we are right in our conclusion that the manufactured product of a trade secret or private formula is not immune from the common-law rules forbidding monopolies and unreasonable restraints in trade, the cases above referred to must be disapproved, at least in so far as they are grounded upon the cases which deal with articles made under patents or copyrights. In addition to the cases cited above, counsel for the appellees cite and rely upon Park v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. That case involved the validity of a method of doing business and a system of contracts between manufacturers of proprietary medicines and wholesale druggists dealing in such medicines for the purpose of suppressing competition in prices. The opinion does not support the validity of such a system of contracts with reference to medicines not protected by any patent, for the decision is bottomed upon the assumption that the "proprietary medicines," the subject of the contracts then involved, were made under patents. Judge Haight, who delivered the opinion of the court, said:

"The matter in controversy has reference to the sale by manufacturers of those particular medicines or remedies covered by trade-marks, copyrights, or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same. These medicines are known as 'proprietary goods,' and their manufacture and sale are confessedly under the control and management of the owner or manufacturer, who may fix his own price and adopt such plan for the sale thereof as he, in his judgment, may determine."

To the objection that the contracts were in restraint of trade, he said:

"Nor does the plan appear to me to be in restraint of trade. It is true that it does away with the competition among dealers as to prices, but it creates no restriction upon them as to the quantities that they may be able to sell or the territory within which they may confine their transactions; but upon the question of prices we must bear in mind that the goods are covered by patent rights and trade-marks, which give the proprietors the exclusive right of specifying prices at which the articles shall be sold, and, following this, the right also to require dealers to maintain the prices specified."

The principle upon which Park & Sons Co. v. National Wholesale Druggists' Association was decided is emphasized in the subsequent case of Straus v. American Publishers' Assn, 177 N. Y. 473, 477, 69 N. E. 1107, 64 L. R. A. 701, 101 Am. St. Rep. 819, where was involved the validity of an agreement between publishers of copyrighted books to regulate the price at which retail dealers should sell such books. If the agreement had stopped there, the New York court thought the agreement valid and not in unlawful restraint of trade under the principles announced in Bement v. National Harrow Company, 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058, an opinion to which we have heretofore referred, which involved contracts for controlling prices of articles made under patents. After referring to the Bement Case Judge Parker, who had written a concurring opinion in the previous case, after setting out the reasoning of Justice Peckham in the Bement Case, said:

"That reasoning is employed as to patent rights. It is equally applicable to copyrights, the protection of which was perhaps the leading object of the association and agreement attacked in this action. And it points to the principle underlying the decision in the Park & Sons Co. Case, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, upon which defendants apparently rest their claim that the judgment of the Appellate Division should be reversed. But there is a feature in this case not to be found in that one, and which requires a different judgment than the one rendered therein, which will now be pointed out."

The dissenting opinion of Judge Martin, in case of Park & Sons Company, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578, also proceeds upon the assumption that the subject-matter of the agreement concerned medicines made under patents. See page 42 of 175 N. Y., on page 140, of 67 N. E. (62 L. R. A. 632, 96 Am. St. Rep. 578). The vice which the New York court found in the Straus Case was, not that the agreement obliged publishers not to sell copyrighted books to dealers who would not maintain the retail price dictated by the publishers, but that they also refused to sell uncopyrighted books to all such dealers as did not maintain prices on copyrighted books. This the court found under the facts of the case would operate practically to exclude all persons from the business of selling uncopyrighted books who would not become parties to the agreement to maintain the price of copyrighted books, and tended to create a monopoly of sale of books not copyrighted. Touching this, the court said:

"While the leading object of this association and agreement purports to be to secure to the owner and publisher of copyrighted books that protec-

tion which the Federal government permits them to enjoy for the reasons stated by Chief Justice Marshall (supra), it does not stop there. It also affects the right of a dealer to sell books not copyrighted at the price he chooses, or to sell at all if he fails to comply with the rules of the association. A combination creating a monopoly of the sale of books not protected by copyright offends against the law of this state as much as if it related to bluestone [Union Bluestone Co. Case, 164 N. Y. 401, 58 N. E. 525, 52 L. R. A. 262, 79 Am. St. Rep. 655] or envelopes [Berlin & Jones Envelope Co. Case, 166 N. Y. 292, 59 N. E. 906], and according to this complaint, which must be accepted as true on this review, such an outcome is not only possible but probable. But it is not of moment whether such a result is probable or not; for the test to be applied is: What may be done under the agreement? Reference to the complaint makes it clear that the association has undertaken to provide for the practical exclusion from the business of selling books not protected by copyright all who refuse to be bound by the rules of the association."

That decision puts the New York court squarely in opposition to agreements, combinations, and "systems of contracts" between a manufacturer of unpatented or uncopyrighted articles and his vendees which tend to an unreasonable restraint of trade or to create a monopoly, and makes plain the ground upon which such contracts had been maintained in the Park & Sons Co. Case. That the "proprietary medicines," called more than once "patent medicines," were not in fact patented, is of no significance, if true, for the court assumed they were, and it does not appear from anything in any of the opinions that the fact assumed was not true. That opinion, by its own language, as well as by the pointed reference to the principle upon which it rested in the later opinion of the same court, has no application when, as here, the subject of the contracts in question is unpatented and uncopyrighted articles. The cases of Elliman & Sons v. Carrington & Son, L. R. 1901, 2 Ch. Div. 275, and Garst v. Harris, 177 Mass. 72, 58 N. E. 174, are also cited as supporting the legality of such a series of agreements as that under which complainant conducts his business. Both cases involved contracts of sale of article, presumably made under secret formulas, though no stress is laid upon the fact in the Elliman Case. Each was a suit directly between the vendor and his vendee. Each involved only a single transaction by which the article was sold upon an agreement that the purchaser would not resell at less than a named price. Neither concerned any other rights than those of the contracting parties, and neither decides more than that an agreement of sale of a chattel by which the purchaser agrees that he will not sell below a certain price is valid and not such a restraint of trade as to be obnoxious to the law. Neither case holds that a buyer from such a vendee, even with notice, would not get title or come under the obligation of the contract between the original parties. The most that can be made of the decisions is that, having regard to the subject-matter and the limited character of each agreement, neither contract had that sweep and extent which would constitute the restraint an unreasonable one, and therefore not within the mischief of the rule against restraints. The Elliman Case was decided by a single judge.

Walsh v. Dwight (Sup.) 58 N. Y. Supp. 91, another case relied upon to support the decree, was an action by a maker and dealer in salaratus and soda, alleged to be an article in common use, against another maker who sold another brand which he called "Dwight's

Cow Brand Saleratus and Soda," for damages to him through a course of business by which his brand of the same article lost much demand. The defendant did this, first, by extensive advertising; second, by giving to all dealers a rebate who would agree to sell its article at a minimum price named and to charge a like price for every other brand. The price thus fixed was, as averred, an extravagant price and operated to enlarge the demand for the defendant's advertised brand and diminish that for the plaintiff's. The court found no illegal restraint of trade, as there was "nothing to prevent others from engaging in the business or the manufacturers of other articles from selling their products to anyone willing to buy." The substance of the decision is well stated in the syllabus as follows:

"An agreement by a manufacturer with his customers to give them a rebate if they should refuse to sell his article, or other similar articles, at less than a certain price, is not in restraint of trade."

The fact that "Peruna" is a trade-name, that it is put on the market in a distinctive trade dress, has no bearing upon the question. The defendants are not charged with infringing the trade-mark or trade dress. The medicine they bought was the medicine put up by the complainant, and the defendants have neither sold nor offered to sell a preparation of their own for and as the preparation of the complainant. A trade-mark, or a trade-name, or trade dress, have no other effect than to prevent one from "palming" off his goods for those of another. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The averments of the bill as to the complainant's trade-name and trade dress are irrelevant, for no exemption from the principles of the common law is secured by either. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The transactions described in the bill plainly constitute sales of complainant's medicines and the general title passes to every such purchaser and subpurchaser. Garst v. Hall & Lyon Co., 179 Mass. 588, 590, 61 N. E. 219, 55 L. R. A. 631. To call such a purchaser an "agent" is to juggle with words. "Sale" is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales which pass the general property in chattels, as well as the possession, and provide for no reverter.

Neither is the suit based upon any breach of contract by the defendants. Confessedly, they have made no contract with complainants, and have definitely refused to conform to complainant's methods of doing business. That they have bought "Peruna" on the market from sellers who had it for sale is true. That the bill avers that they bought without being licensed to buy is true. That they bought from vendors who knew this fact and who thereby breached their agreement not to sell to dealers who had not been certified to them as licensed buyers who had entered into an agreement with the complainant restricting resales is also averred. That Park & Sons Company knew

complainant's plan of business, and that in selling to them every such vendor thereby breached his agreement, is also charged, and, for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because they constitute personal contracts upon which an action will lie only against the contracting party. Garst v. Hall & Lyon Co., 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. A prime objection to the enforcibility of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery.

The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. "If a man," says Lord Coke, in Coke on Littleton, § 360, "be possessed of a horse or any other chattel real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man." It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice. A covenant which may be valid and run with land will not run with or attach itself to a mere chattel. Spencer's Case, 3 Resolution, 5 Coke, 16; Wald's Pollock on Contracts (3d Ed.) 278; Splidt v. Bowles, 10 East, 279, 282; Smith v. Williams, 117 Ga. 782, 45 S. E. 394, 97 Am. St. Rep. 220; Prater v. Campbell, 110 Ky. 23, 60 S. W. 918; Appollinaris Co. v. Scherer (C. C.) 27 Fed. 18, 21; Garst v. Hall & Lyon Co., 179 Mass. 588, 691; 61 N. E. 219, 55 L. R. A. 631; Taddy Co. v. Sterions Co., 73 Law Journal, 1904, Ch. Div. p. 191; De Mattos v. Gibson, 4 De. J. & Jones, 276, 282. Against this conclusion, and in supposed opposition to the above authorities, counsel for the appellee have cited the line of cases heretofore referred to relating to contracts restraining the use or sale of articles made under patents or copyrights. We have already indicated herein that these cases do not apply to contracts which do not relate to articles not made under patents or copyrights. They also cite New York Bank Note Co. v. Hamilton Bank Note Co., 180 N. Y. 280, 294–295, 73 N. E. 48, De Mattox v. Gibson, 4 De J. & Jones, 276, and Whitwell v. Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689. The New York Bank Note Company Case concerned the legality of a contract for the sale of "Kidder

Printing Presses" with attachments enabling them to do a certain class of work. There were patents upon certain parts of the press, but none upon the attachments. It was contended that a covenant which restricted the sales of the press with the attachments was void as in restraint of trade. The fourth syllabus is in these words:

"The fact that the contract restricted the sale of presses except to the printing company, and that a separate consideration was paid for the covenant of restriction, does not render the contract so unreasonable in its restraint of trade that it is void for that reason, where the adoption of the press to the special use was the work of both parties and the covenant not to sell other presses for similar work accompanied the manufacture and sale of a press, and constituted an integral part of the thing sold."

The ground is better shown by the following extract from the opinion itself:

"So far as the machine was the subject of patent its use was lawfully a monopoly, and therefore no contract relating to it could be condemned as creating a monopoly. But, whatever may have been the case as to the patentable character of the machine, we think the fact that its adaption to the special use was the joint work of both parties, and that the covenant not to sell other presses for similar work accompanied the manufacture and sale of a machine, rendered that covenant reasonable as constituting an integral part of the value of the thing sold."

See Tode v. Gross, 127 N. Y. 480, 28 N. E. 469, 13 L. R. A. 652, 24 Am. St. Rep. 475. It is manifest that the case is not in point. De Mattox v. Gibson is still less an authority.

Under a bill for specific performance of a charter party the question arose as to whether a mortgagee of the chartered vessel should be allowed to foreclose and thereby intercept a voyage which the vessel was under contract to make when the mortgage was given, of which contract the mortgagee had notice. It was in respect of such facts that Justice Bruce used the language which is supposed to support the notion that a covenant may attach to chattels which pass by delivery from hand to hand and bring any one who buys with notice under the restrictions against a resale at less than a dictated price. But even in that case it was said that the mortgagee who took his mortgage with notice incurred no liability in respect to the charter party, and was only obliged to desist from doing anything which would prevent performance. Whitwell v. Tobacco Co. involved nothing more than whether a tobacco manufacturer might sell his goods at one price to those who would agree to buy only from him and at a higher price to those who would not.

The conclusion we reach upon all the foregoing considerations is that the complainant cannot obtain the active interposition of a court of equity against one who is under no contract relation to him, unless the covenants which he has imposed upon his vendee and subvendees are only such reasonable and partial restraints, for his own protection, as may be legally exacted by one who sells a business or property. This court in United States v. Addyston Pipe Co. et al., 85 Fed. 271, 281, 29 C. C. A. 141, 46 L. R. A. 122 et seq., speaking by Judge Taft, laid down as an indispensable condition that "no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and neces-

sary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." Covenants in partial restraint, and ancillary to a principal contract, which had generally been upheld, the learned judge divided into five principal classes. The fourth of these classes he defined as covenants "by the buyer of property not to use the same in competition with the business retained by the seller." As typical cases under this class, he cited American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634, and Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80, both being decisions by this court. Navigation Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. Ed. 315; Dunlop v. Gregory, 10 N. Y. 241, 61 Am. Dec. 746; Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335, 1 Am. St. Rep. 816. The court below located the contracts here involved as coming under the fourth class, being covenants ancillary to the sale of the medicines put up by the complainant, which he concluded were not unreasonable for the protection of the retained business of the covenantee. Assuming that these contracts operate only as a partial and not a general restraint, a question which we do not concede, and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal rather than the ancillary matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other and the "system" is to be construed as "one piece," in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In Continental Wall Paper Co. v. Voight & Sons Co. (C. C. A.) 148 Fed. 939, where was involved a combination in restraint of trade, and, where each wholesaler and retailer in the business had executed separate but identical contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing

prices. This was rested upon the holding that the several agreements constituted one whole. See, also, observations of Judge Taft in United States v. Addyston Pipe Co., 85 Fed. 275, 29 C. C. A. 141, 46 L. R. A. 122, and of Justice Peckham in Montague v. Lowry, 193 U. S. 38, 45, 46, 24 Sup. Ct. 307, 48 L. Ed. 608.

The plain effect of the "system of contracts," the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to any one who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about. It is true that the complainant is not in a combination with other makers of "Peruna." There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected. Now, if the complainant had absorbed all the sources from which the demand for lumber, or furniture, or stoves could be supplied and then should say, "I will sell only to those who will resell only to those I shall license to buy and only at the price I dictate," could any voice be raised to say that the covenants, which every dealer should sign in order to prevent exclusion from trade in such articles, would be upheld by the courts and a remedy by injunction granted to restrain breaches? But it is said that a distinction exists between contracts which relate to articles which any one can make and sell and those which are made under a secret process, and that covenants in respect to the former might affect the public interest, while the public would not be affected by like covenants relating to the latter class of subjects. But, unless we are willing to say that that fact places such products wholly outside of the mischief incident to restraints of trade and upon a plane of equality in that respect with that occupied by things made under the statutory monopoly of a patent, the fact can be of no weight except as it may be a factor in determining whether the covenants exacted of jobbers and retailers, alike regulating subsequent sales and selecting subsequent buyers, are

no more than necessary to afford a fair protection to the business of the complainant and not so large as to interfere with the interests of the public. There can be no hard and fast rule by which the result can be reached in such cases. At last the question must come to this: "What is a reasonable restraint with reference to a particular case?" This was the test applied in Horner v. Graves, 7 Bing. 735, and in Nordenfeldt v. Maxim Nordenfeldt Co., 1894, App. Cases, 535,567, and also approved by this court in the Addyston Pipe Co. Case, 85 Fed. 271, 282, 29 C. C. A. 141, 46 L. R. A. 122. A general system of contracts, such as that which the complainant seeks to enforce and which the bill avers is a method generally adopted in his line of business, involves very different questions from those which arise when a single contract only is involved and when the action is between the contracting parties for a breach, as was the case in Garst v. Harris, 177 Mass. 72, 58 N. E. 174, and Elliman v. Carrington, L. R. 1901, 2 Ch. Div. 275.

Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to any one who will buy "necessary," to use Judge Taft's phrase, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party"? In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, "such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public"? Horner v. Graves, 7 Bing. 735. The learned trial judge found it difficult to answer these questions. He says in his opinion (145 Fed. 358):

"That complainant's vendees and subvendees should be so restrained is advantageous to complainant's business. It would be an injury to it for them not to be so restrained. Exactly how it is so advantaged and how it would be injured by a removal of the restraint has not been developed in the argument; and I do not feel sufficiently advised of such matters to say as to this. It would seem that the existence of such a system of contracts in relation to complainant's medicine would tend to prevent demoralization in the trade therein through competition amongst its vendees and subvendees and enable him to maintain his prices for his medicine."

The averments of the bill are very general. Thus it is averred that:

"Some time since the class of stores known as 'department stores' and 'cut rate stores' have inaugurated a system of obtaining from cut rate wholesale and jobbing druggists and elsewhere, and offering for sale your orator's medicines, remedies, and preparations at retail prices lower than the prices fixed by your orator and stamped upon the cartons and packages. Said system is known as the 'cut rate' or 'cut price' system and resulted in much confusion, trouble, and damage to your orator's business, and has injuriously affected the reputation and depleted the sale of your orator's remedies, medicines, and preparations. Thereupon, and in order to protect its trade, custom, and business, and the manufacture and sale of his remedies, medicines, and preparations, your orator has established and put in force the following methods and system of governing, regulating, and controlling the sale and marketing of your orator's said medicines, remedies, and preparations."

Then, after setting out the system of contracts, which is now sought to be enforced, it is said:

"The entire purpose and object of the said system of contracts, serial numbers, lists, and cards being to prevent the cutting of prices and the demoralization of trade, both wholesale and retail in your orator's medicines and remedies, and the injury and damage resulting to your orator's aforesaid trade and business in the manufacture and sale of said remedies and medicines, as aforesaid, which said system and method your orator charges both in its form and purposes, and the prices therein fixed are reasonable, regular and proper, and which, if observed, will accomplish the aforesaid purposes and greatly benefit your orator in his aforesaid business by increasing the sales of and demands for his remedies, medicines, and preparations."

"These allegations," said the court below, "must be taken as true," and upon these he held that the complainants were advantaged by the covenants and injured if not so restrained. In this conclusion we cannot concur. Prima facie the contracts are plainly in restraint of trade. It was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business. Unless he could do this, he could not ask equitable relief under such covenants. This the bill does not do, unless the court is to be content with general averments that the competition methods called derisively the "cut rate" or "cut price" system had "demoralized," "confused," "troubled," and "damaged" the complainant's business. So, also, it is averred that the "system" had and will accomplish the suppression of the competition plan "and greatly benefit your orator in his business by increasing the sales of and demand for his remedies." Doubtless the "system" rigidly enforced will put an end to the "demoralization," the "trouble," and "confusion" incident to competition. But such an averment as this can be of no legal consequence, for it is no more than to say that a noncompetitive system of conducting trade and traffic in the line of articles made by complainant is of more advantage than the ordinary competitive system. That the suppression of even unreasonable competition will sanctify an agreement or combination to restrain trade will not be claimed. The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation. A partial restraint of competition may be upheld when one sells a business or other property, provided it is no greater than necessary to enable the vendor to realize the value of his good will or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. But here the only competition which the contracts in question tend to suppress is competition between those who buy his goods to sell again. How the suppression of competition between his vendees and subvendees is to secure to him the enjoyment of the legitimate fruits of his contracts of sale, to which the restrictive covenants are supposed to be ancillary, or to protect him against an unjust competition, is not clear, and the bill states no facts from which we can determine whether these covenants are necessary and reasonable. The general averment that under the "cut rate" plan of doing business, demoralization and damage resulted, while under the "contract system" enlarged sales and increased emoluments have and will follow, does not answer the question as to why such covenants are necessary to protect complainant against con-

sequences which may fairly require protection. Looking to the averments of the bill as a whole and to the scheme of business as disclosed by the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and subvendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. No instance has been called to our attention where the main purpose and principle, if not only result, is to protect buyers against the competition of each other. If such a principle shall find lodgment in the law, it must be upon economic reasons which are in conflict with those which now prevail. The single direct effect of the "system of contracts" is to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way. Each obtains a price enhanced by the "system" over the "cut rate" or "cut price" method which had before prevailed, and which it was the object of the new plan to abolish. It may be that sales went on as before; but at a higher price to the consumer than would otherwise have been paid. In Addyston Pipe Co. v. United States, 175 U. S. 211, 244, 20 Sup. Ct. 96, 44 L. Ed. 136, it was said:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

It is no answer to such restrictive covenants that after all they only prevent injurious competition between such dealers and only result in maintenance of reasonable prices. These are not the tests by which the validity of such agreements are determined. In People v. Sheldon, 139 N. Y. 251, 264, 34 N. E. 785, 789, 23 L. R. A. 221, 36 Am. St. Rep. 690, it was said:

"If agreements and combinations to prevent competition are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon an actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity although the moral evidence might be very convincing."

This principle was very strongly approved by this court in the Addyston Pipe Case, so frequently referred to, and many other cases cited in its support. It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges. Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of commerce comes under the tests of the law. It was made and answered by Judge Taft in the Addyston Pipe Case with a strength to which we can add nothing.

Our conclusion is that complainant's system of contracts is not enforceable. The injunction must be discharged.

The case will be remanded, with directions to proceed as may be consistent with this opinion.

VAN GESNER v. UNITED STATES. BIGGS v. SAME. WILLIAMSON v. SAME.*

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

Nos. 1,369, 1,370, 1,368.

1. CRIMINAL LAW—REVIEW IN FEDERAL COURTS—ELECTION.

In a criminal case in a federal court which involves a constitutional question, after a judgment of conviction, the defendant is put to his election whether he will take the case direct to the Supreme Court of the United States on such question, or take the whole case to the Circuit Court of Appeals, and, where he elects the former, a writ of error subsequently taken out to the Circuit Court of Appeals will be dismissed.

2. PUBLIC LANDS—REGULATIONS OF LAND DEPARTMENT.

The Land Department of the United States has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force and effect of law, and of which the courts take judicial notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Public Lands, § 288.

Decisions of land department, their conclusiveness and effect, see note to Hartman v. Warren, 22 C. C. A. 38; Carson City Mining Co. v. North Star Mining Co., 28 C. C. A. 344; Unita Tunnel M. & T. Co. v. Creede & C. C. M. & M. Co., 57 C. C. A. 207.]

*Rehearing denied May 20, 1907.

3. PERJURY—PUBLIC LANDS—APPLICATION TO PURCHASE—TIMBER AND STONE ACT.

Under Timber & Stone Act June 3, 1878, § 1, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], which requires applicants to purchase land thereunder to file a verified written statement, and after the required publication of notice to "furnish to the register of the Land Office satisfactory evidence" of certain facts, the regulations of the Land Department, requiring such evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and false swearing in either the preliminary statement or in such depositions constitutes the crime of perjury and an offense against the United States, under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 23.]

4. CONSPIRACY—SUBORNATION OF PERJURY—PUBLIC LANDS—INDICTMENT—AVERMENT OF WILLFULNESS.

Where the facts alleged, in an indictment for conspiracy to commit an offense against the United States by subornation of perjury in proceedings to acquire public lands, necessarily import willfulness on the part of the persons giving such testimony, the failure of the indictment to use the word itself is not fatal.

5. SAME—COMPETENCY OF EVIDENCE.

Under an indictment for conspiracy to commit an offense against the United States by subornation of perjury in procuring persons to make application for the purchase of lands under the timber and stone act, under agreements to convey the same to defendants, and to falsely swear, among other things, that such lands were chiefly valuable for timber, it was not error to permit the government to prove that the lands were not valuable for the timber upon them, but were chiefly valuable for grazing purposes, although such evidence tended to show that the lands were not subject to entry under the act.

6. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—EVIDENCE OF MOTIVE.

An indictment for conspiracy to commit an offense against the United States by subornation of perjury charged that defendants procured and instigated a number of persons to make application for the purchase of public lands in a certain township under the timber and stone act, and to falsely swear in their applications and proofs that they were not seeking to purchase such lands on speculation, but for their own exclusive benefit and use, and that they had not made any contract or agreement by which the title would inure to the benefit of another; whereas, in truth and fact, such persons were applying to purchase the lands on speculation and under prior agreements to convey the title to defendants. *Held*, that under such indictment the motive of the parties to the transactions was a material fact to be proved, and that evidence that defendants had induced other persons to file on or purchase state lands in the same vicinity, which were subsequently conveyed to defendants, was properly admitted, where the jury were instructed to consider it only as bearing on such question of motive.

7. SAME.

Under such indictment, it was also competent for the government to show, by the persons who made such applications to purchase lands, that it was their intention and understanding at the time that the lands should be conveyed by them to defendants, contrary to their sworn statements and testimony.

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

A. S. Bennett and H. S. Wilson, for plaintiffs in error.

Francis J. Heney, Sp. Asst. to Atty. Gen., and William C. Bristol, U. S. Atty., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These cases were tried and submitted together; the plaintiffs in error being jointly charged by indictment with the crime of conspiracy to suborn perjury, in violation of the provisions of section 5440 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3676]. In respect to the plaintiff in error Williamson, this statement is made in the brief of counsel for the plaintiffs in error, to wit:

"Prior to the writ of error in this case, the defendant Williamson, who was a representative in Congress, had sued out a writ of error to the Supreme Court of the United States, based upon the holding of that court, in the Burton Case, that a sentence of imprisonment against a member of Congress involved a constitutional question, giving the right of appeal direct to that court. At the time the writ of error was sued out in this case, the constitutional question in the Burton Case had never been decided. This writ of error to this court in the Williamson Case was sued out after the writ to the Supreme Court, and out of abundance of caution in case the writ to the United States Supreme Court should be dismissed upon jurisdictional grounds. The jurisdiction of this court, therefore, in the Williamson Case, depends upon whether the United States Supreme Court shall entertain jurisdiction thereof, and, if it holds that it has jurisdiction to pass upon the merits, then the proceedings in this court necessarily fail. If the Supreme Court should take jurisdiction in the Williamson Case, and pass upon the merits, its decision will necessarily be controlling in all these cases, as the record and questions presented (except the constitutional one) are identical."

Upon this statement of counsel for the plaintiff in error, we are of the opinion that the writ in respect to the plaintiff in error Williamson must be and hereby is dismissed. He was put to his election whether he would appeal from the judgment given against him directly to the Supreme Court upon the question of jurisdiction alone, or bring the whole case to this court, in which event this court could, if it deemed proper, certify the question of jurisdiction to the Supreme Court, or the case be taken there by that court by its writ of certiorari. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397–407, 24 Sup. Ct. 376, 48 L. Ed. 496; McLish v. Roff, 141 U. S. 661–667, 12 Sup. Ct. 118, 35 L. Ed. 893.

On behalf of the remaining plaintiffs in error, a number of points are made by counsel; the first going to the question of the sufficiency of the indictment.

It is a fundamental right of every defendant in a criminal case to insist that the indictment against him clearly charge an offense denounced by law, fairly inform him of the acts alleged to have been committed by him in violation of that law, and in a manner that will protect him in the event of a verdict of guilty, or acquittal, against any further prosecution for the same offense.

The statute under which the indictment in question is founded provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to" a prescribed penalty. Rev. St. § 5440.

The statute is very broad, and includes any and every case where two or more persons conspire, either to commit an offense against the

United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy. In any and every such case, each and every party to the conspiracy is guilty of the crime denounced by the statute, the gist of which is conspiracy. "This offense," said the Supreme Court in United States v. Britton, 108 U. S. 199–204, 2 Sup. Ct. 531, 534 (27 L. Ed. 698), "does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows, as a rule of criminal pleading, that, in an indictment for conspiracy under section 5440, the conspiracy must be sufficiently charged, and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

The indictment in question undertakes to charge against the defendants thereto the commission of the particular acts bringing them within the provisions of this law. It charges that they, together with divers other persons to the grand jurors unknown, did, on the 30th day of June, 1902, at Prineville, Or., conspire, combine, confederate, and agree together to commit an offense against the United States. That is to say, to unlawfully, willfully, and corruptly suborn, instigate, and procure a large number of persons, to wit, 100 persons, to commit the offense of perjury in the said district (of Oregon) by taking their oaths there, respectively, before a competent officer and person in cases in which a law of the said United States authorized an oath to be administered, that they would declare and depose truly that certain declarations and depositions by them to be subscribed were true, and by thereupon, contrary to such oaths, stating and subscribing material matters contained in such declarations and depositions which they should not believe to be true. That is to say, to suborn, instigate, and procure the said persons, respectively, to come in person before him, the said Marion R. Biggs, who was then and there a United States commissioner for the said district of Oregon, and, after being duly sworn by and before him, the said Marion R. Biggs, as such United States commissioner, to state and subscribe under their oaths that certain public lands of the said United States, lying in Crook county, in said district of Oregon, open to entry and purchase under the acts of Congress, approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons, respectively, and that they had not, directly or indirectly, made any agreement or contract in any way or manner, with any other person or persons whomsoever, by which the title which they might acquire from the said United States in and to such lands should inure in whole or in part to the benefit of any person, except

themselves, when, in truth and in fact, as each of the said persons would then well know, and as they, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, would then well know, such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit, respectively, and would have made agreements and contracts with them, the said John Newton Williamson, Van Gesner, and Marion R. Biggs, by which the titles which they might acquire from the said United States in such lands would inure to the benefit of the said John Newton Williamson and Van Gesner, as copartners in the firm of Williamson & Van Gesner, then and before then engaged in the business of sheep raising in said country. The matters so to be stated, subscribed, and sworn by the said persons being material matters under the circumstances, and matters which the said persons so to be suborned, instigated, and procured, and the said John Newton Williamson, Van Gesner, and Marion R. Biggs would not believe to be true; and the said Marion R. Biggs, United States commissioner, as aforesaid, when administering such oaths to those persons, being an officer and person authorized by law of the said United States to administer the same oaths; and the said oaths being oaths administered in cases where a law of the said United States would then authorize an oath to be administered.

The indictment further charges that, in pursuance of the said unlawful conspiracy, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the 30th day of June, 1902, at Prineville, Or., did unlawfully prepare a sworn statement in writing, for the signature of one Campbell A. Duncan, who was one of the persons who were to be suborned, instigated, and procured, as aforesaid; that is to say, a paper of the tenor following:

"Timber and Stone Lands—Sworn Statement.

"Land Office at The Dalles, Oregon, June 30th, 1902.

"I, Campbell A. Duncan, of Prineville, county of Crook, state of Oregon, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled 'An act for the sale of timber in the states of California, Oregon, Nevada and Washington Territory,' as extended to all the public land states by act of August 4, 1892, for the purchase of the S. 2 of N. E. 4 and S. 2 of N. W. 4 of section 14, township 15 S. of range 18 E. W. M., in the district of lands subject at The Dalles, Oregon, do solemnly swear that I am a native citizen of the United States, of the age of 34, and by occupation farmer; that I have personally examined said land, and from my personal knowledge state that said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements * * * nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; that I have not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself; and that my post office address is Prineville, Or. ———, Applicant.

"State of Oregon, County of Crook—ss.:

"——— do hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ———), and

that I verily believe him to be the person he represents himself to be: and that this affidavit was subscribed and sworn to before me this ——— day of ———, 1902. ———————."

The indictment then charges that, in further pursuance of the said unlawful conspiracy, and to effect the object of the same, the said Marion R. Biggs afterwards, to wit, on the 30th day of June, 1902, at Prineville, Or., did unlawfully prepare a certain other sworn statement for the signature of one Susie M. Duncan, who was another one of the persons who were to be suborned, instigated, and procured as aforesaid; that is to say, the sworn statement required of the said Susie M. Duncan as an applicant to purchase public lands under the provisions of the said acts of Congress, similar to the sworn statement hereinbefore set forth according to its tenor, but referring to certain public lands known and described as the southwest quarter of section 14, in township 15 south, of range 18 east (reference being made to the Willamette meridian and bass line).

Similar alleged acts of the said Biggs in pursuance of the alleged unlawful conspiracy, and to effect the objects of the same, are charged in respect to various others of the 100 persons referred to in the indictment.

Section 1 of the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], provides:

"That surveyed public lands * * * valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold * * * in quantities not exceeding 160 acres to any one * * * at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on similar terms as timber lands."

Section 2 of the act, so far as it is applicable to the present case, is as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone * * * that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the Land Office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The third section of the act, so far as here applicable, is as follows:

"Sec. 3. That upon the filing of said statement * * * the register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in the newspaper published nearest the location of the

premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the Register of the Land Office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as hereinbefore required; secondly, that the land is of the character contemplated in this act * * * and, upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, 1872, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

By Act Aug. 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547), the provisions of the above-mentioned act were extended to all the public-land states.

The form of the "written statement" which the act of Congress requires applicants for such land to file with the register of the proper district, together with the form of the affidavit to be made by such applicant, prescribed by the rules and regulations of the Land Department, are, as have been shown, set out in the indictment, and the record further shows the printed form prescribed by the Land Office for the taking of the testimony of such claimant both direct and cross, together with the form of the certificate to be signed by a United States commissioner of the district certifying that the applicant personally appeared before him, and that each question and answer in the deposition was read to him in the presence of the commissioner before he signed his name thereto, and that the same was subscribed and sworn to before such commissioner at the time and place to be stated, and further certifying that the commissioner has tested the accuracy of the affiant's information and the bona fides of the entry by a close and sufficient oral cross-examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use, and not for sale or speculation, and whether he has conveyed the land or his right thereto, or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entryman shall inure in whole or in part to the benefit of any person or persons excepting himself, and that such commissioner is satisfied from such examination that the entry is made in good faith for the entryman's own exclusive use, and not for sale or speculation, nor in the interest nor for the benefit of any other person or persons, firm or corporation, and to which form is annexed this:

"Note: Every person swearing falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited and all conveyances of the land, or of any right, title or claim thereto, are absolutely null and void as against the United States."

It is well settled that the Land Department has the power to make reasonable rules and regulations, not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force

and effect of law, and of which rules and regulations the courts take judicial notice. Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; Knight v. Land Association, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Orchard v. Alexander, 157 U. S. 385, 15 Sup. Ct. 635, 39 L. Ed. 737; Cornelius v. Kessel, 128 U. S. 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Hawley v. Diller, 178 U. S. 495, 20 Sup. Ct. 986, 44 L. Ed. 1157; In re Kollock, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C.) 104 Fed. 20–43; Id., 112 Fed. 4–11, 50 C. C. A. 79, 61 L. R. A. 230.

It is quite true, as argued by counsel for the plaintiffs in error, that no rule or regulation made by the Land Department is a law in the sense that it can make that a crime which is not made a crime by any statute of the United States. U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. But the present is not a case in which the violation of a mere rule or regulation is made a crime; but, on the contrary, the crime charged against the plaintiffs in error is defined by the statutes of the United States, expressly defining and declaring what shall constitute the crime of conspiracy and the crime of perjury. Rev. St. §§ 5440, 5392 [U. S. Comp. St. 1901, p. 3653]. Not only is there no statute of the United States conflicting with the rule of the Land Department requiring any and every applicant to purchase land under the stone and timber act, to make proof by deposition of the facts required by the statute to be declared and sworn to in his preliminary written statement or declaration, but such rule is in furtherance of and in accord with the requirements of the statute in that regard.

It is perfectly plain, from the provisions of the statute and the rules and regulations of the Land Department, that, in order for any person to effect a purchase of any land under the act in question, he must first make an application to purchase by a verified written statement, which statement is an affidavit as to the truth of the matters therein declared, and, after a compliance with the prescribed procedure, must satisfy the register of the local Land Office by deposition, in which he and such witnesses as he may produce are examined and cross-examined under oath, of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase. It is just as plain that intentional false swearing by the applicant in either instance, in respect to any of the material matter so required to be declared and sworn to, constitutes the crime of perjury, which crime is defined, not by any rule or regulation of the Land Department, but by a statute of the United States.

The indictment, in effect, charged the defendants thereto with having conspired to falsely, willfully, and corruptly suborn, instigate, and procure certain named persons to commit the crime of perjury within the district of Oregon, by knowingly and intentionally swearing falsely to material matter required to be stated and shown both in the verified written statement or declaration, and in the proof by deposition. The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been otherwise than willful

on the part of the instigated persons. When the facts alleged necessarily import such willfulness, the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law. C. R. L. 309; Archbold's Cr. Pl. 429. See, also, U. S. v. Howard (D. C.) 132 Fed. 350, 351.

It is not the name but the essence of the thing that should control the court in the administration of justice. As has already been said, the gist of the offense charged against the plaintiffs in error was the conspiracy, the object of which was the commission of the crime of perjury by numerous persons, in order that the conspirators might acquire the government title to the desired lands. "In stating the object of the conspiracy," said the court, in United States v. Stevens (D. C.) 44 Fed. 141, "the same certainty and strictness are not required as in the indictment for the offense conspired to be committed. Certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is required. When the allegation in the indictment advises the defendants fairly what act is charged as the crime which was agreed to be committed, the chief purpose of pleading is attained. Enough is then set forth to apprise the defendants so that they make a defense." See, also, Noah v. United States, 128 Fed. 272, 62 C. C. A. 618; United States v. Eddy (C. C.) 134 Fed. 114; U. S. v. Rhodes (C. C.) 30 Fed. 431.

We are of the opinion that the indictment is sufficient, and that the court below did not err in permitting proof of the false swearing of the instigated parties both in respect to their declaration in the verified written statement or application to purchase, and in the final proof made by deposition.

The plaintiffs in error also assigned for error various rulings of the trial court upon objections made by them to the admission of evidence. In passing upon such questions, it must not be forgotten that the character of the case is to be taken into consideration. It appears from the record that there was evidence tending to show that Williamson & Gesner were partners in the sheep business, and had a summer range for their sheep in what is called the "Horse Heaven Country," in Crook county, Or., about 25 miles from the town of Prineville, where they as well as Biggs, resided. The latter was a practicing attorney and a United States commissioner. The evidence also tended to show that all of the odd numbered sections of land in the township, in which was the summer range of Williamson & Gesner, were owned by a certain wagon road company from which Williamson & Gesner had leased for a number of years, for grazing purposes, some of those odd numbered sections; that in May, 1902, Williamson & Gesner learned that Morrow & Keenan, a rival sheep firm, had secured from the wagon road company a lease of practically all of its odd numbered sections in the township, and after endeavoring, without success, to defeat the consummation of the lease, Williamson & Gesner employed a surveyor to run the lines of the various sections of the township for the purpose of determining whether the springs and streams of water in the township were on the odd or even numbered sections, which survey showed that the most valuable springs and streams

were upon the even numbered sections, still owned by the government. The evidence tended to show that this township, while partially covered with small timber having no market value at the time, had extensive stretches of fine grazing land with no timber thereon. The evidence further tended to show that Gesner employed Biggs to secure persons to apply to purchase this land under the timber and stone act, and that 45 such persons made application to purchase land selected for them by Gesner within the said township within a period of about two months; the necessary money for which being advanced by Gesner & Williamson. The evidence further showed that Biggs, Gesner, Williamson, and the latter's wife, applied to purchase similar land at the same time, with a number of the other applicants.

The prosecution was allowed to introduce evidence, over the objection and exception of the defendants, to the effect that the lands so applied for were not chiefly valuable for the timber upon them, but, on the contrary, were more valuable for grazing purposes. It is contended, on behalf of the plaintiffs in error, that the conspiracy, according to the averments of the indictment, "contemplated that subornation of perjury should take place only when lands subject to entry under the timber and stone acts were being applied for," and therefore that evidence tending to show that the lands applied for by the instigated parties were not of the character embraced by those acts was incompetent. This objection proceeds upon an erroneous view of the indictment, which does not charge that the conspiracy alleged contemplated that the subornation of perjury should take place only when lands subject to entry under the timber and stone acts were being applied for, but that the instigated parties would so swear —which is an entirely different thing, and quite in line with the alleged fraudulent scheme. It is clear from the language of the statute itself that it is only lands that are chiefly valuable for the timber on them that are authorized to be purchased under the acts in reference to timber lands; but, if authority to that effect be needed, it is found in United States v. Budd, 144 U. S. 167, 12 Sup. Ct. 575, 36 L. Ed. 384.

The prosecution was also permitted, over the objection and exception of the defendants, to introduce evidence against the defendants Gesner & Williamson tending to show that Gesner had tried to induce one Penny to apply to the state of Oregon for school land in the same vicinity for the benefit of Williamson & Gesner, and also tending to show that he had induced one Mary Swearingen to file on state land, and that she had made the necessary affidavit and filed on the land, and afterwards transferred it to the firm of Williamson & Gesner. The case shows that the government relied upon a chain of circumstances to prove that the defendants procured each and every one of the 45 entrymen to swear falsely in making his application, and in making his final proof, by swearing that he was not seeking to purchase the land on speculation, but for his own exclusive use and benefit, and that he had not, either directly or indirectly, made any contract or agreement with any person by which the title which he might acquire to the land would inure to the benefit of another

person; whereas, in truth and in fact, he was applying to purchase the land on speculation and under a prior agreement to convey the title to the defendants Williamson & Gesner as soon as he acquired it from the government. It is manifest, therefore, that the motive of the respective parties to the transactions in question was of prime importance in the inquiry, and it was to that point only that the court below allowed the evidence now under consideration, being careful, both in admitting it and in the instructions to the jury, to limit the evidence to the question of motive and to the defendants Williamson & Gesner. In so doing, we think the court below committed no error. In Wood v. United States, 16 Pet. 343, 10 L. Ed. 987, Mr. Justice Story, speaking for the Supreme Court, said:

"Where the intent of the party is matter in issue, it has always been deemed allowable as well in criminal as in civil cases to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment."

See, also, Moore v. U. S., 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996; Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; Wolfson v. U. S., 101 Fed. 434, 41 C. C. A. 422.

It is assigned for error that the trial court erred in its rulings in respect to the testimony of a number of witnesses for the government as to what their intention or understanding was when making their verified statement in respect to the land applied for, and when making their final proof in respect to the disposition of the land after they should acquire it from the government. All of such testimony was directly responsive to the allegations of the indictment, under which it was clearly competent for the prosecution to prove that the various entrymen swore falsely in respect to the material matters stated in their preliminary application for the land, and in their final proof, and that the real intention of all of the parties concerned was the obtaining of the government title to the land by means of such perjuries for the benefit of Williamson & Gesner. We see no error in the rulings of the trial court in the respects complained of; and, in respect to the charge of the court to the jury, a careful consideration of it satisfies us that it was eminently fair, and covered every aspect of the case in a very lucid manner. There was, therefore, no error in refusing any requested instruction.

The facts of the case were, as a matter of course, for the determination of the jury.

The judgment is affirmed.

ST. LOUIS & S. F. R. CO. v. DEWEES.*

(Circuit Court of Appeals, Eighth Circuit. April 24, 1907.)

No. 2,360.

1. TRIAL—QUESTION FOR COURT OR JURY—NEGLIGENCE—DIRECTION OF VERDICT.
It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be submitted to and determined by them; but it is equally true that when the evidence and the inferences to be reasonably drawn

*Rehearing denied June 10, 1907.

from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 377, 379.]

2. MASTER AND SERVANT—RULES—OBEDIENCE BY SERVANT.

Where the duties of a servant in given circumstances are particularly specified in the unambiguous and reasonable rules of the master, of which the servant has knowledge and to which he has assented by entering and continuing in the service, his nonobservance or disobedience of them at a time when they are capable of observance is negligence as matter of law, and is not to be judged by the undefined and varying requirements of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 759–775.]

3. SAME—RULES—REASONABLENESS—VIOLATION—NEGLIGENCE.

Rules of a railroad company requiring the engineer to keep a careful lookout for signals, to stop the train when a signal is not understood, or is imperfectly displayed or absent from its usual place, and expressly requiring that he "must know," when approaching a switch, that it is in proper position, are reasonable and valid. And where the engineer, in approaching a known switch, at which designated and known signals were customarily displayed to indicate whether the switch was closed or open, either took proper observations, learned that the switch was open, and took chances upon being able to go safely through the same at great and unwarranted speed, or, knowing that he was approaching the switch, and not knowing whether it was closed or open, took chances on its being in proper position, and so drove into the switch when it was open, whereby the train was wrecked and he was killed, *held*, he was guilty of contributory negligence, preventing a recovery for his death.

4. SAME—SPECIAL TRAIN ORDERS—EFFECT.

A wrecked train, of which intestate was the engineer being unable to conform to the regular schedule, was being run under special telegraphic orders directing it to run late, according to a special schedule therein given. The train dispatcher who issued the order testified that it "simply set the train back"; and a general rule of the company, of which the engineer had knowledge, required him to run "steadily and uniformly, adhering as closely to time as due regard for safety permits." *Held*, that such special orders should be construed merely to require the engineer to adhere to them as closely as due regard for safety permitted, and did not abrogate the standing rules of the company requiring engineers, on approaching switches, to know that they are in proper position, etc.

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE PREVENTING RECOVERY.

One cannot—nor can one standing in his stead—recover damages for an injury to the commission of which he has directly contributed; and it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he—as also one standing in his stead—is without remedy against another, also in the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 84.]

Adams, Circuit Judge, dissenting.

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

James Black (I. P. Dana, L. F. Parker, and W. F. Evans, on the brief), for plaintiff in error.

W. R. Biddle (Hubert Lardner, 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 under a Kansas statute by a widow to recover damages of a railroad company for the death of her husband, Charles A. Dewees, alleged to have been caused by the negligence of the company and its employés. The plaintiff obtained a verdict and judgment, and the defendant has brought the case here; its chief contention being that there was error in refusing its request for a directed verdict. In Kansas the fellow-servant rule of the common law has been abrogated as respects employés of railroad companies. Gen. St. Kan. 1901, § 5858.

At the time of his death, Dewees was a locomotive engineer in the service of the railroad company, and was driving the engine of a north-bound passenger train called the "Meteor." While proceeding at a speed of 50 or 60 miles an hour, the train was wrecked in the circumstances here stated; he and the fireman being among those who lost their lives. The accident occurred at Godfrey, a small station in Kansas, at which a passing track of considerable length lies east of the main track and is connected therewith at either end by a switch. A north-bound freight train had become temporarily stalled on the main track between these switches, and they had been opened to permit other trains to use the passing track while the blockade of the main track continued. The passing track was adequately constructed for the purposes for which it was designed and used, but, as was well known, it was not designed or used to carry trains running at great speed. Three trains, a north-bound passenger and two south-bound freights, made the passage in safety. The Meteor was the fourth train to approach while the blockade continued, and was wrecked in consequence of running through the open switch at the south end of the passing track, and onto that track, at the great speed before named. East of the switch was an upright switch stand 7 feet in height. At its top was a red disk 16 inches in diameter, which, when the switch was closed, could not be seen from along the track, and, when the switch was open, presented one red face to the south and the other to the north. Above the disk was a lamp with four faces, two green and two red. When the switch was closed, one green face was to the south and the other to the north, and, when the switch was open, the red faces took the places of the green ones. The accident occurred at 4:54 in the morning, when it was dark, windy, and a little foggy. Whether the lamp in the switch stand was lighted, and whether the rear brakeman of the stalled train made use of certain prescribed signals to advise the Meteor of the existing situation, as was required by the rules of the railroad company, were subjects in respect of which the evidence was quite conflicting; so, for the present purposes, it must be assumed that the lamp was not lighted, that the prescribed signals were not given by the brakeman, and that this negligence was a proximate cause of the accident. We turn, there-

fore, to that phase of the case which relates to the conduct of Dewees.

Among the rules prescribed by the railroad company for the operation of its trains, with which Dewees was familiar and of which he carried a copy, were these:

"General Notice. * * * Obedience to the rules is essential to the safety of passengers and employés, and to the protection of property. * * *"

"(27) A signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal, and the fact reported to the trainmaster."

"(106) In all cases of doubt or uncertainty the safe course must be taken and no risks run."

"(267) Conductors and enginemen are cautioned against reckless running. They must run steadily and uniformly, adhering as closely to time as due regard for safety permits."

"(358) They [the enginemen] must keep a careful lookout on the track for signals and obstructions; look back frequently and know that their train has not parted, obey all signals, even if considered unnecessary; stop and inquire respecting signals not understood. * * *

"(359) When approaching switches the engineer must know that they are in proper position. * * *"

"(412) The company does not require or expect its employés to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety."

The existence and location of the station, switch, and switch stand, the character and meaning of the signals usually displayed at the switch stand, and the proper use of the passing track, were well known to all experienced engineers on that part of the road. This was Dewees' first trip on the Meteor, but he was an experienced engineer, had driven engines over that part of the road almost daily for eight or nine years, was perfectly familiar with it, and was accustomed to determining his locality by familiar objects along the road, and by its grades, curves, and other features. As he approached the station from the south, he passed different fixed objects in plain view from his side of the engine, among them being the whistling sign one mile from the station and 4,100 feet from the switch. He heeded this sign by sounding the whistle for the station, and 3,000 feet from the switch he passed from a downgrade of 6 inches to an upgrade of 9 inches to every 100 feet, and from a straight line to a one degree curve to the left. The engine was a good one, and had a strong electric headlight which shone plainly upon all objects along the road before they were reached, and lighted up the switch stand and its surroundings so as to bring them within his range of vision when they were 1,200 feet away. The engine and cars were equipped with air brakes which gave him such control over the train that, by an emergency application of the air, it could be brought to a full stop in 1,000 feet, and, by a service application, could be brought to a speed of six miles an hour in 1,200 feet, although it could pass through the switch and over the passing track in entire safety at double or treble that speed. The switch was open, and therefore not in proper position for the train to proceed at great speed. The lamp in the switch stand did not show green, the signal for a closed switch. If lighted, it showed red, the signal for an open switch; and, if not lighted, there was an absence of a signal at a place where a signal was usually shown, which, as properly conceded in the

instructions requested by the plaintiff, "was a warning.' And whether or not the lamp was lighted, the red disk, 16 inches in diameter, was so turned as to show that the switch was open. While, as before said, it was dark, windy, and a little foggy, the evidence, including that for the plaintiff respecting the distances at which different lights and objects were seen at the time, makes it plain that, with the strong electric headlight on his engine, Dewees could have observed the conditions at the switch stand at any time after he came within 1,200 feet thereof. But, if the weather had prevented such observation, it would still be beyond question that he knew the relative location of the whistling sign, the switch, and the station, knew he had passed the whistling sign and at what speed he was running, did not know whether the switch was in proper position, and yet proceeded *all the way to it* at a speed of 50 or 60 miles an hour with the disastrous results before stated. He made no application of the air at his command, and his conduct was not induced by any false or misleading signals, for there was none. There was no evidence that any of the rules before set forth, or the use of the signal lamp at the switch, had been abandoned or fallen into disuse.

It is undoubtedly true that cases are not lightly to be withdrawn from the jury, and that ordinarily negligence is so far a question of fact that it should be submitted to and determined by them, but it is equally true that when the evidence and the inferences to be reasonably drawn from it are undisputed, or are of such conclusive character that the exercise of a sound judicial discretion would permit the court to give effect to but one verdict, the case may and should be withdrawn from the jury and a verdict directed for the plaintiff or the defendant, as the one or the other may be proper. Southern Pacific Company v. Pool, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago Great Western Ry. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712. In our opinion this was such a case. The evidence reasonably permitted of either of two conclusions, but none other: One, that Dewees took proper observations, learned that the switch was open, and took chances on being able to go safely through the same and over the passing track at great speed; the other, that, knowing he was approaching the switch, and not knowing whether it was closed or open, he took chances on its being in proper position. In either event he was culpably negligent. It is conceded that negligence is necessarily deducible from the first conclusion, but that it is thus deducible from the second is questioned, and this upon the theory that his conduct must be judged by the standard of ordinary care, and that it cannot be said as matter of law that, in attempting to pass the switch without knowing whether it was closed or open, he failed to conform to this standard. The theory is not sound. His duties in the circumstances were not left to the undefined and varying requirements of ordinary care, but were particularly specified in the rules of the railroad company of which he had knowledge and to which he assented by entering and continuing in its service. An instruction giving effect to the theory so advanced was disapproved by this court in Northern Pacific Ry. Co. v. Cummiskey, 70 C. C. A. 92, 97, 137 Fed. 508, 513, where it was said by Judge Hook:

"To the jury, therefore [that is, by the instruction], was committed the determination of the question whether ordinary care required the doing of that which the company contends it required by a specific rule applicable to the case. If the rule applied, and it imposed upon Cummiskey the duty to send a flagman or to go back himself and flag the approaching passenger train, it was error to make the existence of that duty dependent upon the conception of either court or jury of the requirements of ordinary care. There was no contention that the rule was unreasonable or that Cummiskey was not fully cognizant of it."

And to the same effect is Erie R. Co. v. Kane, 55 C. C. A. 129, 143, 118 Fed. 223, 237, where it was said by the Circuit Court of Appeals for the Sixth Circuit:

"Certainly, in so far as it and that part of the charge which related to the other portion of the rule left it to the jury to determine whether decedent's action was prudent and careful, even though it may have been in violation of the rule, it was erroneous. They contained the vice of the instruction disapproved by this court in the case of Railway Co. v. Craig, 73 Fed. 642, 19 C. C. A. 631; Id., 80 Fed. 488, 25 C. C. A. 585, on the last hearing herein. They left it to the jury to determine whether the violation of said portions of the rule was negligence, when the jury should have been told that such action was negligence, as a matter of law, and that, therefore, if said portion of said rule had been violated, and the violation thereof contributed to the injury, they should find for the defendant."

The rules of the railroad company not only required the engineer to keep a careful outlook for signals and laid upon him the duty of stopping the train where a signal was not understood, or was imperfectly displayed or absent from its usual place, but also expressly enjoined that, when approaching a switch, he must know that it was in proper position. To read these rules is to understand that they required him to ascertain by whatever means and by whatever use of time were necessary whether the switch was closed or open before attempting to pass it. They were unambiguous, reasonable, and designed for his protection, as also that of his fellow servants, the traveling public, and the railroad company. Their observance was therefore a matter of common concern. They were capable of observance in the circumstances, and, if observed, would have prevented the accident. He did not observe them, and this was, as matter of law, negligence. Kansas, etc., Co. v. Dye, 16 C. C. A. 604, 70 Fed. 24; Erie R. Co. v. Kane, 55 C. C. A. 129, 118 Fed. 223; Francis v. Kansas City, etc., Co., 110 Mo. 387, 395, 19 S. W. 935; Louisville, etc., Co. v. Mothershed, 110 Ala. 143, 20 South. 67; Illinois Central R. R. Co. v. Guess, 74 Miss. 170, 21 South. 50; Norfolk & Western R. R. Co. v. Williams, 89 Va. 165, 15 S. E. 522; Green v. Brainerd, etc., Co., 85 Minn. 318, 88 N. W. 974; Chicago, etc., Co. v. Flynn, 154 Ill. 448, 453, 40 N. E. 332; Lake Erie & Western R. Co. v. Craig, 25 C. C. A. 585, 80 Fed. 488. As was well said in the last case:

"The doctrine that the master operating a complicated and dangerous business may and must make reasonable rules for the guidance and safety of the employés, that the employé must yield obedience, and takes upon himself the consequences of disobedience, is a doctrine that is eminently wise, and founded upon the highest considerations of justice and humanity. The master's right to protect himself from heavy pecuniary liability in the operation of a large business is most important. His duty, by suitable regulations, such as are suggested by experience, to protect as far as may be the servant

from risk of injury to himself as well as injury from a fellow servant, for which the master is not pecuniarily liable, and for which there is practially no remedy, is a duty justly imposed by law. And the still higher considerations of the preservation of human life, and the prevention of serious physical maiming and disability with the attendant suffering and impairment of usefulness, furnish the fullest support and sanction to the doctrine. And the law knows no such incongruity as holding the master to the duty of making with the right of making, without at the same time requiring from the servant full conformity to the regulations."

But it is urged that the Meteor was running under a special order which superseded, or at least rendered inapplicable, the rules before set forth, and especially the one requiring the engineer, when approaching a switch, to know that it was in proper position. The train, being late, was unable to conform to the regular schedule, and so the train dispatcher issued the following order, which was duly communicated to Dewees, and also to the employés of other trains on that part of the road:

"No 110 [the Meteor], engine 189, will run late as follows: Leave Columbus 3:45 a. m.; Scammon 3:56 a. m.; Cherokee 4:07 a. m.; Girard 4:26 a. m.; Farlington 4:36 a. m.; Anna 4:46 a. m.; Godfrey 4:54 a. m.; Edwards 4:56 a. m.; arrive at Fort Scott 5:04 a. m."

The argument is that this was a special order requiring the stations named to be made at the times designated, and was an assurance that the track would be kept clear so that this could be done, and therefore that the engineer was relieved of the duties ordinarily imposed by the rules. This is plainly an erroneous view of the order. The train dispatcher, who issued it, in testifying as a witness for the plaintiff, said, "this order simply set the train back"; and we think it was nothing more than a special schedule, which for that occasion superseded the regular one in respect of time. It did not purport to give that portion of the road over to the running of this train alone, or to take from the employés and passengers thereon the protection which would be afforded by the rules if it were running according to the regular schedule. Nor did the order indicate that the time of the special schedule should be adhered to more closely than if it were the regular one. A rule, as before shown, made it a duty to adhere to time as closely "as due regard for safety permits," and as it made no distinction between regular and special schedules, and, as no reason for such a distinction in this instance is perceived, we think it applied equally to both, and that the qualifying clause placed regard for safety, as defined by the rules, above regard for schedule time. In ruling upon a like question, it was said in Illinois Central R. R. Co. v. Neer, 26 Ill. App. 356, 359:

"It is said he [the engineer] was under instruction to make the run within a certain time, and that he was attempting to comply with this order. All trains are under instructions to make certain time, but that does not modify or dispense with the standing rule as to the care to be observed in approaching a station."

And upon a subsequent hearing of the same case it was said (31 Ill. App. 126, 136):

"We apprehend that special orders to make runs in a specified time are never absolute. Of necessity they must be conditional, and their execution must be undertaken with that understanding."

In the case of Northern Pacific R. R. Co. v. Poirier, 167 U. S. 48, 54, 17 Sup. Ct. 741, 42 L. Ed. 72, the question arose whether a conductor, who was running in the nighttime upon special telegraphic orders without any schedule or time-card, and who was without notice that a preceding train would stop at a spur track which was not a regular station, was relieved from observing the usual rules of the railroad company, and it was held that he was not, the court saying:

"One of the plaintiff's witnesses, Allen, the rear brakeman on the first train, testified that the second train was 'running by telegraphic orders and had no schedule orders or time card.' This was doubtless true, as it is true of every 'wild' or extra train; but such a fact by no means warrants the inference drawn by the trial court and given in the charge to the jury that 'the train was running under special orders as to the time it was to make, where it was to go and when it should reach the different stations.' It cannot be justly inferred from the mere fact that the second train was a 'wild train' that its conductor was relieved from obeying the laws of the company."

And again:

"Assuredly more evidence must be given than the mere fact that the second train was a 'wild' train, not running on schedule time, to justify an inference, by either court or jury, that the conductor was relieved by such fact from regarding the rules of the company regulating the running of its train. Nor does the statement of the conductor of the second train, that he had not been notified that the first train was to stop at Clyde Spur, show that he had any right to dispense with the rules."

At Anna, the next station south of Godfrey, the Meteor met two south-bound freight trains which went upon a side track to permit the Meteor to pass, and, when it was doing so, the conductor of the second freight train gave a signal which it is claimed justified Dewees in believing the main track was clear from that point to his destination, Ft. Scott. Apart from the fact that this conductor could not know what occurred along the road after he passed over it, and could give no assurance that it would be clear when Dewees came to pass over it, the evidence in respect of this signal shows that it had no such significance as claimed. The entire evidence is as follows:

"Q. When he [Dewees] came up to your train, did you give any signal? A. Yes, sir.

"Q. What signal did you give him? A. Commonly known as the 'high-ball.' We were in the clear and I gave him the signal up and down to let him know we were in the clear.

"Q. What is the meaning of that signal. A. What I meant was that the main line was clear at Anna and that I was in the clear. That is what I meant by it.

"Q. Then he passed ahead? A. He passed by."

Thus the full significance of the signal was that this freight train had pulled into the siding at Anna a sufficient distance to be clear of the main track and to permit the Meteor to pass in safety.

It is said that the duty of keeping a careful lookout for signals did not devolve upon the engineer alone, but upon the fireman as well; that, by reason of the curve in the track, the fireman could observe the conditions about the switch stand before they could be observed

by the engineer; that he was entitled to rely upon the fireman taking proper observations, and, for aught that appears, may have acted upon inaccurate information given by the latter, or upon the supposition that, unless he advised to the contrary, the switch was in proper position. Both the engineer and fireman lost their lives in the accident, and there is no direct evidence of what, if any, observations were taken by either, or of what, if anything, transpired between them. It cannot be presumed that the fireman rather than the engineer was negligent, and there is no evidence to that effect. True, both were required to keep a careful lookout for signals, but the engineer was in charge and could direct the fireman in his work, which included other important duties, such as shoveling coal into the fire box, which prevented continual observation on his part. The duty of taking observations for the safety of the train was chiefly the engineer's, and the fireman was his assistant. The switch stand was on the engineer's side, and could be observed by him almost as soon as by the fireman, and thereafter the engineer had the better opportunity for observation. He was in control of the movement of the train, and the duty of knowing that the switch was in proper position was, by the rules, expressly laid upon him. The switch was not in proper position. The lamp at the switch stand did not show green, which alone would indicate that the switch was closed. The disk was turned so as to show red, the sign that the switch was open. And yet the engineer, knowing that he was approaching the switch, and either knowing that it was open, or not knowing whether it was closed or open, drove his engine all the way thereto and into it at a speed which was permissible only in the event that he knew it was closed. These considerations, as it seems to us, preclude any other conclusion than that he did not observe the rules and was negligent.

The distinction between the duties and situation of the fireman and those of the engineer is further indicated in the opinion of this court in the fireman's case (St. Louis & San Francisco R. R. Co. v. Bishard [C. C. A.] 147 Fed. 496, 498), where it is said:

"The company claims that, as the switch was thrown for the passing track, the lamp, if burning, must have shown the red sign of danger, and that, if it was not burning when the Meteor approached, the mere absence of a light at that customary place was in itself a sufficient warning under a rule of the company to that effect. Here arises the principal contention of contributory negligence on the part of the fireman. It is said that it was his duty, especially in approaching stations, to keep a lookout for signals, and that, as his train was moving on the curve, his position on the west side of the engine would have enabled him to look along the chord of the arc and to detect either the presence of the red light at the switch stand or the absence of any light, as the case may have been, and that in either event it was his duty to immediately notify the engineer of the result of his observations. Counsel for the company requested the trial court to charge the jury that it was the paramount duty of the fireman to keep this lookout and to warn the engineer in time to avoid the danger, and that, if he could have seen the signal in time to warn the engineer and did not keep the lookout, then the verdict should be for the defendant. The request was denied. The trial court in lieu thereof charged the jury that it was the duty of the fireman to keep the lookout when not otherwise necessarily engaged. We are of the opinion that the trial court was right. There were other important and imperative duties which the fireman was required by the rules of the company and the nature of his position

to perform. Those rules expressly placed him under the supervision and direction of the engineer, and required him to obey the orders of the latter respecting the performance of his duties. In keeping a lookout on the track for signals, he was merely an assistant acting under the direction of the engineer, and it cannot be said that upon the occasion in question it was his paramount duty to be on the lookout at any particular moment. The rules did not so provide, and we cannot infer that the engineer so ordered. Other duties of moment may have demanded his attention elsewhere. Having due regard for that presumption which obtains in the absence of evidence, a court would not be justified in declaring from the record before us that the deceased was not, during the approach of the Meteor, engaged in the performance of some duty of his position or of some order of the engineer that prevented him from observing either the presence or absence of a red light at the switch stand. Moreover, the evidence showed that, even if the lamp had been burning and the fireman had been on the lookout at the precise instant, he could have seen the light just about four seconds before it came into the view of the engineer. Nor can we assume, in the absence of evidence, that if the fireman was on the lookout, and observed that there was no light at the switch stand, he did not seasonably notify the engineer who was in charge of the engine. It is not necessary for us to determine in this case whether the engineer was or was not remiss in the performance of his duties. Even if he was, it does not follow that his negligence is imputable to the fireman, or that the right of the latter or his personal representatives to recover for the injury so caused is in any wise impaired thereby. The negligence of the engineer, if there was such, cannot be visited upon the fireman unless he concurred therein, and there must be proof, not mere surmise of such concurrence."

After a careful examination of the record, and thoughtful consideration of the arguments of counsel, we are of opinion, for the reasons given, that the case is within this general and wholesome rule. One cannot—nor can one standing in his stead—recover damages for an injury to the commission of which he has directly contributed. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been a proximate cause of the injury, he—as also one standing in his stead—is without remedy against another also in the wrong, such as the railroad company here.

The judgment is reversed, with a direction to grant a new trial.

ADAMS, Circuit Judge (dissenting). I fully agree with the majority that the known violation of a rule of a railroad company adopted and promulgated to secure the safe operation of its trains amounts to such negligence as precludes recovery by any employé whose disregard of the rule occasions injury or damage to himself, and that such employé cannot excuse himself for such known violation of the rule by appeal to the doctrine of ordinary or reasonable care. An employé must, at his own peril implicitly obey all rules, whatever he or any other persons may think ordinary care on his part dictates. But a full recognition of his obligation in this respect does not, in my opinion, end inquiry in this case.

Whenever the occasion for performing an act required by a rule depends upon facts not subject to the control of the employé, and when he is required to inform himself of the existence of such facts before he is called upon to perform the act required, the doctrine of

ordinary or reasonable care must apply. He cannot be required to act until he knows or in the exercise of reasonable care ought to know of the requirement.

For the purpose of determining the question whether this case should have been taken from the jury because of contributory negligence of the deceased, we must treat the evidence most favorably to plaintiff and must therefore assume under the proof that neither red nor green colored light was displayed on the switch stand; but, on the contrary, that no light of any kind appeared there.

The engineer clearly was not required to slow down the train until he ascertained, or, in the exercise of reasonable care, could have ascertained, that no light was displayed on the switch stand. On the question whether the proof so conclusively established the engineer's want of care in failing to ascertain that fact as to prevent recovery because of his contributory negligence, I differ radically from the view entertained by the majority. I do not think it so clearly appears that the engineer in the exercise of due care could have discovered the want of a light on the switch stand in time to slow down the train before it reached the switch and was derailed that all reasonable men in the exercise of an honest and impartial judgment would say so. That is the test as frequently declared by us. On the contrary, I think the facts and circumstances surrounding the engineer and the running of his train at the time in question were such as left that issue fairly debatable and rendered it particularly appropriate for the consideration of a jury. The engineer, by reason of running on a curve at the time, was not brought into a line of vision of the switch stand until he came within twelve hundred feet of it. He was running on a special order requiring him to make the unusual speed of 50 to 60 miles per hour. The night was dark, windy, and foggy. The engine had run a long distance. The windows through which he had to look were presumably affected by smoke and fog. The engineer, as he approached the switch stand, had duties to discharge in running his train which required diversified attention. The discovery of the negative fact that no light was displayed was not easy, and in itself would reasonably have taken some time.

These and other facts like them, together with the reasonable inferences deducible from them, were, in my opinion, sufficient to require the submission of the issue of contributory negligence to the jury. They were not so essentially different from those involved in the Bishard Case referred to in the foregoing opinion as to require the radically different treatment which the majority gives them. In my opinion there was less evidence of contributory negligence in this case than in that. As no other reversible error is claimed to be disclosed by the record, I think the judgment should be affirmed.

BURDITT & WILLIAMS CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. April 9, 1907.

No. 678.

1. CUSTOMS DUTIES—CONSTRUCTION OF STATUTE—DOUBLE DUTIES.
The schedules of the tariff acts of 1890 and 1897 are based on the principle of protection to American industry, and in the construction of their provisions no inference can be drawn against a particular construction, because it will result in imposing double or treble duties on an article by adding duties for each stage it is advanced in manufacture.

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

2. SAME—CONSTRUCTION BY TREASURY DEPARTMENT.
The rule applied that a uniform construction given to a provision of a tariff schedule by the Treasury Department through a number of years, during which importations are made in reliance thereon, will not be overruled by the courts, except for cogent reasons.

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

3. SAME—CLASSIFICATION—ARTICLES MADE FROM COATED STEEL WIRE.
Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], imposes a duty on steel wire smaller than No. 16 wire gauge of 2 cents per pound, with an additional duty of 1¼ cents per pound on articles manufactured from such wire, "and on iron or steel wire coated with zinc, tin, or any other metal two-tenths of 1 cent per pound in addition to the duty imposed on the wire from which it is made." In 1900 the Treasury Department ruled that articles manufactured from steel wire coated were subject to all three of such duties, but shortly thereafter, and in the same year, formally reversed such ruling, and has since uniformly ruled that the additional duty of two-tenths of 1 cent was not to be imposed on articles manufactured from coated steel wire. *Held*, that in view of the uncertainty of the language of the statute such uniform ruling by the executive department, continued for five years, would be treated as a practical construction of the act, and would not be reversed by the courts.

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

For opinion below, see 147 Fed. 892.

Charles S. Hamlin, for appellants.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief), for appellee.

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

PUTNAM, Circuit Judge. This case arises on the construction of paragraph 137 of the customs act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639]), as follows:

"137. Round iron or steel wire, not smaller than number thirteen wire gauge, one and one-fourth cents per pound; smaller than number thirteen and not smaller than number sixteen wire gauge, one and one-half cents per pound; smaller than number sixteen wire gauge, two cents per pound: Provided, that all the foregoing valued at more than four cents per pound shall pay forty per centum ad valorem. Iron or steel or other wire not specially provided for

in this act, including such as is commonly known as hat wire, or bonnet wire, crinoline wire, corset wire, needle wire, piano wire, clock wire, and watch wire, whether flat or otherwise, and corset clasps, corset steels and dress steels, and sheet steel in strips, twenty-five one-thousandths of an inch thick or thinner, any of the foregoing, whether uncovered or covered with cotton, silk, metal, or other material, valued at more than four cents per pound, forty-five per centum ad valorem: Provided, that articles manufactured from iron, steel, brass, or copper wire, shall pay the rate of duty imposed upon the wire used in the manufacture of such articles, and in addition thereto one and one-fourth cents per pound, except that wire rope and wire strand shall pay the maximum rate of duty which would be imposed upon any wire used in the manufacture thereof, and in addition thereto one cent per pound; and on iron or steel wire coated with zinc, tin, or any other metal, two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made."

The importations consisted of rat traps, made of steel wire coated with copper. Some question arose at our bar whether the traps were made of coated wire, or whether the coating was done after the traps were put in shape, but the record shows that the former was the case. As said by the importer, practically the only question in the case is whether, on account of the wire being coated, the traps are subject to the additional duty of two-tenths of one cent per pound, stated in the concluding words of the paragraph in question. The ruling was against the importer, and thereupon it appealed to us.

In developing its position here, the importer says that the words "except that" in the proviso to which the imposition of two-tenths of one cent per pound is attached govern everything which follows them, leading to the result that "wire coated" is itself a manufacture of wire, so that the rat traps in question and coated wire are each of them manufactures especially and alternately provided for. The importer also claims that, on the ruling of the Circuit Court, a double duty is imposed, which, of course, is the fact. On the other hand, the United States makes no definite proposition beyond maintaining in general terms the result reached by the Circuit Court, except only that they rely upon Salt v. United States (C. C.) 127 Fed. 890, affirmed by the Circuit Court of Appeals in 134 Fed. 1021, 58 C. C. A. 442; and except, also, that they make some reference to "component material of chief value," which is inapplicable under the act of 1897. Salt v. United States is, also, to some extent relied on by the importer; but it affords no assistance to us because it arose from importations of manufactures of copper wire. Although copper wire and iron and steel wire are all covered by paragraph 137, yet the methods by which each is treated are so essentially different that we need make no further observation in reference to the decision thus cited pro and con.

The reliance which the importer places on the words "except that," to which we have referred, is not supported by any plausible reason therefor drawn from the context. It would have support if coated wire could be regarded a manufacture of wire, so as to be, as further suggested by the importer, an alternative for other manufactures of wire; but we will see that that proposition cannot be sustained. In no other aspect could these words relieve the particular portion of paragraph 137 in issue from the difficulties which present themselves. The words "and on" would still remain undisposed of, indicating that that portion is dislocated.

Although the objection by the importer on the point of double duty was given some weight by the Treasury in decision (22,474), hereafter cited, it is clearly of no assistance. There is a double duty on any construction of the statute, and the question is not one of double, but of treble, duty. However this may be, under the protective systems involved in the statutes of 1890 and 1897, duties specific and ad valorem were piled on each other so often that no particular inference can be drawn from any suggestion as to double duties or treble duties as applied to the case at bar. So, also, the claim by the importer that iron and steel wire coated is a manufacture of wire, and therefore is to be classed with other manufactures of wire, it is plain cannot be maintained. In support of this position, the importer cites several decisions of the Treasury, all of which were prior to the statutes of 1890 and 1897, and were either so remote or coupled with such special circumstances that they are of no assistance whatever. Under the practical rules of construction of customs statutes, to which commercial designations have so much relation, the mind which is fairly experienced perceives at once that giving an ordinary coating to wire does not constitute a new manufacture within the ordinary commercial sense of the expression, or within the meaning of such statutes. This topic was extensively developed by us in United States v. Proctor, 145 Fed. 126, 131, 76 C. C. A. 96, where we pointed out that the extract of nutgalls, although in such advanced state that it contained all the elements of tannin or tannic acid, had not changed its nomenclature so as to be said to be advanced into a distinctly new thing, as water is advanced into steam, or clay into alumina and its metal aluminum. Hartranft v. Wiegmann, 121 U. S. 609, 615, 616, 7 Sup. Ct. 1240, 30 L. Ed. 1012; Tidewater Company v. United States, 171 U. S. 210, 216, 18 Sup. Ct. 837, 43 L. Ed. 139; Allen v. Smith, 173 U. S. 389, 399, 19 Sup. Ct. 446, 43 L. Ed. 741; and United States v. Dudley, 174 U. S. 670, 678, 19 Sup. Ct. 801, 43 L. Ed. 1129. There remains, nevertheless, to be considered the proposition made by the importer that, on a fair and natural reading of the proviso applicable here, the specific duty of two-tenths of one cent is not to be levied, except on wire which has been coated and which is imported as such. We will return to this later.

The Board of General Appraisers did not discuss the particular topic before us, and the reason therefor is apparent. The appraiser at the port of Boston, where the merchandise was entered, assessed a duty of 40 per cent. ad valorem, plus 1¼ cents per pound. Nothing was said by him about the two-tenths of one cent. The protests of the importer were against the 40 per cent.; and those parts of the protests which name the proper duty to be assessed contained several possibly lawful rates, among the rest that of 2 cents, plus 1¼ cents, plus two-tenths of one cent, the very duty which was held by the Circuit Court to be lawful. This latter suggested rate is what is spoken of by the Board of Appraisers as "(c)". The Board rejected the 40 per cent. ad valorem duty; and, without discussion as to it, it accepted (c) exactly as it stood in the protests, so that the importer is now protesting a rate of duty suggested by itself. This is, nevertheless, without objection on the part of the United States, so that it remains for us to determine what assessment is in fact in accordance with the statute.

By a decision of the Treasury of April 20, 1900 (22,168), it was held that heddles, tinned, carried the specific duties now under discussion of 1¼ cents per pound and two-tenths of one cent for the tinning. Subsequently, by its decision of September 7, 1900 (22,474), the Treasury formally reversed its decision of April 20th, and held that the additional duty of two-tenths of one cent per pound was not to be imposed upon heddles manufactured of wire tinned. The heddles stand exactly for the rat traps here under consideration; and the decision of the Treasury of September 7, 1900, is directly in point. We are informed that, until the protests in this case, which bear date respectively on September 20, 1905, and October 13, 1905, the importations of this importer were constantly assessed without the addition of the two-tenths of one cent per pound, and duties were paid accordingly. The record shows no trace of any assessment of this additional duty anywhere, or any claim by the Treasury for any such assessment, during the five years which thus intervened. So absolutely uniform was the practice that, in the case before us, the appraiser, as a matter of course, added only 1¼ cents to the 40 per cent. ad valorem, although, clearly, the additional duty of two-tenths of one cent must be added to the ad valorem duty on iron or steel wire if added to the specific duty. Therefore, we have here a formal ruling of the Treasury, supported by five years continuous, uniform, and universal practice, and this with reference to the construction and practical operation of a statute which certainly must be held in doubt, in view at least of the fact that the experts of the Treasury gave it two absolutely opposite constructions within a period of less than six months.

Aside from this decision of the Treasury of September 7, 1900, and the practice following it, the paragraph in question has no satisfactory history, and no prototype, except as we may hereafter explain. It shows a dislocated form of expression, in that it uses the words "and on," which have no proper relation to any phraseology which precedes them. This suggests that it came in by an amendment, the circumstances touching which have in no manner been explained to us. Therefore it is practically impossible to apply the more ordinary rules of construction, except, on the one hand, that, where a question of interpretation of a customs statute is doubtful, the doubt will be resolved in favor of the importer—a general rule constantly repeated—and, on the other hand, that, applying a particular exceptional rule as to the statutes of 1890 and 1897, we must regard the policy running through them to be one of protection to our manufactures. Arnold v. United States, 147 U. S. 494, 497, 13 Sup. Ct. 406, 37 L. Ed. 253. The most which can be said as to general rules of construction is that the phraseology here interposed by Congress cannot be rejected, and must be interpreted in some way.

The importer finds support for his view of this paragraph in that the words on which the United States rely close the paragraph, and, by their mechanical arrangement, come in after the entire question as to the duty on these importations has apparently been disposed of. Therefore the importer's general position which we have stated—that the closing words have nothing to do with these importations—is not without some plausibility. On the other hand, the peculiar

words "and on" show that they were accidentally located. This leaves a plain right to test the intention of Congress by experimentally locating them elsewhere. Relocating them, therefore, in some part of the paragraph before the proviso assessing the duty of 1¼ cents per pound on manufactures from wire, the whole has an orderly reading; and it would then naturally be conceded that the position of the United States at bar was correct.

The particular expression in question was undoubtedly brought from paragraph 148 of the customs act of 1890. (Act Oct. 1, 1890, c. 1244, § 1, Schedule C, 26 Stat. 577). This paragraph commences with imposing a duty upon wire made of iron or steel, thus generally like the opening portion of paragraph 127 in issue here. Then later, in paragraph 148, come these words: "There shall be paid on iron or steel wire coated with zinc or tin, or any other metal, * * * one-half of one cent per pound in addition to the rate imposed on the wire of which it is made." This is exactly the phraseology, mutatis mutandis, found in issue here, the words "there shall be paid" being omitted. This mutilation, and the consequent dislocation to which we have referred, establishing our proposition of coming in by an amendment, justify the experimental relocation which we have suggested. The act of 1890 contains no specific duty on articles manufactured from wire in the form found in paragraph 137 of the present statute; but it guards against the manufactured article paying less than the duty imposed upon the wire from which it is manufactured, or which forms a component part of chief value. Under that act the duty on traps like those imported in this case was assessed under the more general provisions of the law; and we are told that it was assessed accordingly at 45 per cent. ad valorem, which was probably sufficient to promote the purpose of Congress, which had in view in this legislation the protection of our industries.

However, we have the rule for the interpretation of these statutes of 1890 and 1897, already stated, that they are to be regarded as intended for the protection of domestic industries; and, in that light, and, in accordance with the customary methods, we should expect an additional duty for each marked stage in advance which involves any considerable amount of labor. One of these stages would be the making of the plain wire; the second, the coating; the third, the manufacture of the specific article from the coated wire; and we would be entitled to assume that the phraseology should be relocated so as to carry out the general purpose of this class of legislation. After all, the natural interpretation of the statute is that wire is wire whether coated or not, and that, when Congress declares that articles manufactured from iron or steel wire shall pay the rate of duty "imposed upon the wire used in the manufacture of such articles," besides some special additional duty, it intends to take wire in the form in which it is manufactured, whether coated or uncoated, so that the basis is what wire uncoated pays if wire not coated is used, or what wire coated pays if wire coated is used. Independently of the considerations which we will now state, this is the interpretation which, we think, belongs to this paragraph; but we cannot overlook the ruling of the Treasury of September 7, 1900, to which we have already re-

ferred, and the unbroken, continuous practice from that time until the present importations were made in the autumn of 1905, which practice was in accordance with the present contention of the importer.

We gave attention to the rule of construction growing out of settled practices of executive departments, a class which seems to have peculiarly just application to customs statutes, in United States v. Proctor, 145 Fed. 126, 132, 76 C. C. A. 96, by an opinion passed down on January 25, 1906. There the circumstances were such that there was no question about its application, and we referred to it in that case only in a general way, and only to some leading authorities. The case at bar, however, is closer, so that we need give the law in this particular a somewhat fuller exposition. By its decision of April 20, 1900, which was within three years from the time the act of 1897 went into effect, the Treasury ruled, as we have shown, in accordance with the present position of the United States. On further consideration, however, in September, 1900, the Department positively ruled in favor of the position taken before us by the importer; and the practice ever since has been in accordance with that revised ruling. Notwithstanding the Department first ruled as it did in April, it cannot be fairly said that the departmental practice has not been uniform; because the prompt revision of the ruling which the Department speedily found to be erroneous can hardly be regarded as creating the lack of such uniformity as the Supreme Court said in United States v. Healey, 160 U. S. 136, 145, 16 Sup. 247, 40 L. Ed. 369, is necessary in order to justify the application of the particular rule we are considering. It can hardly be said that, because at an early day the Treasury made a ruling which it immediately after corrected as erroneous, following ever since a practice in accordance with the correction, this amounts to a lack of uniformity in the proper sense of the expression.

Of course, the length of time over which the practice of the Department extended in this case is shorter than that which has usually accompanied the application of this special rule in the various cases reported; yet, in United States v. Alabama Railroad Company, 142 U. S. 615, 621, 12 Sup. Ct. 306, 35 L. Ed. 1134, the continuance of the practice was only a short time longer than in the case at bar. Nevertheless it was regarded as sufficient to justify the adoption by the court of the practical construction given there by the Postmaster General. The rule seems to be always applied where the statute is really doubtful, and where, also, the departmental construction was practically contemporaneous with its enactment, and continued a considerable length of time, with uniformity. The various elements named in this statement give way, more or less, according to all the circumstances of the case; so that, on the whole, the court may derive assistance from the construction given by the executive officers, though all these elements are not present to their full extent. It is often said in general terms as follows:

"The construction given to the 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." United States v. Moore, 95 U. S. 760, 763, 24 L. Ed. 588.

Such expressions as this show that the rule is not a stiff one, and that, as we have said, it has regard to all the circumstances. As to what is a sufficient doubt, Mr. Justice Miller, speaking in behalf of the court in Peabody v. Stark, 16 Wall. 240, 243, 21 L. Ed. 311, says:

"In the absence of a clear conviction on the part of the members of the court on either side of the proposition in which all can freely unite, we incline to adopt the uniform ruling of the office of the Internal Revenue Commissioner."

Returning again to United States v. Alabama Railroad Company, supra, at page 621 of 142 U. S., at page 308 of 12 Sup. Ct., 35 L. Ed. 1134, the opinion observes that the court will "look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced." This has particular application to importers who purchase goods abroad, expecting to market them at home, on the faith of a continuous practice of the Treasury in administering the statutes. This was peculiarly illustrated in United States v. Proctor, supra, where it was shown that the contemplated change on the part of the United States relative to the rate of duty there involved would have resulted in a practical confiscation of importations, which the importer was justified by the preceding practice in assuming would yield a reasonable business profit. In the same direction the opinion passed down in behalf of the court in United States v. Finnell, 185 U. S. 236, 244, 22 Sup. Ct. 633, 636, 46 L. Ed. 890, said that, if a construction acted upon by accounting officers for many years should be overthrown, "we apprehend that much confusion might arise." This was followed by a repetition of what we have already cited from United States v. Alabama Railroad Co., that "the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons."

Of course, we cannot hold that the United States is estopped by the conduct of its executive officers in the technical sense of that expression; but we are reminded in United States v. Finnell, just cited, at page 144 of 185 U. S., at page 636 of 22 Sup. Ct., 46 L. Ed. 890, that Congress can enact legislation to change any existing practice if it deems that course conducive to public interests. We are also reminded by what we have quoted from United States v. Alabama Railroad Company, at page 621 of 142 U. S., at page 308 of 12 Sup. Ct., 35 L. Ed. 1134, that the equities are such that, under all the circumstances, we should apply the particular rule of construction which we are discussing. Therefore we hold that the duty to be imposed is as now maintained by the importer—that is, the duty as assessed less two-tenths of one cent per pound, leaving a duty of 2 cents per pound plus 1¼ cents per pound—in accordance with paragraph 137 of the customs act of 1897.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions for further proceedings in accordance with our opinion passed down this day.

ACME FOOD CO. et al. v. MEIER.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1907.)

No. 1,626.

1. BANKRUPTCY—ACTS OF BANKRUPTCY—SOLVENCY.

Solvency at the time of the filing of a petition in involuntary bankruptcy is important as a defense only when the act of bankruptcy charged is the conveyance, transfer, or concealment of property with intent to hinder, delay, or defraud creditors, under Bankr. Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]. If the act of bankruptcy charged is the giving or permitting of a preference under subdivisions 2 or 3, insolvency must have existed at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance as evidence.

2. SAME—SOLVENCY—VALUE OF PROPERTY CONVEYED.

Where conveyances of property by an alleged bankrupt are charged as acts of bankruptcy, under both subdivisions 1 and 2 of section 3, Bankr. Act July 1, 1898, c. 541, 30 Stat 546 [U. S. Comp. St. 1901, p. 3422], as made with intent to defraud and also as preferences, the value of the property thus conveyed is not to be computed in determining the question of solvency at the time of the filing of the petition as a defense under the first subdivision, but, if the conveyances are found not to have been fraudulent, the value of such property is to be considered in determining the question of solvency or insolvency when the conveyances were made under subdivision 2.

3. SAME—FRAUDULENT CONVEYANCE—EVIDENCE.

Bona fide conveyances intended only to secure indebtedness or to secure the grantees as sureties of the grantor do not constitute acts of bankruptcy under Bankruptcy Act July 1, 1898, § 3 (1), c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], and where such conveyances, made by warranty deed, are charged as fraudulent under said subdivision, and also as preferences under subdivision 2, it is competent for the defendant to show by parol that they were given merely as security both for the purpose of showing the absence of a fraudulent intent, and also that the value of the property may be considered on the question of insolvency in determining whether or not the conveyances were preferential; and it is immaterial that the issues are tried to a jury.

4. APPEAL AND ERROR—ASSIGNMENTS OF ERROR—VIOLATION OF RULES.

An assignment of error, which, in violation of the rules of the court, includes different parts of a charge to the jury, cannot, after being held not well taken as to one part, be sustained as to another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3034, 3035.]

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

This was a petition by plaintiffs in error to have the defendant in error adjudicated a bankrupt. The averments of the petition were, in substance, that the defendant, Charles H. Meier, is insolvent, and that within four months next preceding the date of this petition he had committed an act of bankruptcy.

(1) By conveying on December 30, 1904, by warranty deed to one Mary Losh an interest in a parcel of land described as in the township of Chesterfield, county of Macomb, Mich.

(2) By conveying by warranty deed of November 29, 1904, another interest in land to John Losh situated in same township and county.

(3) By conveying on November 29, 1904, by warranty deed to William D. Parker two village lots in New Baltimore, Macomb, county, Mich.

With reference to these conveyances it is alleged that each was made "with

intent to hinder, delay, and defraud his creditors," and that the said Meier by executing same "did transfer, while insolvent, a portion of his property to one of his creditors with intent to prefer such creditor over his other creditors, and for the purpose of defrauding your petitioners of their just claims."

(4) A further act of bankruptcy is charged, in that the defendant on November 22, 1904, did execute a mortgage to the Citizens' Savings Bank for $1,000 on a certain interest in land in the same county of Macomb. This is not charged to have been for the purpose of defrauding his creditors, but that it was made when insolvent and with intent to prefer the bank over his other creditors.

(5) There is then added an omnibus charge "of different and other unjust transfers and payments to other creditors which constitute preferences, but of the nature and times of which said transfers and preferences your petitioners are not aware."

He answered by denying insolvency as charged in the petition, and also denied that any of the conveyances described constituted an act of bankruptcy as charged. He denied that the debts claimed to be due to the petitioners were valid subsisting claims, and gave their origin with particularity. The answer concluded by a demand for a jury to "try the commission of the alleged acts of bankruptcy and the fact of insolvency" and "to try the questions of fact as to the various fraudulent acts and doings of the said petitioners, and any and all matters contained in said petition and in this plea and answer. * * *"

The petitioners joined issue and a jury was sworn, who, upon all the evidence, returned a general verdict of not guilty. Thereupon the court denied an adjudication of bankruptcy, and dismissed the petition. A bill of exceptions was allowed and errors assigned, and this writ sued out.

A. H. Covert and J. J. Jackson, for plaintiff in error.

Martin Crocker and F. C. Miller, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

1. There was no evidence tending to support the alleged preference by the mortgage to the Citizens' Savings Bank. That mortgage was made for a present consideration and in good faith, and no question has been made by counsel here as to that transaction.

2. Neither is it insisted that the conveyance to Mrs. Mary Losh was either fraudulent or a preference. Counsel before the jury substantially conceded this. Neither is it contended that the conveyance to William D. Parker was a preference. Meier owed nothing to Parker, and the conveyance to him was to protect him as surety upon certain loans which Meier desired to make.

3. One of the issues submitted to the jury was as to whether the petitioners were creditors of Meier. There was evidence tending to show that the larger part of the debt claimed by them originated in the sale of territorial rights for the sale of "Acme Food." The defense was that the food was a humbug, and the contract of sale obtained through fraud and misrepresentation. Meier seems to have been ignorant and credulous, and claimed strenuously that he did not know he was giving notes or entering into any arrangement other than a mere agency. Against this defense there was much positive evidence sustaining the good faith of the contract and the value of the "Acme Food." While the general finding may have been upon the ground that petitioners had not shown a good and

valid debt, we have no right to so assume, in view of the conflicting evidence. We allude to this only because counsel seem to be of opinion that, if the verdict could be sustained upon this defense, it was unimportant whether error had been committed in the trial of the other issues.

4. Neither can we assume that the verdict was rested upon the illegality of the contract, because made by a corporation of another state and within the state of Michigan without having complied with the law of the state requiring the filing of the charter before doing business, nor because the defendant may have been regarded as a farmer and not amenable to such a proceeding. No such question was put in issue, and no instruction was given the jury upon either question.

5. The other issues which were submitted to the jury were, first, whether the conveyances made by Meier, mentioned as acts of bankruptcy in the petition, other than those to Mary Losh and Citizens' Savings Bank, were made with intent to hinder, delay, and defraud the creditors of Meier; and, second, if so, has the defendant shown that when the petition was filed he was solvent, excluding any property so fraudulently conveyed? and, finally, if such conveyances were not fraudulent in law or fact, were they preferences within the meaning of the bankrupt law? After instructing the jury that it was "an act of bankruptcy for any person to convey any part of his property with intent to delay, hinder, or defraud his creditors or any of them," the court then said that by another provision of the law the defendant might establish as a defense against such an act of bankruptcy his solvency when the petition was filed. Upon this aspect of the case, assuming the fraudulent character of the conveyances to have been shown, the court said to the jury:

"With regard to the burden of proof in this matter as to solvency: The burden of proof is upon the respondent. That is to say, if a conveyance is made with the intent to hinder, delay, and defraud the creditors, if the aggregate of his property, exclusive of that conveyance, was sufficient to meet his indebtedness, then the petition, the law says, must be dismissed, because the man has not cheated his creditors, and they cannot complain of the transfer, so long as there remain in his hands to be reached by the processes of the law sufficient to pay his debts, therefore, if he had such an amount of property, the petition should be dismissed, because he was solvent."

By subdivision 1 of section 3 of the bankrupt act, of July 1, 1898 (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3422]), it is made an act of bankruptcy when a person has "conveyed, transferred, concealed or removed or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them."

In Lansing Boiler Works v. Ryerson, 63 C. C. A. 253, 128 Fed. 701, Judge Severens, speaking for this court, said, that:

"The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words."

By subsection "c" of section 3 of the bankrupt act, it is declared that:

"It shall be a complete defense to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed. * * *"

Insolvency, as defined in the act, exists "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

From these provisions of the law two things are plain: First, that in making out this defense of solvency to avoid the consequences of a conveyance made in bad faith, the property thus conveyed shall not be computed in the determination of whether the aggregate of the defendant's property at the time of the filing of the petition against him was, at a fair valuation, sufficient in amount to pay his debts; second, if the jury cannot on the evidence find such conveyance had been made with intent to defraud that all of the property of the debtor, incumbered or free, is to be taken into account in determining the question of solvency or insolvency under the second and third subdivisions of the same section. In short, solvency when the petition was filed is important only as a defense to an act of bankruptcy under subdivision 1 of section 3, and the burden of showing this is on the defendant. 2 Loveland, Bankruptcy, §§ 67, 83; West v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. If the act of bankruptcy be the giving of a preference under subdivision 2, or the permitting of a preference through a legal proceeding under subdivision 3 of the same section, there must be a state of insolvency at the time of the preference and solvency or insolvency at the time of the filing of the petition can only have a reflex importance, if any. West v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098; Loveland, Bankruptcy, § 83; In re Rome Planing Mill, 96 Fed. 813. This distinction the court below had in mind and distinctly told the jury that:

"If a conveyance is made with the intent to hinder, delay, and defraud the creditors, if the aggregate of his property, exclusive of that conveyance, was sufficient to meet his indebtedness, then the petition, the law says, shall be dismissed, because the man has not cheated his creditors, and they cannot complain of the transfer, so long as there remains in his hands to be reached by the process of the law sufficient to pay his debts."

Not one of the several requests of plaintiff in error for special charges in relation to the effect of solvency or insolvency was rightly framed.

Request No. 2 is, in substance, that if they should find that the conveyances mentioned in the petition were made "with intent to prefer" John Losh over petitioning creditors, and the defendant was insolvent "at the time of the filing of the said petition, your verdict should be for petitioners." As this request was based alone upon the claim that they were preferences and not mala fide, the fact of solvency at the time of filing the petition was unimportant if the de-

fendant was solvent when he made the alleged preferential conveyance. Request No. 4 is to the effect that if the jury should find the conveyances mentioned were made with intent to hinder, delay, and defraud, etc., "and if you believe that at the time of said transfers the defendant was insolvent, you should find for petitioners." This would be to deprive the defendant of the defense of solvency at the time the petition was filed against him.

The fifth request is placed upon the erroneous assumption that insolvency at the time of the filing of the petition affords the test as to whether a conveyance within four months was a preference.

The sixth request was in these words:

"Sixth. I charge you further with reference to ascertaining whether or not the defendant was insolvent at the time of the filing of this petition that, in determining the solvency or insolvency, you are not to take into consideration the 40 acres of land which defendant transferred to John Losh under date of November 29, 1904, and that you are not to take into consideration defendant's interest in the 20 acres of land transferred by defendant with other grantors to Mary Losh December 30, 1904, and that you are not to take into consideration the two village lots in New Baltimore, Mich., transferred by this defendant to William D. Parker November 29, 1904, and you are not to take into consideration the personal property transferred by bill of sale of defendant to Harry Meier under date of December 1, 1904, but, in order to believe that the defendant was solvent on the 18th of March, 1905, you must believe that defendant had sufficient property to pay all of said petitioners' debts, together with all other obligations which defendant has admitted that he owed at the time of filing of said petition without taking into consideration any of the property above referred to, notwithstanding the fact that debtor claims to now own real estate and the personal property above referred to."

The conveyance to John Losh was by warranty deed. "On consideration of one dollar and other good and valuable considerations." So, also, was the deed to William D. Parker. The bill of sale to Harry Meier was of certain chattels, and was filed and recorded as a chattel mortgage. Its execution is not averred to be an act of bankruptcy in the petition. There could be no adjudication of bankruptcy for an act of bankruptcy not averred in the petition. Loveland, Bankruptcy, § 69.

The fact of such a bill of sale as that referred to could only be looked to as reflecting upon the intent with which other conveyances, contemporary in time, were made, and as evidence upon the question of solvency or insolvency when the petition was filed against the defendant or when the alleged preferences were given under subdivisions 2 and 3 of the third section. The request includes also a conveyance to Mary Losh made December 30, 1904. The answer denied that this was a conveyance made mala fide or in preference, and set up that the defendant and his two sisters owned a small parcel of land, and that Mary Losh bought this land outright and the defendant joined in the conveyance, the consideration being $1,000, one-third of which was paid to defendant for his undivided interest. There was no evidence whatever tending to support the charge that this was a sale for the purpose of hindering or defrauding creditors, and the counsel upon the hearing below conceded that no preference was thereby given Mary Losh; she not being a creditor. It was therefore proper that the value of this interest so conveyed to Mary Losh should

not be taken into consideration upon any issue of solvency, and, if the request had been limited to that interest, it should have been given. If the conveyance of John Losh and William D. Parker were bona fide conveyances, intended only to secure indebtedness to them or to secure them as securities for the grantor, their execution was not an act of bankruptcy under subdivision 1 of section 3 of the act. See Lansing Boiler Works v. Ryerson, already cited. But the contention was and is that, as they purported to be deeds conveying the fee, it was not open to the defendant in this case to show that they were intended as mere securities. This objection is made upon the contention that only in a court of equity is parol evidence admissible to convert a deed into a mortgage. But we think that upon two grounds it was admissible to show the real purpose and intent of these deeds: First, upon the issue that the intent was to hinder, delay, or defraud his creditors we think it was admissible to show the real intent; second, upon the issue that these conveyances were intended as preferences and therefore acts of bankruptcy under subdivision 2 of section 3 of the act it was admissible to show that these deeds were intended only as securities and the value of the equity of redemption at the date of each such conveyance. In Lansing Boiler Works v. Ryerson, cited above, we held that the interest of a mortgagor might be taken into account in determining whether when the mortgage was made insolvency existed so as to constitute the security a preference. We see no reason for applying any mere technical rule of the common law to a bankruptcy proceeding upon either the issue of actual common-law fraud or solvency at the time of the giving of a deed intended only as a security. Under such issues no relief is sought against such conveyance. The grantee is not a party, and is not bound by the conclusion. But, when petitioning creditors seek an adjudication of bankruptcy based upon the averment that such deeds were either made with intent to hinder and delay creditors, or with intent to give a preference forbidden by the bankrupt act, we think it should be open to the defendant to show the actual facts and intent of the acts claimed to be acts of bankruptcy. Nothing is better settled under the decisions of the Supreme Court of the United States, as well as of the State of Michigan, than that a deed may by oral or written evidence be shown to have been intended by the parties as a mere security. Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Jackson v. Lawrence, 117 U. S. 679, 6 Sup. Ct. 915, 29 L. Ed. 1024. It is true that both these were cases in equity. But the powers exercised by a bankrupt court combine those of a court of law and a court of equity. Section 2 of the act of 1898, which converts the district courts into courts of bankruptcy, provides that such courts "are hereby vested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings," etc. If the question of the commission of an alleged act of bankruptcy involves intent in the execution of an instrument, or the solvency or insolvency of the defendant at the time of an alleged preference, or at the time of the filing of the petition against him, when the defense is solvency, there is no reason for saying that any evidence which would be admissible in any court having jurisdic-

tion to give relief to the grantor against a deed by showing that it was intended only as a mortgage or security shall not be admissible. If one has given a deed where the clear intent and agreement was that the deed should operate only as a mortgage, or if no debt was due and the established purpose was to indemnify the conveyee in a contemplated security, there remains in the grantor an equitable right of redemption. Any creditor of such a grantor, or any vendee, assignee, or trustee in bankruptcy would be clothed with the right to show by evidence, written or oral, the real character of the transaction, and be entitled to all the grantor's remedies under such a state of facts. 3 Pom. Eq. Jurisp. § 1196. Why, then, shall the alleged bankrupt be cut off from the right, in a proceeding to adjudge him a bankrupt, to show by the same kind of evidence the character of the transaction for the purpose of showing the absence of mala fides, or that he has an interest of value to be taken into account upon the question of solvency when the security was given? Neither is there any sound reason for saying that the effect of calling for a jury to try the issues in respect to the alleged acts of bankruptcy operates to circumscribe the powers of the court to those technically belonging to a court of law. It is true that error upon such a trial by jury can be reviewed only by a writ of error. But that is because the act confers as a privilege the right of jury trial and such a trial can only be reviewed according to the course of the common law. Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200. But in the case under consideration the only defense against the charge of an act of bankruptcy by making a deed which at common law was mala fide is that the deed was made in good faith, and intended as a mere security. Against the charge that these same conveyances were intended as illegal preferences, the only defense is that, in fact, they were mere securities, and that defendant was solvent when they were made if his equity of redemption be valued as part of his property. In such a case to give the defendant the right of trial by jury, and then deny the right to show the actual character of the conveyances, would be to give and deny the right of jury trial by the same provision of law.

There was no error in denying the sixth request. This also disposes of the exceptions taken to the admission of evidence, and the exceptions to the charge of the court in instructing the jury that it was open to the defendant to show the real purpose and intent with which the conveyances in question were made.

The court, in substance, told the jury that upon the question as to whether these conveyances constituted a preference they might estimate the value of the defendant's equity in the property so conveyed, as well as that not conveyed, and that, if the aggregate of both was enough to pay all his debts, they should upon this point find for the defendant. This part of the charge must be construed as necessarily resting upon the assumption that the jury should find that these conveyances were not mala fide, he having already instructed the jury that the defense of solvency at the time of filing of the petition must be made out exclusive of property so conveyed. Thus construed, there was no error in directing the jury to estimate the value of the equity

of redemption in determining solvency at the date of each such conveyance. We know of no authority which will justify the exclusion of equitable interests belonging to a debtor when we come to the question of his solvency or insolvency in a bankrupt proceeding. The only exclusion authorized by section 1, cl. 15, is of property "which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors." If, then, these conveyances were found not to be such as described by this provision, and therefore not acts of bankruptcy under subdivision 1 of section 3, the grantor's equity of redemption constituted a part of his property and should be estimated as its "fair value" in the aggregate of his property at the time of each said conveyance attached as a preference.

The thirty-sixth exception to the charge was to this language of the court:

"The testimony of Mr. Meier is that these conveyances, although in the form of warranty deeds, were intended by way of security, and there is no testimony to the contrary except the deeds themselves."

But in assigning error they have included in one assignment (assignment No. 7) this and so much of the charge as dealt with the question of estimating the value of the defendant's equity of redemption in determining solvency or insolvency at date of the conveyance. The eleventh rule (90 Fed. cxlvi, 31 C. C. A. cxlvi) of this court requires that each error intended to be assigned shall be separately and particularly set out, and, when it is to the charge, the assignment shall set out the part referred to totidem verbis. We have already ruled that this assignment, so far as it covers the question last alluded to, is not well taken. We cannot sustain a single assignment as partly good and partly bad without violating our rules. But, aside from this, the court was substantially right in saying that the testimony of Meier upon this point was uncontradicted. When the court undertook to state the evidence, it was the duty of counsel to call attention to evidence overlooked, if important, and give the court an opportunity of correcting the statement. This was not done. We see no sufficient reason for noticing this as "a plain error not assigned," which under strong circumstances the court at its option may do under Rule 11.

All of the errors assigned have been examined. None of them are well taken, and the judgment will be affirmed.

BOARD OF COM'RS OF HERTFORD COUNTY, N. C., v. TOME et al.

(Circuit Court of Appeals, Fourth Circuit. April 9, 1907.)

No. 683.

1. JUDGMENT—CONSTRUCTION—ENFORCEMENT.

Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to annually levy a necessary tax to make the annual interest payments on the bonds, but

such judgments did not direct the clerk to thereafter issue writs of mandamus if defaults should occur in the levy of the tax, they did not contain process within themselves for their own enforcement, so that, on the board's default, it was necessary for the owner of the judgments to obtain orders of the court to compel performance.

2. SAME—ESTOPPEL.

Where judgments on certain township railroad aid bonds had become dormant by the lapse of three years, without process to enforce the same, and therefore required an order of court entered on notice to revive the judgments and authorize enforcement by mandamus, as provided by Revisal, N. C. 1905, § 620, the defendants on such an application were not estopped by the judgments to question the validity of the act under which the bonds were issued.

3. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISION—OBLIGATION OF CONTRACT—IMPAIRMENT.

Where certain township railroad aid bonds were issued under a state statute, and passed into the hands of non-resident holders for value at a time when the highest court of the state had rendered no decision intimating that a provision of the Constitution of the state would be subsequently so construed as to invalidate the bond act, the federal courts sitting within such state were not bound by such a decision holding that the bond act was illegally passed, the effect of which was to impair the obligation of the contract existing between the township and the bondholders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950, 957.

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 of Memphis v. City of Memphis, 49 C. C. A. 468.]

In Error to the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

James H. Shepherd (Shepherd & Shepherd and Winborne & Lawrence, on the brief), for plaintiff in error.

F. H. Busbee (F. H. Busbee & Son, R. T. Gray, P. E. Tome, and E. J. Best, on the briefs), for defendants in error.

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

McDOWELL, District Judge. By act of the Legislature of North Carolina (chapter 365, p. 640, Acts 1887) the Murfreesboro Railroad Company was incorporated and Murfreesboro township of Hertford county, which was by section 30 of the act created a "body politic and corporate" (the county commissioners being by said section made the corporate agents of the township), was authorized to subscribe to the stock of the said railroad company and to issue bonds in the payment of the subscription. This statute, so far as is now material, does not differ essentially from the statute under consideration by this court in Board of Com'rs v. Tollman, 145 Fed. 753, 76 C. C. A. 317. An election was held under the act of 1887, and the subscription was authorized. In 1888 the bonds, which are dated September 19, 1887, were issued to the railroad company. The bonds are each for $1,000, numbered consecutively from 1 to 25. The first bond is made to become due ten years after February 1, 1888, and each successive bond one year later. On each bond were coupons, for $60 each, payable annually.

On August 5, 1891, Jacob Tome became the purchaser of all the bonds and of all the coupons not then due. The coupons falling due February 1, 1892 and 1893, were not paid. In November, 1893, the said Tome instituted an action in the United States Circuit Court for the Eastern District of North Carolina. To this action the only defendant named is the township of Murfreesboro. The relief sought was judgment that the plaintiff recover of the township the amount of the said coupons with interest and costs, and that the board of commissioners of Hertford county be required by mandamus to levy taxes and pay the said coupons, and also to thereafter annually levy such taxes and pay the coupons subsequently to become due. On May 3, 1894, the township appeared by counsel and answered the complaint. On November 29, 1895, the township filed a second answer, in which the defendant pleaded the fact that by chapter 23, p. 31, Private Acts 1895, the Legislature of North Carolina had "abolished the charter of the defendant." Somewhat later the complainant appears to have filed an amended complaint, which does not appear in the record, making the board of commissioners of Hertford county also a defendant. An answer to this amended complaint was filed December 18, 1896. It should here be stated that the act of 1895 referred to repealed the essential sections of chapter 365, p. 640, Acts 1887—including section 30, which made the board of commissioners the corporate agents of the township. The result of this action was a judgment in 1897 in accordance with the prayer of the original complaint. In 1898 the executors, under the will of said Jacob Tome, instituted another action in the said court on account of the subsequent default in payment of coupons, in which the township and the board of commissioners and the individuals constituting such board were made the parties defendant. On this complaint an order similar to the one above mentioned was made December 21, 1898. Commencing in 1898, and continuing until late in 1902, some considerable payments were made on the coupons. On December 20, 1902, the opinion of the Supreme Court of North Carolina in Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3, was announced. In this opinion chapter 365, p. 640, Acts 1887, was held to have been invalidly enacted. Since the publication of that opinion the executors appear to have been unable to obtain further payments on their coupons. In May, 1905, the affidavit of one of the said executors setting out the fact that the two former judgments had been rendered, and that the then overdue coupons had not been fully paid, was filed in the aforesaid trial court. Thereupon the said court issued a rule to show cause why a peremptory writ of mandamus should not issue. The said affidavit and the said rule are both entitled, "Executors of Jacob Tome, Dec'd, v. Murfreesboro Township." The rule appears to have been served only upon the board of commissioners. An answer was filed to the rule on June 5, 1905, by the board of commissioners "appearing specially." The lower court on January 10, 1906, entered an order reviving the above-mentioned judgments of 1897 and 1898, and ordering the issue of a writ of peremptory mandamus directed to the board of commissioners, and in other respects following the judgments and

orders previously made by said court. The mandamus ordered by the judgment of January 10, 1906, was issued May 7, 1906. Thereafter an assignment of errors was filed in behalf of the township, a bill of exceptions was settled and signed, and a writ of error was allowed. On November 21, 1906, the Supreme Court of North Carolina handed down its opinion in Board v. Wachovia Loan & Trust Co., 55 S. E. 442, in which the ruling in Debnam v. Chitty, supra, in regard to the validity of the statute there in question, is expressly repudiated. This fact was not known at the time this case was argued here.

The first matter to which our attention is required arises from the contention that the judgments of 1897 and 1898 estop the plaintiff in error from raising any question as to the validity of the act of 1887, under which the bonds here involved were issued. We are unable to perceive that these judgments "contain process within themselves," or that any reason exists which discriminates the case at bar in this respect from Brownsville v. Loague, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780. The judgments did not direct the clerk of the trial court to thereafter issue writs of mandamus if defaults in the annual payments of the coupons should occur. Clearly for a failure or refusal of the board to levy a tax in 1900, for instance, the coupon holder had to have an order of some description from the court to obtain relief. Although the judgments of 1897 and 1898 contained orders making it the duty of the board to annually levy the necessary tax, yet, on a subsequent failure of the board to obey such orders, some action by the court was necessary to enforce compliance with the previous orders. Whether the necessary action might be process for contempt or another writ of mandamus is immaterial. The fact remains that the judgments are not of themselves sufficient.

Section 620, Revisal 1905 (of the North Carolina laws), reads:

"After the lapse of three years from the entry of judgment on the judgment docket, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or nonresident, or can not be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part."

The last of the two judgments mentioned was rendered December 21, 1898. The affidavit on which was commenced the proceeding now under review was filed more than three years later. By force of the statute above quoted the judgments sought to be revived were dormant. The writ of mandamus applied for in 1905 is essentially, in the case at bar, a process in the nature of an execution. The statute in question is in effect a statute of limitation, and the trial court was bound by it. Ross v. Duval, 13 Pet. 45, 48, et seq., 10 L. Ed. 51. In other words, the plaintiffs below had to take the steps they did take. They necessarily filed the affidavit, had notice given the judgment debtor, and moved the court to revive the dormant judgments and issue, in essence and effect, process of execution, not contained in the judgments

of 1887 and 1898. The decision in Brownsville v. Loague, supra, controls us. The result is that the plaintiff in error was not and is not estopped by the judgments of 1897 and 1898 to question the validity of the act of 1887.

Still another reason exists for holding that the board of commissioners, in behalf of the taxpayers of the township, were and are at liberty to assail the validity of the act of 1887. As has been stated, the Legislature in 1895 annulled the powers of the board to act as the agents of the township. The service of the rule to show cause in 1905 was made only on the chairman of the board. While we doubt the strict legality of this service of process (Revisal 1905, § 440; 1 Code 1883, p. 81, § 217), we shall not pause to discuss this question. The only service of process and the only appearance, that being special, was on and by the board. If the repealing act of 1895 was a valid exercise of a power vested in the Legislature, the township has suffered a judgment without due process of law, and without having had its day in court. It is said, of course, that the act of 1895 is invalid because it impaired the obligation of a contract. But we cannot so decide unless and until we decide that the act of 1887 was validly enacted, for otherwise there was no valid contract which was impaired by the act of 1895.

We must next consider the effect we should give to the recent decision of the Supreme Court of North Carolina in the case of Board v. Wachovia Co., supra. It may be that this court, notwithstanding the Wachovia opinion, is constrained to discuss and independently decide the validity of chapter 365, Acts 1887. But, without expressing an opinion on this question, we think reasons exist making it improper to avoid the discussion which follows. Very frequently it is proper for a court to avoid expressing an opinion on a question not necessarily involved in disposing of the case before the court. And in the case at bar it may be thought that this court could most properly dispose of this case by merely affirming the trial court's ruling with a citation to the Wachovia Case. Such course would leave open a question of grave importance to many litigants and members of the bar in North Carolina. Does this court affirm merely because the view expressed by the North Carolina court coincides with our own view reached independently, or because we consider that this court is bound by the construction put by the North Carolina court on the constitutional provision as to the method of enacting taxing statutes?

Without saying that this court must in all cases relieve litigants and counsel of such embarrassment, we think that there is a reason in this particular case which would render it improper to fail to express and to discuss the reason why we affirm the judgment of the trial court. This reason is as follows: In the case of Tollman v. Board, 145 Fed. 753, 763, 764, 76 C. C. A. 317 (owing chiefly to the fact that certain language, to be hereinafter quoted, used in the opinion in Great Southern Hotel Co. v. Jones, 193 U. S. 546, 24 Sup. Ct. 5, 76, 48 L. Ed. 778, escaped the attention of the writer), we apparently showed less than the respect we feel for the opinion of one of the learned members of the Supreme Court of the United States. A question of great importance was in the Tollman opinion passed over without any consider-

able discussion, and, for reasons which will hereinafter appear, this omission may create a false impression. The respect we entertain for the learned Justice in question impels us to now state fully the reasons which led us to the conclusion reached in the Tollman Case, and which now lead us to affirm the judgment of the trial court in the case at bar.

As has already appeared, the Tollman Case presented a question identical with the question now before us. Unless that opinion is erroneous, we must in the case at bar affirm the judgment below, for we are unable to distinguish the two cases. The one point in which the cases differ is this: In the Tollman Case the alleged invalidity of the statute under which the bonds were issued was attacked under the principle laid down in the case of Debnam v. Chitty, supra. Here the attack is based on the fact that in Debnam v. Chitty the Supreme Court of North Carolina held the particular statute under which the bonds involved were issued not to have been enacted as is required by article 2 section 14 of the Constitution of North Carolina. The nature of the supposed defect will appear from either the opinion in the Tollman Case or in Debnam v. Chitty.

No reason suggests itself to us why the difference mentioned should discriminate the two cases. If the ruling of this court in the Tollman Case was sound, we are unable to perceive why the principle there invoked does not apply here. The bonds here involved were issued in 1888, the decision in Debnam v. Chitty was rendered in 1902. Prior to 1899 (Smathers v. Com'rs, 125 N. C. 480, 34 S. E. 554), so far as we have discovered, there had been no opinion of the Supreme Court of North Carolina which so much as intimated that the Constitution would ever receive the construction subsequently put upon it in Debnam v. Chitty. If the doctrine laid down in the long line of cases preceding and following Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, is correctly understood, such doctrine applies here as clearly as in a case where the erroneous state ruling is made concerning some other statute. That there is no peculiar effect to be given to a state court's decision concerning the particular statute which happens to be invoked in the federal court seems to us to necessarily follow from Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Folsom v. Ninety-Six, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; Stanley County v. Coler, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

However, the chief argument made in behalf of plaintiff in error is based on this proposition: A decision by a state court of last resort to the effect that a legislative act was not validly enacted is binding in the federal court; although such decision is regarded by the federal court as an erroneous construction of the state Constitution; although such decision was rendered after rights based on the validity of such legislative enactment had accrued; and although such decision had not been foreshadowed or indicated by any previous decision of the state court antedating the accrual of such rights, if there had been no previous state court decision holding or indicating that the legislative act was a validly enacted law.

In the opinion of Mr. Justice Harlan in Wilkes County v. Coler, 180 U. S. 506, 519, 21 Sup. Ct. 458, 463, 45 L. Ed. 642, the following language is used:

"Observe that the issue is not as to the construction, meaning or scope of a statute, but whether that which purports to be a legislative enactment ever became a law for any purpose."

In the opinion, written by the same learned member of the court, in Great Southern Hotel Co. v. Jones, 193 U. S. 532, 546, 24 Sup. Ct. 576, 579, 48 L. Ed. 778, the following language is used:

"The only exception to the general rule announced in the above cases [Carroll County v. Smith, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517; Anderson v. Santa Anna, 116 U. S. 356, 365, 6 Sup. Ct. 413, 29 L. Ed. 633; Pleasant Township v. Ætna Co., 138 U. S. 67, 72, 11 Sup. Ct. 215, 34 L. Ed. 864; Folsom v. Ninety-Six, 159 U. S. 611, 627, 16 Sup. Ct. 174, 40 L. Ed. 278; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495] arises when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state constitution so as to become a law of the state. Town of South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204; Wilkes County v. Coler, 180 U. S. 506, 520, 21 Sup. Ct. 458, 45 L. Ed. 642."

The question now presented is whether or not the expressions above quoted should be regarded by us as a binding opinion enunciating a doctrine of law, or as obiter dicta. Perhaps no rule is better settled, or more frequently inculcated by the Supreme Court, than that expressions found in opinions of courts which relate to a doctrine of law not necessarily in issue in the case then before the court are not to be regarded as deliberate and binding enunciations of such doctrines. Carroll v. Carroll's Lessee, 16 How. 275, 287, 14 L. Ed. 936. It is probable that there is no volume of the Supreme Court Reports in which the idea is not advanced that expressions of opinion not necessary to the determination of the case are to be regarded as dicta. We think it safe to say that every judge in writing opinions occasionally uses expressions which relate to points not necessarily in issue, and which do not represent either his own or his associates' studied and deliberate views. We feel, therefore, constrained to consider, first, if the expressions above quoted state views that are binding upon this court, and, if not, if they be such as we should follow.

In Wilkes County v. Coler, 180 U. S. 506, 21 Sup. Ct. 458, 45 L. Ed. 643, the Supreme Court had under consideration article 2, § 14, of the North Carolina Constitution, which forbids the enactment of a law allowing a county to impose a tax unless, inter alia, the yeas and nays on the second and third readings are entered in the journals. The opinion (page 513 of 180 U. S., page 460 of 21 Sup. Ct. [45 L. Ed. 642]) states that the journals of the two houses were put in evidence, and that it did not appear therefrom that the yeas and nays on the second and third readings of the Acts of 1868, 1879, and 1881, respectively, were entered on the legislative journals. It follows therefore, as an independent proposition, that these acts were not validly enacted. In other words, the state court rulings, subsequent to the issue of the bonds, holding these statutes to have been invalidly enacted, were necessarily considered by the United States Supreme Court proper constructions of the constitutional provision. Again, in the

opinion it is stated that the decision of the Supreme Court of North Carolina in State v. Patterson, 98 N. C. 660, 4 S. E. 350, was rendered before the issue of the bonds in question, and it is said:

"After the decision in State v. Patterson * * * it might have been anticipated that the same court would hold as they did in the subsequent cases above cited that the entering of the yea and nay vote on the second and third readings of an act of the class mentioned in section 14 of article 2 of the state Constitution was a condition precedent that could not be dispensed with under any circumstances."

It seems beyond question, therefore, that the decision of the case before the court did not necessarily involve a distinction between state court rulings, which hold legislative acts to have been invalidly enacted, and state court rulings which hold state statutes to be void for some other supposed constitutional defect. The facts in the case brought it directly under the principle enunciated in many previous opinions, and did not raise a question as to the effect of state court rulings, holding a statute to have been invalidly enacted, made after the accrual of rights, not foreshadowed by state court rulings previously made, and repugnant to the construction which the federal court would independently put on the constitutional provision in question.

Although the language hereinabove quoted from Wilkes County v. Coler, supra, may be deemed an unmistakable enunciation of an opinion, yet, as it was used in regard to a feature of that case not necessarily in issue, most assuredly it could not properly be relied upon as a binding enunciation in such a case as Board v. Tollman, supra. The state court ruling, as to the validity of the enactment of the statute (Debnam v. Chitty), came after the accrual of rights, was not indicated by any ruling previous to the accrual of such rights, and is repugnant to our own construction of the constitutional provision. In Great Southern Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, there was nothing in issue relating in the remotest degree to the manner of the enactment of the statute. Consequently the expression from that opinion quoted above could not have related to any point in issue there. With great deference, it seems to us to follow from what has been said that we must regard the expressions in question as dicta.

Let us now very briefly examine Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154, and Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204. (1) In these cases the state court had, years before the issue of the bonds, unmistakably construed the state constitutional provision as it was construed by the state court decisions rendered after the issue of the bonds. (2) The great subject of debate and the point in the mind of the writer of the majority opinion in the Ottawa Case was the propriety of so applying the doctrine of estoppel as to prevent the defendant below from proving that the act of Legislature was not enacted in the manner required by the state Constitution. It seems to us to follow that there was nothing in that case to make it necessary to decide that a settled course of decision of the courts of a state, long antedating the accrual of rights, is more binding when relating to one provision of the state Constitution than

when relating to other provisions of such Constitution. It is true that the language in the Ottawa Case, at page 268, may be read as indicating a belief that such distinction exists. But Mr. Justice Bradley had no reason for drawing such distinction. He was arguing against an alleged estoppel, and everything said by him would have been equally appropriate had the invalidity of the statute there in question arisen from some constitutional defect other than the manner of its enactment. Of Post v. Supervisors, supra, little need be said. It relates to the statute discussed in the Ottawa Case, and arose under the same facts. In the summary of the rulings in the Ottawa Case, as stated in Post v. Supervisors, is the following:

"An act of the Legislature of a state, which has been held by its highest court not to be a statute of the state, because never passed as its Constitution requires, cannot be held by the courts of the United States, upon the same evidence, to be a law of the state."

If this language had been used in a case where the construction given the state Constitution by the state court had been regarded by the United States Supreme Court an erroneous and unwarranted perversion of the state Constitution, and if such construction had been announced (without previous intimation) after the accrual of rights, it would necessarily be decisive of the question we propose to discuss. But in the case then before the federal Supreme Court, the state constitutional provision had been construed by the state court before the issue of the bonds as it was construed after their issue. Hence we do not perceive the propriety of treating the language above quoted as necessarily applicable to the question we are concerned with.

Let us now consider the question on its merits. That the federal court must, in proper cases, construe state constitutional provisions independently will, of course, not be denied. In the opinion in Great Southern Co. v. Jones, 193 U. S. 544, 545, 24 Sup. Ct. 576, 48 L. Ed. 778, are cited numerous Supreme Court cases in which this proposition is stated, and in which it was necessary to decide that this rule is the correct one. As a matter of reason simply, we are unable to perceive the force of the distinction between an erroneous state court ruling that a statute is void because not enacted in the manner required by some provision of the state Constitution, and an erroneous state court ruling that a statute is void because it contravenes some provision of the state Constitution other than that relating to the mere manner of enacting statutes. We find it difficult to see why the clause in a state Constitution which specifies the method of enacting statutes should be given, in the federal courts at least, a more controlling force, or greater effect, than other provisions of the same Constitution. But, even if it be conceded that the manner of enacting statutes is of greater importance than the matter contained in statutes, we conceive that the relative importance of the two classes of constitutional provisions is not the criterion of the power, or of the duty, of the federal courts. The very foundation of the rule under which the federal courts independently construe the ordinary provisions of state Constitutions, and refuse to follow erroneous rulings of the state courts, as we understand it, is the justice and propriety of prevent-

ing the courts of a state from retroactively impairing the obligation of contracts. See Rowan v. Runnels, 5 How. 134, 139, 12 L. Ed. 85, in which the effect of a provision of the Constitution of Mississippi was under consideration, and in which Chief Justice Taney said:

"But we ought not to give them [state decisions] a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which in the judgment of this court were lawfully made. If such rule were adopted and the comity due to state decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another state the right to sue in the courts of the United States, might become useless and nugatory."

We can conceive of no difference in the effect of erroneous state court rulings in impairing the obligation of contracts, whether such ruling be that a statute was not properly enacted or that the statute is in some other respect violative of the state Constitution. If the rules of comity do not forbid the federal courts to repudiate the rulings of the state courts in the one class of cases, we cannot perceive why such rules should have such effect in the other class. If the purpose and intent of the provision in the federal Constitution, which gives to certain citizens of the United States the right to resort to the federal courts, was to furnish to such litigants a shield against sectional or local prejudice, it seems to follow that this purpose and intent must control as fully and as effectually in one class of cases as in the other. If the federal Constitution be supreme, we cannot conceive that an erroneous state court decision retroactively impairing rights can properly be allowed to override its intent, no matter what provision of a state Constitution is the subject of such decision.

We here quote in part some of the language, used in other opinions, which was quoted in the opinion in Great Southern Hotel v. Jones, supra:

From Carroll County v. Smith:

"In the courts of the United States * * * the plaintiff has a right, under the Constitution of the United States, to the independent judgment of those courts. * * * It was to that very end that the Constitution granted to citizens of one state, suing in another, the choice of resorting to a federal tribunal."

From Burgess v. Seligman:

"As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In the Tollman Case the validity of the enactment of the statute in question had not been foreclosed by adjudication previous to the accrual of rights. And in that case this court did not desire to be guilty of a "dereliction of duty." As every reason which authorizes a federal court in any case to independently determine the constitutionality of a state statute existed in the Tollman Case, we conceive that there was there no escape from the duty of an independent examination and conclusion.

On the merits we do not regard it as necessary to add to what was

said in the Tollman Case. But it should be said that the opinion in Debnam v. Chitty, in the light of the recent opinion in the Wachovia Case, affords a striking illustration of how nearly nugatory the constitutional right of nonresidents to litigate in the federal courts might become, if any class of state court decisions must be given by the federal courts the effect of retroactively impairing contracts which in reality are valid. That the learned Supreme Court of North Carolina, as now constituted, concurs in the view expressed in the Tollman Case in respect to the proper construction of article 2, § 14, of the Constitution of North Carolina, is not only gratifying; but it in no small degree tends to fortify us in the position heretofore taken by this court.

It follows from what has been said that the judgment below must be affirmed. It also follows from what has been said that we affirm because in our judgment, independently exercised, we consider that the judgment below is free from error, and that it was free from error, actual or apparent, when rendered.

Affirmed.

In re TUCKER et al.

TUCKER v. CURTIN.

(Circuit Court of Appeals, First Circuit. October 31, 1906.)

No. 658.

1. JUDGMENT—CONCLUSIVENESS—USE OF TRUST FUNDS BY BANKRUPTS—RIGHT OF BENEFICIARY TO INTERVENE.

A testator directed that a fund should be held in trust, the income to be paid to a granddaughter during her life, and appointed his son and grandson "executors and trustees" under the will. They qualified as executors, but not as trustees, and took possession of the trust property. They were also partners in business, and as such borrowed from themselves as executors or trustees a portion of the trust property. To secure the loan they attempted to transfer certain property to themselves as trustees, but on their subsequent adjudication as bankrupts such property was taken into possession by their trustee in bankruptcy. To his application to sell the property they objected on behalf of the beneficiary under the will; but their objection was overruled, and a sale ordered, but without prejudice to a new petition for an accounting if the beneficiary, "or those who properly represent her," should be so advised. Such a petition was filed by the bankrupts in her behalf, and was denied, after a hearing on the merits. Subsequently the beneficiary herself filed a petition for leave to intervene, which was denied on the grounds of laches and that the prior adjudication was conclusive. *Held*, that the petitioner, being a minor, was not chargeable with laches, and that the bankrupts, even if considered formal trustees, stood in such peculiar relation to the transactions involved that they were not persons who could "properly represent" her, for which reason she was not concluded by the adjudication on their petition.

2. SAME—POWERS OF COURT—SETTING ASIDE PRIOR ORDERS.

The rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy, in which the court may, at any time before the close of the proceedings, set aside orders previously made.

Petition to Revise Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

For former opinion, see 148 Fed. 929.

Harold Williams, Jr., for petitioner.
Robert K. Dickerman, for trustee.

Before COLT and PUTNAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a petition by Marion E. Tucker, a minor, by her next friend, to revise certain proceedings in bankruptcy of the District Court for the District of Massachusetts, in which Frederick M. Tucker and Tracy H. Tucker had been duly adjudged bankrupts as copartners under the style of F. M. Tucker & Co. Luther P. Tucker, domiciled in the state of New York, the grandfather of the petitioner, Marion E. Tucker, by his will probated in that state, among other things, bequeathed as follows:

"The other one (1) of said one-quarter parts of said residuary estate, I direct my executors to hold, in trust, and invest the same and pay the income thereof over to my granddaughter Marion E. Tucker, during her natural life, and, upon her decease, leaving lawful issue, to pay over the said one one-quarter part to said issue in equal shares; but in case my said granddaughter shall decease, leaving no issue or descendants of issue her surviving, and her father the said Frederick M. Tucker shall survive her, then and in such event I direct that said one one-quarter part be paid over to him the said Frederick M. Tucker; or, in case said Frederick M. Tucker be not living, then to my grandson Tracy H. Tucker; or, if said Tracy H. Tucker also be deceased, to his issue."

It will be noticed that this bequest makes no provision specifically for trustees, but by its terms it leaves this one-fourth part of the residuary estate in the hands of the executors to carry out the purpose of the will in that respect. The will, however, subsequently speaks of trustees as follows:

"As to the portions of my estate provided to be held in trust, I authorize my executors and trustees to retain existing investments made by me prior to my death, so far as the same shall be practicable, unless there shall be such a change in conditions as shall, in the right discretion of my said executors and trustees, make a change of investment desirable."

Also as follows:

"I hereby authorize and empower my said executors and trustees to sell and convey any or all property, real or personal, of which I may die seised or possessed, and upon the sale thereof to execute, acknowledge and deliver, all proper instruments of conveyance and transfer, under seal or otherwise, necessary in law for vesting of title in the purchase or purchasers."

Also as follows:

"I hereby nominate and appoint my son Frederick M. Tucker, and my grandson, Tracy H. Tucker, executors and trustees under this my last will and testament; and I direct that neither shall be required to give bonds as executors or trustees hereunder. I hereby direct that the trusts herein created shall be maintained and carried to the completion thereof by my said executors and trustees, or, in case only one of them shall qualify, by the one so qualifying, or, in the event of the death of one of them, by the other surviving, or, in case both of them shall fail to qualify or shall decease, by a successor (either individual or a trust company) duly appointed by a court having jurisdiction."

The executors named, one of whom was the son of the testator and the other one his grandson, are the bankrupts in this proceeding. Neither of them qualified especially as trustee, nor did any other

person. Frederick M. Tucker and Tracy H. Tucker having taken their several oaths as executors on the 11th day of April, 1901, the will was probated by a surrogate in the state of New York on the 12th day of the same April, and letters testamentary issued thereon to them as executors. All that was done with reference to the establishment of any trust, as shown by the record, was as follows:

"The said quarter part so provided to be held by said executors in trust for Marion E. Tucker, who is the daughter of said Frederick M. Tucker, amounted at the outset to about the sum of sixty-two thousand nine hundred fifty dollars, and same consisted of stocks, bonds, promissory notes, securities and cash; said executors never applied for or were appointed trustees under said will, but acted as such under their appointment as executors in the way and manner especially set forth and directed in said will."

For the purposes of this petition, we are bound to assume that the allegations made by the petitioner, Marion E. Tucker, are true. Therefore we assume that specific securities were set apart and earmarked as appertaining to the trust which the will proposed to establish in her interest. We also assume that part of the assets so set apart and earmarked were transferred to the bankrupts as hereinafter set out. Therefore it follows that the petitioner, Marion E. Tucker, has such an equity as a present or expectant beneficiary as entitles her to recognition by the chancellor, and as would give her, therefore, a standing in the courts of chancery, and an analogous standing in these proceedings, unless some specific reason is shown to the contrary by the trustee in bankruptcy. Among such reasons might be the unquestioned qualification of some person or persons to perform the trust under the will, provided such person or persons also stood in such relations to the property in litigation as to fully and unquestionably enable them to protect the interests of the cestui que trust.

There is in the record a petition, to which we will hereinafter again refer, filed by Frederick M. Tucker and Tracy H. Tucker on July 4, 1904, which contained the following allegations:

"On November 18, 1902, said Frederick M., being in need of money, borrowed from the assets of said trust estate so held for Marion E. Tucker, the following property, to wit: 50 shares of the National Elevator stock, 26 shares of American Sugar stock, common, five $1,000 bonds of the Chesapeake & Ohio Railroad, three $1,000 bonds of the Norfolk & Western Railroad, and $5,000 cash, all of the value of about ———; that a portion of said property was delivered to him on that day, and the remainder on November 19, 1902, or soon thereafter; that on said November 18th said Frederick M., being then the owner and holder of a seat in the Boston Stock Exchange, so called, located in said Boston, assigned and conveyed to the said Frederick M. and said Tracy H. Tucker, in their capacity as trustees for said Marion E., said seat, together with all membership rights in the said stock exchange going with or belonging to said seat, a copy of said conveyance and assignment being hereto annexed, marked 'A'; that said conveyance was in fact made and delivered as security for the due return of all said property on demand or repayment of its value to said trustees; that said Frederick M., on receiving said property, transferred it to said firm of F. M. Tucker & Co., which firm used it in its business as stockbrokers, and no part of same has ever been returned or any portion repaid, but same is all still due and owing to said trustees and trust estate held for said Marion E."

It is also claimed, as appears by the record before us, that afterwards, fearing that the seat in the Boston Stock Exchange would not

prove to be sufficient security, the bankrupts undertook to add thereto $55,000 of the bonds of the Quincy Granite Quarries Company. These assets, including both the Boston Stock Exchange seat and the bonds of the Quincy Granite Quarries Company, were, in the eyes of the law, in the possession and use of the bankrupts when the petition in bankruptcy was filed. There was no outstanding interest, except as security, in the way in which we have described; and this did not affect the legal possession or use until some action had been taken in the way of foreclosing the rights of the pledgors, nothing of which kind had occurred. Nevertheless, on the trustee in bankruptcy applying on September 1, 1903, for an order for the sale of the same, Frederick M. Tucker and Tracy H. Tucker, acting apparently for the interests under the will, objected for reasons which we need not state; and their objections were overruled. The sale was ordered, without prejudice to an accounting with reference to the proceeds thereof.

The terms of this order require particular attention, because they reserve the right to intervene to Marion E. Tucker alone, in the following language:

"But without prejudice to a new petition for a complete accounting, if Marion E. Tucker, or those who properly represent her, are advised to bring one."

At this time, so far as the record is concerned, she was the only person who had any present interest with reference to this bequest in the will of her grandfather, and there was no one living who could claim the estate subject to the trust for her during her natural life; so that, aside from the trustees under the will, if there were any, or, perhaps, the executors, until there were trustees, the only person who could represent this interest was the petitioner, Marion E. Tucker. Therefore we again call attention to the peculiar and appropriate fact that it was the personal intervention of Marion E. Tucker, or of some one who could "properly represent" her, which was protected. Nevertheless, afterwards, on July 7, 1904, Frederick M. Tucker and Tracy H. Tucker filed a petition in the District Court, setting out alleged facts substantially as we have described, and praying for an accounting and payment to the testate estate of the amount due for the securities alleged to have been borrowed from the assets thereof. It was signed by Frederick M. Tucker and Tracy H. Tucker individually, but the opinion of the learned judge of the District Court described it as made by them "as trustees under the Tucker will for the benefit of Marion E. Tucker." It has been assumed all through that the last-named petition was filed by the persons who signed it in some official capacity, and for this hearing it must be accepted as such. It appears that, on a hearing on the merits, it was denied. Subsequently Marion E. Tucker, by prochein ami, filed a petition in the District Court for leave to intervene with reference to the subject-matter of the disposition, in the manner we have described, of the assets of the testator. That petition prayed that the petitioner might be allowed to intervene for the purpose of contesting jurisdiction. It was denied for two reasons; one, that the merits had been determined on

the petition of July 7, 1904. The other related to laches on the part of Marion E. Tucker. Inasmuch as she was an infant, we are unable to perceive how she can be barred by any delay or laches of any kind shown by the record. This is common learning, of which In re Hogton, L. R. 18 Eq. (1874) 573, is a striking illustration. We should add, however, that we understand from the record that the proceeds of the sale, or sales, have not been in any way distributed, and that they are still in the control of the court in bankruptcy.

The petition before us is technically defective, in that it fails to state the facts on which the case turns as we have stated them, except in a merely inferential manner. The proceedings may also be defective, in that the petition of Marion E. Tucker to the District Court for leave to intervene contained no express prayer, except that she might do so for the purpose of contesting the jurisdiction of that court, as to which the law is clearly against the petitioner. In re Union Trust Company, 122 Fed. 937;[1] Mason v. Wolkowich, 150 Fed. 699. Nevertheless the case is submitted to us without objection in the manner we have already stated, raising the issue whether the petitioner Marion E. Tucker was entitled to intervene in the District Court for the purpose of protecting her alleged interest in the proceeds of the securities disposed of by the trustee in bankruptcy; and therefore, notwithstanding the unsatisfactory condition of the record in the particulars we have explained, we accept that issue.

It is not necessary to point out that the petitions to intervene related to alleged immediate and several rights in the fund in question, and that therefore, unlike interventions by bondholders and stockholders who are represented by trustees or by corporations, which interventions may or may not, ordinarily, be permitted according to the sound discretion of the court, the questions of intervention here were questions of strict law. Consequently, the right of somebody to intervene and to be heard on the merits cannot be disputed. The propositions of the learned judge of the District Court involved a finding that Frederick M. Tucker and Tracy H. Tucker, in their representative capacity, properly intervened, and that, there having been a hearing on the merits on their intervention, the topic was foreclosed. On the other hand, it is claimed by Marion E. Tucker that, as these two gentlemen had never qualified as trustees, they had no authority to intervene, and their intervention was ineffectual; so that she, as representing a fixed equitable interest under the will, in the absence of any duly qualified trustee, was entitled to intervene in her own behalf, and in behalf of whomsoever might be interested under the trust to which her desired intervention related. This proposition of law is correct, unless, as found by the District Court, there had already been an effectual intervention on which the rights of the parties had been determined.

In some states it cannot be doubted that, where a duty is imposed on the executors without any clear establishment of a separate trust, the executors perform that duty, either as technical trustees or quasi trustees, without separate qualification; and in other states the law is otherwise. So far as concerns the law of New York, which is peculiarly applicable to this case, decisions of the Court of Appeals are

[1] 59 C. C. A. 461.

cited pro and con as conclusive each way. In view of the contradictory expressions which we quote from the will, first imposing the duty of working out the trust on the executors eo nomine, and afterwards speaking in the same breath of executors and trustees, it may well be doubted whether any of those decisions are strictly in point, and whether the effect of the will in this respect is not a matter of doubt. We do not, however, find it necessary to determine these questions. Neither do we find it necessary to determine whether the rule which admits executors or testamentary trustees into certain federal courts, and particularly certain courts located in the District of Columbia, including the Supreme Court, from whatever jurisdictions such executors or trustees may have received their appointments, enables executors or trustees qualified by a surrogate of the state of New York to intervene effectually in proceedings in bankruptcy in the district of Massachusetts. The circumstances shown by this record are so peculiar that we are not required to enter upon any such general considerations.

The petitioners, Frederick M. Tucker and Tracy H. Tucker, in the petition filed on July 7, 1904, following the order of May 3, 1904, reserving to Marion E. Tucker, or those who could "properly represent her," the right to proceed further, which petition of July 7, 1904, was denied on September 30, 1905, for the reasons given by the learned judge of the District Court already explained, occupied a peculiar position. They were not only the bankrupts, but they were the executors, or trustees, appointed by the surrogate in the state of New York. They were also the loaners and borrowers of the assets in question, and the pledgors and pledgees thereof; and, in addition thereto, they were clearly tort-feasors in equity, if not in law, in availing themselves of the assets of the estate for their own personal benefit. Therefore they were not suitable parties to represent in equity any interests whatever, except to take such action as they might deem proper to relieve themselves from jeopardy. Marion E. Tucker did not unite in that petition, and thus personally avail herself of any rights under the order of May 3, 1904; and, plainly, Frederick M. Tucker and Tracy H. Tucker, in the peculiar position which they occupied, were in no sense persons who could "properly represent her" in the terms of the same order. This is so plain that we must presume that the court proceeded on the petition filed on July 7, 1904, without its attention being called to the anomalous condition of parties in the respects we have spoken of. Of course, it cannot be said that it was the duty of the judge of any court, even of a judge standing in certain respects in the position of one administering equitable rules, and, therefore, analogous to that of a chancellor, to bear in mind that the interests of an infant are involved, which ought to be independently represented by some person in her behalf, or that it is the duty of such a judge, if the matter comes to his mind, to act of his own volition in that direction. Nevertheless there can be no question that, if the attention of the learned judge of the District Court had been called to the situation presented to us, he would have declined to act on the petition of July 7, 1904, until Marion E. Tucker was

properly and independently represented. It seems quite certain that the learned judge who entered the order of May 3, 1904, had in view the necessity of guarding this very point, because the terms of that order are clear and special in that direction. Certainly, however this may be, the proceedings on the petition of July 7, 1904, were not such as the order of May 3d contemplated; and there has been no intervention in accordance with that order by Marion E. Tucker personally, or by any one who could "properly represent her." Therefore, according to the literal terms of that order, the right reserved to her still existed in full force when the petition of May, 1906, filed as of November 27, 1905, now brought before us, was presented to the District Court.

However this may be, there can be no doubt of our right to grant the petition before us. If, notwithstanding the express reservation in the order of May 3d, the proceedings on the petition of Frederick M. Tucker and Tracy H. Tucker of July 7th were in any way effective, they are at least voidable, thus following the analogy of proceedings in equity, which analogy governs courts in bankruptcy in these particulars; so that the order entered on that petition, if not void, could have been avoided by proceedings analogous to a bill of review, or to an original bill as the case may be, filed by the infant, by her next friend or guardian ad litem, or by the guardian of the domicile. The books are full of learning on this point, so that we need only to refer in this connection to White v. Joyce, 158 U. S. 128, 146–149, 15 Sup. Ct. 788, 39 L. Ed. 921. Indeed, in the present case there was no necessity for any formalities whatever. It must be regarded as well settled that the rule relating to the powers of ordinary judicial tribunals, limiting summary proceedings to the term at which judgment is entered, does not apply to proceedings in bankruptcy. In re Worcester County, 102 Fed. 808, 811, 42 C. C. A. 637, decided by us on April 20, 1900; In re Ives, 113 Fed. 911, 913, 51 C. C. A. 541, decided by the Circuit Court of Appeals for the Sixth Circuit on February 10, 1902. Consequently the proceedings on the petition of July 7, 1904, could have been set aside summarily by the District Court on a petition therefor within such a reasonable time that the petitioner could not be, or should not be, charged with laches. We have said that no laches exists here.

Whatever might be our relations to an appeal in the proper sense of the expression, we sit on a petition for review as a court of bankruptcy. Therefore, on this petition, so far as necessary to give full effect to it, we have all the powers of the District Court. Consequently we ought to give complete relief, and therefore we ought to set aside the order of September 30, 1905, which denied the petition of July 7, 1904, vacate the proceedings in reference to that petition, and direct that it be dismissed without prejudice; and we ought further to permit Marion E. Tucker, or some person who "properly represents her," in view of her infancy, to intervene in accordance with the order of May 3, 1904, and as asked for in the petition now before us.

Let there be a decree vacating the order of September 30, 1905, and directing that the petition filed on July 7, 1904, be dismissed with-

out prejudice, and further directing that Marion E. Tucker, or some suitable person who can properly represent her, or properly represent her interests under the will of her grandfather, Luther P. Tucker, be permitted to intervene and establish her (or their) claims, if any there be, in accordance with our opinion passed down this day.

In re YOUNGSTROM.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1907.)

No. 45.

1. BANKRUPTCY—PETITION TO REVISE—TIME.

An order of a court of bankruptcy confirming an order of a referee denying a claim of certain exemptions asserted by the bankrupt's wife, not being an order made specially appealable by Bankr. Act July 1, 1898, c. 541, § 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], was reviewable on a petition to revise, presented within the six months generally limited for invoking the appellate jurisdiction of the Circuit Court of Appeals by Act Cong. March 3, 1891, c. 517, § 11, 26 Stat. 829 [U. S. Comp. St. 1901, p. 552].

2. SAME—HOMESTEAD EXEMPTIONS.

Mills' Ann. St. Colo. § 2133, provides that, to entitle any person to the benefit of a homestead exemption, he shall cause the word "homestead" to be entered in the margin of his record title to the same, which entry shall be signed and attested by the clerk and recorder of the county in which the premises are situated, and, if the property belongs to the husband, the entry may be made by the wife and vice versa. *Held*, that where the alleged homestead of a bankrupt had not been so designated on the record, when the bankruptcy petition was filed, at the time of the adjudication or the appointment and qualification of the trustee, the premises were not exempt under the state law, and could not be made exempt under Bankr. Act July 1, 1898, c. 541, §§ 6, 21, 70a, 30 Stat. 548, 552, 565 [U. S. Comp. St. 1901, pp. 3424, 3430, 3452], providing for the vesting of the bankrupt's property in the trustee and for the setting apart of exemptions.

3. SAME—EFFECT OF ADJUDICATION.

On a bankrupt's adjudication, the debtor's entire nonexempt estate is in legal contemplation brought into custodia legis and appropriated to the payment of his debts as effectually as if taken in execution or attachment, subject to the qualification, except as otherwise provided, that the property is appropriated in the same condition and subject to the same equities as when in the possession of the bankrupt.

4. SAME—VESTING OF TITLE—TIME.

On the appointment and qualification of a bankrupt's trustee, the title to the bankrupt's property is vested in him as of the date of the adjudication.

5. SAME—EXEMPTIONS—STOCK IN TRADE.

Mills' Ann. St. Colo. § 2562, exempts to a debtor who is the head of a family stock in trade not exceeding $200 in value, and section 2563 declares that, when the head of a family shall die, desert, or cease to reside with the same, the family shall be entitled to receive all the benefits and privileges conferred on the head of the family residing with the same. *Held*, that where a merchant became a bankrupt and absconded with the intention never to return and deserted his wife, who, with him, had constituted a family, she constituted what remained of the family, and was entitled to the $200 exemption from his stock in trade.

Petition for Revision of Proceedings of the District Court of the United States for the District of Colorado, in Bankruptcy.

Theodore H. Thomas (Thornton H. Thomas, on the brief), for petitioner.

Frank L. Grant (Lewis B. Johnson, Edwin A. Van Cise, Henry T. Rogers, Lucius M. Cuthbert, and Daniel B. Ellis, on the brief), for respondent.

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

VAN DEVANTER, Circuit Judge. This is an original petition for the revision in matter of law of an order of the District Court confirming an order of a referee in bankruptcy denying a claim to certain exemptions asserted by the wife of a bankrupt.

Because it was not presented within 10 days after the making of the order sought to be revised, the respondent has moved to dismiss the petition; his contention being that our jurisdiction, under section 24b, of the bankruptcy act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]), to revise in matter of law proceedings in bankruptcy can be invoked only within the ten days limited for taking appeals under section 25a. The decisions upon this and correlated questions have not been harmonious (see Act March 2, 1867, c. 176, 14 Stat. 518, 520, §§ 2, 8; Littlefield v. Delaware, etc., Co., Fed. Cas. No. 8,400; Bank v. Cooper, 20 Wall. 171, 177, 22 L. Ed. 273; In re Good, 39 C. C. A. 581, 99 Fed. 389; In re Worcester County, 42 C. C. A. 637, 641, 102 Fed. 808, 812; Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968; In re New York Economical Printing Co., 45 C. C. A. 665, 106 Fed. 839; In re Groetzinger & Sons, 62 C. C. A. 124, 127 Fed. 124; In re Friend, 67 C. C. A. 500, 502, 134 Fed. 778, 780; s. c., 197 U. S. 620, 25 Sup. Ct. 797, 49 L. Ed. 909; In re Holmes, 73 C. C. A. 491, 142 Fed. 391), but, as the order sought to be revised is not one of those made specially appealable by section 25a, and as the petition was presented within the six months generally limited for invoking the appellate jurisdiction of a Circuit Court of Appeals (Act March 3, 1891, c. 517, 26 Stat. 829, § 11 [U. S. Comp. St. 1901, p. 552]), we think the motion to dismiss must be denied (Steele v. Buel, supra; In re Holmes, supra).

One of the exemptions asserted by the petitioner and denied by the order in question was a homestead exemption in certain real property in Colorado. The material portions of the statutes of the state creating such an exemption are as follows (Mills' Ann. St. §§ 2132, 2133, 2134, 2137):

"Sec. 2132. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation entered into or incurred after the first day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

"Sec. 2133 (as amended). To entitle any person to the benefit of this act, he shall cause the word 'homestead' to be entered in the margin of his record title to the same, which marginal entry shall be signed by the owner mak-

ing such entry and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day on which said marginal entry is so made; provided, that in case the husband is the owner of said homestead, the wife may cause such entry to be made and recorded, and the signature of the said entry by the wife shall have the same effect as if entered by the husband, the owner of the property. And, in case the wife is the owner of the homestead, and shall fail to make such homestead entry, the husband may cause the homestead entry to be made, and the signature thereof by him shall have the same effect as if the entry had been made by the wife, the owner of the property.

"Sec. 2134. Such homestead shall only be exempt as provided in the first section of this act, while occupied as such by the owner thereof, or his or her family."

"Sec. 2137 (as amended). That nothing in this act shall be construed to prevent the owner and occupier of any homestead from voluntarily mortgaging or otherwise conveying the same; provided, no such mortgage or other conveyance shall be binding against the wife of any married man who may be occupying the premises with him, unless she shall freely and voluntarily, separate and apart from her husband, sign and acknowledge the same, and the officer taking the acknowledgment shall fully apprise her of her rights and the effect of signing the said mortgage or other conveyance; and provided, further, that if the owner of said homestead be the wife of any married man who may be occupying the premises with her, no such mortgage or other conveyance shall be binding against said husband, unless he shall sign and acknowledge said mortgage or other conveyance."

The bankruptcy act invests the courts of bankruptcy with authority to "determine all claims of bankrupts to their exemptions" (section 2, cl. 11); requires the bankrupt to "prepare, make oath to, and file in the court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, * * * and a claim for such exemptions as he may be entitled to" (section 7, cl. 8); directs trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment" (section 47a, cl. 11); provides that "all property of the debtor conveyed, transferred, assigned or incumbered as aforesaid"—that is, "subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them"—"shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors" (section 67e); and also provides:

"Sec. 6. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

"Sec. 21. * * * (e) A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened."

"Sec. 70. (a) The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law

with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

So far as it is now material to state them, the facts found by the referee are these: For several years the bankrupt and his family, consisting of himself and his wife, the present petitioner, had occupied the premises in controversy as a home. He was the owner and his title had been duly recorded. Shortly before the filing of the creditor's petition, upon which he was adjudged a bankrupt, he suddenly left the state with the apparent intention of never returning and of deserting his wife. She continued to occupy the premises as a home. Neither he nor his wife caused the word "homestead" to be entered in the margin of his record title until after the time of the filing of the petition in bankruptcy, after he had been adjudged a bankrupt, after the appointment and qualification of the trustee, and after the trustee had caused the premises to be inventoried and appraised and was proceeding to sell them under an order of the court; but before the day fixed for the sale the wife caused such an entry to be made and thereby effectually designated the premises as a homestead, if she could do so at that time. She thereupon presented to the referee a petition, praying that the trustee be directed to set apart the premises as an exempt homestead.

As was said by this court in the case of In re Nye, 66 C. C. A. 139, 133 Fed. 33:

"The express terms of the bankruptcy act are such that it does not affect the allowance to bankrupts of the exemptions which are prescribed by state laws, and does not invest the trustee with the title to property which is exempt. * * * The provisions authorizing bankrupt courts to determine all claims of bankrupts to their exemptions, and directing trustees to set apart the bankrupt's exemptions, * * * disclose no purpose to render the exemptions less beneficial than intended by the state laws, but are in harmony with the purpose of the act, disclosed in other provisions, to make those laws the measure of the extent and nature of the exemptions, as well as of the right to them."

The present case, however, presents the question: At what point of time must the bankrupt be entitled to a particular exemption under the state laws to have it allowed and set apart under the saving and protecting provisions of the bankruptcy act? The answer must, of course, be found in that act. Naturally, it would be expected that this point of time would not be later than the date as of which the general estate of the bankrupt is wrested from his dominion and vested in his trustee for the benefit of the creditors. And such, we think, is actually and plainly the effect of the provisions before set forth. Thus it is declared, in section 6, that the exemptions to be allowed are those prescribed by the state laws in force "at the time of the filing of the petition," and, in section 70a, that, upon his appointment and qualification, the trustee shall be vested, by operation of law, with the title of the bankrupt, "as of the date he was adjudged a bankrupt," to all property, not exempt, which "prior to the filing of the petition" he could by any means have transferred, or which

might have been levied upon and sold under judicial process against him. Other provisions strengthen this view, notably the requirement of section 7, cl. 8, that a voluntary bankrupt shall claim his exemptions at the time of filing his petition and that an involuntary bankrupt shall claim them within 10 days after the adjudication, unless further time is granted. Indeed, we think the statute admits of doubt only in respect of whether the right to any claimed exemption is to be determined as of the time of the filing of the petition or as of the time when the debtor was adjudged a bankrupt. That it is to be determined as of the earlier date is suggested by those provisions of section 6, section 7, cl. 8, and section 70a, cl. 5, which make the time of the filing of the petition of special significance, and that it is to be determined as of the later date is suggested by the provision in section 70a that the trustee shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt. But, as the facts of the present case do not require that we determine this matter, we pass it, observing, first, that the present act differs from that of 1867 in that by section 14 of the latter the trustee became vested with the title of the bankrupt as of the date of the commencement of the proceedings; and, second, that the Circuit Court of Appeals of the Seventh Circuit seems to regard the date when the debtor was adjudged a bankrupt as controlling, as is shown in Re Mayer, 47 C. C. A. 512, 521, 108 Fed. 599, 608, where it was said by Judge Woods:

"The intention of this statute is, without doubt, that the creditors shall have all of the estate of a bankrupt which is not exempt, and that the bankrupt shall have the exemptions allowed by the law of his domicile determined by relation to the date of adjudication."

Although dissenting from the judgment in that case, Judge Jenkins also said (47 C. C. A. 528, 108 Fed. 615):

"The general purpose of the bankruptcy act is that the bankrupt, surrendering his estate not exempt, should be discharged from his debts then existing, and should retain the property exempted and allowed to him by the law of the state of his domicile. The creditors are to have all of the estate not exempt, and must surrender all claims against the bankrupt if he shall receive his discharge. The title to the property thus reserved for the benefit of the creditors is vested in the trustees as of the date he was adjudged a bankrupt. That date is the 'dead line,' separating the past and the future. All that the bankrupt had on that date, except property exempt, goes to his creditors."

We conclude that a claimed exemption otherwise recognized by the state laws, but to which the bankrupt had not become entitled at the time of the filing of the petition or at the time he was adjudged a bankrupt, is not within the saving and protecting clauses of the bankruptcy act, and cannot be allowed or set apart thereunder.

Was the bankrupt or his family entitled to the homestead exemption here asserted at either of these times? The answer must be found in the state statutes before set forth and the decisions of the Supreme Court of the state interpreting them. Repeated decisions of that court are to the effect that the purpose of these statutes is to preserve the home for the family, and, to that end, to protect it from alienation by one spouse without the concurrence of the other, and also from execution or attachment arising from any debt, contract, or civil obligation;

that no one is entitled to the protection and benefits of these statutes until the premises are designated as a homestead upon the margin of the record title as prescribed in section 2132, supra; and that this designation is effective only from the time it is made, and has no retrospective operation. Drake v. Root, 2 Colo. 685; Wells v. Caywood, 3 Colo. 487; Barnett v. Knight, 7 Colo. 365, 3 Pac. 747; Jones v. Olson, 17 Colo. App. 144, 67 Pac. 349; Goodwin v. Colorado Mortgage Investment Co., 110 U. S. 1, 5, 3 Sup. Ct. 473, 28 L. Ed. 47. In the last case it was said by Mr. Justice Harlan:

"No one is entitled to the benefits of the foregoing statutory provisions unless the word 'homestead' be entered upon the margin of the recorded title of the premises occupied as a homestead. Such are the express words of the statute, and there is no room left for construction. We are not at liberty to say that the Legislature intended actual notice to creditors of the occupancy of particular premises as a homestead to be equivalent to the entry on the record of title of the word 'homestead.' The requirement that the record of the title shall show that the premises are occupied as a homestead before any person can become entitled to the benefits of the statute is absolute and unconditional."

The premises in controversy were not so designated until after the time of the filing of the petition and after the time when the owner was adjudged a bankrupt, so neither he nor his family was entitled to a homestead exemption therein at either of these times.

The Colorado courts hold that when premises, otherwise within the homestead statutes of the state, are designated as a homestead upon the margin of the record title, after a judgment for the payment of money against the owner has become a general lien upon his realty under a state law, the designation exempts such premises from the subsequent levy of an execution issued upon the judgment (Woodward v. People's National Bank, 2 Colo. App. 369, 31 Pac. 184; Weare v. Johnson, 20 Colo. 363, 38 Pac. 374); and from this it is argued that the wife's designation of the premises in controversy as a homestead was effective, because it was made before they were sold by the trustee to satisfy the claims of the creditors. We cannot accede to the contention for these reasons: In Colorado, as is generally true, a judgment for the payment of money is enforced by execution, and the cases cited hold nothing more than that under the terms of section 2132, supra, an execution cannot be levied upon a homestead which is exempt at the time. This is shown by the following extract from the opinions:

"The homestead is exempt from 'execution or attachment.' The property in question not having been subjected specifically to the judgment lien by the levy of an execution before it was withdrawn as a homestead, it was exempted from the levy of the execution."

It is not material that such a judgment is by statute made a general lien upon the realty of the debtor, for that does not wrest from him the title, or bring the property into custodia legis, or dispense with an execution as the means of subjecting it to the satisfaction of the judgment. But under the bankruptcy act, when a debtor is adjudged a bankrupt, his entire estate, in so far as it is not exempt, is in legal contemplation as effectually brought into custodia legis and appropriated to the payment of his debts as if it were taken in execution or at-

tachment, subject only to the qualification that, where the act does not specially provide otherwise, as it does in respect of cases affected by fraud, the estate is brought into custodia legis and appropriated in the same plight and condition that the bankrupt himself held it, and subject to all the equities imposed upon it in his hands (In re Pekin Plow Co., 50 C. C. A. 257, 259, 112 Fed. 308, 310; In re Rodgers, 60 C. C. A. 567, 578, 125 Fed. 169, 180; In re Granite City Bank, 70 C. C. A. 316, 137 Fed. 818; State Bank of Chicago v. Cox, 74 C. C. A. 285, 143 Fed. 91; In re Schermerhorn, 76 C. C. A. 215, 145 Fed. 341; In re Blake [C. C. A.] 150 Fed. 279; Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 46 L. Ed. 405; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; 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, 26 Sup. Ct. 481, 50 L. Ed. 782); and upon the appointment and qualification of the trustee the title is vested in him, as of the date of such adjudication, quite as effectually as if the debtor had conveyed it to him on that date. Indeed, the bankruptcy proceedings have a further effect, for as was said in respect of the act of 1867 in Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866:

"The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. If that were in his favor, they revived and were again in full force. If it were against him, they were extinguished as to him, and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became, as it were, for many purposes, civiliter mortuus. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril. They could limit neither the power of the court nor the effect of the final exercise of its jurisdiction. With the intermediate steps they had nothing to do. The time of the filing of the petition and the final result alone concerned them."

And the applicability of what was thus said to the present act was expressed in this way in Mueller v. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:

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

True, the effect of this language has been somewhat qualified by the decisions in Hewit v. Berlin Machine Works, Thompson v. Fairbanks, and York Mfg. Co. v. Cassell, supra, but the qualification does not consist in giving effect to proprietary acts of the bankrupt committed after the sequestration of his property, but only to such as were committed prior to the filing of the petition and gave rise to rights in third persons which were valid as between themselves and the bankrupt, and which they were lawfully entitled to assert when the trustee's title accrued, the ruling, as qualified, being that the trustee, in cases unaffected by fraud, takes the property in the same plight and condition that the bankrupt held it, and therefore subject to the rights of such third persons, although a creditor levying an execution or attachment thereon would take it discharged of such rights.

At the time of the filing of the petition and at the time the debtor was adjudged a bankrupt, as also at the time of the appointment and qualification of the trustee, the premises in controversy had not been designated as a homestead. In the absence of such a designation, they were not exempt under the state law. Prior to the filing of the petition the bankrupt had full power to dispose of them, and they could have been levied upon and sold under judicial process against him. They, therefore, came plainly within the terms of section 70a as property which vested in the trustee, by operation of law, upon his appointment and qualification, so the claim to a homestead exemption was rightly denied.

The order sought to be revised also confirmed the denial of a stock in trade exemption of $200 asserted by the wife under the following statutes (Mills' Ann. St. §§ 2562, 2563):

"Sec. 2562. The following property, when owned by any person being the head of a family and residing with the same, shall be exempt from levy and sale upon any execution or writ of attachment, or distress for rent, and such articles of property shall continue exempt while the family of such person are removing from one place of residence to another within this state. * * * Sixth, The tools and implements, or stock in trade, of any mechanic, miner or other person, used and kept for the purpose of carrying on his trade or business not exceeding two hundred dollars in value.

"Sec. 2563. Whenever in any case the head of a family shall die, desert or cease to reside with the same, the said family shall be entitled to and receive all the benefits and privileges which are in this chapter conferred upon the head of a family residing with the same."

The bankrupt had been a merchant and part of his estate consisted of a stock in trade used and kept for the purpose of carrying on his business, the stock exceeding $200 in value. As before stated, the referee found that shortly before the filing of the petition the bankrupt suddenly left the state with the apparent intention of never returning and of deserting his wife, who with him had constituted the family. The only reason assigned or advanced for the denial of this exemption is that one person, such as the wife here, could not be "the said family" within the meaning of section 2563. It is quite true that a person residing alone is not, generally speaking, a family, but that does not answer the question here presented. Without doubt, there was a family prior to the husband's desertion. Of that family he was the head and so was entitled, under section 2562, to an exemption of $200 in his stock in trade. We think the other section in providing that, whenever the head of a family shall die, desert, or cease to reside with the same, "the said family" shall succeed to the right of exemption, plainly means that this right shall pass to the remaining portion of the family; that is, to the family as it was before, but minus the head, whether what remains be one or several persons. In this view the wife, as the remaining portion of the family, was entitled to this exemption.

The case is remanded to the District Court, with a direction to modify its order to the extent of allowing the exemption in the stock in trade.

SOUTHERN RY. CO. v. CARR.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 682.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE OF MASTER.

Where no injury had ever occurred on account of the eaves of a house projecting slightly over a railroad track for 15 years, the eaves being of a permanent character, and not liable to become impaired by use, the railroad company was not negligent in permitting them to remain in such condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 224–227.]

2. SAME—ASSUMED RISK.

The eaves of a house had slightly projected over a railroad spur track for over 15 years, during which no injury had occurred. There was ample room on top of the cars for a brakeman, in the exercise of ordinary care, to pass along the running board and manipulate the brakes without incurring any danger from the eaves; but plaintiff, though knowing the condition of the eaves, took a position on top of a car with his back toward the house, in which situation he was struck by the eaves, knocked from the car, and injured. *Held*, that the danger was an open and visible one, which plaintiff assumed.

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

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

3. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK.

In an action for injuries to a servant, the court charged that, in determining whether an employé has exempted his employer from liability in any particular case because of alleged contributory negligence or assumed risk, the jury should consider the exigencies of his position and all the circumstances of the particular occasion. *Held*, that such instruction was objectionable for failure to explain the difference between the doctrine of contributory negligence and assumption of risk.

4. SAME—DEFECTIVE APPLIANCES—EVIDENCE.

In an action for injuries to a brakeman, proof that the brakes on a railroad car failed to work at the time plaintiff was injured was not evidence that the same were defective.

5. SAME—DUTIES OF MASTER.

The duty of a master to furnish reasonably safe appliances for servants to work with, and to use ordinary care to keep them in repair, does not make the master an insurer of the safety of the servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 172–174.]

6. SAME—BURDEN OF PROOF.

In an action for injuries to a servant by alleged defective appliances, the burden is on plaintiff to show that the master was negligent either in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 882, 900–905.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Greenville.

C. P. Sanders, for plaintiff in error.

Stanyarne Wilson and J. A. Sawyer, for defendant in error.

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

PRITCHARD, Circuit Judge. This is an action at law brought by the defendant in error, Joseph Oliver Carr, by guardian ad litem, to recover damages for personal injuries sustained by him while in the employment of the plaintiff in error on the 12th day of December, 1903, as brakeman or flagman. As brakeman and flagman, it was his duty to stand on freight cars and control and stop the same with handbrakes. At the time he was injured he was on the top of the cars which were being pushed into a spur track at Hickory, N. C., and was attempting to put on the brakes. Before he succeeded in so doing, the cars ran under the projecting eaves of a house which was erected near the spur track; the eaves striking defendant in error, knocking him to the ground, and injuring him. There was a verdict and judgment for the defendant in error, from which this writ of error was taken.

The testimony shows that the house standing near the side track had been constructed about 15 years before the injury occurred, the eaves of which projected over the track; that during all this time cars had been constantly shoved in on the side track, passing along by the house and under its eaves, with brakemen on the top of the cars; that no one had ever been injured there before or since the accident in question. The evidence also shows that the brakes immediately after the accident were in good order. It also appears that there was ample room on the car for one, by the exercise of ordinary care, to set the brakes without coming in contact with the overhanging eaves. The eaves projected over the top of the car about 18 inches. This defect, if any, was not latent, but patent, and easily observed. The person injured was familiar with the location of the house, track, and overhanging eaves, and while at work on top of the cars had passed along this track by the house quite a number of times. In passing along on this occasion he stood on the side of the car with his back toward the house. It was shown that he failed to look to ascertain whether he was in danger of coming in contact with the eaves of the house, notwithstanding he knew he was in close proximity to the house. While in this position, the car ran under the eaves, and he, being struck by the same, was knocked off and injured. It was shown that there was ample room for him to have stood on the car and set the brakes without coming in contact with the eaves.

It appears from the record that at the conclusion of the testimony in chief on behalf of the defendant in error, and again at the conclusion of all the testimony, the plaintiff in error moved the court to direct a verdict on the following grounds:

"(1) That there is not sufficient evidence of negligence shown on the part of the master.

"(2) That the injury which came to Mr. Carr came from one of the risks assumed by him when he entered the service of plaintiff in error.

"(3) That, if there is any evidence of negligence on the part of the master, the evidence clearly shows contributory negligence on the part of Mr. Carr."

The court below refused the motion to direct a verdict, but at the same time stated:

"I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

The plaintiff in error excepted to the refusal of the court to direct a verdict, and also excepted to the charge of the court because it did not distinguish between the defense of assumption of risk and that of contributory negligence.

It is a well-settled rule that the master must furnish safe appliances and a reasonably safe place in which to work. The testimony shows that, if he had remained on the running board which is laid along the center of the top of the car, he would not have been injured, or, if he had taken the precaution to have stepped to the opposite side of the running board, he would have been still further removed from the point which he occupied when injured. It is true that he claims the brake was defective, and that he could not successfully operate it on that occasion, but the uncontradicted evidence shows that the brake was in good condition just immediately after the accident occurred.

John White, who was conductor of the switch engine and crew, among other things, testified as follows:

"Q. On this occasion state whether or not a brakeman could have gone through there, if he had been looking, without being struck by those eaves? A. Yes, sir; he could have gone through there without being struck.

"Q. Did you examine the brakes afterwards? A. I got my brakes stake and went up on the cars and examined them to see if they was all right.

"Q. What did you do? A. I put them on.

"Q. Did you put them on, or were they on? A. No, sir; he had them on enough to stop the car. I tried to see if they were sprung, or anything had caught so they would not turn.

"Q. Could you turn it any more? A. Yes, sir.

"Q. What was the condition below? A. Chains were all right, and brake rods all right.

"Q. How was the shoe? A. All right.

"Q. Could a man stand between the brakes and the centerboard and put on brakes, and not come in contact with that? A. Yes, sir; he could stand on that side.

"Q. After these cars were started in there, was it time enough for a man to put on both brakes there? A. Oh, yes, sir; a long time."

E. C. Klinerd, who was at the same time employed as a brakeman, testified, among other things, as follows:

"Q. Did you know anything about the condition of those brakes on those two cars? The conductor examined them?

"(Objected to by Mr. Wilson.)

"Mr. Sanders: Q. Unless you saw him—did you see him examine them? A. He called my attention to it.

"Q. Were you there when he did it? A. Yes, sir.

"Q. What was the condition of those two brakes? A. I could not see anything wrong about them. I did not try to hold them. I don't know anything about their holding.

"Q. Explain to the jury how they are operated, and what causes them to hold? A. When you wind it, it winds up on the brake. The chain winds up the brake.

"Q. And that throws a pressure against the wheel? A. Yes, sir.

"Q. On this occasion you saw nothing out of order? A. No."

Even if the brakes had been defective, there is nothing to show that the master had knowledge of such defect, and, under the circumstances, the master having furnished safe appliances, to wit, brakes that were in good condition, if the same became defective without the knowledge of the master, he could not be held responsible therefor; it appearing that he had in the first instance furnished reasonably safe appliances and had used due diligence to keep the same in a reasonably safe condition, as the evidence shows the master did on this occasion. No injury ever having occurred on account of the projecting eaves during all the time cars had been carried by this point, and the eaves being of a permanent character and not liable to become impaired by use, as in the case of machinery, it must be presumed that the master exercised reasonable care.

Labatt, in his work on Master and Servant (volume 1, § 136), states the rule as follows:

"The true doctrine applicable in this connection seems to be rather this: That the previous safe and successful operation of the instrumentality is conclusive in the master's favor, provided that it appears that he has not been derelict in regard to his duty of active inspection at reasonably sufficient intervals, and no circumstances which would have put a prudent man on inquiry has come to his knowledge."

We have carefully considered all of the evidence offered in the court below, from which it appears, as hereinbefore stated, that the party injured had been in the employment of the plaintiff in error for a considerable length of time, and was thoroughly familiar with his surroundings, and the dangers incident thereto.

In determining whether a reasonably safe place has been furnished the servant in which to work, it is necessary to ascertain the character of the danger which is sought to be avoided. For instance, if a servant is required to work in the open, where he can readily observe the conditions surrounding him, the same degree of caution is not required of the master as in cases where a servant is required to work in a place where he is not afforded the means of comprehending as fully dangers by which he may be confronted.

Thompson on Negligence (volume 4, § 3772), in discussing this phase of the question, says:

"As in other situations, this ordinary or reasonable care, by whatever term it is designated, varies according to the danger to be avoided. For example, the care required of the master, under this rule, in respect to machinery and appliances, is much less where the service required to be performed is on the surface of the earth, in open day, and its character and appliances are simple, than when the machinery used is dangerous and complicated, or the work is performed in a place or at a time when the surrounding dangers are not so obvious."

When the spur track was constructed, the eaves of the house projected over the same, and the cars had been passing thereunder almost daily for 15 years prior to the date of the accident, and no injury had occurred prior to that time, and there was ample room on top of the car for one who exercised ordinary or reasonable care to pass along so as to manipulate the brakes without incurring danger. The injured understood these arrangements perfectly well, and, even if he had not taken particular care in observing how far the eaves extended over the

car, it was not the fault of the master. It was the duty of the defendant in error to see a thing which was plain, open and patent.

It is insisted that the court below erred in granting the following request which was offered by the defendant in error. "In determining whether an employé has exempted his employer from liability, in any particular case, because of the alleged contributory negligence or assumption of risk on the part of the employé, the jury should take into consideration the exigencies of his position and all the circumstances of the particular occasion. While regarding his own safety, he should also bear in mind his duty to his employer." Kane v. Railroad Co., 128 U. S. 95, 9 Sup. Ct. 16, 32 L. Ed. 339. It is insisted by the plaintiff in error that the Kane Case, supra, is not analogous to the case at bar, and that the doctrine announced therein does not apply to the facts in this case. In that case the facts were as follows:

"It was in evidence that at midnight, in the month of February, a train of freight cars, belonging to or being operated by the defendant, left Marysville on its line of road, for the city of Baltimore. The rear car was the caboose. The third car from the caboose was an ordinary 'house car.' The fourth one was laden with lumber. The car upon which the plaintiff was required to take position while the train was in motion was about the eighth or tenth one from the caboose. His principal duty was to 'brake' the train from that car back to the caboose. When the train, moving southward, was going into York Haven, 20 miles from Marysville, the plaintiff, while passing over it for the purpose of putting down the brakes, discovered that the third car from the caboose had one step off at the end nearest the engine, and immediately called the attention of the conductor to the fact. The conductor promised to drop that car at the coal yard or junction beyond them in the direction of Baltimore, if, upon looking at his manifest, he found it did not contain perishable freight.

"When the train stopped, about 4 or 5 o'clock in the morning at Coldfelters, some miles north of the coal yard or junction, the plaintiff went to the caboose to eat his breakfast and warm himself. It was snowing, freezing, and sleeting. One of the witnesses testified that 'it was a fearful cold night, raining, and sleeting. * * * It was almost bitter cold. The rain was freezing as it fell—a regular winter's storm.' While the plaintiff was in the caboose eating his breakfast, the train moved off. He immediately started for his post, leaving behind his coat and gloves. Upon reaching the south end of the third car from the caboose, he attempted to let himself down from it in order to reach the next car ahead of him, which was the lumber car, and pass over the latter to the one on which he usually stood while the train was in motion. At the moment he let himself down from the top of the house car, he forgot that one of its steps was missing; and, before realizing the danger of his position, and without being able then to lift himself back to the top of the car, he fell below upon the railroad track and between the wheels of the moving train, causing him to lose both legs. The plaintiff testifies that if, at the moment of letting himself down from the top of the car, he had recalled the fact that one of its steps was gone, he might have pulled himself back with his hands, or have 'slid down' on the brake rod, for he had before climbed up and down by holding that rod with one hand and putting his foot against it and pulling himself up until he touched the running board."

The foregoing statement shows that the knowledge of the defect, to wit, the missing step, was brought to the attention of the conductor who in turn assured the party injured that the car would be dropped at the next station, and, in the absence of information from the conductor to the effect that he had not removed the car, the party injured was justified in assuming that the same had been dropped, and that any car that he might attempt to climb upon would be in a reasonably

safe condition. The information he had received from the conductor, taken together with the exigencies of the occasion, were sufficient to relieve the plaintiff from the charge of contributory negligence, as the court very properly held in that case.

In the case of Kane v. Railroad Co., supra, among other things, it was said:

"But it is said that the efficient, proximate cause of the injury to the plaintiff was his use of the defective appliances at the end of the car from which he fell, when he knew, and, at the moment of letting himself down from that car should not have forgotten, as he said he did, that one of its steps was missing. It is undoubtedly the law that the employé is guilty of contributory negligence, which will defeat his right to recover for injuries sustained in the course of his employment, where such injuries substantially resulted from dangers so obvious and threatening that a reasonably prudent man, under similar circumstances, would have avoided them if in his power to do so. He will be deemed, in such case, to have assumed the risks involved in such heedless exposure of himself to danger. Hough v. R. R. Co. [100 U. S. 224, 25 L. Ed. 612], Dist. of Columbia v. McElligott [117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946], and Goodlett v. Louisville & Nash. R. R. Co. [122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230], above cited; Northern Pac. R. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755."

In submitting the instruction hereinbefore referred to, the court failed to explain to the jury that the rule in regard to contributory negligence was different from the one which pertains to assumption of risk. These two defenses being essentially different, and not depending upon the same principles of law, the granting of this instruction was calculated to confuse the minds of the jury in determining the issues submitted for their consideration. In the case at bar the injuries sustained resulted from dangers that were so open, patent, and obvious that a reasonably prudent man, situated as the injured person was on that occasion, could have avoided the same if he had exercised ordinary care and caution. Therefore the rule announced in the Kane Case, supra, and relied upon as controlling in this case, does not apply.

Even if the brake had been defective, as contended by counsel for defendant in error, it is shown by the evidence that if he had stood on the running board, or near thereto, that he could have avoided all danger; but in utter disregard of dangers that were well known to him, for some unknown reason, he took a position on the car which necessarily brought him in contact with the eaves of the house, and was thereby injured. Under the circumstances it cannot be contended that his injury was in any wise due to the negligence of the plaintiff in error.

It is insisted by defendant in error that the brakes failed to work at the time he was injured. This is not evidence that the same were defective. It is true that the master is required to furnish his employés with reasonably safe appliances with which to work, and to use ordinary care in keeping the same in repair; but the rule does not go to the extent of constituting the master an insurer. If the master negligently fails to perform his duty towards his servants in providing them with reasonably safe appliances with which to work, or fails to inspect such appliances, and injury results therefrom, then he can be held liable for injuries which may be received by his servants by reason of such failure. In an action like the one at bar, the burden

is on the plaintiff to show one or the other of these facts. He must either show by competent evidence that the master was negligent in furnishing the appliances or machinery, or that he did not exercise ordinary care in repairing and inspecting the same. These facts must affirmatively appear in order to entitle the plaintiff to recover.

"The mere fact of the accident is not enough to establish negligence. There must be additional and affirmative proof of the particular negligence which caused the accident, and it must also appear that the master had opportunity of previous knowledge." 1 Bail. Mas. & Servt. § 406.

"The presumption is that the master has done his duty by furnishing safe and suitable appliances, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the master had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the machinery; but it must go further and establish the fact that the injury happened because the master did not exercise proper care in the premises." 1 Bail. Per. Inj. Mas. & Servt. § 365.

The evidence in this case fails to show that the master was negligent in any respect. It was shown by the defendant in error that he undertook to operate the brake, but that it would not hold. Further on in his cross-examination he said, "I wound the chain up tight," which shows that the chain was not broken. Even if in attempting to set the brakes he had broken the chain, this of itself would not have constituted negligence on the part of the master. However, the uncontradicted evidence of the conductor and brakeman is to the effect that immediately after the accident the brake was found in perfect order. Under these circumstances, we do not think that there was sufficient evidence as to the negligence of the defendant company to warrant the submission of the case to the jury.

In the case of Edgens v. Mfg. Co., 69 S. C. 529, 48 S. E. 538, the court, said:

"The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence. * * * It is not sufficient for the employé to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was."

The learned judge who tried the case below was evidently impressed with the fact that there was not sufficient legal evidence to entitle the plaintiff to recover, and, in discussing this phase of the question, said:

"I am doubtful if the plaintiff has the right to recover in this case. I am inclined to think that this injury was the result of his own negligence; but I think there is a question for the jury, and I will let it go to the jury."

While there are a number of exceptions to the charge of the court, at the same time, we do not deem it necessary to consider the same, feeling, as we do, that there is not sufficient legal evidence from which the jury could infer that the injury sustained was the result of the negligence of the defendant in error.

For the reasons herein stated, the judgment of the Circuit Court is

reversed, and the case remanded to that court, with instructions to set aside the verdict, award a new trial, and to proceed thereafter in accordance with the views herein expressed.

UNITED STATES v. LARKIN.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1907.)

No. 1,595.

1. CUSTOMS DUTIES—PROCEEDING FOR FORFEITURE OF SMUGGLED GOODS—JURISDICTION.

Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found; a collector cannot, by carrying them into another district and there making the formal seizure, confer jurisdiction of the proceeding on the court in such district.

2. PLEADING—NEGATIVE PREGNANT.

Pleas which are evasive or double are bad, and a negative pregnant is not a good plea for any purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 202-205, 261-263.]

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

This is a proceeding to declare the forfeiture of certain valuable jewelry alleged to have been fraudulently smuggled into the United States, through the port of New York, on June 10, 1902, by one Cassie L. Chadwick. The information contains the usual and requisite averments touching the intentional and fraudulent importation with intent to cheat and defraud the revenue of the United States, and then avers that the property so smuggled had been seized by Charles F. Leach, collector of the Northern District of Ohio, within said district, on May 19, 1905. Adrian H. Larkin, being interested as a claimant, came in and entered his appearance for the sole purpose of denying the jurisdiction of the court below to entertain jurisdiction of any proceeding for the forfeiture of said property. To this plea a demurrer was filed which, upon argument, was overruled. A reply to the plea was then filed, and to this reply the claimant demurred. This demurrer was sustained. The government declined to amend or further plead. The court sustained the plea, and dismissed the information. From this judgment, the United States have appealed, and assigned error.

John J. Sullivan, for the United States.
A. C. Dustin, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the case). The articles against which this forfeiture proceeding was begun were illegally imported through the port of New York. Subsequently, they were found in the city of New York and in the possession of the claimant as bailee. These jewels had been pledged by the owner and importer, Mrs. Cassie L. Chadwick, to one J. W. Friend, and Friend placed them in the custody of Adrian H. Larkin, as bailee and attorney. Friend, learning that a claim had been made that same had been illegally and surreptitiously imported through the port of New York by the pledgor, visited the Secretary of the Treasury and made disclosure of his

possession of same and his rights, and, as averred by the plea, made an agreement with the Secretary that same should be kept in the city of New York, open to the inspection and examination of any official of the department. Friend, not being himself a resident of New York, placed them in the custody of the claimant, with authority to conduct any transactions with the Treasury Department growing out of the claim that same may have been fraudulently imported. At the request of the department, Mr. Leach, collector of the port of Cleveland, went to New York for the purpose of examining the jewelry and determining by inspection whether same had been illegally imported, and whether it was subject to seizure and forfeiture. He accordingly applied to Larkin to be allowed an inspection, and this was permitted. The plea then states that Leach "informed said Larkin that certain of said jewelry had not been wrongfully imported, and that he did not care to make further examination thereof, but that certain of said pieces he was in doubt about, and would like to exhibit them to a person, located in New York City, who was expert in such matters, for his opinion, and asked permission to take said jewelry away from the office of said Larkin for that purpose, he promising and agreeing to return said property to said Larkin, at his office in New York City, on the afternoon of that same day. Thereupon, said Larkin, relying upon said promise and agreement of said Leach, delivered said property into his possession and custody, receiving from said Leach a receipt therefor in writing, a true copy of which is hereto attached and marked "Exhibit A," and made a part hereof.

The receipt referred to is in these words:

"New York, March 14, 1905.

"Received of A. H. Larkin, attorney for J. W. Friend, the following pieces of jewelry, for examination and identification:

"1 Marquise (single stone) diamond ring.
"1 ruby and diamond ring.
"1 diamond ring, about three karats, off color diamond.
"1 ring set with two cabochin rubies and sixteen diamonds.
"2 earrings set with two karat diamond and small pear-shaped diamond pendants.
"1 Marquise (canary) diamond ring.
"1 ring set with diamonds in shape of shield.
"2 empty settings.
"1 ring set with diamond in shape of shield.
"1 ring set with two five-karat diamonds, twelve diamonds in shank.
"1 six-karat diamond (white) ring.
"1 seven-stone pearl ring.
"2 opal stick pins.
"1 chatelaine watch.
"1 brooch (one oval opal) surrounded by eight diamonds and small spr. rubies.
"1 card case set with jewels.

"[Signed] Chas. F. Leach, Collector of Customs."

It is then averred that said Leach, in violation of his agreement, carried same to Cleveland. That from there he returned certain pieces of the lot to Larkin, as not subject to seizure, and seized the remainder at Cleveland, as having been illegally imported, and then caused this proceeding to be instituted in the District Court for the Northern District of Ohio. To this plea the district attorney replied. So far

as this relates to the promise or agreement under which the collector received the property here involved, it is in these words:

"That after an examination of the jewelry aforementioned, the said collector informed the said Adrian H. Larkin that he was in doubt as to which specific articles of jewelry and merchandise were unlawfully imported, and that it would be necessary for him to take such articles as to which he was in doubt and further examine them as to whether or not they had been unlawfully imported; and thereupon the said Charles F. Leach received into his care certain of the said articles of jewelry and merchandise, and gave to the said Adrian H. Larkin a receipt for the same, a copy of which is set forth in the plea to the jurisdiction herein filed."

"Plaintiff further says, that it denies that the said Charles F. Leach, collector as aforesaid, promised to the said Adrian H. Larkin that he would immediately return the said articles of jewelry and merchandise which he thus received into his care, and plaintiff further denies that he took said jewelry into his care merely to submit it to an expert in New York for valuation, or that he said to said Larkin, or any other person, that such was his purpose or intention. But plaintiff says that only in the city of Cleveland, Ohio, could the said collector of customs, Charles F. Leach, ascertain which of said articles were unlawfully imported, and that, with consent of the said J. W. Friend, the said Charles F. Leach brought the said articles of jewelry and merchandise to Cleveland, and that he there made a careful investigation and ascertained that certain of the said articles of jewelry and merchandise which he had thus brought from New York were not unlawfully imported, and these articles of jewelry and merchandise he forthwith returned to the said J. H. Larkin, at New York; the remaining articles of jewelry and merchandise—that is to say, those mentioned in the information herein filed—he ascertained were unlawfully imported, and thereupon—that is to say, on the 19th day of May, 1905, in Cleveland, Ohio—he did seize the said articles of jewelry and merchandise mentioned in the said information, and did claim title in the same for the plaintiff, the said United States."

The reply is ambiguous. The averment is that he promised to return the jewelry to the claimant upon the "afternoon" of the day he received it. The reply is a denial that he promised to "immediately return the said articles." It is that form of pleading which is styled a "negative pregnant," an admission that he received same under a promise to return same and a tender of an issue as to whether his promise was to return same immediately. The averment was that he received the jewelry under a statement that he wished to submit same to an expert in the city. The reply is that he did not take it into his custody "merely to submit to an expert in New York for valuation." The question is not whether he entertained a purpose not expressed, but whether he did not promise to return same when he had carried out the purpose for which he had requested possession. The reply is evasive and does not deny the substantial averments of the plea. "The law refuseth double pleading," said Lord Hobart, in Slade v. Drake, Hob. 295, "and negative pregnants, though they be true, because they do inveigle and do not settle judgment upon one point." Stephen on Pleading (Heard's) *381, 382. We quite agree with the court below that under the circumstances of this case, these jewels were not subject to seizure in Cleveland, but should have been seized in the district of New York. The articles were found in the latter district and should have been there seized.

Section 3072, Rev. St. [U. S. Comp. St. 1901, p. 2011], is supposed to confer general authority upon every collector to make seizures of property both within and without his district, if he has ground for

believing same subject to seizure. No construction of this section has been found, save that by Judge Benedict, in the case of The Joshua Leviness, 9 Ben. 339, Fed. Cas. No. 7,549, where that learned judge expressed the view that the authority to make seizure without the district is of merchandise found upon a vessel seized under section 3059, Rev. St. [U. S. Comp. St. 1901, p. 2006]. We need express no opinion upon this subject. But there is no authority which authorizes a collector who finds smuggled property in one district to carry it into another for the purpose of changing the situs of seizure and adjudication. Section 3086, Rev. St. [U. S. Comp. St. 1901, p. 2015], provides that when an article is seized it shall be placed "in the custody of the collector or other principal officer of the customs of the district in which the seizure shall be made, to abide adjudication by the proper tribunal. * * *"

The dictrict of seizure is the district in which the suspected article, if merchandise on land, is found. The proper district for an adjudication of forfeiture is the district in which the seizure was made. The Abby, 1 Mason, 360, Fed. Cas. No. 14; Four Packages v. United States, 97 U. S. 404, 24 L. Ed. 1031. These articles were found in the Southern District of New York. If, as now claimed, the collector for the Northern District of Ohio had authority to seize them wherever found, he should have seized them where in fact he found them, and then placed them in the custody of the collector of the port of New York, to hold until adjudication. But he neither seized the jewels, unless his breach of trust in not returning them as he promised to do, be regarded as an official seizure, nor returned them to the possession of the claimant, but carried them to his own district and there went through the form of a seizure. That he took them to his own district in order to determine whether they were subject to seizure, cannot affect the question of jurisdiction. They had been found in New York, and should have been seized there. The fact that evidence important to identify them was in Cleveland, and that it was necessary to carry the jewels to that point for identification, should not, under the circumstances of this case, affect the jurisdiction of seizure and adjudication. When Leach received these jewels, he did so as a collector. So ran his receipt. If he carried them out of the district where they were found for the purpose of identification, he did so in breach of his agreement and should not be suffered to say now that he "found" them in Cleveland and there seized them.

Judgment affirmed.

VICKSBURG WATERWORKS CO. v. MAYOR, ETC., OF CITY OF VICKSBURG.

(Circuit Court of Appeals, Fifth Circuit. April 25, 1907.)

No. 1,641.

APPEAL—FINAL ORDER.

Complainant, having obtained an injunction against the maintenance of certain suits in a state court affecting its water rights and right to cut off service in order to coerce payment of back debts, filed a bill, the object of which was to have defendants made parties to the original bills,

and to obtain against them a perpetual injunction restraining further prosecution of certain suits which defendants had brought in a state court for the same purpose. *Held*, that a order modifying a temporary restraining order against defendants, so as to permit them to prosecute their suits in the state court with reference to questions not determined in the prior proceedings, but not determining the cause on the merits nor ordering that the bill or motion be dismissed, was not a final order from which an appeal could be taken.

[Ed. Note.—Finality of judgments and decrees for purposes of review, see note to Brush Electric Co. v. Electric Imp. Co. of San Jose, 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co. et al., 28 C. C. A. 482.]

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

In certain suits, No. 41, and ancillary proceedings thereto, No. 79, of the docket of the Circuit Court, entitled Vicksburg Waterworks Company v. Mayor and Aldermen of the City of Vicksburg, theretofore brought and decided, the last branch of the same being now pending in the Supreme Court of the United States, the Vicksburg Waterworks Company, complainant, filed a so-called motion making new and additional parties defendant, praying for a perpetual injunction and for a rule upon such defendants to show cause why they should not be attached for contempt for the violation of the decrees of the court theretofore rendered and of the injunctions granted in such cases, and for reasons gave a full statement of the previous litigation and the decrees rendered therein. The decree in No. 79 was particularly set forth as follows:

"This cause coming on to be finally heard at this the January term, 1906, of this court, upon the original bill of complaint and the answer of the defendant thereto, and all of the exhibits which are made such, to said original bill of complaint and said answer, and all of the other pleas and proceedings in this cause, together with a certified copy of the charter of the said Vicksburg Waterworks Company, which is filed in the records as evidence in this cause, also the petition of defendant for a modification of the temporary injunction granted in this cause, so that the complainant shall not be authorized to cut off water from its patrons who refuse to pay the rates of complainant, claiming the right to have the injunction modified by virtue of the ordinances of the defendant, fixing water rates; and the motion of complainant to have said injunction granted heretofore made perpetual, and the court having heard the argument of counsel, and being fully advised in the premises, and being satisfied that the complainant is entitled to the relief prayed for in its bill of complaint and for full relief, it is thereupon finally ordered, adjudged and decreed:

"First. That the defendant, the mayor and aldermen of the city of Vicksburg, be and is hereby denied the relief prayed for in its petition, to wit: That the injunction be modified so that the mayor and aldermen of the city of Vicksburg shall not be restrained from enforcing the ordinances passed by them fixing the water rates and prescribing rules and regulations of the Vicksburg Waterworks Company, and that the Vicksburg Waterworks Company shall not be permitted to cut off patrons' water, provided patrons pay the rates fixed in said ordinances.

"Second. That said defendant be and is hereby enjoined from enforcing the said three ordinances described in said bill, to wit: An ordinance entitled 'An ordinance to fix and prescribe maximum rates and charges for water supplied to the inhabitants of the city of Vicksburg whether measured by meters, and for other purposes,' approved the 20th day of April, 1904; an ordinance entitled 'An ordinance to fix and prescribe maximum flat rates and charges for the supply of water to consumers in the city of Vicksburg and for other purposes,' approved the 20th day of April, 1904; and an ordinance entitled 'An ordinance to require waterworks, gas and electric light companies to present bills before charging damages for a failure to pay them when due,' approved the 8th day of December, 1903, so far as the latter relates to complainant.

"Third. That the restraining order heretofore granted in this cause on the 11th day of January, 1905, be, and the same is hereby, made perpetual.

"Fourth. That said defendant be, and is hereby, enjoined from in any manner interfering with complainant's contract rights under its said contract with the city of Vicksburg entered into between Samuel R. Bullock & Co. and said city under the ordinances of November 19, 1886.

"Fifth. That the defendant be, and is hereby, enjoined from interfering with the rules and regulations of complainant, the Vicksburg Waterworks Company, and the water rates for the inhabitants of the city of Vicksburg now in force, established by the Vicksburg Waterworks Company.

"Sixth. That said defendant be, and is hereby, enjoined from interfering with the water rater known as 'flat rates,' now in force established by the Vicksburg Waterworks Company.

"It is further ordered, adjudged, and decreed that the defendant pay all costs of this cause.

"Finally ordered, adjudged, and decreed this the 3d day of January, A. D. 1906.

"H. C. Niles, Judge."

Among other things, it was averred:

"Your orator would show that notwithstanding the decree and injunctions of this honorable court, as hereinabove set forth, and notwithstanding that the Supreme Court of the state of Mississippi has decreed that suits of the character of the suits filed by defendants can not be brought in the state courts, and notwithstanding defendants full knowledge of all the proceedings hereinabove set forth, the said defendants, either as complainants, or as attorneys for complainants, as will be hereinafter more particularly stated, have willfully and maliciously filed suits in the chancery court of Warren county, Miss., based on alleged invalidity, illegality, and unreasonableness of various of your petitioner's rates, rules, and regulations and have obtained temporary injunctions, some prohibitory, and some mandatory, restraining your orator from enforcing its rates, rules, and regulations, and especially the cutting off of the water from defendants' premises for nonpayment of back bills, commanding defendant to turn on the water again where it has been cut off because of the nonpayment of past due bills of defendants, thereby willfully, maliciously, and unlawfully committing acts in violation of said decrees and injunctions of this honorable court."

The complaint then proceeds with argumentative averments showing the right of the complainants to enforce its rules and regulations, and how the defendants were in contempt, and the said motion concludes with the following prayer:

"Wherefore, your orator prays that your honorable court grant an order requiring defendants J. C. Bryson, J. B. Dabney, Harris Dickson, A. O. Hardenstein, Mrs. Thos. H. Dickson, T. M. Searles, G. W. Crock, Lizzie Sanguinetti, Annie Sanguinetti, Mary Sanguinetti, Delia Lanceskes, and Lena Youngblood to show cause why they should not be attached for contempt of this court in violating said decrees and injunctions in said suit No. 41, and said suit No. 79, ancillary thereto, and upon the petition of your orator to grant said alias and pluries writs of injunction which were issued on the 2d day of April, 1906, upon petition of your orator, by filing their bills of complaint containing the said contemptuous averments in the chancery court of Warren county, Miss., as aforesaid; and that they and each of them, their agents, servants, and attorneys, be restrained by order of this court from proceeding further in the prosecution of said suits in the chancery court of Warren county, Miss., until this motion for contempts shall have been heard and a final order made herein; and that, upon said final hearing hereof, they and each of them, their agents, servants, and attorneys, may be perpetually restrained from further prosecution of said suits or any of them; and that your orator may be awarded its said damages in the sum of $675 to be paid by said defendants, and such other and further damages as your orator may suffer hereafter in the premises; and that the costs of this proceeding be required to be paid by defendants. And for such other and further relief as the facts may demand, and as in duty bound your orator will ever pray," etc.

Upon this motion, the judge made the following order:

"To the Clerk of the Circuit Court of the United States for the Southern District of Mississippi:

"You will issue a restraining order commanding the said defendants in the foregoing motion to refrain from doing any further act in further prosecution of the said suits in the chancery court of Warren county, Miss., which are named in said motion, until the further order of this court. And you will also issue an order commanding said defendants to appear before this court on the first Monday in November, 1906, unless another time and place shall be fixed upon application of said defendants, by order of this court, and show cause, if any, as prayed for in said motion, why they should not be attached for contempt for violating the decrees and injunctions heretofore rendered and issued in said suits in this court entitled 'Vicksburg Waterworks Company v. Mayor and Aldermen of the City of Vicksburg,' No. 41, equity, and said suit known as No. 79 of the same title, ancillary to said No. 41, as set out in said motion.

"Sept. 1st, 1906. H. C. Niles, Judge."

The several respondents filed an answer to the motion, and also a demurrer to the same. The answer is lengthy, and puts at issue many facts alleged in the motion.

The demurrer gave as grounds: First. That it does not appear from the said complaint that the said respondents or any of them were parties to either suit No. 41 or No. 79, equity, the decrees whereof are alleged to have been violated by said parties respondent; second, that the said complaint is otherwise insufficient in law to charge defendants with contempt or any other misdemeanor.

On a day fixed, the matter came on to be heard, and the following decrees were rendered:

"Vicksburg Waterworks Co. v. Mayor and Aldermen of the City of Vicksburg. Nos. 41 and 79, Eq.

"Decree in Contempt Proceedings.

"This day this cause coming on to be heard on petition of complainant and exhibits, and the answer of defendants and exhibits, upon motion to dissolve the restraining order heretofore granted herein, and the court having heard the argument of counsel for the respective parties, and having considered the matter, it is thereupon ordered, adjudged, and decreed that said restraining order be and the same is hereby modified in the following particulars, to wit: The defendants herein shall be permitted to prosecute said suits heretofore filed by them against complainants in the chancery court of Warren county, Miss., in so far as they, and upon the allegations in the several bills contained which, do not contravene and are not in conflict with any of the rates, rules, and regulations of complainant the Vicksburg Waterworks Company, which are made Exhibit A, to its petition herein and heretofore adjudicated by this court to be reasonable. But any other questions contained in said suits, this court does not restrain said defendant from trying in the chancery court of Warren county, or in any other county, or in any other court or county. And the court is further of the opinion that in cases where there is a claim for arrears due on a water bill from the consumer to the waterworks company, and the consumer tenders payment for future services under the rules and regulations of the complainant waterworks company, that the said waterworks company has no legal right to cut off the water of said consumer solely for the purpose of coercing payment for prior service; but the said waterworks company must proceed to collect the past due indebtedness as other debts collected under the law.

"It is therefore ordered, adjudged, and decreed that the said restraining order be modified in accordance with these views, and to that extent dissolved and vacated, and that complainants pay the costs of this proceeding.

"Ordered, adjudged and decreed this the 14th day of November, 1906.

"H. C. Niles, Judge."

"Vicksburg Waterworks Co. v. Mayor and Aldermen of the City of Vicksburg. Nos. 41 and 79. Equity.

"The above-styled matter coming on to be heard on the motion of the complainant, the Vicksburg Waterworks Company, to have the defendants J. C. Bryson, J. B. Dabney, Harris Dickson et al. cited to show cause why they should not be punished as and for a contempt, and upon the demurrer of the said defendants to the said motion, and the court, having heard and considered the said motion on the said demurrer, is of the opinion that the said demurrer is well taken, and that the said motion should be dismissed in so far as it charges contempt against the said parties.

"It is therefore ordered, adjudged, and decreed that the said demurrer be sustained, and that said defendants named in said petition be, and they are hereby, purged of contempt by reason of the matters and things set forth and charged in said motion, and that complainant pay the cost of this proceeding.

"Ordered, adjudged, and decreed this the 14th day of November, 1906.

"H. C. Niles, Judge."

From these two decrees the Vicksburg Waterworks Company sued out this appeal, assigning many errors in the same.

Robert L. McLaurin, Amos A. Armistead, and E. L. Brien, for appellant.

J. C. Bryson and Harris Dickson, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, the opinion of the court was delivered by PARDEE, Circuit Judge.

The appellees move to dismiss this appeal, because neither of the decrees above mentioned is final. At the bar the appellant abandoned the appeal so far as the contempt proceedings are concerned, but insists on the errors assigned as to the first-mentioned decree. Leaving out of consideration the charge of contempt for violation of former decrees, and treating the so-called motion as a bill in equity, the object was to have the respondents made parties defendant in the bills already decreed upon, and to obtain against them a perpetual injunction restraining them from further prosecution of certain suits pending in the chancery court of Warren county, Miss. In the way of passing upon complainant's right to such relief, the Circuit Court issued a temporary restraining order, and thereafter, on a hearing, modified the restraining order. Beyond this modified restraining order, the court has not decided as to the relief the complainant is entitled to, unless it be in the opinion and ruling found in the modifying order, to wit:

"And the court is further of the opinion that in cases where there is a claim for arrears due on a water bill from the consumer to the waterworks company, and the consumer tenders payment for future service under the rules and regulations of complainant waterworks company, the said waterworks company has no legal right to cut off the water of said consumer solely for the purpose of coercing payment for prior service; but the said waterworks company must proceed to collect the past due indebtedness as other debts collected under the law."

It is contended that as the rules and regulations of the complainant, as approved by final decree in the ancillary proceeding No. 79, allowed the cutting off of water from a consumer to coerce payment for prior services, and as the court has, in modifying the restraining

order, expressly held to the contrary, the court has finally passed on the merits of the original motion, and the decree is final. To support this contention, the counsel cite French v. Shoemaker, 12 Wall. (U. S.) 86, 20 L. Ed. 270, as follows:

"Objection is made that the decree is not final, because it does not in terms dismiss the cross-bill; but the court is of the opinion that the statement contained in the decree that the equity of the case is with the complainant by necessary implication disposes of the cross-bill as effectually as it does of the answer filed by the appellant to the original bill of complaint. Leave, it is true, is given to either party to apply at the foot of the decree for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it: but it is quite apparent that the reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree. Such was doubtless the view of the Chief Justice who passed the decree, as the application for the appeal was made to him at the same term, and was immediately granted without objection."

Again:

"Unquestionably, the whole law of the case before the court was settled by the Chief Justice in that decree, and as nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings." Forgay v. Conrad, 6 How. (U. S.) 202, 12 L. Ed. 404; Thomson v. Dean, 7 Wall. (U. S.) 342, 19 L. Ed. 94; Beebe v. Russell, 19 How. (U. S.) 283, 15 L. Ed. 668, supra. Also, section 503, Foster's Fed. Pr.; Am. & Eng. Enc. Pl. & Pr. vol. 2, pp. 66, 72, to like purport.

And counsel say:

"No clearer distinction between an interlocutory or administrative order, and a final decree, can be found, than that given in the above authorities. An examination of the final decree in this cause, on page 666 of the record, shows clearly that the court so understood it to be a final decree, and this is a fact to be considered, for it fixed the rights of the parties as set up in the pleading, and taxed the cost against complainants [appellants here]. As far as the pleadings in this cause went, there was nothing else for the court to decide. The matter was at an end. There was no other report to court to be had, no other facts to hear. The rights of the parties were fully heard and finally adjudicated by this decree, and the complainant was taxed with the cost, as above stated, showing that the court understood that this decree was final on the pleadings presented in this cause."

To all this, we say that the authorities cited, though unquestionably stating correct rules, are not controlling on the facts shown in this record. No matter what the judge may have thought he was deciding, and although he gave a judgment for costs, he did not, in the decree in question, grant or dismiss the motion bringing the defendants into court, and he has left for future decision the main question presented on the motion, i. e., whether the respondents shall be in any wise perpetually restrained from further prosecution of the suits in the chancery court of Warren county, Miss., and pending the decision of that question they are temporarily restrained from such prosecution; true, not to the extent desired by the complainant, because the judge in modifying the original restraining order gave a construction temporary, not final, of certain rules of the company relating to the cutting off of water from nonpaying consumers.

It frequently occurs that all the law of a case is settled by the rul-

ing on demurrer; but, unless the ruling is followed by a dismissal of the bill, there is no final decree. Here, the court's ruling goes only to a part of the case, and the bill or motion is not dismissed. The case presented is anomalous, if not unique, involving interesting questions of practice; but as yet no final decree has been rendered, and without a final decree our jurisdiction to review does not attach.

Appeal dismissed.

ATLANTA, K. & N. RY. CO. v. SOUTHERN RY. CO.

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

No. 1,588.

1. RAILROADS—RIGHT OF WAY—ABANDONMENT —NATURE AND ELEMENTS—INTENT.

A railroad company, which wrongfully obtained and held possession of a right of way for a spur track to reach certain industries which rightfully belonged to another company, is not entitled to retain such possession as against the rightful owner, on the ground of abandonment because of the construction by the latter of a spur track over another route, where it appeared that such construction was necessitated by its inability to obtain possession of the right of way in dispute, and was temporary only, and without any intention to abandon its rights which were in litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 213–219.

Abandonment or forfeiture of right of way, see note to Townsend v. Michigan Cent. R. Co., 42 C. C. A. 576.]

2. REMOVAL OF CAUSES—JURISDICTIONAL AVERMENTS IN PETITION—FAILURE TO DENY.

Averments of fact in a petition for removal, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will sustain the jurisdiction of the Circuit Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 166, 189, 195.]

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

This is a second appeal; the first being from an interlocutory injunction awarded under the cross-bill upon pleadings, affidavits, and counter affidavits. For a full statement of the issues and our conclusions supporting the jurisdiction of the Circuit Court and the injunction awarded the Southern Railway, we refer to the opinion. 131 Fed. 657, 66 C. C. A. 601. Upon a final hearing below, upon the bill of the Atlanta, Knoxville & Northern Railway Company, and the cross-bill of the Southern Railway Company, and all of the evidence, the disputed right of way was held to belong to the Southern Railway Company. The bill of the Atlanta, Knoxville & Northern Railway Company was dismissed, and the interlocutory injunction granted the Southern Railway Company under its cross-bill was made final. The Atlanta, Knoxville & Northern Railway Company was required to surrender possession and to desist from all interference with the Southern Railway Company's possession. From this decree the Atlanta, Knoxville & Northern Railway Company has appealed.

J. W. Caldwell, for appellant.

Leon Jourolmon, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

This is a litigation between two competing railway companies over the question of priority to a right of way desired by each for the purpose of constructing a spur, whereby certain manufacturing plants on the bank of the Tennessee river, at Knoxville, Tenn., might be served. The steps taken by each to obtain that part of the only direct route are fully stated in the opinion of this court, reported 131 Fed. 666, 66 C. C. A. 601. The former hearing was upon the pleadings and exhibits and a volume of affidavits and counter affidavits We then held that the Southern Railway Company had obtained the prior right over the land of S. B. Luttrell through priority of contract with the owner, and this conclusion was again reached by the court below upon full evidence. The essential facts of the controversy, as presented by this transcript, are so materially identical with those found in the former as not to demand any further restatement of the case or reconsideration of the conclusions we then reached. The first, second, third, and fourth assignments of error, which alone challenge the conclusion of fact as to the priority of right of the Southern Railway Company, are therefore overruled.

The remaining assignments involve questions not necessarily precluded by the fact of the priority of right found in favor of the appellee company. The first of the questions covered by the assignments of error referred to is that the court erred in requiring the Atlanta, Knoxville & Northern Railway Company to deliver possession of the disputed right of way and desist from interfering with the use and occupation of same by that company. The ground upon which error is predicated is that pending this suit, and while the Southern was excluded from the occupation of the right of way in dispute, it had abandoned this route and constructed its spur upon another and different route, and by this alternate route had reached and was serving the manufacturing plants which it originally purposed to reach by the disputed line. Intervening between the main line of the railway of each of the antagonistic companies, and the lands occupied by the industries negotiating with both for the construction of a spur for their private use, lay a body of land abutting on the Tennessee river owned by Mr. S. B. Luttrell. The industries desiring the spur proposed to furnish the company with which it should first agree a right of way across this Luttrell land. The only direct or feasible way was at the foot of a bluff on this land and along the bank of the river. The industries came first to an agreement with the Southern, and procured from Luttrell a deed to this coveted right of way, a way apparently too narrow to be used by both companies. After the Southern had come to an agreement, and after Luttrell had executed a deed to the Southern of the right of way, and while it was in the hands of a representative of the industries, but unregistered, the Atlanta, Knoxville & Northern Railway Company commenced a condemnation proceeding against Luttrell. Upon the strength of this fact and of a preliminary survey, it put a force of men at work upon this Luttrell right of way. Upon the same day, and perhaps, or almost, simultaneously with the action of the Atlanta, Knoxville & Northern Railway Company,

the Southern likewise took possession of part of the same route. At this juncture the present bill was filed in a state chancery court, and an ex parte injunction was allowed excluding the Southern from the disputed route and from interfering with the occupation of the Luttrell right of way by the Atlanta, Knoxville & Northern Railway Company. At a later hour of the same day, a like bill was filed in same court by the Southern Railway Company, and an ex parte injunction obtained stopping the activities of the Atlanta, Knoxville & Northern Railway Company. Some days later the chancellor denied a motion to dissolve the injunction restraining the Southern, but did dissolve the injunction restraining the Atlanta, Knoxville & Northern Railway Company. This action left the Atlanta, Knoxville & Northern Railway Company in possession, and it has since remained in possession, and has constructed a spur track over part of the disputed route under the protection of the interlocutory injunction. The case in which this injunction was allowed was later removed to the Circuit Court of the United States, and at a still later day the injunction dissolved, and an interlocutory injunction awarded the Southern. The decree awarding this was the subject of the first appeal already referred to.

The agreement between the Southern Railway Company and the industries, under which at an expense of several thousand dollars the latter had procured Luttrell to convey to the Southern Railway Company the right of way across his premises, obligated the former to at once construct and operate the proposed switch. When it found itself excluded from this route, it entered into a supplemental agreement, whereby the industries agreed that the railway company might substitute an alternate line. This supplemental agreement recites that it is necessitated by the pending litigation with the Atlanta, Knoxville & Northern Railway Company. The original agreement bore date of June 30, 1903, and this supplemental agreement was made September 1, 1903, and pending this suit. Pursuant to this later arrangement, the Southern Railway Company constructed a spur to certain marble quarries; the spur being about four miles in length. This spur paralleled the route originally projected as far as the location of the contracting industries, but was about 1,000 feet south of that line. From this quarry spur a lateral spur was constructed to reach the industries lying north and on the river. This spur is shown to have been quite inexpedient, as it crossed several traveled streets and roads, and was built in a public street for several hundred feet. The grade was bad, and the spur very expensive to operate, and not so convenient to some of the industries. To obtain the assent of one of the largest of the contracting industries, the appellee agreed to bear certain hauling expenses incident to the substitution of this alternate way "until such time as the Southern may secure control of its original line or arrange to make delivery of logs at the point contemplated in the original contract."

That this "alternate" line, so far as the spur from the quarry line is concerned, was only a temporary expedient resorted to as a consequence of its wrongful exclusion by appellant from the right of way to which it had a deed, is most evident from all the circumstances in the case, including the very significant clause from the supplemental agreement

above quoted. It would be a most remarkable result if an expedient to which the conduct of the appellant has driven the appellee should upon mere evidence of the fact, and without any supplemental bill, be held sufficient evidence of an abandonment of the very right of way in litigation and a sufficient reason for denying the relief which the cross-bill plaintiff is otherwise plainly entitled to. The appellant itself is responsible for the nonuser of this right of way up to this time, and has protected its own wrongful possession by the processes of the court erroneously granted. The mere fact that the appellee has constructed a spur into these industries over a longer and more expensive route does not, under the circumstances, amount to serious evidence of an intent to abandon the more direct way from which it has been excluded. Abandonment of a property right is always a question of intention. As to the character of evidence necessary to support a decree based upon abandonment, see the views of this court as expressed by Judge Day, now Justice Day, in Townsend v. Mich. Central R. R. Co., 101 Fed. 757, 761, 42 C. C. A. 570.

The suggestion is advanced that, to dispossess appellant, will give to appellee the only two routes by which these industries can be reached. There is nothing in this. It may often happen that there is but one feasible approach for a private track to serve a particular interest. Nor does it appear that the Atlanta, Knoxville & Northern may not parallel appellee's quarry line and run a spur from such line into these industries, as it forced appellee to do. Whether the Atlanta, Knoxville & Northern Railway Company may, under Acts Tenn. 1899, p. 920, c. 399, condemn the right to jointly use so much of any track the Southern may construct at the foot of Luttrell bluff, as a line through a gap, gorge, or along a cliff, where no other way is practical, is a question which certainly cannot arise now and upon these pleadings. The Atlanta, Knoxville & Northern Railway Company is wrongfully in possession of a right of way to which the Southern has the prior right, under its contracts with the industries and the conveyance from Luttrell. Being wrongfully in occupation of a right of way owned by the Southern, it must surrender that right of way to its rightful owners. Both of the defenses last considered are based upon matter which has arisen pending the litigation, and no supplemental pleading has been filed upon which issues thus arising might be litigated. Bates Eq. Pl. § 638; Foster Eq. Pr. § 187. As the objection was not made below, nor relied upon here, we have decided the questions upon the merits. Kelsey v. Hobby, 16 Pet. 269, 277, 10 L. Ed. 961; Coburn v. Cedar Valley Land Co., 138 U. S. 196, 222, 11 Sup. Ct. 258, 34 L. Ed. 876.

One other question remains, and that pertains to the jurisdiction of the Circuit Court. It is said now that this case was wrongfully removed from the state court because the Knoxville & Augusta Railroad Company was joined with the Southern Railway Company as a defendant. The Atlanta, Knoxville & Northern Railway Company was a corporation of the state of Georgia; the Southern, a corporation of the state of Virginia. It is now said that the Knoxville & Augusta was a corporation of the state of Tennessee, and that it did not and could not join with the Southern in the petition to remove. This question has never before been mooted, and nothing was said upon this subject in

our former opinion, when the question of jurisdiction was threshed out upon wholly different matters. The reason why this ground for objecting to the jurisdiction was not earlier made seems to be found in the fact that the Knoxville & Augusta Railroad Company is a defunct corporation, whose railroad was long since sold to the Southern Railway Company, and has since been operated by the latter corporation. This fact was stated in the petition for removal, and the existence of any such corporation as the Knoxville & Augusta Railroad Company denied. That petition further averred that the complainant had named the extinct company as a defendant "improvidently and improperly and for the purpose of attempting to prevent and interfere with your petitioner's right of removal," etc., "and of fraudulently interfering with the legal jurisdiction of said United States courts over this proceeding." No issue was ever made upon this averment, and the motion to remand was upon other grounds. Averments of fact in a petition to remove, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will entitle the Circuit Court to maintain its jurisdiction. Dishon v. C., N. O. & R. Co., 133 Fed. 471, 474, 66 C. C. A. 345.

The objection now made is untenable.

The decree will be in all things affirmed.

BONSALL v. PLATT.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 203.

CORPORATIONS—CONTRACT FOR SERVICES—FORMATION OF CORPORATION—EFFECT.

Defendant employed plaintiff to assist him in building up a business, under a parol contract that plaintiff was to draw his necessary expenses, and that the balance of his compensation should be determined at a future time, when plaintiff had proved his worth in the business, and that plaintiff should consider that he was "in with" defendant in the business, and that it was half his own. After the business commenced to succeed, defendant formed a corporation, in order to better conduct the same, and became the owner of all the stock; plaintiff being elected president, treasurer, and one of the directors, which office he continued to hold until he resigned, in 1903. No action was ever taken by the corporation with reference to the payment of salaries, and no salary was ever fixed during plaintiff's employment. *Held*, that plaintiff's services, rendered after the organization of the corporation, were rendered under the original contract, and that the organization of the corporation did not relieve defendant from liability therefor.

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

F. W. Russell, Louis Lowenstein, and Wentworth, Lowenstein & Stern, for plaintiff in error.

R. B. Honeyman and A. Parker Smith, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The only error claimed herein is in the denial by the trial court of defendant's motion to dismiss the complaint, on the ground that plaintiff had failed to make out a case against the defendant Bonsall, because the services for which a recovery was claimed were rendered, not to him, but to the defendant corporation, the Innovation Trunk Company. The action was brought against both defendants, but at the close of the trial the court held that there was no joint contract on the part of defendants, and required plaintiff to elect as to which of the defendants he would claim was liable for the services rendered. The plaintiff elected to hold the defendant Bonsall. The complaint was amended accordingly, and was dismissed as against the Innovation Trunk Company. No question is raised as to the value of the services rendered, and both defendants are solvent.

The evidence for the plaintiff material to the question raised by defendant is as follows: Defendant, claiming to be the inventor of a new trunk, had been acquainted with the plaintiff for some 12 years, and in June, 1889, the following conversation took place between the parties:

"He [Bonsall] told me he wanted me to come with him and help him build up the business; that he would make it an object for me to do so; that he would properly compensate me, if the business was a success. I told him that I would accept his offer. We did not have any conversation about my expenses until I came with him at his office, and then we talked about the matter, and he said, that the business was small at the time, and that he did not want to add any more expense than he could help; but he told me to draw what I considered necessary to use for my expenses. I had no other conversation with him on that subject at that time, further than he stated that I would get my compensation at a future time after I had proved my worth in the business. He told me that I could consider that I was really in with him in the business, and that I could consider it half my own."

Plaintiff took charge of the business, and supervised and managed it and made it successful. On March 5, 1900, defendant caused the defendant corporation to be organized, and became the owner of all the stock. Plaintiff was elected president, treasurer, and one of the directors, and continued to be president until November 17, 1903. No action was ever taken by the corporation with reference to the payment of salaries, and the plaintiff and defendant never had any other material conversation in regard to compensation, except on one occasion, when they were returning together from California, in March, 1903. The plaintiff then suggested that he would be better pleased if he knew exactly what his compensation was to be. Thereupon, according to plaintiff's testimony, the following conversation took place:

" 'Now I [Bonsall] am trusting you, and I expect you to trust me, and when I decide it is time to divide this "rake off," ' as he called it, 'in the business, I will do so, but you can rest assured you will be properly taken care of.' * * * I told Mr. Bonsall I had drawn for the past year about $2,500, and he said he didn't give a damn if it was twice that. He expected me to live well and dress well. I was president of the company, and I was to hold my end up, and go around and see people, and he also said I had worked hard enough to enjoy a little let up, and he intended I should get it, and he then stated I was to go to Europe, if he could arrange it. * * * I told him: 'This arrangement is not very satisfactory to me. In case of your death I am left out in the cold.' And he said he had arranged his will so that was all taken care of."

In November, 1903, as a result of a quarrel between the parties having no connection with this business, the plaintiff resigned. He received no fixed salary, as such, during the time of his employment; but, after the incorporation of the company, he drew some $10,000 or $12,000, which he charged himself with, as salary or expenses. No claim is made for services prior to the incorporation of the defendant company.

Counsel for defendant, in support of his argument, has elaborately discussed various well-settled propositions of law, claiming thereunder that, as the plaintiff was employed by the corporation, as such he could not have been employed by defendant as an individual, or as the owner of the whole stock; that such a contract by defendant would be void as contrary to public policy; and that the plaintiff, as president of the corporation, and having brought suit against it, was estopped from questioning its separate entity.

Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, chiefly relied upon by counsel for defendant, is not in point. There, the defendant corporation had been in existence for several years when the plaintiff made his contract with Pulitzer, who was practically the sole owner of the property of the corporation. The court found as a fact that when the contract was made the plaintiff supposed he was dealing with one who had authority to act for the corporation, and that both "parties who signed the contract unquestionably intended that the corporation should be bound." The court further found that Pulitzer had authority to make said contract on behalf of the corporation, and that the plaintiff knew this fact. In these circumstances, the court affirmed the decree of the court below enjoining the corporation, which had accepted plaintiff's services, from terminating the contract made with him by Pulitzer on behalf of the corporation.

The argument of defendant proceeds upon the doctrine that, where a corporation has accepted services rendered to it under a contract, it cannot escape liability by a claim that the contract was made without its authority. But we are not called upon to determine whether, if plaintiff had elected to hold the corporation, he might have availed himself of this doctrine upon the theory of ratification and estoppel. Here, the plaintiff stands upon his original contract with defendant Bonsall, which, so far as appears, has never been modified in any way by either party; and, in the disposition of this case, it is unnecessary to consider any of the other questions raised, because, upon the assumed facts, as stated above, they can have no bearing upon the question of fact, which the court properly left to the jury. This question was whether the plaintiff was rendering the services under the original agreement made with the defendant Bonsall, or under a new and independent contract between the plaintiff and the defendant corporation, whereby the plaintiff released the defendant Bonsall from further liability, and agreed thereafter to look to the corporation for payment for his services. The evidence amply supported the finding of the jury, on which their verdict was based, that all the services were rendered under the original contract with the defendant Bonsall. Evidently the organization of the corporation, in which the defendant

owned all the stock, was merely a convenient and proper method adopted by him for carrying on his business. There is no question here of novation or public policy, or of the rights of minority stockholders, or of third persons as against either defendant. Under the original contract, the plaintiff was employed to help the defendant to build up the defendant's trunk business in whatever way defendant chose to carry it on, and plaintiff was to get his compensation in the future, when the value of his services had been determined. If the defendant saw fit to have said business run for his benefit under a corporate organization, and in order to accomplish this purpose the plaintiff became, at his request, the president and treasurer and a director of the corporation, these acts were merely incident to, and in furtherance of, plaintiff's original employment, and in accordance with the wishes of his employer. It does not appear that there was any change in the method of carrying on the business.

We cannot accede to the proposition that an individual having large business interests, who employs agents to carry on his business, can relieve himself from his individual responsibility for their services merely by creating a corporation and causing them to be chosen as officers. In order to establish such a claim of change of liability, there must also be evidence of a novation, either express or implied.

Nor can we accede to the highly technical argument that the mere change in form of carrying on the business through a corporation necessarily, as a matter of law, modified the existing respective rights and obligations of the plaintiff and defendant Bonsall. The very fact that, while the corporation was a separate entity, no new contract for services was entered into with the plaintiff, is of itself indicative of the understanding of both parties that the old contract continued in existence.

We conclude that the evidence was sufficient to support the verdict, and that the court properly submitted it to the jury.

The judgment is affirmed.

BAER v. SLEICHER et al.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1907.)

No. 1,605.

1. COUNTERCLAIM—SUBJECT-MATTER—OHIO STATUTE.

A contractor for a government work in Ohio canceled the contract of subcontractors for an alleged breach, and took possession of the tools and materials of the subcontractors on the premises under a provision of the contract, and used the same in completing the work. The subcontractors, who were citizens of another state, having brought an action in replevin for such tools and materials in a federal court, the defendant therein filed a counterclaim for damages growing out of the breach of contract by the plaintiffs. *Held*, that such claim for damages was one "arising out of the contract or transaction set forth in the petition, as the foundation of the plaintiff's claim, or connected with the subject of the action," in such sense as to make it a proper counterclaim under Rev. St. Ohio 1906, § 5069, and therefore that the court had authority under section 5089 to order it docketed as a separate action, and had jurisdiction over the subject-matter and the persons of the defendants therein.

2. DAMAGES—BREACH OF BUILDING CONTRACT.

A contract to furnish the materials and labor for certain work on a structure provided that in case the contractor should fail to complete the contract in accordance with its terms the second party should have the right to recover any and all damages incurred by reason of said failure, and also to recover whatever sums might be expended in completing the said contract in excess of the contract price. *Held*, that upon such failure and the completion of the contract by the second party his recovery was not limited to the reasonable cost of such completion, to be determined by a jury, but that he was entitled to recover the actual amount expended by him in good faith in such completion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 307, 308.]

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

N. S. Monsarrat, Jr., for plaintiff in error.

C. A. Seiders, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought by John H. Baer, a resident of Toledo, and citizen of Ohio, surviving partner of Randolph & Baer, general contractors, against William Sleicher, Jr., and William N. Sleicher, partners under the firm name of the West Side Foundry Company, residents of Troy, and citizens of New York, to recover damages for a breach of contract. It appears that Randolph & Baer entered into a contract with the United States to furnish labor and material, and erect the Toledo Harbor Light Station, for the sum of $84,700. Thereafter Randolph & Baer entered into a contract with the West Side Foundry Company to furnish and erect the iron and metal work for said station for the sum of $15,600, the work to be completed by September 1, 1901. By an agreement made April 23, 1902, the West Side Foundry Company was given until October 1, 1902, to complete this work. It failed to do so by the stipulated time, but continued at work until about December 12, 1902, when Baer notified the West Side Foundry Company that its contract was canceled, giving the reasons, and thereafter assumed charge of the job, and proceeded to complete the iron and metal work, charging the West Side Foundry Company with its cost. It was for the cost of thus completing the iron and metal work, and for the damages resulting from the breach of contract by the West Side Foundry Company, that the petition was filed by Baer.

To this petition the defendants filed an answer on June 23, 1905, in which they set out: That on April 2, 1903, they commenced an action in replevin in the court below against Baer and the administrator of his former partner, Randolph, to recover the material and tools which had been left at the station and taken possession of and converted by Baer, which property, on the filing of proper affidavits, was delivered to them. That thereafter Baer filed an answer and counterclaim in which he claimed that the property replevined had been delivered to the said John H. Baer by said plaintiffs under the contract set up in said counterclaim and in its petition herein, and that the said counterclaim arose out of the transaction of the delivery of said materials and

property, and was connected with the subject of the plaintiffs' action, and damages for the breach of the contract on which the present action is founded. This counterclaim was demurred to by the present defendants, and, the demurrer being overruled, a reply was filed denying that the property had ever been delivered to Baer, or that the counterclaim arose out of the transaction of the delivery of the property. That thereafter the cause came on for trial, was submitted to the jury, and the jury found in favor of the plaintiffs therein, and judgment was rendered against the defendant Baer. During the trial testimony offered by Baer in support of his said counterclaim was excluded on the ground that his cause of action did not amount to a counterclaim, and before the final submission of the cause Baer was permitted to withdraw said counterclaim, and it was ordered by the court that the same be docketed and proceeded with without further process under section 5089 of the Revised Statutes of Ohio for 1906. After stating these facts, the answer submitted that, there being no counterclaim under section 5069 of the Revised Statutes of Ohio for 1906, there was no authority under section 5089 to docket the same as a separate action, and the court was without jurisdiction over the persons of the defendants.

A demurrer to this answer, or plea in bar, was sustained and leave given to answer. The answer, after a preliminary protest against the jurisdiction of the court over the persons of the defendants, goes on to present in detail their defense to the action upon its merits, and along with the same incorporates a cross-petition in which they seek to recover a large amount of money for extra work and material furnished under the contract. A reply was filed to this answer and cross-petition, and the case went to trial before a jury, which returned a verdict in favor of the plaintiff and for $1,000 and costs. Both the defendants below and the plaintiff seek to set aside this judgment, the defendants on the ground that the court below was without jurisdiction over the persons of the defendants, and the plaintiff on the ground that the court erred in its rulings upon the trial.

1. The defendants make the point that after the court held there was no counterclaim under section 5069 of the Revised Statutes of Ohio for 1906, in favor of Baer, it was without authority, under section 5089 of the Revised Statutes of Ohio for 1906, to order this alleged counterclaim to be docketed as a separate action, and therefore was without jurisdiction over the persons of the defendants in the action thus wrongfully docketed. But we are satisfied the court below was wrong in holding that there was no counterclaim under section 5069 in favor of Baer. This section of the Ohio Code provides that "a counterclaim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." The right claimed by Baer to recover damages for the breach of the contract with the West Side Foundry Company was so connected with the material and tools replevined by the latter that it came within the definition of a counterclaim under the section mentioned. It arose out of the contract or transaction relied upon by the West Side Foundry Company, and

was so connected with the subject of their action as to make it properly a counterclaim. For this reason the court below had authority, under section 5089 of the Revised Statutes of Ohio for 1906, to order it to be docketed as a separate action, and therefore had jurisdiction over the persons of the defendants and the subject-matter of the action now before us on error. Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; Morgan v. Spangler, 20 Ohio St. 38.

2. Having thus disposed of the question of jurisdiction, the case, so far as it is necessary for us to consider it, turns upon the proper construction of that portion of the contract which defines the limits of recovery to one who rightfully cancels the contract, and under its terms completes the job. Under the present contract, he was clearly entitled, in addition to certain damages, to the cost of completing the work. This did not mean the reasonable, but actual, cost. If it appeared from the testimony that he paid in good faith certain sums of money for material and labor to complete the job, he was entitled to recover such sums, whether the jury thought they were reasonable or not.

The contract provided:

"It is further understood and agreed that in case of failure of the party of the first part, the West Side Foundry Company, to complete this contract as specified and agreed upon, that the said party of the second part, Randolph & Baer, shall have the right to recover any and all damages incurred by reason of said failure by the party of the first part, and shall also have the right to recover whatever sums may be expended by the party of the second part in completing the said contract in excess of the price stipulated, to be paid by the party of the first part for completing the same."

Referring to this portion of the contract, the court charged the jury as follows:

"Now, gentlemen, if, under these instructions, you find that the plaintiff was entitled to cancel this contract on the 12th day of December, you will proceed to inquire what, under the proof, he is entitled to recover from the defendants. I cannot be of much service to you in that respect. If he is entitled to recover, he is entitled to recover the reasonable cost of completing the contract, not the unreasonable or extravagant cost, but only the reasonable cost of it."

This portion of the charge was specially excepted to. Under it, as appears from the record, testimony was relied upon tending to lead the jury to believe that certain items charged against the defendants for the cost of completing the work were unreasonable and extravagant, and should be rejected or reduced, although paid by the plaintiff in good faith. Thus it was left to the jury to determine, as to each particular item, whether the cost should be recovered or not; in other words, no matter if the item cost what Baer charged for it, and no matter if he had paid the price thus demanded, and no matter if he could not have obtained the material or labor for less money, nevertheless, if the jury, in its discretion, should determine that the cost of the material or labor was extravagant, it might reject or reduce the item.

We do not understand that the contract vests any such power in the jury, or leaves the contracting party to such a doubtful and uncertain remedy under the contract. A man who contracts to do certain work must perform his contract, and, if he fails to do so and leaves the contract uncompleted, the other party is given the right to cancel the contract and complete the work. In case the contract is thus annulled,

"the party of the second part [meaning in this instance Baer], shall be thereupon authorized, if an immediate performance of the work or delivery of the materials in their opinion is required by the public exigency, to proceed to provide for the same by open purchase or contract, and the party of the first part shall remain liable to the party of the second part for the damages occasioned to them by the said noncompliance, delay, or negligence."

We have already referred to that part of the contract which provides:

"That in case of failure of the party of the first part to complete this contract * * * that the party of the second part shall have the right to recover any and all damages incurred by reason of said failure, * * * and shall also have the right to recover whatever sums may be expended by the party of the second part in completing said contract in excess of the price stipulated to be paid to the party of the first part for completing the same."

The view we take is that the purchase of the material and labor is left to the party of the first part. It may be made either "by open purchase or contract." If it is made in good faith, the sums thus expended to complete the work become a proper charge against the party of the second part. The sole question is whether such sums have been expended in good faith by the party of the second part in completing the work. If they have been, it is not for the jury to say that they are unreasonable or extravagant. The party of the first part in completing the work, occupied substantially the position of an agent for the party of the second part, and did not guaranty the wisdom of the purchase of labor or material.

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

BEEBE et al. v. WELLS.

In re FEDERATION SHOE CO.

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

No. 666.

BILLS AND NOTES—CONSIDERATION—FORBEARANCE TO SUE.

The P. S. Company, being insolvent, instead of liquidating, formed a new corporation, which subsequently became bankrupt, conveying a substantial portion of the assets of the P. S. Company to the new corporation, in payment of capital stock. Claimant, a creditor of the P. S. Company, had been demanding payment, and, after the reorganization, proposed that the balance of the P. S. Company's assets be transferred to the new corporation, in consideration of certain notes of the latter which should be transferred by the new corporation to claimant as security for its debt, threatening otherwise to sue to wind up both corporations. The notes were executed as agreed, but no additional property was transferred from the P. S. Company to the bankrupt. *Held*, that claimant's promise to forbear suit against both corporations constituted a sufficient consideration for the bankrupt's notes.

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

On appeal from an order affirming an order of a referee disallowing the claim of Lucius Beebe & Sons against the estate of the Federation Shoe Company, a bankrupt.

The following is the opinion of Dodge, District Judge, in the District Court:

The notes upon which the claim of the petitioners for review is based are dated March 20, 1902. They are payable to the petitioners' order, and signed: "The Federation Shoe Company, by H. M. Cushman, Treas." The bankrupt was a corporation under the laws of Massachusetts. Cushman was its treasurer, and signed the notes, which were then delivered to the petitioners.

The Federation Shoe Company was adjudged a bankrupt October 17, 1902, upon an involuntary petition filed against it on September 26, 1902. The petitioners' claim against it upon these notes was rejected by the referee, and upon their petition for review a certificate was filed June 15, 1903, which was recommitted to the referee April 17, 1905, to hear further evidence. The referee's decision after the hearing on recommittal was the same as at first, and the petitioners now seek to review that decision. The question certified by the referee (March 24, 1906) is: "Are the notes offered in proof good and valid notes and entitled to be proved against the estate of the bankrupt?" By the findings of fact and opinion which accompany the referee's certificate it appears that he answered this question in the negative, because on the facts found he ruled that the notes were without consideration, and that the petitioners are not bona fide purchasers of the notes for value without knowledge of the want of consideration.

No reason appears for questioning any of the findings of fact which the referee has made, and they are therefore approved and adopted.

He has declined to make certain further findings of fact requested by the petitioners. These requests, and the referee's decision upon each, appear in his report of findings, being numbered 4, 5, 6, 7, and 8. As to requests 4 and 5, it was for the referee to determine how far Small's statements could be relied upon. His refusal to rely upon them is supported by the undisputed facts appearing regarding Small, and nothing has been shown which warrants the court in holding that the refusal was wrong. As to the request numbered 6, also, it cannot be said that the referee was required by the evidence before him to make the finding requested. I am unable, upon the evidence before the referee, to see any reason for doubting the correctness of his qualified finding made upon the request numbered 7.

In refusing the request numbered 8, the referee decides against the petitioners' contention that a good consideration for the notes is found in their forbearance to bring a suit in equity for the purpose of following those assets of the Pray-Small Company which that company had conveyed to the bankrupt in exchange for $30,000 in its stock. Such a suit would, it is claimed, have resulted in avoiding the conveyance referred to as fraudulent, and in a marshaling of the bankrupt's assets for the purpose of paying therefrom the indebtedness due the petitioners from the Pray-Small Company; and that such would have been the result of the suit, had it been brought, must be granted, in view of the findings that the conveyance was in fraud of the petitioners' rights as creditors of the grantor and gave them the right to avoid it. The petitioners, however, fail to show, in my opinion, that the notes were given in consideration of their forbearance to bring such a suit.

No such suit was brought, it is true, but it does not follow, from the mere fact that the petitioners did not bring it, that the notes were upon consideration of their forbearance. There must have been an express or implied agreement to forbear between them and the bankrupt. Boyd v. Freize, 5 Gray (Mass.) 553. No express agreement is claimed, and the evidence does not show an implied agreement.

The actual consideration for which the notes were, in fact, given must be ascertained from the petitioners' letter to Small dated March 20, 1902. The notes bear the same date, and, as the referee has found, were made by the treasurer of the bankrupt corporation, at Small's request, upon receipt of the letter referred to. Not only does that letter specify, as the consideration contemplated for the proposed notes, the purchase which it suggests by the bankrupt of more of the Pray-Small Company's assets, and not only does it omit any statement or intimation that the petitioners will attack the former conveyance by that company as fraudulent unless the proposed notes

are given, but it states that the assets of that company were undoubtedly sufficient, when that conveyance was made, to pay all its debts. This statement is inconsistent with the findings now made by the referee, it is true; but it is nevertheless inconsistent also with the contention that the petitioners were, when the notes were given, threatening the bankrupt with a suit to avoid the former conveyance, as is also the further statement in the letter that there seems to be no good reason why the Pray-Small Company should not make a further conveyance of its assets to the bankrupt.

Nothing which may have been said or written before March 20, 1902, to Small or to the bankrupt by the petitioners or their counsel, seems to me sufficient to affect the above conclusion, because the letter of that date, which as the referee has found was drafted by the petitioners' counsel, and must be considered as written in view of everything which had been previously discussed, expressly states that the previous request for payment is "somewhat modified," and thereupon proceeds as above stated. The position stated in the letter must be considered as the attitude of the petitioners upon which the parties acted in giving and receiving the notes, to the exclusion of anything inconsistent therewith involved in what may have passed between them before the writing of the letter. It is indeed said in the letter that the petitioners "do not care to unnecessarily cripple your new company by requiring a liquidation of the affairs of both companies," etc. But since the other statements made in the letter are, as has been indicated, wholly inconsistent with the theory that it was in the petitioners' power to accomplish anything of the kind, I am unable to consider this language as manifesting any intent on their part to make the attempt.

The proposed notes were, according to the letter, to be given by the bankrupt to the Pray-Small Company, which company was then to deliver them to the petitioners as collateral security for their claim against it. This course was not, in fact, followed. The notes were, instead, made payable to the petitioners direct, indorsed by the Pray-Small Company, and thus indorsed delivered to the petitioners.

The petitioners, however, accepted this arrangement as the equivalent of that proposed in the letter, and I see nothing, therefore, in the fact that it was a departure to the above extent from the arrangement proposed which requires any modification of the conclusions herein reached.

The separate written inquiries addressed by the petitioners' counsel on April 23, 1902, after the petitioners had received the notes, to the Pray-Small Company and the bankrupt, and the replies thereto received from each, afford further confirmation of the strongest character to the view that the only consideration for the notes was understood by the petitioners and the bankrupt to be property sold by the Pray-Small Company to the bankrupt. The substance of these inquiries and replies is set forth in the referee's report. The petitioners' understanding is thus definitely set forth in the inquiry addressed to the bankrupt: "I am advised that in payment of these notes (the Pray-Small Company notes then held by the petitioners) the Pray-Small Company has given to L. Beebe & Sons certain notes made by you and indorsed by the Pray-Small Company, which were given by you to Pray-Small Company in payment of property which you purchased of Pray-Small Company." If any other consideration, or if a different consideration, was then in the petitioners' minds, it is difficult to believe that all reference to it would have been here omitted, considering the circumstances under which this inquiry was written and the purpose for which it was written.

Lastly, the proof of claim in these proceedings, sworn to December 5, 1902, by one of the petitioners, contains the explicit statement, "These notes were given by the bankrupt for merchandise and assets sold to them by the Pray-Small Company, and Pray-Small Company transferred them to creditors in payment of indebtedness to the deponents," and no reference whatever is made in it to any other or any different consideration for the notes.

There never was, in fact, any such purchase by the bankrupt from the Pray-Small Company, as suggested in the letter of March 20, 1902, or as referred to in the letters of inquiry of April 23, 1902. Small's answers to those inquiries were untrue. Unless, therefore, the petitioners were misled by the bankrupt into the belief that it had, in fact, bought merchandise of

the Pray-Small Company and had given these notes in payment therefor, the referee's ruling must stand.

The referee has found on the evidence before him that the petitioners did not believe Small's statements as to the value of the Pray-Small Company's assets, but knew them to have been false, and, in view of Small's control of both companies, the petitioners' knowledge that he so controlled them, their knowledge that the bankrupt's notes were, in fact, given in payment of the debt of another, the indications afforded them from the circumstances that no such sale and purchase could have been made by proper corporate action on the part of both companies, and the indications afforded them from their knowledge of the affairs of both companies that such a sale and purchase would at best have been of no benefit to the bankrupt, the referee was of opinion that the petitioners were bound to see to it, before they acted upon Small's statements, that the sale and purchase had been actually made. With these conclusions I agree. The petitioners, in my opinion, should have been put on their guard by the facts shown to have been within their knowledge or the means of knowledge at their command. These facts were of such a character that they must be regarded as having acted at their own peril in taking the notes, and cannot claim to have been misled. The notes offered in proof, therefore, are not good and valid notes and entitled to be proved against this estate. The referee's order disallowing them is affirmed.

Boyd B. Jones (Hurlburt, Jones & Cabot, on the brief), for appellants.

Elisha M. Stevens (William H. Niles and Niles, Stevens, Underwood & Mayo, on the brief), for appellee.

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

LOWELL, Circuit Judge. This is an appeal from a judgment of the District Court disallowing the appellant's proof of claim against the bankrupt estate. The claim is based upon promissory notes given to Beebe, the appellant, by the bankrupt, the Federation Shoe Company, and indorsed by another corporation, the Pray-Small Company. The referee disallowed the proof, and on appeal his order was sustained by the learned district judge, on the ground that the notes, being given for the debt of another, were without consideration, moving to the bankrupt, and that the creditor did not purchase them in good faith, believing that a consideration for them existed. Morawetz on Private Corporations, § 423. The creditor contends that the notes were given by the bankrupt for value, and, if he can establish this, his claim must be allowed.

The Pray-Small Company, a corporation controlled by Small, owed Beebe on promissory notes and on account about $10,000. The corporation was insolvent. In order to continue its business unhampered by its creditors, Small organized the Federation Shoe Company, the bankrupt in this case. A large part of the property of the Pray-Small Company was transferred to the bankrupt in exchange for its corporate stock. After this transfer, Beebe sought, through his counsel, Jones, to collect from the Pray-Small Company the amount due on the notes, or to obtain further security. Jones had an interview with Small, in which Small described the condition of the two companies. Jones thereupon asked him to transfer to Beebe, as collateral security for the debt, the accounts receivable of the Pray-Small Company. This Small refused to do. Jones then suggested that the Pray-Small

Company sell to the bankrupt a part of its property yet remaining untransferred, for which the bankrupt should give its promissory notes to the Pray-Small Company, and that the Pray-Small Company should indorse these notes to Beebe. This transaction in effect would give to Beebe an obligation of the bankrupt as security for the indebtedness of the Pray-Small Company. This, also, Small refused to do. Jones further testified that he told Small:

"I considered that this new corporation and the conveyance of the assets to this new corporation was for the purpose of continuing the business of the old corporation, or enabling the old corporation, the people interested in it, to keep along the business, and that it was in fraud of creditors, that they had no right to do it, that we had a right to have both companies liquidated and have a marshaling of the assets, and that we should do it. I told him we should not permit the business to continue as it was continuing at the present time, and that, unless we got payment or security, we would close them both up. Then I advised him to talk with Mr. Beebe about it."

"I said I would force both companies into liquidation and have the assets marshaled, unless we had security or payment, and I suggested, myself, this method of their giving us security. The idea of security was abandoned later on, because it was just as well to have the notes with the same maker and indorser as to have the notes of the Pray-Small Company with these notes as collateral. It made no difference. We had the liability of each company for the whole indebtedness."

What was the negotiation between Small and Beebe does not appear in evidence. Beebe was not called. Small had absconded. A few days afterwards Beebe told Jones that he had not made much progress with Small. Jones then wrote a letter, which Beebe signed as follows:

"Boston, Mass., March 20, 1902.

"L. Linn Small, c/o Pray-Small Company, Haverhill, Mass.—Dear Sir: Since seeing you I have given the matter of your indebtedness to our firm pretty careful consideration, and am inclined to somewhat modify my request for payment. The situation is substantially this: Pray-Small Company owes L. Beebe & Sons on open account $3,182.02 and notes amounting to $6,667.82 together with interest on both sums.

"The assets of Pray-Small Company at the time of the formation of the Federation Shoe Company were undoubtedly sufficient in value to pay all of its indebtedness; but such payment would have required the liquidation of its business. Instead of liquidating, Pray-Small Company formed a corporation, to wit, the Federation Shoe Company, to which it conveyed a substantial portion of its assets in payment of capital stock; and this capital stock is now held by Pray-Small Company.

"From your standpoint it was desirable for you to continue on in business by this method. From our standpoint a liquidation of the business of the company was more desirable. We do not care to continue to be creditors of a corporation which has ceased to do business; but, on the other hand, do not care to unnecessarily cripple your new company by requiring a liquidation of the affairs of both companies, a marshaling of the assets, and the payment of our claim in cash. As you say it would be for the mutual benefit of both companies that the Federation Shoe Company should purchase some more of the assets of Pray-Small Company on reasonable terms, there seems to be no good reason why such purchase should not be made, and payment could be made in the notes of the Federation Shoe Company. We would accept the notes of the Federation Shoe Company as collateral security for the payment of our claims, said notes to be as follows:

"$1,500 in four months from date; $500 in five months from date; and $500 payable at the expiration of each and every month thereafter until the whole amount is paid, interest at five per cent.

"We feel that this proposition is an exceedingly liberal one on our part and one of which you should be glad to avail yourself. In conclusion, in

order to avoid any possible misapprehension, I may add that we shall not allow our claim to stand longer in its present form, and must ask you for early and definite information as to your intentions in the matter.

"Yours truly."

About April 20th Jones received the notes offered for proof, signed by the bankrupt and indorsed in blank by the Pray-Small Company. On his inquiry, he was informed by Small that the property mentioned in the letter of March 20th had been transferred to the bankrupt. The old notes of the Pray-Small Company were thereupon surrendered. Beebe contends that the bankrupt received value for the notes, to wit, an implied agreement that Beebe would not carry out his threat to liquidate both companies. The trustee contends that this was no part of the consideration moving to the bankrupt, but only the merchandise which was to be turned over by the Pray-Small Company. In fact, there was no transfer of merchandise, if any merchandise existed. An agreement not to prosecute a doubtful claim is a thing of value, and if Beebe made such an agreement, and if the agreement was the consideration of the notes in whole or in part, the trustee does not dispute that Beebe is entitled to share in the distribution of the bankrupt's estate.

Taking all the facts together, we are of opinion that the creditor's contention is well founded. We attach particular importance to the purpose expressed by Jones in his interview with Small and reiterated in the letter of March 20th. We accept his language as establishing his bona fide intention to institute proceedings in liquidation in order to protect his client's interests. It was urged at the argument that no agreement to refrain from legal proceedings was made by Beebe; but by his whole conduct, by the surrender of the old notes, and by the taking of new notes in their place, Beebe impliedly contracted to forbear and to abandon his proposed proceedings in liquidation. Had he instituted proceedings in equity to liquidate the two corporations before their notes fell due, this implied agreement would have been a sufficient defense to his suit. Had he sought the same result by proceedings in bankruptcy against the Pray-Small Company, the Federation Shoe Company might have restrained him from thus breaking his agreement. If there was a valid contract by Beebe not to proceed against the two companies, we have little difficulty in holding that it was a consideration for the execution of the notes by the bankrupt. Doubtless, a transfer of property from the Pray-Small Company was intended also as a consideration moving to the bankrupt for its signature to the notes; but we hold that this transfer was conceived and used by the parties as a method of strengthening the notes, while the implied agreement not to sue remained the principal consideration.

As value passed from Beebe to the bankrupt in part consideration for the notes, it follows, as above stated, that the creditor must prevail. We need not consider the other questions argued at the hearing arising from the failure of the Pray-Small Company to turn over any property to the bankrupt.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to allow the appellants' proof of claims; and the appellants recover their costs of appeal.

GLOUCESTER ELECTRIC CO. v. DOVER.

(Circuit Court of Appeals, First Circuit. February 18, 1907.)

No. 683.

1. ELECTRICITY—INJURY FROM LIVE WIRE—ACTION—ISSUES.
In an action by a telephone lineman against an electric light company to recover for a personal injury received by plaintiff from contact with an uninsulated part of a wire strung in close proximity to a telephone pole on which plaintiff was working, the question at issue is not one of assumption of risk, but of due care and reasonable inspection on the part of defendant in relation to its wire, and of due care on the part of plaintiff in the manner of doing his work in view of the known danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, §§ 6–11.]

2. SAME—QUESTIONS FOR JURY—CONTRIBUTORY NEGLIGENCE.
Plaintiff, who was a telephone lineman, was directed to climb a pole to assist in stringing a wire thereon. Defendant electric company maintained a highly charged electric light wire which passed within four inches of the pole, and on the side nearest the pole the insulation had been worn or burned off. There was already one man on the pole above such wire, and plaintiff testified that he looked at the wire from the ground and the insulation appeared to be all right. He went up on the opposite side, and at the time he reached the wire the pole was swayed, apparently by some action of the man above, and his hands came in contract with the exposed wire, resulting in his injury. *Held*, that such evidence did not warrant an inference of negligence on his part as matter of law, but such question was properly one for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

3. NEGLIGENCE—ACTION—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.
On the trial of an action for a personal injury, the charge of the court with respect to the question of contributory negligence *held* erroneous, in that it tended to lead the jury to determine the question of due care with reference to the particular plaintiff and his own situation and observation, and not by the standard of what a man of ordinary prudence would have done under the same circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 382–394.]

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

John Lowell and James A. Lowell, for plaintiff in error.
William A. Pew, Jr., for defendant in error.

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

ALDRICH, District Judge. At the time of the injury complained of the Gloucester Electric Company, the defendant below, maintained an electric lighting system in and about the city of Gloucester, and Joseph R. Dover, the plaintiff below, was an employé of the New England Telephone & Telegraph Company, which maintained a system of wires in the same locality.

At the place of injury on East Main street there were two poles, one belonging to the telephone company, and the other to the electric company, and the poles were 8 or 10 feet apart. The defendant's pole

upon its arms and other appliances carried several insulated electric light wires, with a current of something like 2,550 volts. The telephone pole carried certain fire-alarm wires belonging to the city of Gloucester, and four bare iron wires and one cable of its own, and a second cable was being strung upon the telephone pole at the time of the injury. It was in connection with the stringing of this cable that the injury was sustained by the plaintiff. These poles are spoken of in the record as having a "street side," and a "field side," meaning, of course, that one side faces the street, and the other the field. The wires upon the two poles at this point were running in the same general direction, and the defendant's wire which caused the injury was about 20 feet from the ground, and passed the telephone pole on its street side 4 inches from it. The cable being strung upon the telephone company's pole was to be attached at a point above the electric wire in question. The electric wire which caused the injury was bare of insulation for 3 or 5 inches on its side next to the telephone pole, and there was a charred rut or depression, 3 or 4 inches long and something like a half inch deep, across the street side of the pole opposite the wire at the point of broken insulation. The plaintiff knew in a general way of the danger of live wires, and had been cautioned about them, and he as subforeman had told men under him to be careful and look out for live wires; but there was no evidence that he actually knew that the insulation was broken on the wire in question at the time of the injury. Dover had been working on a nearby pole, and was ordered down to relieve a kink in the cable, and it became necessary in the prosecution of the work for him to ascend the pole in question to a point above the defendant's wire which caused the injury. One Gillis was on the pole above him at the time. Before starting, the plaintiff looked up the pole to see if everything was clear so he could get up. He saw the location of the wires, and, among other things, that one of the electric wires was within 4 or 6 inches of the pole he was to climb, and, on being asked about the insulation, he said it looked to be all right. Gillis, who ascended the pole before him, testified that he supposed that they were electric wires and kept away, that in going up the pole opposite the wire he saw the break in the insulation, and in coming down he saw where the wire had rubbed against the pole and burned it.

It is pointed out by one side that there was considerable evidence tending to show that this break in the insulation, and particularly the charred mark on the pole, could be seen from the middle of the street some feet away, while it was suggested by the other side that such a mark would more readily catch the eye of one standing some distance from the pole than of one who was standing at its base.

The defendant claims, first, that, though Dover was working for the telephone company, the liability of insulation of electric wires to get out of repair is so well understood, and the danger is so far within the knowledge of an experienced lineman, that it should be held that he assumed the risk or hazard incident to the defendant's wire being maintained in proximity to those of the telephone company, for which he was working.

We need not inquire whether the doctrine of assumption of risk, which, in its general acceptation, applies to cases between employer and employé, and involves the idea of implied contract of assumption, might, under some conditions, be extended to a case in which the injury results from a careless condition of things caused by the negligence of an outside party in respect to an outside business, because there is nothing in the nature of the plaintiff's contract with the telephone company, or in the character of the work, so far as shown by the record, which would warrant the application of the doctrine of assumption of risk against the plaintiff and in favor of the defendant.

We think it a question of due care. So far as the defendant is concerned, it is a question of due care and reasonable circumspection in respect to the oversight of wires known to be dangerous when out of repair in a situation where it is the duty and the right of others to go in the prosecution of their work, and, so far as the plaintiff is concerned, a question of due care in the manner of doing a rightful work in the line of duty, in a situation which he knows necessarily involves some hazard. Knowledge that wires are liable to get out of repair, and when out of repair that they are dangerous to life, is something entering into the question of care as it applies to both parties.

The defendant's second position is that the plaintiff's case is controlled against him by contributory negligence, and that it was so unquestionably careless for a man who knew the liability of insulation to get out of repair, and the resulting danger, to merely look and then voluntarily bring himself into contact with a wire without the safeguard of a safety belt, that contributory negligence should be ruled as a matter of law.

We do not think the negligence so clear as to warrant this. The plaintiff knew that one man had ascended the pole before him; and when he was called upon to ascend the pole and do something in the line of his work, he looked and saw the proximity of the wire to the pole which he was to ascend, and testified that it seemed all right. He may, without thinking much of insulation, have meant by this that he thought he could climb the pole without touching the wire, because he said he went up on the field side, sliding his hands up the pole, and that he felt a sway of the pole as though the men had given a jerk and let up quick, and that was the last he remembered. If it were clear that he had seen the break in the insulation, or that he had climbed the pole and got in contact with the wire, without any intervening cause like the swaying of the pole, it would be quite a different thing. There is no evidence that he saw the lack of insulation. It is only argued that he ought to have seen it. This being so, and the unforeseen swaying of the pole being the probable cause of the contact, it reasonably, we think, became a question for the jury whether, under all the circumstances the plaintiff exercised the care of a prudent man in attempting to do what he did.

The defendant's third point is that, if the question of the plaintiff's care is one for the jury, it was not submitted under proper instructions, and upon this point we are compelled to hold with the defendant.

It is quite apparent, from the correct statement of the principle by

the learned judge upon the motion to set aside the verdict, that he had in mind the rule under which questions of care in respect to a given situation are submitted to a jury; but we think he failed in his instructions to convey to the jury a full understanding of the rule which should have governed them in their deliberations in respect to the proper standard of care and in respect to its application to the plaintiff. The effect of the instructions, we think, was to lead the jury to determine the question of the plaintiff's due care by reference to men of the character of the plaintiff and with reference to his own situation and observation, rather than by reference to the standard afforded by the man of ordinary prudence. Thus the learned judge said:

"I think you should take, gentlemen, this particular pole and form a judgment. How suspicious a place was it? How dangerous a place would it appear to the ordinary observation of a man of this character? How suspicious would it appear to a man of that kind? Was he fairly warned by the mere look of that place that there was danger that the insulation might be off, or that he was called upon to inspect for lack of insulation? Is the lack of insulation—is a bare spot on the wire—a thing of such common occurrence, gentlemen, on poles of this description, that men should always invariably inspect it and always make a close inspection?"

The last words quoted, we think, led the jury to understand the real issue in the case to be, did due care require the plaintiff to make a "close inspection" of the pole? A misleading standard of due care was thus suggested, which, so far as appears by the record, was not sufficiently corrected by other instructions.

Under the instructions, we think the jury would naturally turn the case in their own minds upon the situation and the particular man in question, and upon the question whether such a situation always requires close inspection. We are unable to find anything in the instructions which would convey to the jury the idea that the plaintiff's care should be determined with reference to the question as to what men of ordinary care and prudence would have done under the circumstances. The plaintiff's negligence, if there were negligence, would consist in the failure to use such care as a person of common prudence similarly situated would exercise. The question of ordinary caution in carrying on dangerous work, or the question of ordinary care and prudence, must be determined with reference to what men of ordinary prudence would do under the circumstances. Similarly situated and under like circumstances, of course, includes the idea of men of similar knowledge and experience; and ordinary care means such care as such men would ordinarily exercise in such a situation as the plaintiff was in.

The reason for this rule, quite likely, is found in the idea that greater security resides in an impersonal standard than in the best attempt of jurors to decide upon a particular personal aspect. In the one view, the jurors are bound to hold the plaintiff's rights subject to the standard of care which men of ordinary prudence would exercise, while in the other the jury would be relieved from that standard, and feel at liberty to say, "Well, he probably thought it was all right, or perhaps he did not think," or, "It cannot be reasonable that men should always and invariably make a close inspection." In the one aspect there is a standard; in the other there is no standard for measuring the care.

Of course, it stands to reason, under the rule of ordinary care, that

the jury must consider the entire situation. The knowledge of the dangerous elements involved, the duty to enter the field of hazard, where the dangers cannot always be seen, where the care of a reasonable man may or may not discover the danger of contact if things remain as he sees them, and the probability that danger would have been averted but for the intervention of some unforeseen force which precipitates the danger, are all things to be considered. Care cannot be measured in degrees applicable to a particular plaintiff in a particular situation of hazard. Due care in a particular situation can only be ascertained upon inquiry as to what men of ordinary prudence would have done in a situation like that in which the plaintiff was involved. This idea was not clearly brought to the attention of the jury.

The judgment of the Circuit Court is reversed, and this case is remanded to that court, with directions to set aside the verdict and for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its cost of appeal.

BROWN et al. v. WILMORE COAL CO.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 14.

MINES AND MINERALS—GRANT OF MINING RIGHTS—FORFEITURE BY ABANDONMENT.

Defendant, for a nominal consideration expressed therein, obtained a large number of contracts, denominated "leases," from owners of land, conveying to him the coal and other minerals under such land, with the right to mine the same for 99 years and of renewal in perpetuity. By the terms of the contracts he was to render an account to the grantors and pay royalty at specified rates whenever any coal or other mineral was mined. *Held*, that such contracts imposed obligations upon defendant, as well as vesting him with rights, a mining enterprise being clearly contemplated thereby, and that where he did not in fact intend to prosecute such enterprise, and took no steps toward it, and paid no royalties, through a period of more than 20 years, during which coal was extensively mined in the vicinity, his rights were lost by abandonment, without regard to his actual intent to retain the same, and an owner in possession under subsequent conveyances from the same grantors was entitled to maintain a suit in equity to cancel the contracts as clouds upon its title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 189, 190.]

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

For opinion below, see 147 Fed. 931.

H. Snowden Marshall, for appellants.

D. L. Krebs and John G. Johnson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The Wilmore Coal Company exhibited its bill for relief from a cloud upon title against J. Willcox Brown and the New Amsterdam Coal Company in a court of common pleas of the state of Pennsylvania. The defendants having been duly served,

the suit, at their instance, was removed into the Circuit Court of the United States for the Western District of Pennsylvania, where, after hearing upon pleadings and proofs, a decree was entered in favor of the complainant, and the defendants appealed.

The general facts have been clearly set forth by the learned judge of the court below (147 Fed. 931), and we adopt his statement of them, as follows:

"In the years 1878 and 1880 the defendant J. Willcox Brown, a resident of Baltimore, Md., secured a large number of mining leases, aggregating about 16,000 acres, in different tracts, of various sizes, in Somerset county, Pa., as well as a like number in adjoining counties of Indiana and Cambria, 19 of which, of the Somerset lot, covering some 2,400 acres, are involved in the present suit. These leases were indentures under seal, and severally undertook, for the consideration in some cases of $5, and in some cases of $10, to grant, bargain, and sell to the said J. Willcox Brown, his heirs, executors, administrators, and assigns, 'all the iron ore, coal, cement, and fire clay, and all other minerals of every kind,' under the different tracts described, 'including the privilege of boring any number of wells and taking therefrom, by such means as are or may be most practicable, petroleum, carbon, or coal oil; also any salt water that may be found on the premises and manufacturing the same into salt,' together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away the said iron ore and other minerals, and of using such stones, earth, and water as might be necessary or required for conducting the mining operations. A few acres were reserved around buildings, and enough coal for the grantor's own use, and in some cases such as he might sell to his neighbors. The leases were to run for 99 years; the grantors covenanting at the end of that time to execute other leases of like tenor, for a similar term, renewable forever. In consideration whereof, it was agreed by the grantee that on the expiration of every three months, whenever any ore or other minerals were mined, quarried, or otherwise reduced to possession and removed from the premises, he would render to the grantor, his heirs, executors, and assigns, a true and correct account thereof; for every ton of coal, cement, fire clay, or other minerals than iron, five cents; and for every 100 barrels of petroleum or coal oil, and every 100 bushels of salt, 5 per cent. of the net profits. The leases were duly acknowledged and put on record in the office for recording of deeds in Somerset county, Pa., in July, 1880. A copy of one, as a type of all, although they differ in some minor particulars, is reproduced in the margin.[1]

"The section where these leases were located was entirely undeveloped at that time, except for farming, and was discredited as coal or mineral territory by the state geological survey. There was no railroad into it, and in view of this it was provided, in somewhat varying terms, in all but four of the leases here in controversy, that unless one was built within five years they should be null and void. As to those where no such provision appears it is charged in the bill that there was a verbal undertaking to the same effect by the defendant's agent at the time of securing them. But this is denied in the answer, and the evidence to sustain it is unsatisfactory, and they must therefore be taken as they stand. A railroad being a recognized necessity, however, the defendant Brown, in addition to his leases, busied himself with getting rights of way, some 64 of which he secured, 7 of these being from parties whose leases are involved in this suit. The railroad which he had in contemplation was to start at Johnstown, Pa., on the main line of the Pennsylvania Railroad, and run up Stony creek, and Paint or Shade creek, to the old Rockingham furnace at the head of the latter, and thence southeasterly, by other waters, in the direction of Hagerstown, Md.; and it was in general conformity with this that the rights of way were taken. No such railroad, however, was ever built. But in 1880 the Baltimore & Ohio Railroad constructed a branch from their line at Rockwood, Pa., northerly about 40 miles, through the center of Somerset county, to Johnstown, which followed down Stony creek

[1] See note at end of case.

a part of the way, by the mouth of Shade and Paint; and when it was being laid out the defendant Brown put his rights of way at the service of the Baltimore & Ohio engineers, although none of them were made use of. The building of this road, however, did not lead to the mineral development of that section, which came about a number of years later in quite another way. In 1892 to 1894 Robert H. Sayre and others began taking up coal lands in this territory, getting together about 18,000 acres, including much of that which is now in controversy, which they subsequently conveyed to the Wilmore Coal Company, which they had organized; and a year or two afterwards they sold out their interests in the company to Mr. Edward J. Berwind, president of the Berwind-White Coal Mining Company, who thereby secured their holdings, which he increased later to some 35,000 or 40,000 acres. Both Mr. Sayre and his associates, and Mr. Berwind after him, bought outright, at so much an acre, the coal which they purchased; that already leased to the defendant Brown being conveyed to them in fee by the original lessors or those who had succeeded to the title, in most instances without regard to the leases, but in some cases subject to them, the rights of the lessors being assigned, and in all with actual knowledge of them. Having got together this extended acreage, Mr. Berwind, endeavored to induce the Pennsylvania Railroad to run in a branch, but they declined to do so; and he was compelled to undertake it individually, which he did at an expense of about $500,000. This and the development of the different properties for mining, which followed, involving about $1,000,000 more, extended over two or three years, and not until some time in 1897, therefore, was any mining done; but since that time it has been actively pursued, and an extensive business built up, the operations being conducted by the Berwind-White Coal Mining Company, under the Wilmore Coal Company, to whom a royalty of 10 cents a ton is paid.

"In securing the lease in suit and others in that region, Mr. Brown did not expect to do any mining personally, and he has not, either by himself or others, nor has he paid royalties at any time on any of them; his purpose being to sell the leases to others or to transfer them to some company in which he had an interest, which would operate them. He sold some of his holdings in the southern part of the county in this way, and he made several attempts to interest parties in the others, including the New York Central Railroad people, and the Baltimore & Ohio. Learning of Mr. Berwind's purchases, he finally offered them to him, but without success; these negotiations ending in the spring of 1895, after which no others were undertaken. In 1892 certain of the leases were assessed and sold for taxes, but were redeemed by Mr. Brown, who paid some $1,500 to do so. They were sold again in 1896, but this he resisted, and succeeded in having the sale set aside by the court. Learning in 1902 that the Berwind-White Company were mining on certain of the lands which he had leased, he sent an engineer to investigate the matter, receiving from him a detailed and extended report, which confirmed the information, upon which he took counsel, with the idea of legal action. Some delay was experienced, however, with regard to this, the one-quarter interest, which he had assigned to the agent who secured the leases, being outstanding in the hands of various parties. But these having been got into line, a corporation was organized—the New Amsterdam Coal Company, defendant—to which all interests were transferred in exchange for stock; and in 1904 actions were brought by that company against the Berwind-White Coal Mining Company in the United States Circuit Court for the Southern District of New York for damages for taking the coal from six of the different tracts in controversy, following which, in May, 1904, the present bill was filed."

The conclusion reached by the learned judge was that the leases held by the defendants were invalid, and that, as they constituted a serious cloud upon the title of the plaintiff company, it was entitled to a decree requiring that they "be delivered up and canceled, and a minute of it made in the office where they are on record, limited always, however, to the coal, and not the other minerals, as to which

alone an issue has been made." Omitting details, and eliminating the declaratory portions of the decree, it appears that its remedial part conforms precisely to the conclusion above referred to. That part may be restated thus:

"* * * Each and all of the said 18 leases or agreements hereinbefore described be, and the same hereby are, canceled, so far as the same purport in any way to affect the coal upon the said premises, or the right to enter the said premises and mine the coal upon the said premises, or in any other way affect the title to the coal upon the said premises; and * * * that upon delivery of a copy of this decree, duly certified by the Clerk of the United States Circuit Court, Western District of Pennsylvania, to the recorder of deeds of said county of Somerset, he, upon payment of the proper fees, enter the same or a minute thereof upon the margin of the record of each of said agreements or leases, and that thereafter it be filed among the records of his office."

Of the existence of the jurisdiction which was invoked, and of the propriety of its exercise under the circumstances stated by the court, there can be no doubt; and therefore the correctness of the decree must depend solely upon the answer which should be made to the question: Did the instruments of writing held by the defendants below vest in them a valid and paramount title to the coal in question, as against the plaintiff in possession under title through later conveyances? In deciding this question we need not discuss all of the many points and authorities to which counsel have invited our attention, for, as we view it, it may be briefly determined by simply applying the plain terms of the instruments themselves to the conclusively established facts.

Let it be conceded, as the court below held, that "the so-called leases to the defendant Brown constituted a sale and conveyance of the coal * * * in place." Yet it does not follow that he was entitled to have it remain in place indefinitely, notwithstanding his undertaking to pay for it from time to time, "as mined * * * or otherwise reduced to possession." The fact is that he never mined at all, nor made any payment whatever under his agreement to pay "for every ton of coal" "removed and taken from the premises." He could not abandon the possession, for he never had it, and his grantors could not have re-entered without first withdrawing, and this it was not incumbent upon them to do under any possible view of the provisions respecting mining and railroad construction. "* * * The party would not be required to turn out and re-enter. The law does not require the performance of vain things." Clark v. Trindle et al., 52 Pa. 492–496; Hamilton v. Elliott, 5 Serg. & R. 375; Innis v. Templeton, 95 Pa. 262, 40 Am. Rep. 643.

This case differs materially from that of Plummer v. Hillside Co., 160 Pa. 483–494, 28 Atl. 853, where "the consideration of the grant was not the development of the mineral value of the land, but the price fixed by the agreement and actually paid to the lessor in money." Brown, by the very nature of his contract, was bound by obligations to be fulfilled, as well as clothed with rights to be exercised; and "while the question [of abandonment] is one of intention mainly, its decision does not depend upon an intention to abandon or retain the

mineral right alone, divorced from the obligations which adhere to it under the contract, but the intention to abandon the contemplated enterprise." Paine v. Griffiths, 86 Fed. 455, 30 C. C. A. 182; Elk Fork Co. v. Jennings (C. C.) 84 Fed. 839. That the parties to these instruments contemplated the prosecution of an enterprise, and not an absolute sale of coal in place, their whole tenor makes perfectly plain; and that the lessee did not really intend to carry on that enterprise the proofs abundantly show.

The decree of the Circuit Court is affirmed.

NOTE.

"This indenture, made this 3d day of January, one thousand eight hundred and seventy-nine, by and between Abraham Weaver, of the county of Somerset and state of Pennsylvania, of the first part, and J. Willcox Brown, of the city of Baltimore and state of Maryland, of the second and other part, witnesseth: That the said party of the first part, in consideration of the sum of five dollars, to them in hand paid by the said party of the second part (the receipt whereof is hereby acknowledged), have granted, bargained, sold, aliened, enfeoffed, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, and confirm, unto the said party of the second part, his heirs, executors, administrators, and assigns, all the iron ore, coal, cement, and fire clay and all other minerals of every kind, including stone or earth as may be required for mining operations in, upon, and under all that certain tract of land situated in Paint township, county of Somerset, and state aforesaid, and containing one hundred and seventeen acres, more or less, and described as follows: Adjoining land with T. Hays, D. Shaffer, J. Nerenberger, and others—(all minerals are to be drifted) with the appurtenances thereto appertaining, together with the full and exclusive right, liberty, and privilege of mining, taking, and carrying away said iron ore and other materials, as heretofore more fully recited, with such control of, rights in, and privilege of using said land and water as may be necessary in conducting mining operations in a full and convenient manner. To have and to hold all the said iron ore and other materials, as is more fully recited heretofore, and all the rights and easements aforesaid in, upon, through, and under the said tract of land, and the hereditaments and premises hereby granted or mentioned, and intended so to be, unto the said party of the second part, his heirs, executors, administrators, and assigns, to and for his and their only proper use and behoof, for the period of ninety-nine years from the date hereof. The said party of the first part further covenants, for his heirs, executors, administrators, and assigns, that he will, upon the proper demand of the party of the second part, his heirs, executors, administrators, and assigns, and at the expiration of the term herein provided for, and upon tender by the said party of the second part, his heirs, executors, administrators, and assigns, of ——— dollars, execute another lease. If the railroad be not commenced within five years from this date, then this contract to be null and void.

"In further consideration whereof, the said party of the second part, his heirs, executors, administrators, and assigns, promises and agrees with the said party of the first part, his executors, administrators, and assigns, that he will, at the expiration of every three months, whenever any ore or other materials, as hereinbefore more particularly recited, is mined, quarried, or otherwise reduced to possession by the said party of the second part, his heirs, executors, administrators, and assigns, and removed from the premises, render to the said party of the first part, his heirs, executors, administrators, and assigns, a true and correct account of the materials removed and taken from the premises during the said preceding three months, and pay it to the said party of the first part, his heirs, executors, administrators, and assigns, as follows, that is to say. For every ton of iron ore of 2,240 pounds, ten cents. For every ton of coal of 2,240 pounds, five cents. For every ton of cement or fire clay of 2,240 pounds, five cents. For every ton of mineral ores, other than the above, of 2,240 pounds, five cents.

"In witness whereof, the parties hereto have set their hands and seals this 3d day of January, in the year one thousand eight hundred and seventy-nine.

Abraham Weaver. [Seal.]
"J. Wilcox Brown. [Seal.]

"State of Pennsylvania, Somerset County—ss.:

"Before me, a justice of the peace in and for the said county and state, personally came Abraham Weaver, the grantor, and acknowledged the foregoing instrument of writing to be his act and deed, and desired the same to be recorded as such, according to law.

"Witness my hand and seal, the 3d day of January, A. D. 1879.

"Stephen H. Griffith, Justice of the Peace. [Seal.]"

BURNS v. COOPER.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1907.)

No. 2,430.

APPEAL—REVERSAL—FURTHER PROCEEDINGS—MANDATE.

A mortgage having been executed by a husband and wife, suit was brought to foreclose the same, and a decree rendered charging the life estate of the wife, as widow of a former husband, as well as her after-acquired title to the remainder. This decree was reversed, in so far as it affected such after-acquired title, and the cause was remanded, with directions to render a decree charging the wife's life estate. *Held*, that such judgment constituted the law of the case so far as the wife's life estate was concerned, and that a decree following such mandate was not objectionable for failure of the Circuit Court to declare the decree without prejudice to the future determination of the nature and extent of the wife's interest in the premises at the date of the mortgage.

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

A. M. Post (John J. Sullivan, on the brief), for appellant.
C. C. Flansburg (R. O. Williams, on the brief), for appellee.

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

VAN DEVANTER, Circuit Judge. The single question presented by this appeal is: Does the decree which it challenges conform to the mandate of this court issued when the case was here before? A full statement of the case is made in the opinion then rendered (Burns v. Cooper, 72 C. C. A. 25, 140 Fed. 273), and it will suffice to now briefly mention such matters as are relevant to the question just stated. The suit was one to foreclose a mortgage containing full covenants for title given by Martin Burns and Mary Burns, his wife, upon land in Nebraska to secure the payment of their joint promissory note. One of the defenses interposed by the wife was that she executed the note and mortgage solely for the benefit of her husband, and that, although she had a right or estate in the land at the date of the mortgage, she did not then have the full title, and, although she had subsequently acquired the full title, the mortgage did not affect the after-acquired title, by estoppel or otherwise, because under the laws of the state in force at the date of the mortgage a married woman could not bind her after-acquired property for the benefit of her husband. In the

bill it was alleged that her right or estate in the land at the date of the mortgage was "a life estate" of which she had become seised upon the death of her former husband, Daniel Foley, then the owner of the land; "said life estate being the right of homestead of the said Mary Foley (now Mary Burns) and her vested right of dower in and to said premises." In her separate answer it was alleged that, upon the death of Daniel Foley, "said property descended to his said children subject to the estate for life therein with which this respondent was seised as such widow, and said children were thereupon seised of said property by title in fee simple subject to the exception above stated," and, as further illustrating her attitude in respect of the nature and extent of her right or estate in the premises at the date of the mortgage, she sought in her answer, as also at the final hearing, to obtain some advantage from prior litigation to which she was a party and in which it was found and adjudged "that the said Mary Burns, then Mary Foley, has a life estate in said land as the survivor of her said husband, Daniel Foley." In the opinion rendered by the Circuit Court at the final hearing (Cooper v. Burns, 133 Fed. [C. C.] 398), it was stated that among the questions presented for determination were these:

"Fourth. Did the fact that Mary Burns had a present vested life estate in said lands at the time she executed complainant's mortgage, and that said mortgage contained the before mentioned covenants as to title, extend the lien of complainant's mortgage to her after-acquired title to the remainder? Fifth. Mary Burns, at the time of the execution of complainant's mortgage, having an existing vested life estate in the mortgaged premises, is she now estopped by virtue of the covenants in the mortgage from asserting that such mortgage is not a lien upon the entire fee estate?"

These questions were answered in the affirmative, and, it appearing that an undivided one-half of the estate in remainder was acquired by her subject to an intervening mortgage, a decree was passed declaring the complainant's mortgage a first lien "on the life estate of respondent, Mary Burns, in said premises," and also a first lien on one undivided one-half, and a second lien on the other undivided one-half, of the estate in remainder. From that decree she appealed to this court, the gravamen of her complaint, as stated in her assignments of error, being that:

"The Circuit Court erred in finding and determining that the mortgage described in the bill of complaint is a lien upon the entire present estate of the respondent, Mary Burns, in the mortgaged property, and in failing to limit and restrict such lien to the interest and estate of said respondent in said property at the date of the execution of such mortgage."

There was no assignment that the Circuit Court erred in finding and determining that at the time of executing the mortgage she had a present vested life estate in the land, or that it erred in declaring the mortgage a lien upon such life estate.

This court, in the opinion rendered upon that appeal, stated at the outset that:

"Prior to the 5th day of July, 1877, one Daniel Foley was the owner of 150 acres of land in Platte county, Neb., occupied by himself, his wife, Mary Foley, and their minor children, Jeremiah and Mary E. Foley, as a homestead. On that day Daniel Foley died intestate, the property descending

under the laws of the state of Nebraska to the children, share and share alike, subject, however, to the right of homestead and the vested right of dower in the widow; these rights of homestead and dower, in practical effect, amounting to a life estate in Mary Foley."

Then after it was also stated that all had conceded that "the mortgage binds the life estate of Mary Burns," and after the questions presented by the appeal in respect of the effect of the mortgage upon after-acquired title were considered the decree of the Circuit Court was, for reasons there given, held erroneous and reversed, in so far as it fixed the lien of the mortgage upon a greater interest in the lands than "the life estate of appellant, Mary Burns, as held by her at the date of the mortgage," and it was directed that a decree be entered in conformity with the opinion. The mandate subsequently issued precisely followed this ruling and direction.

Upon receiving the mandate the circuit court entered another decree declaring, as did the prior one, the complainant's mortgage a first lien "upon the life estate of Mary Burns in the premises," and directing a sale of such life estate to satisfy the mortgage debt, with costs, if not paid within 20 days, but this decree, differing from the prior one, gave the mortgage no effect beyond this. Mrs. Burns at that time proposed, and the court declined to adopt, the following limitation upon the decree:

"Provided, however, that the decree is without prejudice to the rights of her, the said Mary Burns, and of her successors in interest in respect to the nature and extent of the life interest or estate possessed by her, the said Mary Burns, in the aforesaid real property at the date of the execution of the above-described mortgage and without prejudice to the rights of either or any party in respect to the nature or extent of the interest or estate in said real property which will vest in a purchaser under this decree, such questions and each thereof being hereby expressly reserved by the court."

She then appealed from this decree, and now takes the position that we did not upon the first appeal determine the nature or extent of the right or estate held by her in the premises at the date of the mortgage, that the Circuit Court should have proceeded to determine that matter or should have expressly reserved it, and that, in disregard of the terms of the mandate, the Circuit Court fixed the lien of the mortgage upon an estate for her life in the premises, when, in fact, she did not have such an estate at the date of the mortgage, but was only entitled, at her election, to possess and occupy the premises as a homestead for her life, which was a mere personal right and not vendible, or to take, as dower, a life estate in one third thereof.

What has been said indicates quite strongly that, prior to the original decree, the appellant did not make any such claim as is now put forth, and that she did not upon her first appeal question the Circuit Court's decision that she had a present vested life estate in the premises at the date of the mortgage; but we pass to the question first above stated: Does the second decree conform to the mandate of this court issued when the case was here before? We think it does. As has been shown, the appellant was treated in our former opinion as having at the date of the mortgage a right of homestead and a vested right of dower in the land, the two, in practical effect, amounting to a life estate, and it was distinctly stated that it was conceded by all

that the mortgage was a lien upon this estate. It is not possible to read the opinion without understanding that the life estate so frequently spoken of therein was one in the entire mortgaged premises, and not in some undivided part of them; and, when the concluding paragraph declared that the decree was erroneous and must be reversed, in so far as it fixed the lien of the mortgage upon a greater interest in the land than the life estate of the appellant, "as held by her at the date of the mortgage," these last words were employed as indicating that such was the nature and extent of the estate held by her at that time, as had been before stated, and not as qualifying the ordinary acceptation and meaning of what immediately preceded them. By the plainest implication the opinion held that, when the mortgage was given, the appellant was possessed of homestead and dower rights in the land, amounting to a life estate, and that this was all that was bound by the mortgage; and the decree was reversed because it also declared the mortgage a lien upon the after-acquired estate in remainder. The case is thus fully within the ruling in United States v. California, etc., Co., 148 U. S. 31, 38, 13 Sup. Ct. 458, 37 L. Ed. 354. There the Supreme Court upon a former appeal had reversed a decree dismissing the bill of the United States; the reason for the reversal being that the Circuit Court, upon sustaining pleas interposed by the defendants, erred in dismissing the bill without permitting the United States to reply to them, and the reversal was accompanied by a direction that the United States be permitted to join issue on the pleas. The Circuit Court thereafter restricted the scope of the inquiry to the truthfulness of the matters set forth in the pleas, and upon a second appeal the United States assigned error upon this ruling. Mr. Justice Brewer, after referring to the opinion rendered upon the first appeal and stating that the mandate sent to the Circuit Court conformed to the opinion, said:

"That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law. On the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The Circuit Court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter open for inquiry."

As the Circuit Court properly interpreted and followed our former opinion and mandate, that must end the controversy; for our former decision, like the final decision of every court which has jurisdiction of the matters and parties it judges, rendered every question which was actually determined upon that appeal, and every question which might have been then raised in opposition to the decision, res judicata between the parties to it as respects the claim or cause of action there litigated. Guarantee Co. of North America v. Phœnix Ins. Co., 59 C. C. A. 376, 124 Fed. 170; United States Mining Co. v. Lawson, 67 C. C. A. 587, 594, 134 Fed. 769, 776; Haley v. Kilpatrick, 44 C. C. A. 102, 104 Fed. 647; Board of Com'rs v. Geer, 47 C. C. A. 450, 108 Fed. 478; In re

Sanford Fork & Tool Co., 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; Illinois v. Illinois Central R. R. Co., 184 U. S. 77, 91, 22 Sup. Ct. 300, 46 L. Ed. 440.

The decree is accordingly affirmed.

STANLEY v. BECKHAM.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1907.)

No. 2,397.

1. EVIDENCE—CONVERSATION—RIGHT TO EXPLAIN, VARY, OR CONTRADICT.
Where the whole or part of a conversation is put in evidence by one party, the other is entitled to explain, vary, or contradict it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 455.]

2. TRIAL—RECEPTION OF EVIDENCE—SCOPE OF REBUTTAL.
In an action for broker's services, defendant sought, on cross-examination of plaintiff, to prove an agreement to accept an employment and certain stock, in full for his services; but this, on objection, was excluded as not proper cross-examination, as being matter of defense. As a part of the defense, one of defendant's witnesses testified that, after the services had been rendered, plaintiff in a stated conversation, accepted as full compensation a position as salesman and defendant's agreement to carry for him, on certain terms, certain capital stock of a corporation. *Held*, that it was error, after the admission of such evidence, to refuse to permit plaintiff in rebuttal to give his version of such conversation, though plaintiff had previously in such cross-examination, testified to certain phases thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 146–155.]

3. SAME—EXCLUSION OF EVIDENCE—OFFER OF PROOF—NECESSITY.
Where, when a witness testifies in person at the trial, and not by deposition, certain questions asked of him are in proper form, relevant, and admit of favorable answers on behalf of the party propounding them, the sustaining of an objection thereto constitutes error, though there is no offer to show the substance of the proposed testimony; no offer being required by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 115–118.]

4. SAME—MISLEADING INSTRUCTIONS—BROKERS—ACTION FOR SERVICES.
Plaintiff was employed to get information with reference to the contemplated purchase of a grocery business for defendant, and to obtain a statement from the prospective sellers showing the volume of their business, amount of capital used, merchandise usually carried, salaries paid, profits realized, etc., but was expressly charged not to disclose his principal's name. On beginning negotiations, the sellers declined to make any statement, unless informed concerning plaintiff's principal, whereupon he disclosed defendant's name and obtained the required information, shortly after which defendant authorized the disclosure of his name, and then completed the negotiations himself, expressing satisfaction with plaintiff's efforts. *Held*, that, as applied to this evidence, in an action for plaintiff's commissions, it was error to charge that a broker, in order to show himself entitled to commissions, must faithfully carry out the instructions given by the principal, and has no right to depart substantially therefrom.

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

Thomas M. Morrow (William T. Skelton, on the brief), for plaintiff in error.

Edmund F. Richardson and Horace N. Hawkins, for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action by John T. Stanley to recover from James H. Beckham the reasonable value of services alleged to have been rendered by the former at the latter's request in certain preliminary negotiations resulting in his purchase of the wholesale grocery business of N. B. McCreary & Co., of Denver, Colo. The verdict and judgment were for the defendant, and the plaintiff prosecutes this writ of error.

One of the issues presented by the pleadings was whether, after the rendition of the services in question, the plaintiff had accepted, as full compensation therefor, the defendant's engagement to employ him as a salesman in the business and to carry for him $5,000 of the capital stock of a corporation to which the business was transferred. As part of his case in chief, the plaintiff, testifying in his own behalf, explained the circumstances of his alleged employment and the services rendered, and upon his cross-examination the following occurred:

"Q. Do you remember having had a conversation with him [Mr. Beckham] one night shortly after January 1st [when the purchase was consummated], or about that period, in the Albany Hotel? A. Yes, sir. Q. Did you not in that conversation ask Mr. Beckham, say to Mr. Beckham, that you had come to see him about the position which he had promised you, and that you wanted to know what he was going to do in the way of a position for you? A. No, sir. Q. Did he not in that same conversation say to you that he would give you a position? A. He sent for me to come to the hotel to see him that night. Q. And did he not on that visit state to you that he was going to give you a position in his business house? A. He told me if I wanted it, yes. Q. And you and he agreed on what you were to charge, what you were to receive for holding that position, did you not? A. Yes, sir. Q. You were to receive a commission which he guarantied to be not less than $100 a month, did you not? A. He never made any guaranty to me at all. Q. Never? A. Never, none; no, sir. Q. Who was present when this conversation occurred? A. Mr. McKnight. Q. Mr. McKnight was a gentleman who had been in business for many years with Mr. Beckham in Kansas City, had he not? A. Yes, sir. Q. You knew Mr. McKnight very well?

"Mr. Morrow (for plaintiff): We object to this as improper cross-examination. We did not go into it in any way, shape or form. It is a matter of defense.

"The Court: If it is in the case at all, I think it is a matter of defense.

"Q. I wish you to state what that conversation was that night at the Albany Hotel. (Objected to by counsel for plaintiff.)

"The Court: He may answer the question. (To which ruling of the court counsel for plaintiff then and there duly excepted.)

"Q. Didn't you say to Mr. Beckham at the time, in the presence of Mr. McKnight, that you felt amply repaid in the position which he gave you then, for everything you had done in interesting him in business in Denver? A. No, sir; I never made such a statement. Q. No such conversation as that occurred at all? A. No, sir. Q. In that conversation did not Mr. Beckham also say to you that he was going to carry $5,000 of stock for you, and that you should have that $5,000 of stock when it was paid for, and that you wouldn't have to pay for it yourself, but that it should be paid for out of the profits of the business, and that all dividends over and in excess of 6 per cent. should

be credited on the purchase price, and when it was paid for he would turn it over to you; and then did you not say that, in exchange for the position which he had given you and the opportunity to become a stockholder, you felt amply repaid, and were repaid, for everything that he had done, and that you felt extremely grateful to him for what he was doing for you? (Objected to by counsel for plaintiff, as improper cross-examination. Which objection was by the court sustained. To which ruling of the court counsel for defendant then and there duly excepted.)

"Mr. Hawkins (for defendant): So that I may not pursue that any further. I understand your honor's ruling to be that it is a part of the defense?

"The Court: Yes, sir."

As part of the defense, the defendant and Mr. McKnight testified at length respecting the conversation at the Albany Hotel; their version thereof being that the defendant then proposed, and the plaintiff accepted, as full compensation for his services, an arrangement by which he was to be made a salesman in the business and the defendant was to carry for him upon the terms indicated $5,000 of the capital stock of the corporation. Then in rebuttal the plaintiff again became a witness, and the following occurred:

"Q. Now, you heard the version of the conversation in the Albany Hotel? A. Yes, sir. Q. You can give your recollection of it.

"Mr. Hawkins: That is objected to. I asked Mr. Stanley about that.

"The Court: Omit that; he went over that yesterday fully. If there is any specific matter he failed to speak of yesterday, or any part of the conversation overlooked, you may ask him in regard to that. (To which the plaintiff excepted.)

"Q. You may state whether or not you stated to Mr. Beckham at that time that what he had done for you in giving you a position and in holding stock for you amply repaid you for any services that you had rendered? (Objected to by counsel for plaintiff, because that was gone over.) "The Court: I think that was in his statement, but he may answer this.

"A. Mr. Beckham asked me to come to the office—Q. That is not the question, did you ever make that statement to him? A. No, sir. Q. And did he state to you that he would give you this position, and that he would hold this stock for you to compensate you for your services performed for him? (Objected to for the reasons last above stated. Objection sustained. Exception allowed.)"

Error is assigned upon the rulings preventing the plaintiff from giving in rebuttal his version of the conversation mentioned, and we entertain no doubt that in this there was error, for, where the whole or part of a conversation is put in evidence by one party, the other party is entitled to explain, vary, or contradict it. Carver v. United States, 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602; Home Benefit Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160; Chicago City Railway Co. v. Bundy, 210 Ill. 39, 44, 71 N. E. 28; Hoggson, etc., Co. v. Sears, 60 Atl. 133, 136, 77 Conn. 587. And it is immaterial that upon the prior cross-examination the plaintiff had been interrogated respecting some particular phases of the conversation, for, as it had not been made, and was not necessarily, part of his case in chief, he was entitled in rebuttal to give his version of it and to go into every phase of it having any tendency to show that the defendant's version was not the correct one. The rulings seem to have been made in the belief that the subject had been fully covered by the prior cross-examination, but the belief was a mistaken one according to the record, for it shows that the cross-interrogatory, "I wish you to state what that

conversation was that night at the Albany Hotel," the only one calling for the plaintiff's full version, was not answered, and also that the cross-examination was stopped by the court's ruling that it related to what, if admissible, was part of the defense. But it is said there was no offer to show the substance of the testimony proposed to be elicited by the questions propounded and excluded in rebuttal, and therefore it does not appear that their exclusion was reversible error. The premise is correct, but not the conclusion. The controlling rule, applicable where the witness testifies in person at the trial, and not by deposition, as stated by Mr. Justice Harlan, in Buckstaff v. Russell, 151 U. S. 626, 637, 14 Sup. Ct. 448, 452, 38 L. Ed. 292, is this:

"If the question is in proper form, and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer; but, if that be not done, the rejection of the answer will be deemed error or not, according as the question upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

And this rule is recognized in other cases. Oriegt v. Hedden, 155 U. S. 228, 235, 15 Sup. Ct. 92, 39 L. Ed. 130; Atchison, Topeka & Santa Fé Ry. Co. v. Phipps, 60 C. C. A. 314, 316, 125 Fed. 478, 480.

As it is plain that here the questions were in proper form, were relevant to the issues, and admitted of answers favorable to the party in whose behalf they were propounded, and as a statement of what was proposed to be proved was not required by the court, there was prejudicial error in not permitting the questions to be answered.

Error is also assigned upon the giving of the following instruction to the jury:

"You are instructed that an agent or broker must, in order to show that he is entitled to commissions from his principal, faithfully carry out the instructions given by the principal. He has no right to depart substantially from such instructions."

That in the abstract the instruction was correct must be conceded; but we think it was so plainly calculated to mislead the jury when they came to apply it to the case committed to their consideration that there was error in giving it. The only respect in which it could be said from the evidence that the instructions of the defendant had been departed from by the plaintiff was that, although instructed not to do so, he had disclosed to N. B. McCreary & Co. the name of his principal in the early part of his negotiations with them. The facts in that connection were these: The defendant, who resided in Kansas City, Mo., was desirous of purchasing a wholesale grocery business in Denver, Colo., and the plaintiff, who resided at the latter place, was conducting preliminary negotiations, under the defendant's instructions, to the end that his desire might be realized. One of these instructions, repeated in several of the defendant's letters, was, "My name must not be used," and another was to obtain for him a statement from the prospective sellers giving in detail the volume of their business, amount of capital used, amount of merchandise usually carried, salaries paid, profits realized, etc. When the negotiations with McCreary & Co. began, they

declined to make such a statement, unless informed for whom it was intended, so they might determine whether he was a responsible party. The plaintiff then, without obtaining the defendant's consent, disclosed his name, and was thus enabled to obtain and transmit to him the statement requested. About a month later, while the negotiations were still in progress, the defendant authorized the disclosure of his name, and still later went to Denver, and, as it was previously understood he would do, took up the negotiations himself and carried them to completion, availing himself of the results obtained by the plaintiff, and expressing satisfaction therewith. There was no evidence that in prematurely disclosing the identity of his principal the plaintiff was actuated by any purpose other than that of obtaining the statement covered by his instructions, or that the disclosure operated prejudicially to the defendant or advantageously to McCreary & Co. In these circumstances, we think the plaintiff's departure from the instructions of his principal was so unsubstantial, so devoid of any imputation of bad faith, and so plainly free from resulting injury to his principal, that it did not affect his right to recover for his services, if he was otherwise entitled to recover. Story on Agency, § 331; Hinton v. Coleman, 76 Wis. 221, 45 N. W. 26; Veasey v. Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241. The jury, however, could not well have regarded the court's instruction otherwise than as committing to their judgment the question of whether there was such a departure from the instructions of the principal as to disentitle the agent to compensation for his services.

It is said that the evidence was so overwhelmingly in favor of the defendant that, notwithstanding the matters here considered, no jury would have found for the plaintiff; but of this it is enough to observe that, while the evidence for defendant was strong and persuasive, there was yet such a conflict between it and the evidence for the plaintiff as to entitle the latter to a submission of the issues to the jury.

The judgment is reversed, with a direction to grant a new trial.

AUGUSTA TRUST CO. v. FEDERAL TRUST CO. et al.

(Circuit Court of Appeals, First Circuit. February 1, 1907. On Appeal from Taxation of Costs, March 27, 1907.)

No. 667.

1. STREET RAILROADS—LIEN UNDER MASSACHUSETTS LAW.

Rev. Laws Mass. 1902, c. 112, § 23, requiring a street railroad company before issuing mortgage bonds to obtain authority therefor from the state board of railroad commissioners, which may be granted only after a hearing and examination into the assets and liabilities of the company, and upon being satisfied that its property exclusive of its franchise equals or exceeds its indebtedness, embodies a rule of public policy which cannot be ignored nor overridden by the courts.

2. SAME—AGREEMENT TO ISSUE BONDS.

A provision in notes, given by a Massachusetts street railroad company, by which it agreed to issue to the holder as security certain of its bonds secured by a mortgage previously executed, as soon as a further issue of bonds thereunder should be authorized by the state railroad commissioners, whose authority was necessary before they could be legally issued under Rev. Laws Mass. 1902, c. 112, § 23, does not place the notes on an equality with bonds previously issued, nor entitle the holders to any preference over general creditors where no further issue of bonds was authorized, and the company has become insolvent and is in the course of administration, although the circumstances were such as to create an equitable lien as between the parties which the courts would enforce in the absence of the statute.

3. COSTS—SEPARATE COSTS.

Where appellees recover costs in the Circuit Court of Appeals, separate costs are taxed for the several appellees who appear separately and file separate briefs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 921.]

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

Orville D. Baker (Daniel C. Stanwood, on the brief), for appellant.

Joseph P. Fagan (James C. Cotter on the brief), for appellee Federal Trust Company.

Joshua M. Sears, for appellees John T. Burnett and John L. Hall.

William M. Richardson, for appellee Massachusetts Securities Company.

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

PUTNAM, Circuit Judge. The facts are sufficiently stated in the opinion of the learned judge of the Circuit Court reported as Augusta Trust Co. v. Federal Trust Co. (C. C.) 140 Fed. 930, except that we deem it advisable for convenience to repeat here in full one of the notes.

No. 75.

$5,000. Boston, Mass., February 5, 1903.

For value received the Middleboro, Wareham and Buzzards Bay Street Railway Company, incorporated under the laws of Massachusetts, promises to pay to ourselves or order the sum of five thousand dollars on the fifth day of August, 1903, at the office of Federal Trust Company, in the city of Boston, Mass., with interest at the rate of 6 per centum per annum.

It is hereby certified that the issue hereof has been duly authorized by law and by the proceedings of the said company and does not exceed any limit prescribed by law.

The Middleboro, Wareham & Buzzards Bay Street Railway Company hereby agrees to use the proceeds of $6.000 of its first mortgage bonds Nos. 205 to 210 in payment of its note dated February 5th, 1903, payable August 5th, 1903, and in case the said note shall not be paid at maturity the said company agrees to deliver $6,000 of its said first mortgage bonds to the owner of the said note as security therefor within a reasonable time after the same shall have been authorized by the board of railroad commissioners. The said company agrees not to agree to deliver first mortgage bonds to any person or corporation in excess of $500,000 for an extension of its tracks from Buzzards Bay into the town of Falmouth, and equipment for the same.

In witness whereof the said Middleboro, Wareham & Buzzards Bay Street Railway Company has caused this common seal to be hereto affixed and these presents to be signed in its behalf by its treasurer thereto duly authorized.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
Thomas F. Carey, Treasurer.

Approved by
Edward A. Mead,
Chas. S. Cummings, 2d,
Executive Committee.

Indorsements.

Oct. 3, 1903. Received five hundred dollars.
Oct. 30, 1903. Received five hundred dollars.
Nov. 6, 1903. Received five hundred dollars.
Dec. 26, 1903. Received five hundred dollars.
Jan. 4, 1904. Received five hundred dollars.
1904, Jan. 15. Received five hundred dollars.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
Thomas F. Carey, Treasurer.

Horace B. Parker.
Thomas F. Carey.

Article X.

The directors may appoint an executive committee of not more than three. The duty of the committee shall be to have full charge and control of the making and executing of all contracts for the financing and constructing and furnishing equipment for the road, and all notes or bills payable, not including bonds secured by mortgage, to be legal and binding upon the company shall be signed by the treasurer and approved on their face by the signature of at least two of the executive committee.

Middleboro, Wareham & Buzzards Bay Street Railway Company First Mortgage 5% Bonds.

This is to certify that Note No. 75 is entitled to six (6,000) thousand dollars in first mortgage 5% bonds of the Middleboro, Wareham & Buzzards Bay Street Railway Company Bonds Nos. 205 to 210 secured by a mortgage or deed of trust to the Federal Trust Company as trustee, which bonds, or the sum payable by the underwriter of same, is to be delivered to said holder of Note No. 75 as soon as said bonds are engraved and certified by said trust company and authorized by the railroad commissioners of Massachusetts and upon return of this certificate properly indorsed. Said bonds are to be subject to order of the company upon fulfillment of the attached note.

Middleboro, Wareham & Buzzards Bay Street Railway Company,
By Thomas F. Carey, Treasurer.

Recorded, Boston, Feb. 5, 1903.
Federal Trust Co., by David Bates, Treasurer.

We also reiterate the fact that the moneys advanced upon the notes in question were bona fide used in the construction of the railway of the corporation whose obligations are involved here. We also desire to call attention to the fact that the mortgage under which the complainant claims rights in this proceeding expressly provided that the bonds secured thereby might be used, not only for furnishing means of construction and equipment, but "for funding the floating debt"

"that has been incurred for construction," etc. Therefore, by the very terms of the mortgage, it was lawful, so far as the corporation itself and the mortgage were concerned, to issue bonds as stipulated in the notes given the complainant, and the holders of the bonds which have in fact been issued according to the terms of the mortgage had lawful notice thereof; so that, so far as they are concerned, and the corporation also, there is, aside from the statutes hereinafter referred to, no equity prohibiting the relief which the complainant seeks.

We also desire to call attention to the fact that, although bonds to the amount of only $150,000 had been issued under the mortgage, the mortgage provided for additional bonds, completing the entire sum of $500,000, and those additional bonds were identified in advance by serial numbers, as to which the note which we have copied refers specifically to bonds numbered 205 to 210, each inclusive; and the other notes involved in this litigation likewise refer in the same way to other bonds contemplated by the mortgage according to specified serial numbers.

It will be observed that the body of each note pledges the bonds named in it, or the proceeds thereof, to its payment, with the additional provision that, in case the note is not paid at maturity, the corporation agrees to deliver $6,000 of its first mortgage bonds to the owner of the note as security therefor within a reasonable time after the same shall have been authorized by the board of railroad commissioners. While this does not in terms require the delivery of the precise bonds named in the note, nevertheless it cannot be questioned that, if, at the time this bill was filed, the bonds so named had not been disposed of, as in fact they had not been, they were pointed out as the bonds as to which the holder of the note might claim a specific right. The certificate on the note departs somewhat from the terms of the note itself, in that it provides that the bonds named, or what might be received therefor, should be delivered to the holder as soon as they were engraved and certified, without any stipulation for delay until the note came due. Therefore, on the whole, putting together the note and the certificate, it is plain that the holder had an option to demand that the specific bonds named should be delivered to him as soon as issued, or the proceeds thereof paid to him, thus putting it beyond doubt that the holder was entitled to a lien on those specific bonds, or the proceeds thereof. Thus the property as to which the lien was contemplated was specifically identified.

In view of the facts stated by the learned judge of the Circuit Court, in connection with those to which we have referred, it is difficult to perceive any stronger equity than that raised on this appeal in behalf of the complainant. Here we have a stipulation that certain funds should be advanced in the construction of the railway of the corporation involved, and that, as soon as the details of the issuing of the mortgage bonds could be worked out, specific bonds, or the proceeds thereof, should be delivered to the holders of the notes given for the advances, either as collateral or payment, as the case might be. Under the circumstances, the complainant claims, first, that it is entitled to be admitted to share pro rata with the holders of the $150,000 of bonds of which we have spoken; or, second, that in the distribution of any surplus proceeds of the property of the corporation in question, not re-

quired to satisfy such $150,000 of bonds, the complainant should have priority over the general creditors. Independently of the peculiar circumstances to which we will refer, what difficulty stands in the way of the complainant's first proposition? With regard to all liens of this character, equity proceeds on very broad principles to give effect to what has been fairly agreed to be done, so far as it can accomplish a result without injustice to others than the parties directly concerned. We have shown that, by the terms of this mortgage, which gave full notice to the holders of the outstanding bonds, no such injustice can be done. We have also shown that the equities of the case are supported by the fact that the funds of the complainant went into the property, under the express agreement that it should share in the security thus created by the use of what was thus advanced.

An illustration of the extent to which equity goes in this direction is the fact that, while it is often held that mortgages of after-acquired property are not valid in law, they are generally held to be valid in equity, provided the property is sufficiently pointed out and afterwards comes into existence under the terms of the intended security. The general rule in this respect has been stated often by the Supreme Court, although applied specifically to mortgages covering railroad supplies and rolling stock, which, in a certain sense, are incidental to the franchise of the corporation. Pennock v. Coe, 23 How. (U. S.) 117, 127, 16 L. Ed. 436; Irrigation Company v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. Ed. 327. Jones on Chattel Mortgages (4th Ed. 1894), 202, 203, lays down like broad propositions as the settled American doctrine; and it cites decisions of the Circuit Courts which have long been accepted as of very high authority, establishing this as the rule of federal tribunals, although we think the Supreme Court has never in fact applied it except to the incidental property of railway corporations. It must also be admitted that, where there is an incomplete attempt to give security on existing property, equity will give relief. Fry on Specific Performance (4th Ed. 1903) p. 22, states the rule unqualifiedly and positively as follows:

"Again, the court will specifically enforce a contract to execute a mortgage, and that even with an immediate power of sale, where the money has been actually advanced either before or at the time of the contract."

The author adds that specific performance will not be granted where the money has not been advanced in fact, neither to enforce an agreement for such an advance. This is undoubtedly the general rule, although possibly it would not apply to some exceptional cases, like those of quasi corporations which have agreed to furnish aid towards public utilities already initiated. However, that particular topic does not concern this case. The rule of so much of the text as we have cited was applied unhesitatingly by Vice Chancellor Wickens, in 1871, in Ashton v. Coryton, L. R. 13 Eq. 76, and by Lord Chancellor Selborne, in 1872, in Hermann v. Hodges, L. R. 16 Eq. 18; and the principle involved was made use of, with a thorough discussion and favorable observations, under circumstances substantially the same as those at bar in Walker v. Brown, 165 U. S. 653, 654, 656, 17 Sup. Ct. 453, 41 L. Ed. 865.

Therefore, it may be that there would be no difficulty in sustaining the complainant's bill except for a peculiar obstacle which seems in-

superable. The opinion of the learned judge of the Circuit Court observes that under the laws of Massachusetts this corporation could not issue bonds without the approval of the board of railroad commissioners, and makes reference to sundry statutes, of which we need cite only section 23 of chapter 112 of the Revised Laws of 1902. The opinion also observes as follows:

"The petitioner advances the proposition that under this trust indenture there may exist, not only legal bondholders, whose bonds have been authorized by law, but equitable bondholders under the agreements contained in these notes. For the court to accept this proposition would be to lay down the principle that a street railway company in Massachusetts may first execute a mortgage, and then, in direct violation of the state statutes, may proceed to issue bonds to the amount named in the mortgage under the form of contracts embodied in its promissory notes. This is in effect taking the control of street railways out of the hands of the state, by permitting them in this way to annul the laws which the state has passed for their proper regulation."

We are forced to agree with these observations, and they seem to leave us nothing except to affirm the judgment of the Circuit Court. What is involved in the line of statutes concerning this matter is a deep-seated, clearly implied, public policy, intended to protect the community, and incidentally both secured and unsecured creditors. The statute which we have named requires that no bond be issued except, of course, by a vote of a majority in interest of the stockholders of the corporation, which condition, perhaps, is sufficiently covered in this record. Nor can they be issued until the board of railroad commissioners is satisfied that the value of the property of the corporation, "excluding the value of the franchise, * * * taken at a fair value for railway purposes, * * * equals or exceeds the amount of the capital stock outstanding and the debt"; nor until the board, "after an examination of the assets and liabilities of the company, and such further investigation as it considers expedient, shall by vote approve their issue."

Proceedings under the line of statutes to which the section quoted relates have never been merely formal, but, according to the practice, they are not completed until after due notice, public hearing, and a solemn adjudication. Indeed, this section requires a formal vote by the board, to be passed "after an examination of the assets and liabilities of the company, and such further investigation as it," that is, the board, "considers expedient." All this emphasizes the fact that this legislation is in line with a deep-seated public policy, which, inasmuch as the corporation involved is purely local, we could not in any way disregard with reference to either a formal or an equitable mortgage, or to any attempt to authorize the complainant to share with the holders of the bonds already issued, or even to protect it by a lien on the property in excess of their claims. Any attempt in either direction would be equally violative of the local statutes appertaining hereto.

It is true that it is settled that a court proceeding in bankruptcy, or for the purpose of winding up insolvent estates in any method, may lay hold of the value of seats in stock exchanges, notwithstanding transfers of them require the approval of the officers of the exchanges. Such a condition, however, involves no rule of public policy. It is also true that, in Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51

L. R. A. 292, decided by us on June 15, 1900, we authorized the court in bankruptcy to lay hold of the proceeds of a license for the sale of intoxicating liquors, issued in accordance with the statutes of Massachusetts, notwithstanding the same could be transferred only by authority of the commissioners. It appeared, however, in that case that the commissioners were accustomed to grant authority for such transfers, unless there was some special reason to the contrary, and that in that way licenses had proved of substantial value, yielding sometimes from $4,000 to $5,000. However, we made no attempt to avoid the statutes of the state, because a transfer had been lawfully approved, and we dealt only with the proceeds thereof. Therefore, such classes of cases are of no assistance here.

It is also true that, if the corporation involved here were still an active one, we might, on a bill in equity framed therefor, but otherwise like that at bar, compel it to apply to the board for authority to issue the bonds asked for. But this corporation went into the hands of a receiver before this bill was filed; and there is no allegation that the circumstances are such as would call upon the commissioners to authorize any further lien, because there is no allegation that the property of the corporation would, as required by the statute we have cited, at a fair value for railway purposes, equal or exceed the amount of the outstanding capital stock and debt. On the other hand, the whole case is based on the hypothesis that the corporation is insolvent, without sufficient assets to pay its creditors, much less to divide anything to its stockholders. It is defunct and powerless, and incapable of acting under orders from a court sitting in equity, or of receiving the recognition of the board of railroad commissioners for any purposes involved in this litigation. On the whole, we find no method by which the difficulty stated by the learned judge of the Circuit Court can be overcome.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

LOWELL, Circuit Judge, concurs in the result.

On Appeal from Clerk's Taxation of Separate Costs for the Several Appellees Who Appeared Separately and Filed Separate Briefs.

PER CURIAM. In this case the clerk taxed separate bills of costs for each of the several parties appearing as appellees, and an appeal was taken to us, claiming that only one bill should be taxed. By analogy to the implication of equity rule 62,[1] the taxation by the clerk must be sustained.

The appeal is dismissed.

[1]Equity Rule 62.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

KENTUCKY COAL, TIMBER, OIL & LAND CO. v. HOWES et al.

(Circuit Court of Appeals, Sixth Circuit. March 21, 1907.)

No. 1,631.

1. WRIT OF ERROR—TIME FOR BRINGING.
While a motion for new trial seasonably filed in an action at law in a Circuit Court prevents the judgment from becoming final until it is disposed of, time given for the allowance of a bill of exceptions has no such effect and cannot enlarge the time within which a writ of error must be brought, which, where the writ is returnable to the Circuit Court of Appeals, is limited to six months from the date of the final judgment.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1889–1896.]

2. SAME—WHEN "BROUGHT."
A writ of error is not "brought" within the meaning of Rev. St. § 1008 [U. S. Comp. St. 1901, p. 715], until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1918.]

3. SAME—ORDER ALLOWING WRIT—CONDITION.
An order allowing a writ of error conditioned on the giving of a bond by the plaintiff in error is ineffective until the condition is complied with.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1915.]

4. SAME—ISSUANCE—DUTY OF CLERK.
A writ of error must be served, and such service is made by depositing it with the clerk of the court which rendered the judgment. While the clerk of a Circuit Court may issue a writ of error to that court, under the statute, as well as the clerk of the appellate court, upon an order allowing the same, it is not his duty to do so unless requested, but it is the duty of the plaintiff in error to apply for the writ and to deposit it for filing when issued.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2105–2113.]

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

On motion to dismiss writ of error.

D. W. Steele, Jr., for plaintiff in error.

C. B. Wheeler and E. W. Hager, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This cause is now heard upon a motion to dismiss this writ of error, because not "brought" within the limitation of six months, prescribed by section 11 of the Court of Appeals act (Act March 3, 1891, c. 517, 26 Stat. 829 [U. S. Comp. St. 1901, p. 553]), after the date of the final judgment.

The judgment sought to be reviewed was rendered May 27, 1905. A motion for a new trial was not denied until September 5, 1905. This motion, having been seasonably entered, prevented the judgment from becoming final until disposed of. In re McCall, 145 Fed. 898, 76 C. C. A. 430; Aspen Mining Co. v. Billings, 150 U. S. 31, 14 Sup. Ct.

4, 37 L. Ed. 986. But no writ of error was filed with the clerk of the court until May 7, 1906, which was more than six months after the judgment became final. That the Circuit Court, from time to time, after the judgment became final, enlarged the time for filing a bill of exceptions, did not prevent the running of the time limit within which the writ might be "brought."

A pending application for a rehearing in an equity cause, or a new trial in an action at law, does suspend the time within which an appeal may be "taken" or a writ of error "brought" because neither the decree nor the judgment can be final until the motion is disposed of, and the time limit does not begin to run until the decree or judgment is final. But the allowance of a bill of exceptions has no effect upon the finality of a judgment and an enlargement of the time for filing cannot therefore affect the time limit for bringing a writ of error. But it is said that a petition for a writ of error was filed together with an assignment of error on October 24, 1905, and a journal entry made allowing the writ "upon the plaintiffs giving bond in the sum of $500.00." There is nothing in the transcript to indicate that this was ever prosecuted by giving the bond upon which the allowance of the writ was conditioned, or if so, that it was ever given within the time within which the writ must be brought. But, however this may be, no writ of error was ever filed with the clerk of the court until May 7, 1906, and this seems to have been issued because upon that day there was a second allowance of a writ of error by one of the judges of the court. A writ of error is not "brought," to use the verbiage of section 1008, Rev. St. [U. S. Comp. St. 1901, p. 715], within the legal meaning of the term until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed. "It is the filing of the writ," said Chief Justice Taney, in Brooks v. Morris, 11 How. 203, 207, 13 L. Ed. 665, "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 upon 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." This case has been many times followed. Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed. 810; Scarborough v. Pargoud, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; Polleys v. Black River Co., 113 U. S. 81, 5 Sup. Ct. 369, 28 L. Ed. 938; Mutual Life Co. v. Phinney, 178 U. S. 327, 335, 20 Sup. Ct. 906, 44 L. Ed. 1088. The principle applicable to writs of error applies also to appeals. Credit Co. v. Arkansas, etc., Ry. Co., 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448. But it is said that whether plaintiff filed a bond or not it was the duty of the clerk under the order allowing a writ of error, made October 24, 1905, to issue and file the writ before the limit for the bringing of the writ should expire, and that, when a plaintiff has done all that he is required to do, he should not be deprived of his remedy by reason of the fault of the clerk in not actually issuing and filing the writ in accordance with the order of the court. For this, counsel cite Mutual Insurance Co. v. Phinney, cited above, where it was held that the failure of a clerk to indorse a writ lodged with him as filed will not defeat the writ; the plaintiff having

properly and seasonably sued one out and left it with the clerk for filing.

The case does not apply to the facts of this cause for two reasons: First, the plaintiff did not do all that he was required to do; and, second, the clerk did not neglect any duty which the law imposed upon him. The allowance of the writ of error on October 24, 1905, was conditional upon giving bond. Plainly, it was ineffective until the condition was complied with. Nothing appears to show when, if ever, such a bond was given. The inference from a new allowance upon May 7, 1906, when a writ was filed, is that the allowance of a writ on October 24, 1905, was abandoned and never prosecuted. But assuming a bond to have been given in time, and that the plaintiff did not follow it up by obtaining a writ and delivering it to the clerk for filing, was it the clerk's duty to issue a writ and file it for the plaintiff in error, although not requested so to do? It must be remembered that the writ of error which is to deprive the Circuit Court of jurisdiction and to remove the record to the appellate court is the writ of the Supreme Court or of this court, according to the jurisdiction of those courts, and not of the Circuit Court, although the clerk of that court may actually issue it. Originally they issued only from the office of the clerk of the Supreme Court. But by statute enacted in 1792 it was provided that a form of writ should be prepared by the Supreme Court and copies placed in the hands of the clerks of the Circuit Courts to be issued upon application under the seal of that court. Mussina v. Cavazos, 6 Wall. 355, 18 L. Ed 810. This enactment is now carried into the Revised Statutes as section 1004 [U. S. Comp. St. 1901, p. 713], whereby it is provided that the writ may be issued either by the clerk of the Supreme Court or the clerks of the Circuit Courts. By section 11 of the Court of Appeals act, all of the existing provisions of law regulating methods of review are made applicable to the Circuit Courts of Appeal. Under this, writs of error, returnable to this court, may be issued from the office of the clerk of this court or the office of the clerk of the circuit court in which the judgment was rendered Northern Pacific R. R. Co. v. Amato (C. C.) 49 Fed. 881. The writ runs in the name of the President and bears the test of the Chief Justice. It is directed to the judges of the Circuit Court, and commands them to return, with the writ, into this court, a transcript of the record. Such a writ must be served, and it is so served when it is deposited with the clerk of the court in which the judgment was rendered. This deposit of the writ is its service, and the file mark, which it is the duty of the clerk to place thereon, is but evidence to show the fact of service and its date. It is clear that it is the duty of the plaintiff in error to apply for the writ, either to the clerk of this court or, if more convenient, to the clerk of the Circuit Court, and then it is his duty to deposit the writ, when issued, with the clerk of the Circuit Court. The clerk of the Circuit Court is under no greater duty to issue such a writ, without it is demanded by the plaintiff, than is the clerk of this court. Of course, for a neglect to issue the writ when requested an action might lie, but that it not the question here. Baltimore & O. R. Co. v. Weedon, 78 Fed. 584, 24 C. C. A. 249. The clerk was not requested to is-

sue this writ at any time prior to its actual issuance and was under no legal duty to do so without request.

The motion to dismiss the writ, because not "brought" within time is allowed.

UNITED STATES v. PEEKE.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 58.

CRIMINAL LAW—EXCESSIVE SENTENCE—CONVICTION ON DIFFERENT COUNTS.

Where a defendant has been convicted on different counts of an indictment charging separate offenses under the same statute, the court may impose separate and cumulative sentences upon the several counts, but a single sentence for a term longer than is authorized by the statute for one offense is void to the extent of the excess, and another court cannot cure the defect by apportioning the term upon the different counts, but after serving the lawful part of the term the prisoner may be discharged on a writ of habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3285, 3298–3300; vol. 25, Habeas Corpus, § 23.

Power of court to revise sentence, see note to Nichols v. United States, 46 C. C. A. 412.]

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 144 Fed. 1016.

John P. Nields, for appellant.

Scott Scammell, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and HOLLAND, District Judge.

HOLLAND, District Judge. This is an appeal from an order of the District Court of New Jersey discharging Erastus Carl Benedict Peeke from the state prison at Trenton on a writ of habeas corpus. Peeke was tried and convicted in the United States Court in the District of Delaware on the third, fourth, fifth, sixth, and sixteenth counts of an indictment charging him under section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], with the crime of conspiring to commit an offense prohibited in section 5501, Rev. St. [U. S. Comp. St. 1901, p. 3709].

On August 2, 1904, the following judgment was pronounced against him:

"And now, to wit, this second day of August, A. D. nineteen hundred and four, the district attorney moves for judgment. And it appearing to the court that the jury has found the said Erastus Carl Benedict Peeke, alias Benedict Peeke, guilty in manner and form as he stands indicted in the third, fourth, fifth, sixth, and sixteenth counts of the indictment returned against him in the above-entitled cause on the twenty-fourth day of February, A. D., nineteen hundred and four, it is considered and adjudged by the court now here that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, do forfeit and pay to the United States a fine of three thousand dollars and costs of this prosecution; and further that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, be imprisoned in the New Jersey State Prison at Trenton, New Jersey,

for the term of five years, beginning on this day and ending on the first day of August, A. D. nineteen hundred and nine. And it is further considered, adjudged, and ordered by the court now here that you, Erastus Carl Benedict Peeke, alias Benedict Peeke, be now committed to the custody of the marshal of the United States for the district of Delaware in order that the foregoing sentence may be carried into execution."

After sentence, on the same day, he was delivered to the keeper of the New Jersey state prison, where he was confined as a prisoner until April 16, 1906, the date of his discharge.

In his petition for the writ he stated that sentence was imposed upon him "for a term of five years, beginning on this day (to wit, 2d day of August, 1904), and ending on the 1st day of August, 1909, and that, "according to the provisions of section 5440 and the conviction thereunder, the court was limited in its power to punish * * * to a period of imprisonment of not more than two years," and as a consequence the petitioner insists that he is unlawfully detained, and should be discharged. The prisoner was entitled to a reduction of time for good behavior provided for by section 5540 of the Revised Statutes. With this credit to which he is entitled a two-year sentence expired on the 11th day of March, 1906, upon which day he would be entitled to be discharged, if his contention be right as to the unlawfulness of the sentence imposed. The entry of the decree was withheld from April 6th to the 16th to allow time for the correction of the judgment by the court imposing the sentence, if the records warranted a correction. There being no amendments made, the prisoner upon the latter date was discharged, from which judgment an appeal was taken to this court, and a number of errors assigned, all of which can be disposed of in the consideration of the objections: (1) The Court erred in holding that the sentence was void except for the period of two years; and (2) the remedy of the prisoner, if any, was by writ of error, and not by habeas corpus. The petitioner was convicted under section 5440 for conspiracy to violate section 5501, in five different counts in the same indictment, and, it is contended, for five distinct offenses, for each of which offense section 5440 authorized the imposition of a maximum term of imprisonment of two years. The authorities cited by Judge Lanning are sufficient to show that cumulative sentences can be imposed in the federal courts (Ex parte Peeke [D. C.] 144 Fed. 1018), but, in order that a sentence should have this effect, it must be imposed in that form (United States v. Patterson [C. C.] 29 Fed. 775). Where there is a general verdict on two or more counts of an indictment charging crimes which are of the same character, although growing out of totally distinct and separate transactions, sentence may be passed and judgment may be entered for a specified term of imprisonment upon each count, which terms must be consecutive, and it is error to sentence for a certain period in gross. 12 Cyc. 962. Upon these five different counts of the indictment there is no doubt but that a term of imprisonment in the aggregate could have been inflicted by cumulative sentences of five years, or even ten; but this was not done. The judgment was a single sentence "for the term of five years, beginning this day (to wit, August 2, 1904) and ending on the 1st day of August, 1909." As

the maximum term for which the prisoner could be sentenced upon any count in the indictment was two years, this sentence is clearly excessive to the amount of three years, and to that extent null and void. If construed, as suggested by counsel for the government, to be five successive sentences of one year each, it would be entirely void. Section 5440 does not prescribe confinement in a "state jail or penitentiary," and section 5541, Rev. St. [U. S. Comp. St. 1901, p. 3721], prohibits imprisonment in a "state jail or penitentiary" unless the statute violated prescribes such imprisonment, or the sentence is for a period longer than one year. Mills Case, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107. If the prisoner, therefore, is to be detained for the full time of five years, there must be an apportionment of the time other than one year to each count. If we were to divide it into three successive sentences, the first for 2 years, the second for 1½ years, and the third for 1½ years, to which count of the indictment would we assign the different terms? The prisoner has already served two years, and it may be asked upon which count of the indictment did he serve this term, which count would cover the second period of confinement, and, after the expiration of that, to which count should we assign the last year and a half? These counts charge distinct conspiracies with different persons to violate section 5501. Should some newly discovered evidence induce the executive to pardon the prisoner on one or more counts, how would it be possible to ascertain to what part of the sentence the pardon applied? To what reduction from the five-year term would he be entitled? To state these questions is to answer them.

The District Court was not without authority for refusing to correct the sentence by assigning different parts of the term to separate counts in the indictment. In the case of Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110, the Supreme Court refused to apportion a sentence to two counts in an indictment, assigning one year to each.

The learned judge in the court below, after referring to this case, aptly says:

"It is quite as impossible to construe the judgment now before me as one for imprisonment for five successive terms of one year each, or as one for any other number of terms of more than one year and not more than two years each, as it was for the Supreme Court to construe the judgment in the Dimmick Case as one for imprisonment for two successive terms of one year each."

It is undoubtedly a single judgment for a single term of five years, and, the maximum time for which the defendant can be imprisoned for any offense of which he was convicted in the five different counts being two years, the sentence is good to that extent (Goode v. U. S., 159 U. S. 663, 16 Sup. Ct. 136, 40 L. Ed. 297), and as to that part of the sentence in excess of the power of the court to impose it is void (In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149), and it may be dealt with in this proceeding without disturbing the valid portion of the sentence. U. S. v. Pridgeon, 153 U. S. 62, 14 Sup. Ct. 746, 38 L. Ed. 631. If we are correct, then, that the sentence is void for all time in excess of two years, that time having elapsed, any further confinement would be upon a void judgment and without warrant

of law, which entitled him to be heard upon a writ of habeas corpus, and he was properly discharged. In re Patterson, supra; U. S. v. Pridgeon, supra; In re Bonner, supra; Ex parte Virginia, 100 U. S. 343, 25 L. Ed. 676.

The order of the District Court of April 16, 1906, discharging Erastus Carl Benedict Peeke from the custody of the keeper of the New Jersey state prison at Trenton is affirmed.

In re UNITED EDUCATIONAL CO.

Appeal of PERKINS-GOODWIN CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 209.

SALES—DISTINGUISHED FROM PLEDGE—CORPORATE STOCK.

B., being desirous of reorganizing the business of K. & Co., who were indebted to claimant, organized the E. Company, of the preferred stock of which claimant agreed to accept $5,000 of K. & Co.'s indebtedness, with a bonus of 20 per cent. common stock, and agreed not to press the new corporation for the remaining indebtedness so long as claimant felt assured of its ultimate success, it being also agreed that B., through the new corporation, should sell to others the full preferred capital stock issue of the company and redeem within 18 months the preferred stock and bonus which claimant agreed to accept as a temporary arrangement to further a reorganization, but before this could be accomplished the new corporation became a bankrupt. *Held*, that claimant's arrangement constituted a pledge of the new corporation's stock as security for the debt of K. & Co., and not a sale of such stock.

[Ed. Note.—Rights and liabilities of pledgees of corporate stock, see note to Frater v. Old Nat. Bank of Providence, R. I., et al., 42 C. C. A. 135.]

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

On appeal from an order confirming an order of the Referee in Bankruptcy which reduced the claim of the appellant—The Perkins-Goodwin Company—to to extent of $5,000. The Perkins-Goodwin Company filed a proof of debt against the United Educational Company, the bankrupt, for merchandise sold and delivered in the sum of $23,944.26. Upon an order for the re-examination of the claim the referee reduced the amount to $18,944.26 and his action was subsequently sustained by the District Court. The facts are fully set out in the opinion of the referee and need not be repeated here. Suffice it to say that the negotiations between the parties culminated in a letter, dated April 10, 1905, written by the Perkins-Goodwin Company to F. R. Boocock, representing the bankrupt, then about to be organized. This letter and the reply sufficiently state the agreement. It is as follows:

"Dear Sir: We understand that it is your purpose to organize a new company with a capitalization of $300,000, of which $100,000 is to be preferred stock, for the purpose of acquiring the business, assets and good-will of E. L. Kellogg & Co. and such other independent periodicals as it may appear wise and advantageous to secure. Of this preferred capital stock, we understand that you purpose underwriting $40,000 before the operation of the new company in order to provide cash working capital, but that the cash under this underwriting guarantee will not be available for a period of six months.

"In order that you may succeed in your purpose, we agree, upon submission to us of evidence that the $40,000 of preferred stock has been underwritten, to accept $5,000 of whatever amount E. L. Kellogg & Co. may now owe us or that may become due upon May 15th so long as the present indebted-

ness is not increased, in the 7% cumulative preferred stock of the new company with a bonus of 20% of common stock, and that we will not press you upon the remaining indebtedness so long as we feel assured of your ultimate success in the matter.

"It is understood, however, that you will sell through your own periodicals and other channels the full preferred capital stock issue of the new company and redeem within eighteen months the preferred stock and bonus which we thus agree to accept as a temporary arrangement to further your plans.

"We also understand that the assets of the new company will be sufficient to thorougly protect the preferred stock issue, that the earning capacity is reasonably certain to earn dividends upon the preferred stock, and that the employment of the total preferred stock issue as planned will not only entirely liquidate all assumed indebtedness but provide also substantial cash working capital."

About the middle of May thereafter the certificates of stock were delivered to the Perkins-Goodwin Company and, on June 2, 1905, Mr. Boocock, representing the bankrupt, wrote as follows:

"Perkins, Goodwin & Co., City—Gentlemen: Under date of April the 10th you addressed a communication to the writer agreeing to accept, provided he was successful in his reorganization of the E. L. Kellogg & Company, $5,000 of the preferred stock of the new corporation in exchange for a like amount of indebtedness of E. L. Kellogg & Co. We have completed our part of the arrangement by turning over to you the stock in question, and receiving your receipt therefor, and we take pleasure in confirming that paragraph of the letter in question relative to the purpose on our part to relieve you by sale in other directions within a period of eighteen months of the stock you thus accept."

Upon the failure of the United Educational Company to comply with the conditions of the letter of April 10 the certificates of stock were returned to its president December 12, 1905. The company was adjudicated a bankrupt on December 26, 1905, at which time it had not disposed of all its preferred stock.

Mortimer W. Byers, for appellant.

Charles D. Ridgway, for trustee in bankruptcy.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We are unable to agree with the referee in thinking that the agreement, as expressed in the correspondence, amounted to an absolute purchase from the Educational Company of $5,000 of its preferred stock, the consideration being a reduction of its indebtedness to the Perkins-Goodwin Company to that amount, which purchase was fully consummated by the delivery of the stock. We are also of the opinion that the referee erred in construing the agreement to sell the entire amount of preferred stock and to redeem the $5,000 taken by the Perkins-Goodwin Company as the personal undertaking of Mr. Boocock.

On the contrary we think that, read in the light of the surrounding circumstances, the correspondence clearly establishes an agreement for an extension of credit for eighteen months with the stock as collateral security.

Our reasons for this conclusion may be epitomized as follows:

First. The stock was taken solely as an accommodation to the new company to enable it to get a successful start.

Second. The Perkins-Goodwin Company had been solicited and had declined to take stock in the new company in payment of the indebtedness, or otherwise.

Third. The express agreement to "redeem within eighteen months" and the acceptance of the stock as "a temporary arrangement to further your plans" are wholly incompatible with the theory of an absolute sale of the stock.

Fourth. It is true that the letter of April 10 was addressed to Mr. Boocock personally, for the reason that the new company had not then been organized. Subsequently Mr. Boocock became its present and general manager. The actual agreement was between the two corporations and the action of the Educational Company in delivering the stock was an acceptance of the terms stated in the letter of April 10 and a ratification thereof.

The transaction has all the attributes of a pledge. The Educational Company was to have eighteen months in which to pay its debt on condition that it transferred $5,000 stock as collateral and redeemed it within that time. The debt was not paid; the time of payment was extended but the obligation to pay remained.

The use of the words "and redeem within eighteen months the preferred stock and bonus" is inconsistent with the theory of an absolute sale.

"To redeem is defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain, as mortgage property, by paying what is due; to receive back by paying the obligation." 24 Am. and Eng. Encyclopedia (2d Ed.) p. 214.

One member of the court is inclined to the opinion that the evidence tends to establish a conditional sale rather than a pledge, but as the same result, though by different methods, must be reached whichever theory is adopted, he concurs in the result.

The order is reversed with costs and the matter is remanded to the District Court with instructions to allow the claim of the appellant in full.

THE GOLDEN ROD.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 253.

1. MARITIME LIENS—STATUTORY LIEN FOR SUPPLIES—NOTICE.

The fact that notice of a lien filed under the New York statute for supplies furnished to a vessel did not contain the name of the owner of the vessel is immaterial and does not invalidate the lien, where prior to the filing of such notice the claimant had instituted a suit in rem to foreclose the lien in which the vessel had been seized by the marshal.

[Ed. Note.—Maritime lines, see note to The George Dunvois, 15 C. C. A. 679; The Nebraska, 17 C. C. A. 102; The Electron, 21 C. C. A. 21.]

2. SAME—TIME FOR FILING NOTICE—RUNNING ACCOUNT.

Where supplies of coal for a vessel were ordered and delivered at different times a bill being rendered after each delivery, the several charges do not constitute a running account, but each constitutes a separate and distinct cause of action, and to entitle the seller to a lien for any item under the New York statute notice thereof must have been filed within 30 days after such item was furnished or suit to enforce the lien must have been instituted within that time.

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

On appeal by the owner of the yacht Golden Rod from a decree of the District Court for the Southern District of New York condemning the yacht to pay a claim of $296.13 for coal supplied to the yacht between May 25, 1905, and June 22, 1905.

The facts fully appear in the opinion of the District Judge, which is reported in 145 Fed. 743.

Wilcox & Green, for appellant.

Wing, Putnam & Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. We are satisfied with the finding of the District Judge that the agent of the purchaser on board the yacht had authority to bind her for necessaries and that a lien was created under the state statute for coal furnished by the libelant to the Golden Rod.

The proof shows that the coal was delivered on board the yacht in May and June, 1905, as follows:

May	25,	5	tons	$ 28 75
June	1,	10	"	57 50
"	9,	10	"	57 50
"	19,	5	"	28 75
"	22,	22½	"	123 63
				$296 13

The specification of lien was filed in the county clerk's office July 19, 1905. The libel was filed July 14, 1905, and it is stated, and not denied, that on that day the yacht was seized by the marshal and was actually in his custody.

The criticism of the claimant that the notice of lien as filed was defective, in that it did not contain the name of the owner, need not be considered, for the reason that, prior to the date of filing, the yacht had actually been taken by the marshal on process issued out of the District Court.

The statute gives the materialman a lien for thirty days and during that time, as to a portion of the coal at least, the lienor commenced foreclosure proceedings by an action in rem and a seizure of the yacht. This was notice to all interested persons and rendered the filing of specifications in the clerk's office an idle and unnecessary proceeding.

We fully approve the doctrine of the Niagara (D. C.) 31 Fed. 163, where it is said:

"The presumptive purpose of filing specifications, namely, to give notice to other parties interested in the vessel, would seem to be fulfilled by the filing of the libel and the custody of the marshal."

The first three items, as stated above, were furnished more than thirty days prior to the filing of the libel or the notice of the lien in the county clerk's office. As to them, therefore, the lien had expired unless they may be considered as part of a running account.

The libelant's president testified that he rendered a bill for the coal after each delivery. We are inclined to think that each was an in-

dependent transaction and that an action could have been brought after the rendition of each bill.

"An account current is an open or running account between two or more parties, or an account which contains items between the parties from which the balance due to one of them is or can be ascertained, from which it follows that such an account comes under the terms of an open account in so far as it is running, unsettled, or unclosed." 1 Cyc. 363.

In order to constitute a running account there must be an uninterrupted and connected series of transactions; if all the terms be agreed upon so that each item constitutes a separate and distinct cause of action in itself there is no running account.

In Rockefeller v. Thompson, 2 Sanf. 395 (N. Y. Super. Ct.) Judge Vanderpoel says:

"Miller, the clerk of the boat, testified that the boat wanted painting every week or two, and whatever was wanted to be done, they ordered the plaintiffs to do; that the painting of certain parts of the boat was done at different times; they would wear the part painted two or three months, and then paint it again. This gives a fair idea of the character of the work. It was palpably not the result of one entire and indivisible contract. The plaintiffs could have presented their bills and enforced their claims from time to time."

We hold, therefore, that there was no lien as to the first three items amounting to $143.75.

It follows that the decree must be reduced to the sum of $152.38 with interest thereon from June 22, 1905, and the costs of the District Court, and the cause is remanded to the District Court with instructions to enter such a decree. Neither party to recover the costs of this court.

OLD COLONY ZINC & SMELTING CO. v. CARRICK et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,433.

VENDOR AND PURCHASER—RESCISSION OF SALE—FRAUD—TIME.

Complainant, having purchased a lead and zinc mine in July, 1902, discovered in April, 1903, that its agent had been corrupted by the vendors, and that complainant had been induced to pay $7,000 more for the mine than the owners deemed it worth. With this knowledge, complainant brought suit to recover the amount alleged to have been wrongfully paid to its agent and made a claim against the vendors for the overpayment, but no notice of rescission for fraud was given to the vendors until August, 1904, and suit was not brought for such relief until September of that year, during which time complainant treated the mine as its own and operated the same changing the status of the parties and condition of the property in such a manner as to disclose a purpose to waive the fraud and affirm the sale. *Held*, that complainant was not entitled to a decree for rescission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 213.]

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

George Hubbert and C. V. Buckley, for appellant.
Thomas Dolan, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a suit in equity to set aside a deed and rescind the sale of a lead and zinc mine for fraudulent misrepresentations by the vendors touching the value of the mine and for alleged corruption by them of the agent of the vendee who was deputed to examine and report on its value. We need not stop to consider whether any such representations were made, and, if made, whether they were of the character which entitled the vendee to equitable relief, or whether the agent of the vendee was improperly approached and influenced by the vendors. The facts of the case clearly show that the appellant, who was complainant below, conducted mining operations, speculated on the chances of finding valuable mineral, and postponed beginning its action to rescind the sale so long after the discovery of the alleged wrongdoing by defendants that it now has no standing in a court of equity to obtain the relief sought by the bill. The mine was purchased on July 28, 1902. From that time until August, 1905, when the president of complainant company gave his testimony, the mine was continuously operated by the vendee, and, so far as this record discloses, is now being so operated. He testified that he found just enough encouragement to cause him to keep on mining; that he continued prospecting, drilling, and drifting, and occasionally struck fairly good bodies of ore. He admitted that he learned in April, 1903, that the company's agent had been corrupted, having received from defendants the sum of $2,000 for exerting his influence in bringing about a sale to complainant, his principal; that he then learned that his company had paid $7,000 more for the mine than the owners deemed it worth. He caused suit to be instituted against the agent to recover the $2,000 wrongfully paid him, and asserted a claim for and considered the advisability of instituting suit against the vendors to recover $7,000, which he denounced as their "graft." With all this knowledge he neither stopped work nor took any steps to rescind the sale for sixteen or seventeen months thereafter. In June, 1903, he wrote his attorney, Mr. Gray, as follows:

"If you and Mr. Buckley should judge that we are entitled at this late day to repudiate the sale, demand our money back, you will please advise us whether or not we should take a vote of our directors to that effect and give the defendant notice of it. Will the fact that we have continued to operate and develop the property for a month or two since we gained knowledge of the fraud estop us from rescinding the sale?"

And then, doubtless with a view of not committing himself irretrievably to follow his attorney's advice, he said:

"Possibly our board may not think best to rescind if we can, but it seems to me to make that attack with others, and later make choice for main reliance may be good tactics because it would be most likely to bring out a liberal offer of settlement."

With knowledge in April, 1903, of all the alleged fraud, plainly and unambiguously acknowledged by the president of the company in his letter of June, 1903, no notice of rescission was given to the defendants

until August, 1904, and this suit was not instituted until September, 1904, 17 months after adequate knowledge was acquired. Instead of asserting the right to rescind promptly upon discovering the fraud as required by a rule of equity universally recognized, the complainant waited 16 months before giving the notice of rescission or taking any steps in that direction. During this period it treated the mine as its own, conducted the usual operations, mined and sold ore, changed the status of the parties and the condition of the property, and in every way disclosed a purpose to waive the fraud and affirm the contract, notwithstanding the fraud. It asserted a claim against its unfaithful agent for $2,000 received by him from the defendants for his perfidy, and asserted a claim of $7,000 against the defendants, which it considered to be the amount paid for the mine over and above its value. Its conduct was consistent with the affirmation of the contract, notwithstanding the fraud and the recovery of damages occasioned by the fraud, and was totally inconsistent with the intention to disaffirm and rescind the contract by reason of the fraud.

Even the institution of this suit does not seem to have been the result of a definite purpose to exercise the right of rescission. It appears rather to have been resorted to for the purpose of enforcing a settlement of its claims just mentioned. In the language of the president this suit was "good tactics, * * * most likely to bring out a liberal offer of settlement."

It is difficult to seriously discuss the right of a suitor to resort to a court of equity for relief on the facts and circumstances disclosed by this record. The case falls fully within the recent case of Richardson v. Lowe (C. C. A.) 149 Fed. 625, decided by us and the cases therein cited, and is governed by the rules and principles therein announced.

The Circuit Court properly dismissed the bill, and its decree is accordingly affirmed.

CRAFT, Internal Revenue Collector, v. SCHAFER.

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

No. 1,589.

INTERNAL REVENUE—OLEOMARGARINE LAW—POWERS OF COLLECTOR.

The oleomargarine acts (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], as amended by Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1905, p. 432]) are complete in themselves, only those provisions of the general internal revenue statutes which are expressly enumerated therein being applicable thereto; and a collector is not authorized to exact the penalty of 50 per cent. provided for by Rev. St. § 3176 [U. S. Comp. St. 1901, p. 2068], from a dealer for neglecting to make the proper return.

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

For opinion below, see 144 Fed. 907.

George Du Relle, for plaintiff in error.

Henry M. Johnson, for defendant in error.

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

RICHARDS, Circuit Judge. This is one of a number of actions brought to recover back the taxes and penalties assessed and paid under what are known as the "Oleomargarine Acts." Retail dealers of oleomargarine are required to pay a special tax of $48 per year; but, if the oleomargarine be free from any artificial coloration which causes it to look like butter of any shade of yellow, the annual tax is only $6. In the present cases it was held, as a matter of fact, that the oleomargarine sold was artificially colored, and therefore subject to the special tax of $48 per year. The internal revenue officers, acting under supposed authority of section 3176 of the Revised Statutes [U. S. Comp. St. 1901, p. 2068], assessed a penalty of 50 per cent. on the tax, making the entire amount $72.

There is only one question for consideration, namely, whether this section applied, so as to authorize the assessment of the penalty mentioned. The court below held it did not, and in this conclusion we concur. The oleomargarine acts are complete in themselves. They either contain provisions of their own for the enforcement of the tax, or they incorporate such sections of the internal revenue laws as Congress thought ought to be made applicable. Section 3176 of the Revised Statutes was not one of those sections, or Congress would have said so, making it applicable in the enforcement of the oleomargarine tax. This has been the holding in Re Kearns, Collector (D. C.) 64 Fed. 481, and in Re Kinney (D. C.) 102 Fed. 468, not to mention other analogous cases.

It appears that, at the same time the government collected from certain dealers the tax of $48 per annum for selling artificially colored oleomargarine, it also collected the tax of $6 per annum for selling oleomargarine not artificially colored. The latter amounts should be refunded.

Judgment accordingly.

PAYNE v. KNICKERBOCKER TRUST CO.

(Circuit Court of Appeals, Third Circuit. May 6, 1907.)

No. 22

PLEADING—ISSUES AND PROOF.

Where a special plea setting up the defense of fraud was properly stricken out as not sufficiently specific, the defendant is not entitled to introduce such defense under the plea of general issue by cross-examination of plaintiff's witnesses.

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

H. L. Allen, for appellant.
Conover English, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This assignment of errors presents no question requiring our decision which may not briefly be disposed of. The specification respecting the overruling of the demurrer to the declaration does not appear to be seriously insisted upon. It could not be maintained.

The learned judge was clearly right in holding that the second and third pleas were not specific enough. He properly exercised his discretion in striking them out, and as the fraud to which they referred was not again and more specifically pleaded, it is manifest that no error was committed in refusing to permit the defendant to irregularly introduce his supposed defense by cross-examining a witness of the plaintiff "with respect to the question of fraud, under the plea of general issue, which was the only plea of record."

The judgment of the Circuit Court is affirmed.

DEERE & WEBBER CO. v. DOWAGIAC MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1907.)

No. 2,436.

1. PATENTS—SUIT FOR INFRINGEMENT—PLEADING.
   Under the rule that answers in equity must be full, unequivocal, and responsive to the bill, where a bill for infringement of a patent alleges past and present infringement, and that defendant then had on hand a large number of infringing machines which it was offering for sale, an answer which admits that defendant had previously sold a machine which had been adjudged an infringement, but alleges that it had ceased selling the same "long prior" to the beginning of the suit and returned the parts on hand to the manufacturer, and since "that time" had sold no machines of that character, is indefinite and evasive and not responsive, and must be treated as admitting the averment that defendant had infringing machines on hand which it was offering for sale.
2. SAME—DISCLAIMER OF INTENTION TO INFRINGE WHEN SUFFICIENT TO AVOID INJUNCTION.
   Where the answer in a suit in equity for infringement of a patent denies the validity of the patent, and asserts the right of defendant to make and vend the machine covered thereby, and also by implication admits an allegation of the bill that it has on hand and is offering for sale a large number of infringing machines, a mere averment that it ceased selling an alleged infringing machine prior to the commencement of the suit, and has no intention of using or selling any machines embodying the features of the patent, not supported by any clear proof, is not such a disclaimer as will deprive the complainant of the right to an injunction.
3. SAME—INFRINGEMENT—GRAIN DRILLS.
   The Hoyt patent, No. 446,230, for a grain drill, *held* valid and infringed.

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

Border Bowman (Paul A. Staley and Louis K. Hull, on the brief), for appellant.

Fred L. Chappell (Otis A. Earl, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill to enjoin infringement of letters patent No. 446,230, issued to Will F. Hoyt in 1891 for an im-

provement in grain drills and assigned to appellee, the complainant below, in 1894. The bill charged infringement in the past and a continuance of it at the time the suit was brought, and particularly charged that defendant had on hand at that time a large quantity of infringing machines which it was offering for sale. It further charged that the machines sold by defendant were the same in principle as those manufactured and sold by five other firms or corporations which had, in suits duly instituted against them, been judicially decreed by courts of last resort to be infringements of complainant's patent. The answer denied the validity of complainant's patent on all the statutory grounds, denied infringement, and in effect asserted the right to make, use, and vend any grain drills, notwithstanding complainant's patent. It then contained the following averments:

"Defendant, further answering, on information and belief, says that the alleged infringing device was sold by it and made in accordance with letters patent No. 497,864, issued May 23, 1893, for grain drills, on the application of E. Christman and W. G. Munn, but defendant avers that it ceased the sale of said grain drill long prior to the beginning of the present action; that all of the parts of said grain drills which were made in accordance with said letters patent or which had any resemblance thereto were returned to the manufacturers, and that no drills of that character were sold after that time; that since that time the defendant has sold a grain drill of an entirely different type, and one which does not in any sense embody the principle of the said Hoyt patent in suit or of the said Christman and Munn patent; that said defendant has no intention nor has had any intention of manufacturing using, or selling, or causing to be manufactured, used, or sold any grain drills embodying in any sense the features of said Hoyt patent or of the Christman and Munn patent, and as to these facts complainant was fully advised long prior to the commencement of this action."

The grain drill admitted to have been sold by defendant, constructed in accordance with the Christman and Munn patent, is one of the five alleged in the bill to have been judicially decreed to constitute, and one which this record shows to be an infringement of complainant's patent. Many of the last quoted allegations are so uncertain and indefinite as to be practically meaningless. There is an allegation that the defendant had ceased to sell that device a long time before this suit was brought, but how long, whether a week or a year is not disclosed; that no drills had been sold after that time; and that since that time defendant has sold a different drill, and one that does not infringe either complainant's or Christman and Munn's patent. The two latter averments depend for their accuracy of meaning upon what was meant by their antecedent, the long time first referred to. They depend upon the meaning given by the writer to a word of relative and variable significance whose accurate meaning can be understood only by contrasting it with some fixed standard, which is absent from this pleading.

There is no denial of the definite averment of the bill that defendant has a large quantity of infringing drills on hand which it was offering for sale, except such as inferentially arises from the averment of the answer that, when it ceased selling the Christman and Munn drill, it returned all the infringing parts of those drills to the manufacturer.

Answers in equity must be full, unequivocal, and responsive to the bill. 1 Ency. Pl. & Pr. pp. 875, 876. The indefinite, evasive averments of the answer in this case signally fail to respond to the requirements of that rule and well justify us in treating them as negative pregnants admitting the truth of the definite averments of the bill which are not fully answered. There next follows what is urged upon us as such a disclaimer of any intention to infringe as avoids the necessity for injunctive relief and requires the dismissal of the bill. A formal replication was filed; and on these pleadings and the proof hereinafter referred to the case was submitted for final decree.

The answer amounts to a vigorous assertion of the invalidity of complainant's patent and of defendant's right to make, use, and vend the device described in it; an admission by necessary implication from the pleadings that defendant had on hand at the time the suit was instituted a large quantity of infringing drills for sale; that it had actually infringed by selling the Christman and Munn drill; and that such an infringement had continued down to an indefinitely fixed time prior to the commencement of this suit.

The proof, it is conceded, establishes the validity of complainant's patent and negatives defendant's right to infringe its claims. The evidence relied on by defendant to establish the issue joined that it had discontinued infringement a long time before this suit was begun was given by witness Hoyt, the secretary and superintendent of complainant's company, and is very brief. On cross-examination he was asked and answered the following questions:

"Q. How many litigations have been conducted by your company for the infringement of this patent? A. I figure up eight different suits.

"Q. I understand from your testimony on accounting in the Brennan Case that, so far as you know, during the year 1904–05, none of these parties were infringing your patent. A. This is correct, as far as I know.

"Q. Mr. Hoyt, you have stated that eight different suits have been brought by your company involving this patent. Do you include with those the present suit against Deere & Webber Co.? A. I do."

All that can reasonably be understood from that testimony is that Hoyt did not know that the defendant had during the year 1904–05 infringed complainant's patent. Assuming that it was probable that the witness would have known if infringements had occurred during the time in question, the testimony is nevertheless indefinite and uncertain, and no pains seem to have been taken to make it clear. It obviously does not refer to any calendar year, but most probably to a business season for the sale of grain drills. So far as we know, that season might have begun in November or December of 1904, and all that the witness can necessarily mean by his testimony is that he did not know of any infringement by the defendant during a short period before this suit was brought, which the record shows was in January, 1905.

Taking the foregoing, the pleadings, and proof together, we have little to sustain the defendant's present contention that it had not for a long time infringed complainant's patent. It consists exclusively of defendant's unsworn and evasive allegations to that effect, denied by the complainant, and the vague and uncertain testimony of witness Hoyt.

The legal questions are therefore these: First. Where the validity of complainant's patent is denied, the right to infringe asserted, the possession of a large quantity of infringing machines admitted, and no satisfactory evidence adduced of cessation to infringe for any considerable time before the beginning of the suit, is the danger so threatening as to warrant injunctive relief? Second. Does the allegation in the answer that defendant does not intend to infringe any more prevent the granting of injunctive relief to the complainants, restraining the defendant from further infringement? We think in the light of the pleadings and proof just analyzed these questions are self-answering, but as they are earnestly argued by counsel we proceed to their consideration.

Whether a suit to protect a patentee in the use and enjoyment of his invention shall be at law or in equity is to be determined by the same principles as are applied in ordinary litigation. If he has an adequate remedy at law, he cannot resort to equity for relief any more than suitors in other departments of jurisprudence. Starting from this conceded standpoint, defendants contend that, when a patent has expired or when circumstances are such as not to entitle the patentee to injunctive relief against infringement, a court of equity will not entertain a bill for the sole purpose of an accounting for damages sustained by a past infringement or for profits realized by an infringer. This proposition is well settled (Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392; Woodmanse & Hewitt Mfg. Co. v. Williams, 15 C. C. A. 520, 68 Fed. 489; Brown v. Lanyon [C. C. A.] 148 Fed. 838), and, relying upon it, counsel contend that because there is no showing of any recent or threatened infringement or any continuing trespass, such as imperiled complainant's rights, the court of equity had no jurisdiction over the case, and it should have been dismissed. If their premises were correct, their conclusion might follow; but their premises are not correct. We have already called attention to the uncertain character of the showing made by the pleadings and proof, concerning the time when the admitted infringement ceased, if it ever ceased, and have concluded that the showing does not confine it to a time very remote from the institution of the suit. It is left sufficiently near to warrant a well-grounded apprehension taken in connection with complainant's right to do so that it might and would continue its infringement in the future. The case is therefore brought within the general principle that warrants a court of equity in interfering to prevent threatened or continued trespasses upon complainant's rights.

Does the disclaimer warrant refusal of injunctive relief? Taking the allegations of the answer as a full and frank disclaimer of any purpose to further infringe complainant's patent, is it in itself sufficient to prevent equitable interference? When after some infringement and after conduct disclosing danger of a continued or renewed infringement a patentee finds it necessary to incur the expense of bringing a bill to protect his rights, he is entitled to all the remedies which the law affords him, and among them is a final adjudication of his rights and a permanent and effective injunction against further infringement, and he should not be driven from the court to

which he has rightfully resorted with a mere promise by the offender of better conduct in the future. Considering the likelihood that an infringement once practiced will be repeated as long as the wrongdoer believes he is right (as from the pleadings in this case the defendant appears to believe), we think the patentee is entitled to a more effective remedy than a mere promise of that kind. The authorities abundantly support this conclusion. Celluloid Mfg. Co. v. Arlington Mfg. Co. (C. C.) 34 Fed. 324; White v. Walbridge (C. C.) 46 Fed. 526; Sawyer Spindle Co. v. Turner (C. C.) 55 Fed. 979; Matthews & Willard Mfg. Co. v. National Brass & Iron Works (C. C.) 71 Fed. 518; New York Filter Mfg. Co. v. Chemical Building Co. (C. C.) 93 Fed. 827.

Some other questions are argued which, in our opinion, concern the accounting to follow and will be then more appropriately met and disposed of, and which, in consideration of the conclusions already announced, do not require present consideration by us.

The decree of the Circuit Court was correct, and it is accordingly affirmed.

WILLS v. SCRANTON COLD STORAGE & WAREHOUSE CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 6.

1. PATENTS—INVENTION—REFRIGERATOR BUILDING.
   The Wills reissued patent, No. 12,300 (original No. 742,540), for a refrigerator building the essential feature of which is the use of flaps or other devices for closing the space between the elevator car and the sides of the shaft to prevent the escape of cold air from the refrigerating rooms when the elevator is in use, is manifestly void on its face for lack of invention.
2. SAME—SUIT FOR INFRINGEMENT—PATENT INVALID ON ITS FACE.
   Where the invalidity of a patent for lack of invention is clear upon its face, the court may so declare it sua sponte, although the question is not raised by the pleadings, and may dismiss a bill for its infringement.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 551.]

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

For opinion below, see 147 Fed. 525.

Herbert Knight and Edmund Wetmore, for appellant.

R. L. Levy, for appellee.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. This is an appeal from a final decree of the circuit court for the middle district of Pennsylvania, dismissing the bill of the complainant-appellant. The bill claims infringement by the defendant of a certain patent for an improvement in refrigerator buildings, being Reissued Letters Patent No. 12,300, dated January 3, 1905. Defendant, in its answer, sets forth the defense of noninfringement, and upon issue joined, testimony in support of said de-

fense was duly taken, as set forth in this record. At the argument in the court below, however, it was contended by defendant that the device set forth and described in the letters patent did not, on the face thereof, show patentable invention, and this contention having been sustained, it was upon this ground that the decree dismissing the bill was entered.

Refrigerator buildings containing cold storage rooms on their several stories, are not very old in the refrigerating art. The use of elevators to carry commodities to the several floors, to be stored, caused an escape of cold air through the spaces in the elevator shaft surrounding the car, when the door communicating therewith was opened. It appears from the evidence and by the statements of the patent itself, that the device most frequently resorted to, to prevent, or at least diminish, the loss of cold air in this way, was to provide a small ante-room, into which the shaft of the elevator was introduced. This ante-room was refrigerated in the same way as the storage rooms, and whatever cold air escaped down the shaft, when the elevator door was opened, escaped from this ante-room. The goods, being held in the ante-room until the door communicating with the elevator shaft was closed, could then be moved into the storage room, through a door which until then had been kept closed. In this method, there was the obvious objection that the temperature of the ante-room was somewhat raised by each opening of the elevator door, so that when the door to the storage room was opened, its temperature was affected by the temperature of the ante-room. There was also, as stated in the specifications, the disadvantage of the warm air coming up the shaft condensing its moisture on the refrigerator pipes, and producing a damp and unwholesome atmosphere.

The claimed invention of the patent in suit is the making air tight the space between the car and the shaft in which it travels, thus permitting the elevator shaft to be introduced directly through the cold storage rooms on the several floors, the only effect in the temperature of which, would be that produced by the air confined in the small space of the car itself when the door was opened. This was undoubtedly an advantage in requiring but one handling of the goods to be stored, and the saving of space occupied by an ante-room. This has all been stated in the specifications, as follows:

"Heretofore in refrigerating plants and cold storage buildings it has been customary where elevators were employed to convey merchandise from one floor to another to provide a vestibule or anteroom between the elevator shaft and the cold rooms in order that the cold air in the latter compartment should not escape up or down the elevator shaft while the entrance thereto was open. This escape of the cold air was made possible because the cab did not fit the shaft and the shaft openings with sufficient closeness to prevent a free and extensive movement of air at and around its sides or edges and also because during the rush hours of business the doors between the rooms were often left open. To obviate these difficulties as much as possible, the anteroom was provided as a sort of air lock or buffer, and the space so employed was by reason of the shifting temperature rendered useless for storage and was consequently a loss of space. This room was also by reason of the differing temperatures wet and musty and always unsanitary. My present invention is designed to utilize this space and make it clean and wholesome and, in fact, to absorb the space in the general storage room and make the cab a traveling anteroom, and to this end I make the cab practically air-

tight, except the open face or faces or fronts, and provide flexible flaps, which bridge over and between the edges of the cab and the corresponding opening in the elevator shaft and provide a vestibule. The result will be that while the cab is discharging or taking on goods the air in the adjoining room cannot escape through or around it. The room and space heretofore rendered unavailable for storage purposes can thus be utilized. In the employment also of the old form of anteroom as an air-lock or buffer it implied and required a double handling of the goods. It constituted an intermediary room only. This room in connection with my invention I eliminate and dispense with and absorb into the general storage room. Air locks are established by merging the air in the elevator car and each floor when they are thrown together in my present invention, as will be explained."

There are six claims of the patent in suit, the first of which is as follows:

"(1) A refrigerator-building comprising two or more floors, an elevator shaft, means of access between the floors and said shaft, an elevator-car providing a traveling anteroom operating in said shaft, and means whereby an air-lock is established between said elevator-car and each floor when they are thrown together."

The other claims are more specific as to means for closing or bridging the space between the car and the sides of the elevator shaft. The question, however, as to patentability is applicable to them all. It was admitted by the counsel for the appellant, that there was no invention in the means employed to make the space between the elevator shaft and the car air-tight at the different floors. His contention, however, was that the invention lay in the conception or "happy thought" that an ante-room might be dispensed with, and the goods to be refrigerated directly introduced into the cold storage rooms, by simply making the shaft air-tight by any well-known device. This is a forceful, as well as an ingenious, way of stating appellant's case, and might as to some combinations of old elements be applicable and decisive. Here, however, it fails to convince us that patentable invention was involved in the combination of the patent in suit. The essential feature of the combination was making air-tight the shaft of the elevator around the car, so as to prevent the escape of cold air from the floor at which the car was being loaded or unloaded. When the difficulty to be overcome is so obvious a one, as the escape or entrance of air through the open spaces between the elevator car and the shaft through which it travels, into the rooms communicating therewith, it is hard to conceive what invention there can be in making air-tight those open spaces by bridging them with rubber flaps, or any of the other well-known devices for such purposes. It would seem that the conception or thought of doing so, was as obvious as the means employed. To put weather strips on a window or door, to prevent the ingress of cold air or the escape of warm air, does not involve invention, any more in the thought than in the means employed.

As pointed out by the learned judge of the court below, the fact that this combination dispensed with the use of the ante-room, and made necessary only one handling of the goods carried, though it may establish the utility essential to patentability, does not of itself prove invention. Neither is the argument for the patentability of the combination advanced by the constant iteration of the appellation "traveling

ante-room," as applied to the elevator car. It is still an elevator car, as it was before the spaces between it and the shaft were made air-tight. It performs the same function and has the same relation to the cold storage room that it had to the ante-room. It is the packing of the piston, the making air-tight of the shaft in the space around the car, that makes possible the introduction of the elevator directly into the cold storage room.

We have carefully considered the cases referred to by appellant's counsel, in which courts have refused to sustain demurrers to the patentability of the device on the face of the letters patent, and we have not been unmindful, in the consideration of this case, of the admonition so frequently made by courts, that patents should not be declared invalid, upon demurrer or otherwise, upon the face of the patent itself, unless the invalidity so clearly appears that no testimony can change the legal aspect of the case, and that if doubt exists, the complainant is entitled to its benefit. But in cases thus clear on the face of the patent itself, courts may, even where the question is not raised by the pleadings, sua sponte, declare the patent invalid and dismiss the bill. That the power and duty of the court may have this extent, is clearly held by the Supreme Court in Brown v. Piper, 91 U. S. 37, 43–44, 23 L. Ed. 200. Slawson v. Grand St. Ry. Co., 107 U. S. 649, 652, 2 Sup. Ct. 663, 27 L. Ed. 576.

In view of the clear and elaborate opinion of the learned judge of the court below ([C. C.] 147 Fed. 525), it is unnecessary to further extend the discussion of the single question involved in this case.

The decree below is therefore affirmed.

NATIONAL ENAMELING & STAMPING CO. et al. v. NEW ENGLAND ENAMELING CO.

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

No. 261.

PATENTS—VALIDITY AND INFRINGEMENT—ENAMELING METAL WARE.

The Claus patent, No. 527,361, for an improvement in enameling metal ware, *held* void as to claims 1, 2, and 3, and not infringed as to claims 9, 10, 11, and 12.

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

Arthur v. Briesen (Louis Marshall, of counsel), for appellants.

R. N. Kenyon, Wm. Houston Kenyon, and Steinhardt & Goldman (Walter F. Rogers, of counsel), for appellee.

Before WALLACE and COXE, Circuit Judges, and HOLT, District Judge.

HOLT, District Judge. This is an appeal by the complainants from a portion of a decree of the Circuit Court rendered in a suit brought to restrain the alleged infringement of United States patent 527,361 dated October 9, 1894, granted to Hubert Claus for an improvement in enam-

eling metal ware. The patent contains 13 claims. The court below held that claims 1, 2, and 3 were invalid, that claims 4, 5, 6, 7, and 8 were valid and infringed, and that claims, 9, 10, 11, and 12 were not infringed. Claim 13 was not involved in the suit.

The defendant formerly appealed from that portion of the decree which held that claims 4, 5, 6, 7, and 8 were valid and infringed, and on a former hearing in this court that portion of the decree was reversed, and a final decree was entered dismissing the bill. 151 Fed. 19. From the portion of the decree below which dismisses the bill of complaint as to claims 1, 2, 3, 9, 10, 11, and 12 the complainant now appeals, and the question upon this appeal is whether the decision of the court below holding that claims 1, 2, and 3 were invalid, and claims 9, 10, 11, and 12 were not infringed, was erroneous in any respect. The decision of this court on the former appeal that claims 4, 5, 6, and 7 were invalid necessarily establishes that claims 1, 2, and 3 are invalid. Claims 4, 5, 6, and 7 are in substance the same as claims 1, 2, and 3, except that the latter claims are more detailed. The decision of the court that the later claims were invalid necessarily established that the broader and more general earlier claims are also invalid.

Claims 9, 10, 11, and 12 are process claims. Claim 9 reads as follows:

"The process of enameling which consists in coating an article with an alkaline enamel and in applying thereto while still moist a metallic salt or salts, substantially as described."

Claims 10, 11, and 12 are substantially the same, except that, instead of the general term "a metallic salt or salts," is substituted, in claim 10, "sulphate of iron and sulphate of copper," in claim 11 "sulphate of iron," and in claim 12 "sulphate of copper."

The process particularly described in the specification for the application of the metallic salts to the enamel is as follows:

"The surface to be coated is cleaned and the alkaline enamel applied in a thin layer in any suitable manner. The metallic salts are now applied to the enamel coating by dusting or by sprinkling or the salts may be mixed with the enamel before it is applied to the surface to be coated."

It is apparent, however, from the entire patent that Claus preferred the process of applying the metallic salts by dusting or sprinkling them on the moist coat on the article after it was dipped, rather than by mixing it with the enamel before it is applied to the surface to be coated. The only claim in his German patent is for the process of applying the metallic salts by dusting or sprinkling. The court below held, in substance, that the defendants had never applied metallic salts by dusting or sprinkling, and that, if that was to be regarded as the invention, the defendants had never infringed. It also held that, if the claims were to be construed broadly enough to include the mixing of the metallic salts with the enamel before its application to the article to be enameled, the process was not novel.

We entirely concur in these views of the court below. The method of obtaining mottles in enameling ware by mixing metallic oxides in the dip was old, and well known in the art. It was described in the

Quimby and Whiting patent, and in the Niedringhaus patent. The fact that Claus in his tenth, eleventh, and twelfth claims specifies sulphate of iron and sulphate of copper, or one of them, as the metallic salts to be used, shows no invention. If a metallic salt of any kind was previously used, the substitution of another metallic salt which produced the same result would be the employment merely of an equivalent. If the claim, however, should be confined to the process of applying the salts by dusting and sprinkling upon the surface after the dip had been applied to the surface while still moist, even if such a method of applying the salts as distinct from the method of mixing them in the dip constituted an invention, it is enough to say, as was said by the court below, that the evidence establishes that the defendants have never used that process, and therefore have not infringed.

Our conclusion is that the portions of the decree appealed from in this appeal should be affirmed, with costs.

DODGE NEEDLE CO. v. JONES.

(Circuit Court, E. D. Pennsylvania. April 3, 1907.)

No. 40, April Term, 1904.

1. PATENTS—CONSTRUCTION—PROCEEDINGS IN PATENT OFFICE—RETRACTED DISCLAIMERS—FINAL FORM OF APPLICATION.

Where, upon application for a patent for a pivot pin of a knitting machine needle, at the outstart of the proceedings in the Patent Office, the applicant, for the purpose of distinguishing certain references, made positive and reiterated declarations as to the headless character of the pins, but later was prompted to file a new and completely revised application, as a continuation of the proceedings, in which there were claims for a headed, as well as a headless, pin, the specifications being changed to correspond, which the examiner allowed and passed, although as the result of interference proceedings the headed claims were subsequently canceled, the patent (aside from the effect of the cancellation) is not limited, by such earlier declarations, to a headless pin; both specifications and claims, as allowed, being broad enough to include a headed one, and the final form in which the patent is cast being the one to be taken in determining the scope of the invention, which stands as it was asserted and accepted at the close of the proceedings, regardless of what had been declared previously.

2. SAME—INTERFERENCE PROCEEDINGS—CANCELLATION OF CLAIMS AFTER.

Where, however, interference proceedings with another party have been declared, as the result of which he is found to be the prior inventor of the headed form of pin, and thereupon the applicant for the patent in suit cancels the claims covering this form, and takes out a patent without them, he is precluded thereafter from asserting a right to anything but a headless pin, not because priority of invention was found in favor of the other patent, which may not be conclusive, but because by his own direct act, in response thereto, he canceled his claims for headed pins and accepted a patent in this restricted shape.

3. SAME—PRIOR PUBLIC USE—PUBLIC USE PROCEEDINGS—EFFECT OF.

The patentee having been defeated in interference proceedings as to one form of device, priority of invention being found in favor of the other party, at his instigation, in order to defeat the right of such party to a patent, public use proceedings were instituted, in which it was shown that for over two years prior to the time to which such party could carry

back his invention this form of the device had been manufactured and used by the company where the patentee was employed. *Held* that, while this showing was fatal to the right of the other party to a patent, it did not change the status of the patentee, or restore his rights to the device as in fact the prior inventor; his own patent having been already taken out after he had canceled claims covering this form.

4. SAME—KNITTING MACHINE NEEDLE—INFRINGEMENT.
The Currier patent, No. 743,152, for a knitting machine needle, if broad enough in terms to cover both a headed, as well as a headless, form of pivot pin, was anticipated as to the headed form, which cannot, therefore, be claimed; and, as so limited, *held* not infringed.

5. SAME—STRUCTURAL FORM—METHOD OF MANUFACTURE.
Semble, that where a patent is not for a product, the result of a method or process, but for an article of special mechanical structure, the method of manufacture cannot enter into it as a patentable element.

In Equity. Suit for infringement of letters patent No. 743,152 for a knitting machine needle granted to A. Currier November 3, 1903. On final hearing.

Nathan Heard, for complainants.
Francis T. Chambers, for defendant.

ARCHBALD, District Judge.[1] The pivot pins of knitting machine needles are pretty small to be patented, the largest needles being only forty-six thousandths of an inch thick, and the finest considerably less than that; but it is no doubt important that they should be right, and they have been made the subject of not a little inventive concern in consequence. Distinctions are not to be drawn too fine, however, nor too much made of the shading of a figure, or the disclosures of the microscope. It is only clear structural differences, involving a principle, that can be considered, which is not said to disparage the case, but to meet certain phases of it, as will be understood by counsel.

The knitting machine needles in controversy are manufactured by Friedrich Ernst Beckert of Chemnitz, Germany, of whom the defendant is the representative in the United States. They have the usual latch, pivoted on a pin, extending through the body of the needle; a longitudinal slot in the center being provided for the end of the latch, and the pin being fastened in place in the following manner: A conical depression is made at each end of the hole drilled for the pin, and, the latch and pin being put in position, pressure is applied to the ends of the pin by means of punches or dies, whereby the pin, being somewhat greater in length than the diameter of the needle, and being forced in upon itself by the pressure, is made to bulge in the center and to enlarge or swell out generally, filling the hole, and being upset into heads at either end. The ends of the punches are made large enough to extend over the heads of the pin and a portion of the adjacent sides of the needle, and sufficient pressure is applied to carry all that is so covered below the surface, forming a depression; the end of the pin being flush with and constituting a part of the bottom, and the edge or flange of the head projecting over and binding upon the sides of the depression adjacent to it. This corresponds in

[1]Specially assigned.

a general way with the form of needle manufactured by the complainants by virtue of the patent which they hold, infringement of which is therefore charged. It is to be noted, however, that, as an essential feature of the defendant's needles, the ends of the pivots are headed, while the complainants, as it is contended, are restricted to headless or substantially headless pins, this limitation, as it is said, not only being imposed by the prior art, if the patent is to be sustained, but also resulting from the proceedings in the Patent Office, on the strength of which the patent was obtained; and it is upon these considerations that the question of infringement turns.

The claims of the patent are as follows:

"1. A knitting machine needle comprising a body having a latch mounted on a pivot pin, the said pivot pin and the side walls of the body adjacent the ends of the pin being compressed to form depressions, the compressed ends of the pins coinciding with the bottom of the said depressions.

"2. A knitting machine needle comprising a body, a latch and a pivot pin in said body upon which said latch is loosely mounted, the side walls of the body adjacent the ends of the pins being compressed to form depressions, the ends of the pins being flush with and forming a portion of the bottoms of the said depressions.

"3. A knitting machine needle comprising a body, a latch, and a pivot pin in said body upon which said latch is loosely mounted, the outer side walls of said body having that portion which surrounds and is concentric with the ends of the pivot pin compressed to form depressions, the pivot pin also being compressed longitudinally thereof and the ends of said pin when compressed being flush with and forming a portion of the bottom of the depressions."

Nothing is said, it will be observed, in either of these claims as to whether the ends are to be headed or headless; so that, if the way is otherwise clear for it, the one is as consistent with what is there declared for as the other. Neither is there anything in the specifications to limit the device in this particular, and, on the contrary, both forms are expressly spoken of; the only restriction suggested as to the one being that the heads are small. Nor can the case be made to turn on whether those figures, which are supposed to stand for the headed form, do or do not show the edge or flange of the head extending over onto the bottom of the countersink. Examining with a glass, this seems to be the fact, and is sufficiently indicated, perhaps, without the aid of one. But the showing so made, at best, is minute, and, while so far as it goes it favors the idea of a head, it is not inconsistent, on the other hand, with a pin, substantially—that is to say, for all practical purposes—without one.

Neither is anything by way of a limitation to be made out of what took place in the Patent Office, leading up to the obtaining of a patent, prior to the interference proceedings. It is true that the inventor at the outstart, for the purpose of distinguishing certain references which were brought up against him, made some very positive and reiterated declarations as to the headless character of his pivot pins. Thus, for instance, in the specifications of the original application, filed November 18, 1899, it is said:

"The ends of the pivot pins instead of standing in the countersinks made in the outer sides of the body of the needle, practically stand in and constitute the bottoms of the countersinks made in said body, the ends of the pivot pins in the bottoms of the countersinks presenting preferably a slight concavity, no part of the pivot pin projecting into the countersink."

And, again, referring to the action of the dies in compressing the ends of the pins:

"In this way, the outer ends of the pivot pins are not upset, in such a way as to make heads to stand in the countersinks, but the pivot pin is simply shortened and expanded, filling closely the hole in the body of the needle * * * the ends of the pivot pins not being enlarged to present heads to stand in, or in any way fill or overlap the bottoms of the countersinks."

So, also, after the rejection of the application, on the Mitlacher (German) patent, new claims having been brought in, it was pointed out, for the purpose of distinguishing the device there shown, that when the rivets were pressed endwise to shorten them the ends would spread out over the bottom of the countersinks previously formed, with the result that the rivet ends would not be flush or coincident with the bottom of the countersinks, or in substantially the same plane, as specified in the applicant's claims, but would be headed over, instead, upon the bottom of the countersinks, so that the ends of the rivets and the bottom of the countersinks would be in different planes, a distance apart equal to the thickness of the head of the rivets; while in the method pursued by the applicant, on the contrary, the ends of the rivets and the body of the needle, as it is declared, are countersunk evenly, the metal of the one not crawling over or overlapping the metal of the other. And, again, when the application was a second time rejected, on the Huke and Weston patent, which shows heads, certain changes and amendments being thereupon introduced, it was argued to the examiner that, by reference to the specifications and drawings, it would be seen that in the applicant's needles there were no heads on the ends of the pivot pin, but that, instead of this, they were of substantially uniform size, the ends of the pins forming the central portion of the bottom of the countersinks, the ends of the Huke pin, on the other hand, not being of uniform size, but formed with heads or enlarged portions that filled the countersinks.

Notwithstanding, however, the repeated disclaimers so made, on August 26, 1901, after certain intermediate proceedings which it is not necessary to dwell upon, a new and completely revised application was filed, with specifications the same as appear in the present patent, and with five claims, the first three coinciding with those which we have here, but the fourth and fifth expressly declaring for pivot ends enlarged to form heads filling the countersinks. What inspired this radical change of front or by what means it was brought about there is nothing to suggest, nor is it important to know. Treating the new application as a continuance of the earlier one in the face of this departure, and accepting the device as patentable, notwithstanding the references which had been cited against it and the position previously taken—the headed as well as the headless form—the examiner, September 24, 1901, declared the claims to be allowable, thereby putting the case in shape to pass to issue. It is this final form in which it was thus cast, and not the earlier one, which must be regarded in determining the scope of the invention, and whether any position was assumed in the Patent Office which is inconsistent with the one now taken, by which it is consequently limited; having respect to which it is to be observed, that reversing the ordinary experience the inven-

tor was permitted to enlarge his claims, where at first he was led to retract them, including what he had previously thought necessary to discard and differentiate in order to save his invention, and he is not to be forced back now to the narrower construction by reason of anything which was said in that connection, it not having been insisted upon. The invention, in other words, stands as it was asserted and accepted at the close of the proceedings, regardless of what had passed previously, and to that extent, if otherwise allowable, it is entitled to be maintained.

Unfortunately, however, for the complainants, the same cannot be said of that which followed. Pending at the time in the office was an application by Beckert, the defendant's principal, mentioned above, filed August 4, 1900, which was also for a pivot pin, with ends "compressed to form depressions," and which, after somewhat similar vicissitudes, was on the way to be accepted and put in shape for allowance, about the same time as the other. Between this and the Currier application, therefore, an interference was declared, December 24, 1901, to determine who was the prior inventor, four counts being framed, coinciding with the first four claims of the Currier application, the fifth claim being involved in the disposition of the fourth. Each of the contesting parties, according to the practice of the Patent Office, being thereupon called on to make a preliminary statement as to the date of the conception of his invention, January 26, 1901, was assigned by Currier as that of the headed form; the conception of the headless being fixed in the early part of August, 1897. The time so given for the headed pin, it will be noted, was after the application of Beckert had been filed, the conception of the latter, according to his affidavit, being still earlier, and judgment as to this was accordingly rendered on the face of the record, without more, October 17, 1902, in Beckert's favor; the right of Currier, on the other hand, to the headless form, being at the same time sustained. The invention was thus in effect divided, one party getting the headless and the other the headed pin. Currier subsequently tried to reopen the case, but without success; and later on was instrumental in having public use proceedings instituted against Beckert, by which in the end the right of the latter to a patent for the headed form, which had been apparently established, was defeated and a patent refused him. Accepting the situation, however, as to himself, meantime, on October 9, 1903, Currier canceled the claims covering headed ends, and requesting that the case be passed to issue took out the patent, November 3, following, as it now stands.

There can be no question upon this showing as to Currier being precluded from asserting a right under his patent to anything but a headless pin. Not only as the result of the interference proceedings was priority of invention accorded to Beckert as to the headed form, which may not be conclusive; but, by the direct action of Currier in response to it, the two claims, in which headed ends were declared for, were canceled, and a patent accepted by him in this restricted shape. Thereafter, whatever the original breadth of the invention, or to whatever extent it may have been previously practiced, the right to lay claim to headed ends as a part of it was gone, and cannot be revived. The

specifications were not changed, it is true, and having been framed to cover headed, as well as headless ends, it explains how they now seem to give countenance to both. But that is of no consequence. It is true, also, that in the public use proceedings, which, as already stated, were instituted in order to defeat Beckert's right to a patent for a headed pin, it was shown that, while Beckert could not carry back his invention beyond June, 1900, pins with heads, substantially the same as are in controversy here were made and sold by the Dodge Needle Company, where Currier was employed, as early as March 1898. This, of course, was fatal to Beckert, but did not help Currier, whose status was not changed by it, nor his rights restored; his patent having been already taken out. It merely made public property of the headed form, which could not thereafter be monopolized by any one. It may have established, as between Currier and Beckert, contrary to the result in the interference proceedings, that Currier was entitled to priority, as to the headed as well as the headless ends. But the trouble is that it came too late to be of any benefit to him, either then or now. If it be said that the patent, as issued, is broad enough to cover both forms, both being spoken of in the specifications, and there being nothing inconsistent in the claims, the patentable feature of the invention, as declared by the examiner, being the compression of the side walls of the needle along with the ends of the pins to form depressions, in which the heads, as such, play no part, it is to be answered that, not only does this overlook the fact that Currier, having been compelled to cancel his claims for headed pins, whether rightly or wrongly, is now estopped from asserting the form which they covered, but, also, going back of this, that the right to a headed pin as a patentable part of the invention is only maintainable on the strength of the application of August 26, 1901, which, in view of the disclaimers which preceded it and the entirely new and enlarged conception of the invention introduced by it, cannot be properly treated as a continuance of the original—the examiner to the contrary notwithstanding—and that, taken as new, as it must be, it is met by the two years' prior public use of headed pins of this character by the Dodge Needle Company, which Dodge and Currier have themselves established, which effectually disposes of it.

This is sufficiently decisive of the case, but the same result is reached by another and independent course. Assuming for the sake of argument, notwithstanding what has just been said, that so far as concerns the proceedings in the Patent Office the inventor, after all, was left with a free hand, the prior art is still to be reckoned with, and cannot, in my judgment, be overcome. Nothing directly anticipating the construction in controversy, it may be, is to be found before the Huke and Weston (1898) patent is reached, the others which are cited, such as the first, second, and third Adams, the Jackman and Flanders, the Mitlacher, and the Treat, being concerned with other structural features which sufficiently distinguish them. All, indeed, are progressively engaged with, and seek to solve the same general problem of securing the pin firmly in place without unduly weakening the needle body, or leaving a roughness or burr at the point of union with the sides, to catch and entangle the fiber of the yarn, and all have necessarily, there-

fore, certain more or less common points of resemblance. But in none except the Huke and Weston, and one figure of the Mitlacher, is there a depression of the ends of the pin below the sides of the needle, which at the same time extends to and involves a portion of the circumjacent surface; the ends of the needle coinciding or being flush with and forming a part of the bottom of such depression, the same as in the device in suit. That this structural form, however, does appear in the two mentioned, there can be no question; and, still more to the point, in the Huke and Weston there is a plainly headed pin, the bevel or flange of which extends over and binds upon the walls of the pin hole, the outer extremity at the same time combining with the adjacent parts to make up the bottom of the depression formed in the side of the needle. In configuration and structure this is indistinguishable from the headed form of pin and depression which is now in controversy, which it thus apparently anticipates, for confirmation of which it is not necessary to go further than the argument made to the examiner when the Huke and Weston patent was cited against the original Currier application; the only distinction there attempted, aside from the method of forming the depression, being that, while the Huke and Weston pins had heads which extended over onto and stood in the bottom of the countersinks, the ends of the Currier pins were of uniform size, and stood flush with and formed a part of the bottom of the depression, which could not be said of the other—a distinction which disappears in the present contention.

It is sought to overcome this result, however, by the fact that in the device in suit the ends of the pins are "compressed to form depressions," as it is expressed in the patent; that is to say, that the depressions in the sides of the needle, by which the point of union between the end of the pin and the needle body is carried down and away from contact with the yarn, are made by pressure exerted upon the ends of the pins and the surrounding surface by the dies or punches, instead of being dressed out or cut with a tool, as in the Huke and Weston, the one removing all chance of a burr or roughness, as it is claimed, where the other is altogether likely to produce it, the distinction constituting the virtue and the patentable feature of the invention. But the patent is not for a product—the result of a method or process—but for an article of special mechanical structure, into which the method of manufacture cannot enter as a patentable element. The question is one of structural form, and not how this may happen to be brought about, as to which, if this were not the case, two articles, absolutely indistinguishable in shape, size, construction, and useful qualities, would not conflict, provided one was made by one method, and the other by another, a position which will hardly be contended for. In the present comparison a Huke and Weston needle does not necessarily have a roughness or burr. It may or it may not, according to circumstances. Perhaps it is more likely to have, as well as to be structurally weaker, because it is recessed by means of a tool, instead of being compressed between dies. But this is the most that can be said. And dressing off with a tool is only given as a preferred way, to which the invention is not thus confined. Outside of this, it is in all respects the same as the Currier needle, the headless as well as the

headed form. And the use of compressing dies to force in the heads and surrounding surface to form depressions, which is the only distinction asserted, being in no respect new, it certainly involved no invention, even if the method of manufacture was open for consideration, to substitute it in place of another method in vogue, based upon possibly advantageous results. The Huke and Weston needle being, therefore, a clear anticipation as to headed if not headless pins, the patent for this reason also cannot be construed so as to include them, and the defendant does not infringe.

Let a decree be drawn dismissing the bill on the ground of non-infringement, with costs.

CONSOLIDATED RY. ELECTRIC LIGHTING & EQUIPMENT CO. v. ADAMS & WESTLAKE CO.

(Circuit Court, N. D. Illinois, E. D. March 15, 1907.)

No. 27,850.

PATENTS—VALIDITY AND INFRINGEMENT—MECHANISM FOR ELECTRIC LIGHTING OF CARS.

The Kennedy patent, No. 740,982, for mechanism for driving dynamos on railway trucks for the purpose of the electric lighting of cars, the essential new features of which are a removable cradle having therein a block upon which the dynamo is pivotally mounted, and which is adjustable to secure parallel alignment with the car axle, covers a combination which is an advance upon the prior art, and discloses invention; also *held* valid as against the claim of prior use, and the owner held entitled to an injunction to restrain infringement.

In Equity. On final hearing.

Thomas W. Bakewell, Clarence P. Byrnes, and Edward Rector, for complainant.

Louis K. Gilson, for defendant.

KOHLSAAT, Circuit Judge. Complainant seeks by the bill herein to restrain defendant from infringing claims 1, 2, and 3 of patent No. 740,982, issued to Patrick Kennedy on October 6, 1903, for mechanism for driving dynamos on railway-trucks, held by it under assignment from the patentee. The claims read as follows, viz.:

"(1) The combination with a car-truck and a bracket device extended outside of the beams of said truck, of a removable cradle placed between said bracket and an outside cross-beam of the truck, a dynamo within the cradle and adjustably pivoted thereto, a pulley on the armature-shaft of the dynamo, a driving-pulley on an axle of the truck, a driving-belt extended from the driving-pulley to the pulley on the armature-shaft, and means for elastically swinging the dynamo to maintain the tension of the belt, as described.

"(2) The combination with a car-truck and a bracket extended outside of the beams of said truck, of a removable cradle placed between said bracket and an outside cross-beam of the truck, a dynamo within the cradle adjustably pivoted at the bottom thereof, a pulley fast on the armature of the dynamo, a driving-pulley on the axle of the truck, a driving-belt extended from the driving-pulley to the pulley on the armature-shaft, and a compression-spring provided to swing the dynamo to maintain the tension of the driving-belt, as described.

"(3) The combination with a car-truck, of a bracket-support outside of an outer cross-beam of the truck, a cradle having lugs at opposite sides of its top to rest upon the bracket and the adjacent cross-beam to suspend the cradle in the space between them, and a dynamo pivotally supported at its bottom within the cradle, of a pulley on the armature-shaft of the dynamo, a driving-pulley on an axle of the truck, a driving-belt extended from the driving-pulley to the pulley on the armature-shaft, a compression-spring for swinging the dynamo against the tension of the belt to control said tension, and means for adjusting the compression of the spring, as described."

In substance, they call for a dynamo mounted upon an adjustable pivot and supported within removably attached cradle irons, held in position by lugs resting upon the end truck-beam and the rear cross-bar of a bracket-frame provided for that purpose, together with means for keeping the driving belt taut.

The defendant contends that (1) the state of the art considered, complainant's device discloses no invention; (2) that it was proposed and used by the officials of the Pennsylvania Railroad not less than 18 months before complainant's assignor filed his application for a patent, which he did after obtaining knowledge of such device from said use; and (3) that whatever invention there may be in the patent in suit must, by reason of the prior art, be found in matters of mere detail, not found in defendant's device.

It was not new to utilize the revolutions of railway-car axles in generating electricity for car-lighting purposes. Prior to the issuance of patent No. 699,187 to complainant's assignor herein, on May 6, 1902, dynamos had been located between the cross-beams of the trucks, or suspended from the underside of the car. The first method was objectionable because the dynamo was inaccessible, except by raising the whole car body from the trucks, and because the driving-belt was, by reason of the close proximity of the axle pulley to that of the armature, necessarily made very short, and consequently liable to be displaced and to operate otherwise unsatisfactorily. The suspended method placed too much strain upon the sustaining appliances, and also was apt to disarrange the relation between the elements of the driving device with reference to each other, by unavoidable changes in the alignment of the truck wheels in making curves and the like. The 1902 patent to Kennedy, last above named, calls for "a support for the dynamo outside of the truck composed of side bars made fast at their inward ends to an inward cross-beam of the truck, extended outward over an outboard of the truck and beyond the latter, and thence shaped to form a cage for the dynamo, then inward and back to the truck; means for attaching the said bars to the truck and means for releasing the dynamo in the cage as described." This was the first car-lighting device hung from a bracket and outside of the truck. Kennedy claims that it was subject to too much vibration, tending to loosen the joints and shake the lubricating oil from the dynamo bearings. He sets out that the device of the patent in suit obviates the above defects, and insists that he was the first to place upon the market a practical substitute for the independent motor for car-lighting purposes. The difference between this 1902 patent and the one in suit consists in (1) the form of the outside sustaining bracket; (2) a cradle readily removable without lifting the car body; (3) an ad-

justable block at the bottom of this cradle, upon which the dynamo is pivoted, and which is capable of being moved back and forth to secure parallel alignment with the car axle.

There is nothing new in the bracket of the patent in suit. It is so constructed as to be more unyielding than that in the 1902 patent to rough handling and jolts, by means of braces, edgewise bearing and fastenings, and other well-known devices. Instead of forming a basket, it is carried out beyond the truck much like a bale, consisting of two outward extending arms and a cross-bar, connecting the arms and integral therewith. These, together with the rear cross-beam of the truck, form a square frame in which the cradle is suspended. The lugs of the cradle-irons rest upon the cross-bar of the bracket and the rear beam, respectively; both the forward and rear lugs turning inward, and so adjusted with reference to the opening between the rear cross-bar and cross-beam as to pass between and clear them, permitting the basket and dynamo to drop to the ground. To prevent the cradle-irons from falling out when in use, the lugs of the inward cradle-irons are secured to the rear cross-beam of the truck upon which they rest by nutted bolts. The rear lugs on the cross-bar may, as shown by the drawings, also be bolted thereto. Practically the identical cradle, save that the lugs of the cradle-irons do not turn in the same direction, and that the cradle is not necessarily removable, is found in patent No. 685,516 granted to Kennedy October 29, 1901. That patent, however, was for a dash-pot as an equalizer between the tension spring and the dynamo to offset the excessive rocking of the dynamo. The patentee terms the cradle a "stirrip-frame formed of brackets, H, suspended from the truck frame," and says "all these features are well-known." Thus it appears that the only new features in the device of the patent in suit, as regards the car-lighting art, are the removable cradle. This block is, however, adjustable manually only. It is not automatic. Adjustment is attained by manipulating the end set screws. This adaptability to proper alignment of the dynamo with the car axle is, however, a necessary element in securing reasonably perfect results in generating electricity under the circumstances above considered. It co-operates with the other parts of the device in producing the desired end. No device in the prior art combines all the enumerated elements or accomplishes the same results. The difference is not strongly marked, but it is appreciable. The patent applies to an art which has long attracted attention—one in which slight advances are difficult to attain and much desired. The advance may be but a short one, still no one else has made it. The evidence shows that the device has taken hold of the market and is supplanting its predecessors in the art. Considered apart from all questions of prior use and suggestion, I am of the opinion that claims 1 and 2 of the device of the patent in suit show invention, and that as to those claims the patent should be sustained.

Whether or not claim 3 is valid depends upon the construction to be given to the words, "having lugs at opposite sides of its top * * * as described." From the file wrapper and contents in evidence it appears that original claim 4 of Kennedy's application was rejected by the examiner upon his 1902 patent, numbered 699,187, in which re-

jection Kennedy acquiesced. An examination of claim 3 of the patent in suit discloses no other substantial difference between the latter claim and said rejected claim 4 than the location of the lugs. The words are:

"Having lugs at opposite sides of its top to rest upon the bracket and the adjacent cross-beam to suspend the cradle in the space between said bracket and a cross-beam of the truck."

The removable cradle is an indispensable element of the patent in suit. Claim 4 of the first application was rejected because it did not in terms call for it. In order to obviate the defect, Kennedy made the change above suggested. The specifications and drawings of the patent in suit show lugs so placed as to turn in the same direction; that is, the lugs on the opposite sides of the top of the cradle both turn inward, so that an inward movement locates them both upon their several supports at the same time and an outward movement releases both of them from their supports at the same time, provided they are of the same length, and practically synchronously, in any case. The cradle would be unavoidably removable. In that view of the matter, there would be, under the language of claim 3, a removable cradle, while under the language of original claim 4 the cradle might or might not be removable. Claim 3 in suit, construed to include lugs turning in the same direction, is valid, and should be so construed.

Defendant's supporting device appears to be substantially that of the patent to Newbold, granted August 9, 1904, and numbered 766,891, except that in the latter patent the cradle-irons are attached rigidly to their rear bearings, and are not removable. Whether defendant's cradle is removable depends upon the length of the supporting lugs, with reference to the spaces between the cradle and its frame. It uses the outward extended bracket-arms, but makes the end cross-bar adjustable and consequently not integral with the arms. This adjustability takes the place of the adjustable block upon which complainant's dynamo rests, so far as its alignment with the truck-axle is concerned. The only movement left to the dynamo case is the rocking motion necessary in keeping the driving belt taut. Moreover, defendant's device, while it uses the cradle-irons for hanging the dynamo, makes no other use of them, but relies upon the removable bearing ends as shown in Newbold patent, No. 759,122, granted May 3, 1904, whereby the dynamo can be repaired without removal from the truck. In this way the armature and other parts of the dynamo may be taken out and repaired without disturbing the other parts. The cradle arrangement is that of the Kennedy 1901 patent, No. 685,516, and prior patents. The lugs of the cradle-irons turn in opposite directions, and, in order to make the cradle removable, there must be play enough between the cradle and its suspension from to permit the release from the latter of one of the lugs, or some other means of effecting the release of the cradle must be provided. The device of defendant is not of itself a removable cradle, and, as to its cradle, comes within the provisions of rejected claim 4 aforesaid. It appears from the evidence that on one occasion defendant's witness, Newbold, at the request of the Pennsylvania Railroad, made one of its cradles removable without

dismembering the bracket frame, but aside from this one instance no removable cradle has been manufactured by defendant. It is a circumstance that the Newbold patent of 1904, which defendant's device follows to a considerable degree, excludes the idea of a removable cradle.

The defendant's device also differs from that of claims 1 and 2 of the patent in suit in the manner of securing parallel alignment of the dynamo with the truck-axle. Both methods accomplish the same result. Both are well-known devices in the car-lighting art for effecting parallel alignment of the dynamo and car axle. In one case the block upon which the dynamo rests is movable within the cradle, carrying the dynamo with it; in the other, the outside bar of the bracket which constitutes also the other rest of the cradle-irons may be moved by driving the bolts which hold it to the bracket arms through elongated slots provided for that purpose, whereby the cradle itself is made adjustable with reference to the parallel alignment of the dynamo and axle. In one case the dynamo alone moves; in the other, the dynamo cradle with its contents. In one case the adjustment device is at the bottom of the cradle; in the other, it is at the top. One is pushed by end screws; the other driven by blows. Kennedy was the first to use an adjusting device in combination with a removable cradle on an outside mounting of a car-lighting device. Under the circumstances, the one would be the equivalent of the other. It will be noted that this feature is absent from claim 3. In view of the fact that defendant did on one occasion employ a lighting device which included all the elements of the patent in suit, and the further fact that, while its cradle is not, per se, adjustable, it yet is so constructed that it readily lends itself to such a construction, it should be restrained from exploiting any car-lighting device which employs a removable cradle in combination with the other elements of the patent in suit.

The claim of prior use and suggestion I do not deem affirmatively established by the evidence. Kennedy was the first to assemble and put in practical commercial shape the various elements of the combination patent in suit. Much should be presumed in his favor under circumstances such as appear in this record.

An injunction may issue restraining defendant from manufacturing, using, or selling the device of the patent in suit, limited as above set out.

CUTLER-HAMMER MFG. CO. v. AUTOMATIC SWITCH CO. OF BALTIMORE CITY et al.

(Circuit Court, S. D. New York. July 25, 1906.)

No. 8,099.

PATENTS—INFRINGEMENT—ELECTRIC SWITCH.

The Blades patent, No. 453,032, for an automatic switch mechanism for an electric motor, construed, and *held* not infringed.

In Equity.

W. Clyde Jones and Robert Lewis Ames, for complainant.

Philip Mauro, C. A. L. Massie, and Reeve Lewis, for defendants.

PLATT, District Judge. This is a patent suit based upon letters patent No. 453,032, dated May 26, 1891, to Harry H. Blades, and assigned to complainant February 15, 1902. The claims at issue in suit are 1, 2, and 5:

"(1) An automatic switch mechanism for an electric motor, the same consisting of a switch governing the admission of current to the motor, an electro-magnet on an independent shunt-circuit, an automatic switch-lever on the armature-circuit, a series of resistances with their terminals arranged to successively engage the said switch-lever, and a dash-pot to retard the motion of the lever, said lever actuated by the armature of the said electro-magnet, substantially as and for the purposes described.

"(2) An automatic switch mechanism for an electric motor, the same consisting of a switch for admitting current to the motor, an electro-magnet on an independent shunt-circuit, an automatic switch-lever in the armature-circuit, a series of resistance terminals in contact with which said automatic switch is adapted to traverse, an armature to said electro-magnet adapted to operate said automatic switch, a dash-pot adapted to retard the motion of the automatic switch, and a spring or springs for restoring the automatic switch to its initial position when the current is cut off from the machine, substantially as described."

"(5) The combination with a shunt-wound electric motor on a constant-potential circuit, of a magnet on an independent shunt-circuit between the terminals of the motor, a switch adapted to open and close the armature-circuit, said switch arranged to be held in its closed position by the magnetism of the said magnet, and means for automatically retracting the said switch to its initial position when the magnet is de-energized by the cessation of the current, substantially as described."

The defenses are that the claims are invalid if construed broadly enough to cover defendants' construction; but that, if limited to features of possible novelty, there is no infringement.

We are to concern ourselves herein with starting-boxes for shunt-motors, and we are especially directed to self-starters, rather than to hand-starters. The former differ from the latter in that a pulling electro-magnet is provided, which, when energized, automatically moves the contact arm across the series of resistance terminals, thus permitting the electric current to start the motor. When it is de-energized, the contact arm is carried back to its initial position.

The complainant's main contention is that the self-starter art is distinct from other branches of the electric art, and that in developing the same it was a serious problem to so locate the magnet and to so arrange the self-starter and electric motor elements as to properly, economically, and expeditiously perform the purposes for which the self-starter is provided. Complainant insists that Blades solved the problem by placing the magnet in an independent shunt-circuit, so that from the main line comes the energy which separately cares for the field, the armature, and the self-starter, called ordinarily the "three-branch system"; that these are all united in such a way that, while each contributes its rightful part to the common result, the self-starter is independent of the electric motor system, and neither part injuriously affects the proper operation of the other—that is to say, that they are mutually dependent, but reciprocally noninterfering, each doing its own work, and not interfering with the other. Such a self-starter, it is vigorously asserted, was new with Blades. It is said to be a radically new result, never before produced in the art, and that

its great virtue is due to the glorious burst of inspiration which swept over Blades, pushing forth an idea which has made the self-starter a tremendous commercial success.

Defendants, on the contrary, with equal vigor insist that it was not an inventive act to place the self-starting magnet on an independent shunt-circuit; that to do so was only a matter of selection, and, admitting that to do so would require invention, there is no evidence that Blades had any notion that he was indulging in such an act of invention when he signed and swore to his claims and delivered them to his attorneys to be filed in the Patent Office.

The dog days are on, and I hope to be excused for touching nothing except the points which to my mind seem exceptionally essential.

George Whittingham had a patent for an automatic electric switch, No. 415,487, dated November 19, 1889. Figure 3 of that patent is said to furnish the foundation for his second patent, No. 499,769, dated June 20, 1893, which latter has been found by Judge Townsend in Auto. Sw. Co. v. Cut. Ham. Co. (C. C.) 139 Fed. 870, to be the invention which really made self-starters a commercial possibility. Reference may be had to the description of the constructions in that case, since they are the same as those now in suit. It has been found that up to the date of this last patent the art had languished, and it will be noticed that the patent in suit was issued a trifle more than two years prior thereto. Now, Whittingham's earlier patent was issued over a year before the patent in suit, so that Blades had ample time to digest it thoroughly. In that patent Whittingham shows in figure 1 the magnet intended to move the resistance-bar as placed in the "main line current which passes to both armature and field." In figure 2 he puts it in the field branch. In figure 3 he shows it "operated by independent circuit." The experts differ about what he meant by the quoted words, but from any view point he showed how the magnet could be operated independently of the field and armature circuits. Later in his specifications, at lines 39 et seq., he again calls attention to figures 1 and 2, and says that they are "identical * * * except that the wiring is different." Figure 3, he says, is also identical with figure 1, but that the "wiring is different." And yet figure 1 shows the magnet in the main line, figure 2 in the field, and figure 3 in an independent circuit. All this strongly supports defendants' contention that it is merely a matter of judicious selection to decide in which of the various locations awaiting it one shall place his magnet. An examination of the file wrapper of the patent in suit removes any doubt which may have lingered for a moment in the mind.

A careful study of the specifications discloses some interesting things which seem to have obsessed the patentee at the outset. He was thinking about switch mechanism, and he presented figure 1 as a plan view embodying the invention. Figure 2 showed how the switch operated. He intended to show how an automatic switch could operate, and at the same time "properly" guard the gradual introduction of current into the armature "circuit or circuits." He expected it to be gradual, no matter how quickly the operator moved the hand lever. The current would go freely through the coils, etc. The claims 1 and 2, which he based upon his disclosure, placed the magnet on "the

main circuit through which current is shunted"; and claim 3 did not place it anywhere. All this he signed in due and regular form. I am not surprised that so intelligent a man as Mr. Greeley should have told him that his location of the magnet was presented "obscurely," and have called his attention to the fact that he was dealing with electricity.

Counsel for complainant make much of the proper guarding and free passing of current which is alluded to in the specifications, but they must remember that those thoughts were expressed and figure 2 was drawn at a time when the patentee was locating his magnet on the main line. If there is anything to this glorious invention, this bursting of an inventive spark into flame, this putting of the self-starter magnet into the independent shunt, the credit for the same should go to Mr. Greeley.

Ponder for a moment on Blades' actions. He was told to take his magnet to the independent shunt to avoid Whittingham's patent then existing. He grudgingly accepted what evidently struck him then as a limitation, but his attitude toward the examiner was somewhat like that of the proverbial recipient from the Greeks, and through his attorneys he reserved the right to make a separate application with the magnet in the field.

The last straw comes when we look at claim 5 in suit. Nothing like it appeared in the papers originally filed, but after the examiner had helped him in selecting the place for his magnet, and reminded him that he was dealing with electricity, and he had hesitatingly acquiesced, he began to think about that hand-starter patent No. 418,678, which has since become, through the sanction of the courts, a pioneer. There the switch was held in its closed position by a magnet on the field circuit, which, by the way, appears to have been one powerful reason for giving it the coveted pioneership. It might be a good scheme to have that magnet on an independent shunt, and so he prepared and obtained claim 5 now in suit, which obviously must be read on a hand-starter. The patent in suit then came out. The complainants were licensed under it. Then came Whittingham's second patent based upon his first. The present defendants sued the present complainant on the later Whittingham patent. The defendants therein, using this Blades patent, turn about and sue the complainants therein, and yet the Blades patent antedates the later Whittingham patent. Now that Whittingham has told us about the trials and tribulations which beset the explorer in the self-starter art, the experts can point out many advantages and the absence of many disadvantages in the broad invention which they claim for Blades upon the patent in suit. There was no point in using an independent shunt for the purpose now credited to Blades until the high resistance lamp of Whittingham was brought into the combination. Of course, if that were located on the field-shunt, or the armature-shunt, it would while in use take away power from one or the other part of the motor, and so the separate shunt became a necessity. It may have been invention to so use it, and it may not have been; but certainly every one had long known that, if you did not wish to interfere with the field and armature, all you had to do was to run another rung of the ladder, as it were, across the

mains. If he had seen all these things, or if he had obtained a glimmer of the light which has come, it is not difficult to imagine how he would have extolled his discovery; but, alas, from alpha to omega he is as silent as the tomb.

To place the suggested invention in Mr. Blades' mind when he disclosed what he did think to the world in return for a 17 years' monopoly thereof, we must credit not only himself, but his attorneys, with less than the expected skill. In fine, the present counsel base their argument largely upon the blundering incapacity of those attorneys, but even that does not account for Blades' monumental denseness. After the second Whittingham patent, we can see what the trouble was, but until then no mind could have been acute enough to find in Blades's attempt at switch mechanism the great things which can now be so cleverly labeled upon it.

The commercial structures of the contending parties are so much alike that at the end of things somebody will be found to have been right and somebody wrong, and to the victor will belong the spoils. I have contributed my mite to the struggle, and in closing I would like to say to the contending parties that I must beg them not to imagine that I have taken up this matter in any light or careless vein. It is a very important cause. I have given it, both at and about the hearing and since, the best that is in me of conscientious study, and have decided it without fear or favor, as I think that it ought to be decided. Whatever the Blades invention in suit may be, it certainly is not one which the defendants infringe.

Let the bill be dismissed.

DAYTON MALLEABLE IRON CO. v. FORSTER, WATERBURY & CO.

(Circuit Court, N. D. Illinois, E. D. March 15, 1907.)

No. 27,814.

1. PATENTS—VALIDITY—COMBINATION.

Under the modern rule, it is not necessary, in order to constitute a patentable combination, that each element should directly coact upon each of the others to produce the result, but, where all are necessary to obtain the desired end, a combination may be implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27–29.]

2. SAME—INFRINGEMENT—FIFTH WHEEL FOR VEHICLES.

The Morrill patent, No. 578,576, for a fifth wheel for vehicles, while of narrow scope in view of the prior art, discloses patentable novelty and invention, and is valid; also *held* infringed.

In Equity. On final hearing.

Paul Synnestvedt (James C. Bradley, of counsel), for complainant.
Frederick Benjamin, for defendant.

KOHLSAAT, Circuit Judge. Complainant brings this bill to enjoin defendant from infringing patent No. 578,576, dated March 9, 1897, and granted to complainant, as assignee of the inventor, Horace E. Morrill. The cause is now before the court on final hearing. The claims in suit read as follows, viz.:

"(1) A fifth wheel for vehicles, having a king-bolt in rear of the axle, an upper fifth-wheel member secured to the bolster, a lower fifth-wheel member, secured to the axle, brace-arms from said lower member, and a collar surrounding the king-bolt and held by said brace-arms and interposed between a central clip-tie on the axle and a fixed bearing on the bolster, substantially as described.

"(2) A fifth wheel for vehicles, having a king-bolt in rear of the axle, an upper fifth-wheel member secured to the bolster, a lower fifth-wheel member secured to the axle, brace-arms from said lower member carrying a collar surrounding the king-bolt, and a clip embracing the axle directly in front of said collar and provided with a bearing for the king-bolt, substantially as described.

"(3) A fifth wheel for vehicles, having a king-bolt in rear of the axle, a bearing-plate with a collar therefor, secured to the bolster, a collar therefor secured to the upper fifth-wheel member, a collar therefor secured to the lower fifth-wheel member by brace-arms, a clip embracing the axle directly in front of said last-named collar and having its tie extended to encircle the king-bolt, substantially as described."

The patent covers all the elements of a fifth wheel for side-bar vehicles, none of which are new in the fifth-wheel art, unless it be the so-called braces, which differ some in form from the prior art. The patent locates the king-bolt and the segments of the fifth wheel back of the front axle, and therefore out of view from the front. The same arrangement is found in the E. B. Smith patent, No. 548,015, granted October 15, 1895, the Uckotter patent, No. 435,988, granted September 9, 1890, and the Wilcox patent, No. 544,710, granted August 20, 1895. The location of the king-bolt back of the axle and bolster is also shown in the Burg patent, No. 542,076, granted July 2, 1895, the Swan patent, No. 558,232, granted April 14, 1896, and the Blume patent, No. 376,178, granted January 10, 1888. In the patent in suit the king-bolt rests in a socket made up as follows, viz.: The top section of the socket is a perforated collar or lug, E, integral with and extending backward and at right angles to the bearing plate, C. The second section consists of a collar, integral with the plate under the bolster, which constitutes a part of the upper portion of the fifth wheel, and extending rearward to a position directly beneath collar, E, and adapted to engage the under side of collar, E, by means of a boss on its upper end. The third section is the collar, G, serving to lengthen the socket and engaging section 2 at its upper end by means of a boss. The fourth section consists of a perforated rearward extension of the clip-tie, located under the axle, provided with a boss in its upper end to engage the lower end of collar, G. The fifth section consists of the perforated forward end of the lower perch irons, also having a bossed end to fit into the counterbore in the under side of section 4. The sixth member consists of a nut engaging the threaded end of the king-bolt and bearing against the under side of section 5. The perforations of the several sections coincide in circumferential alignment, so that the king-bolt passes snugly through them all. This same arrangement as to number and bearing of parts is found in the Swan 1896 patent. In the patent in suit the upper perch irons are extended rearward from, and are integral with, the bearing plate, C. This is the case in the Swan and Smith patents above set out. The segment ends of the upper part of the fifth wheel are integral with the place

attached to the under side of the bolster, which also carries section 2 of the king-bolt socket.

The patentee's first application covered five claims. All of these were rejected by the examiner on the Smith, October 15, 1895, patent, the Uckotter and Swan patents. He then amended his application by striking out claims 1 and 2 and asked for a re-examination of claims 3, 4, and 5, for the reason that the above prior-art patents disclosed no brace-arms connecting the lower fifth-wheel member and the king-bolt collar. New claim 1 was again rejected on the Blume patent. The patentee asked for a re-examination as to claim 1, alleging that the braces of the patent held the collar, and that the Blume patent shows braces extending from the axle to the king-bolt at its lowest point. Claim 1 was again rejected on the Blume patent. Patentee thereupon amended claim 1 by inserting: "And interposed between a fixed bearing on the axle and a fixed bearing on the bolster"—thus locating the collar, G. Whereupon original claim 3, as amended, and original claims 4 and 5, were allowed, and constitute the claims in suit. Original claim 1 provided for a central clip embracing the axle, and having an extended collar to help form a bearing for the king-bolt. Original claim 2 covered the same clip snugly fitted to the underside of the axle. It is apparent that the examiner deemed the definite location of the braces as remedying the lack of novelty in claim 1 as allowed. The segment ends of the lower part of the fifth wheel are secured to the axle close to their extremities, and are integrally connected with said third section of the socket by what are termed "braces," extending from the latter, at first horizontally and then upwardly to the former. The drawings locate the lower end of the brace at about the perpendicular middle of the said third section of the socket and the upper end thereof at a point in the lower part of the fifth wheel, a short distance behind the axle.

The prior art does not show braces between the king-bolt socket and the lower fifth-wheel segment. Indeed, Morrill does not seem to have had this in mind as a support to the lower fifth wheel, as he does not mention it, but speaks of the brace arms as "holding" collar, G, in the first claim, "carrying" said collar in claim 2, and in claim 3 as "securing" the collar, G, to the said lower member. There is nothing to indicate that the brace supported said lower member of the fifth wheel, except the bald use of the term "brace." While the braces as constructed would afford some support, yet it is doubtful whether one seeking merely to stiffen the bearings of the lower member of the fifth wheel would have provided such a brace. The evidence is that the brace is apt to give way at the point of its contact with the collar, G. The Smith patent supports the collar corresponding to the third section, by plates integral with it and bolted to the rear of the axle. So far as the support of the collar, G, is concerned, the patent in suit shows no advance over the method of the Smith patent. Neither the latter, nor any patents in the prior art, make any attempt to strengthen the lower segment of the fifth wheel, unless the upwardly curved bar connecting the two ends of the lower segment, as shown in the Blume patent, have that effect. The tendency of this upward curved cross-

piece would be to give a truss-like support to the king-bolt socket, which would serve to spread and depress the wheel segments rather than brace them. The bar which unites the segment ends of the lower member of the fifth wheel in the Smith patent rests upon the axle, as do the segment ends where no support is required, except when the axle is turning. It may or may not serve to brace said member at such times, though no such use is claimed. The braces in Morrill's patent leave space for the central axle clip. The Burg patent shows this clip, but with forward extending fifth-wheel members. Others devices show two clips—one in each side of the king-bolt socket. The advantage of one clip over two is not very clear, except perhaps that its clip tie may be extended and used to form a part of the king-bolt socket. Much emphasis is laid upon the improvement in appearance of the central clip. It would seem to be a matter of taste whether one would look better than two. Generally speaking, the mere looks of things do not bear upon their novelty, except in case of a design patent. What we have to look for is a combination of novelty and utility. The only appreciable difference between the patent in suit and the Smith patent which I can discern is the arrangement of the braces. Aside from the sustaining property of those in Morrill's device, there is the fact that they clear the front axle and make the center clip possible. The distinction is very slight. The device of the patent, however, contains a humble modicum of patentable novelty, which, taken in connection with the fact that complainant's sales are estimated at 100,000 a year and the further fact that defendant has appropriated the device bodily—facts which, while not conclusive, are yet very persuasive—lead me to the conclusion that the patent should be sustained.

The contention that the patent calls for an aggregation of elements cannot be sustained. The rule has been much modified in later years, and it is no longer held that, in order to constitute a valid combination patent, each element must directly coact upon each of the others to produce the result. Where all are necessary to obtain the desired end, a combination may be implied. National Cash Register Company v. American Cash Register Company, 53 Fed. 367, 371, 372, 3 C. C. A. 559; Bowers v. Von Schmidt (C. C.) 63 Fed. 582, and cases cited; Walker on Patents, § 32. There does not seem to be any element set out in the patent which would not have to be taken into consideration in installing the fifth wheel claimed. Nor do I think that the invasion of Kimball and others of complainant's domain should be construed as a waiver of complainant's rights in the premises. Defendant seized upon the device of the patent in suit at his peril, and is entitled to no consideration, even outside of the rule obtaining in patent cases.

The prayer of the bill is granted. Complainant's counsel may prepare a decree in accordance herewith.

LORAIN STEEL CO. v. NEW YORK SWITCH & CROSSING CO.

(Circuit Court, D. New Jersey. April 15, 1907.)

1. PATENTS — SUIT FOR INFRINGEMENT — RIGHT TO RECOVER DAMAGES AND PROFITS.

Under Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], which makes it the duty of a patentee to give notice of his rights by marking the patented article, and precludes the recovery of damages for infringement, except on proof that defendant was duly notified of the infringement and continued to infringe thereafter, the burden rests on the complainant, in a suit for infringement, to allege and prove such notice either to the public generally by such marking of the patented article, or by direct notice to the defendant, and in the latter case neither damages nor profits are recoverable except for infringements after such notice was given.

2. SAME—NOTICE OF INFRINGEMENT.

Where a bill for infringement of a patent admitted that complainant had made and vended the patented articles without any averment that they were marked, as required by Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], but alleged that defendant was notified of its infringement, and continued to infringe thereafter, without, however, giving the date of such notice, an admission of such notice by defendant by failing to deny it in the answer did not relieve complainant from the burden of proving the date, and, where that question was not adjudicated by an interlocutory decree finding infringement and directing an accounting, such date must be proved before the master to afford any basis for an accounting.

[Ed. Note.—Accounting by infringer for profits, see note to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8.]

In Equity. On exceptions to master's report on accounting.

Harding & Harding (George H. Parmelee, of counsel), for complainant.

A. G. N. Vermilya (Charles G. Coe, of counsel), for defendant.

CROSS, District Judge. The bill of complaint in this case was filed November 29, 1899. The defendant answered the bill, and such proceedings in the suit were subsequently taken as resulted, September 14, 1903, in an interlocutory decree which sustained the validity of the complainant's patent No. 539,878, found that the defendant has infringed the same, particularly the first and second claims thereof, and granted a perpetual injunction restraining the defendant from further infringement. It also contained the usual order of reference to a master to take an accounting. 124 Fed. 548. Under said interlocutory decree, the master proceeded with the accounting thereby directed, and on June 27, 1906, filed his report, by which he found that there was due to the complainant the sum of $12,091.73 for its profits and damages arising from the defendant's infringement of the complainant's rights under said patent. To this report of the master, the defendant has filed 46 exceptions. Exceptions 1, 2, 3, 4, 45, and 46 are fundamental, and will be first considered. They are as follows:

"First Exception. Said master failed to find that complainant did not allege or prove that it ever marked its goods as provided by Rev. St. § 4900 [U. S. Comp. St. 1901, p. 3388], in such case made and provided.

"Second Exception. Said master failed to find that on or about November 14, 1899, said complainant notified defendant that it was infringing the patent in suit.

"Third Exception. Said master failed to find that defendant neither made, nor sold, nor used, any infringing articles after the giving by complainant of the notice aforesaid.

"Fourth Exception. Said master failed to find that under Rev. St. § 4900, complainant was not entitled to any damages or profits for the infringement defendant was decided to have committed, for the reason that it was before the giving of the notice aforesaid, all of which he should have found."

"Forty-Fifth Exception. The fourth exception is repeated, omitting the words 'or profits.'

"Forty-Sixth Exception. The fourth exception is repeated, omitting the words 'damages or.'"

For the purpose of easy reference, section 4900, Rev. St., is set forth at length:

"It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word 'patented,' together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing, so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use or vend the article so patented."

The bill of complaint, while admitting that the complainant had put the invention to practical use, did not allege that the patented articles were marked pursuant to the statute. The bill was silent in this respect, but, as to the notice of infringement thereby enjoined, made this averment:

"And your orator further shows unto your honors that the said respondent was notified of the said letters patent No. 539,878, and its infringement thereof, and said respondent continued thereafter to infringe said letters patent."

The defendant by its answer did not expressly deny notice, but did deny that it had ever at any time infringed any of the complainant's lawful rights in the premises, in and to said letters patent, or that it had ever at any time made, constructed, used, or vended, or that it had ever at any time made, sold, or used, any article embodying said invention. This denial was tantamount to saying that the defendant had never, either before or after notice, infringed the complainant's rights. Upon the issue of infringement, however, the decree of the court was adverse to the defendant; but, in the absence of any specified date of infringement, either alleged in the bill or found as a fact by the decree, its adjudication of infringement was referable to any date subsequent to the issue of the patent. Upon the question of notice, the situation presented was this: The complainant alleged notice, but did not allege any specific day or date when it was given. The allegation of the bill in this respect required an answer, and the defendant contends that it was fully answered by the statement that it never at any time infringed; but, without admitting the correctness of this position, it seems clear that the defendant's failure to answer constituted, at most, an admission of notice. An admission by default in pleading, however, cannot be broader than the unanswered allegation. Since, therefore, the averment contained no specific date or time when notice was given, the admission must be taken to be simply

of notice, but not of notice as of any particular time. The burden of proof, under the statute, still rested upon the complainant to establish the date when the alleged notice was given. This admittedly it has not done. It claims, however, that proof thereof has been waived by the defendant, or at least that under the circumstances such proof was not required, and in support of its position relies upon the case of Rubber Company v. Goodyear, 9 Wall. 788, 801, 19 L. Ed. 566. In that case, the court, after reciting the statute, said:

"It is said that the bill contains no averment on this subject, and that the record is equally barren of proof that any such notice was ever given to the defendants, except by the service of process, upon the filing of the bill. Hence it is insisted that the master should have commenced his account at that time, instead of the earlier period of the beginning of the infringement. His refusal to do so was made the subject of an exception. The answer of the defendants is as silent upon the subject as the bill of the complainants. No such issue was made by the pleadings. It was too late for the defendants to raise the point before the master. They were concluded by their previous silence, and must be held to have waived it. It cannot be considered here."

It will be observed that in that case no issue was made by the pleadings, and the point was first raised before the master, which was held to be too late. In the case at bar, there were no such laches. The issue was raised in the pleadings, and the only material matters decided by the interlocutory decree were the ownership and validity of complainant's patent and its infringement by the defendant, with a reference to a master to take an account of the complainant's profits and damages, which meant, and could only mean, such as it was legally entitled to. It certainly did not mean that, at all events, and whether legally or illegally, the master must find some amount in favor of the complainant. Counsel for the parties, upon the argument, admitted that the point under consideration was raised before the court when the interlocutory decree was settled, and that such was the fact also appears in the record in complainant's answer to defendant's exceptions; but it manifestly was not adjudicated, and I find nothing in that decree which required the master to do anything unlawfully, or which bars the defendant's right to his exceptions.

In Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426, after reciting section 4900, Rev. St., Mr. Justice Gray, speaking for the court said, at page 247 of 152 U. S., page 577 of 14 Sup. Ct. (38 L. Ed. 426):

"The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against infringers of the patents, unless he has given notice of his right, either to the whole public by marking his article 'patented,' or to the particular defendants by informing them of his patent and of their infringement of it. One of these two things, marking the articles, or notice to the infringers, is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him. Whether his patented articles have been duly marked or not is a matter peculiarly within his own knowledge; and, if they are not duly marked, the statute expressly puts upon him the burden of proving the notice to the infringers, before he can charge them in damages. By the elementary principles of pleading, therefore, the duty of alleging, and the burden of proving, either of these facts, is upon the plaintiff."

And later, after referring to the case of Rubber Company v. Goodyear, supra, adds:

"In that case, as appears in the passage just quoted from the opinion, not only was there no averment in the bill or in the answer on the subject of marking or of notice, but no objection to the want of proof of either fact was made by the defendants at the original hearing in the Circuit Court, as appears by its opinion reported in 2 Cliff. 351, Fed. Cas. No. 5,583."

Dunlap v. Schofield is quoted and approved in Coupe v. Royer, 155 U. S. 584, 15 Sup. Ct. 199, 39 L. Ed. 263. See, also, McComb v. Brodie, Fed. Cas. No. 8,708, 1 Woods, 153. The word "damages" of the statute, moreover, includes profits. Lowell Mfg. Co. v. Hogg (C. C.) 70 Fed. 787.

I think the burden of proof was on the complainant in this case to establish infringement after notice, and that it is only entitled to such damages and profits, if any, as may appear to have accrued after notice shall have been established, since it was neither alleged nor proved that the complainant's product was marked, although it plainly was of a character susceptible of marking under the statute.

As has already been stated, the point under consideration was raised before the court, and is directly raised by several exceptions, and it was also raised before the master. The complainant, however, submitted no proof whatever on the question of notice; but the defendant in its case did. It offered evidence intended to show that the first notice that it ever received of the complainant's patent, or of its rights thereunder, was given on the 14th day of November, 1899, while the bill of complaint herein was filed on the 29th day of that month. The evidence thus offered by the defendant was objected to at the time by the complainant, and on its motion was overruled and stricken out by the master, which action by the master was duly excepted to by the defendant. It is unnecessary to determine whether the ruling of the master was correct or not, since in my view the burden of proof rested upon the complainant in any event, and, when it failed to make such proof, it by its own default virtually nullified the accounting. The action of the master in striking out the testimony, however, does not help the complainant's case, since it leaves it without any proof whatever as to the time of notice, or, indeed, of any notice other than such as arose from the filing of the bill of complaint; while, on the other hand, if the ruling of the master was incorrect, and the testimony stricken out had been allowed to stand, there would have been affirmative and uncontradicted proof before the court, from which it would have appeared that the last infringing act of the defendant was committed on October 7, 1899, while the defendant had no notice of the complainant's rights, until November 14th or 15th of the succeeding November. Although unnecessary to this decision, I will, nevertheless, say that in my opinion the evidence of notice offered by the defendant should have been allowed to stand, as it had the right to safeguard its rights in every proper way, and to controvert the complainant's case at every point.

As I have already said, I think it was necessary for the complainant to have shown, in view of the statute, and under the circumstances of this case, that the infringing acts were committed subsequent to

notice, and, as no such proof was submitted, the exceptions above considered are sustained, with the result that the findings of the master must be set aside. If, however, the complainant desires to submit proof upon the question of notice, and will so signify within 20 days, the matter will be referred back to the master for that purpose not only, but also for the purpose of taking such other and further proofs as may thereby be rendered necessary to show any loss of profits and damages it sustained after such notice, with instructions to the master to report accordingly.

UNITED STATES v. NGUM LUN MAY.

(District Court, D. Oregon. April 8, 1907.)

No. 4,790.

1. ALIENS—EXCLUSION—DEPARTMENTS OF GOVERNMENT—REVIEW OF ACTS.
The right to exclude or expel aliens from the territory of the United States is vested in the political department of the government, and is a right with which the judicial department can have nothing to do except as authorized by treaty or act of Congress.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, § 71.]

2. JURY—TRIAL BY JURY—DEPORTATION PROCEEDINGS.
Congress not having authorized trial by jury in proceedings for the deportation of a Chinese person, provided for by Act Cong. Sept. 13, 1888, c. 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312], the right to a jury trial does not exist.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 104.
Right to trial by jury in federal court, see note to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

3. ALIENS—CHINESE PERSONS—MERCHANTS—EVIDENCE.
In proceedings for the deportation of a Chinese person, evidence *held* insufficient to establish that he was a Chinese merchant when he came to the United States, and that he engaged in that line of business for some time thereafter.

James Cole, Asst. U. S. Atty.
Edwin Mays, for defendant.

WOLVERTON, District Judge. This cause is on appeal from the judgment of the United States commissioner directing the defendant to be deported to China. The defendant came into the United States about the year 1888, landing in San Francisco. His right to remain here is based upon the assertion that he was a Chinese merchant when he came to the United States, and that he engaged in that line of business for some time thereafter. He has no certificate showing his right to remain here, although he is at this time a laborer, engaged in laundry work. At the opening of the trial he demanded that he be accorded a trial by jury, insisting that it was his right under the Constitution and laws of the country. This brings on for determination the question whether the cause is one in which the defendant is entitled to a trial by jury.

There are certain matters appropriate for judicial cognizance, but which are not required, either by the Constitution or the law of the

land, to be so cognizable. As to such matters, it is within the legislative discretion of Congress to prescribe. It may leave them to the discretion and judgment of the administrative or executive functions of the government, or it may assign them for judicial determination by the courts of justice, and prescribe the mode and manner of procedure with respect thereto. The procedure is exceptional and special, and due process of law in the constitutional sense, or as applied in view of the common law, is not a necessary or essential adjunct, or demandable as of right. The Congress may require the observance of due process; so also it may prescribe a procedure without reference or allusion to the principle or the incorporation of it therewith. Murray's Lessee et al. v. Hoboken Land & Improvement Co., 18 How. 272, 15 L. Ed. 372. The right to exclude or expel aliens from the territory of the United States is vested in the political department of the government, and it is a right with which the judicial department has, and can have, nothing to do, except as authorized by treaty or by act of Congress. Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

Now, while it is true that the appeal under section 13 of the act of September 13, 1888 (25 Stat. 479, c. 1015 [U. S. Comp. St. 1901, p. 1317]), is to the District Court as contradistinguished from the judge thereof (United States, Petitioner, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931), yet, the Congress not having provided in the act by which the procedure is prescribed for the court to follow for a trial by jury, the right to a trial in that mode does not exist. The function to be exercised by the court is one delegated to it by the Congress, is special, and is only to be exercised in the manner prescribed by the law delegating the authority, and the common-law or constitutional right of trial by jury does not attach; and, further, as was said in the case of Fong Yue Ting v. United States, supra:

"The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not therefore been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

See, also, In re Tsu Tse Mee (D. C.) 81 Fed. 562.

In view of these authorities, the demand of the defendant for a trial by jury must be denied.

Now, as it relates to the facts: The defendant testifies that he began work in the store of San Chung Lung, in San Francisco, immediately after his arrival, and that he continued in such employment for about 10 years. In this, however, he is certainly mistaken, because the firm was dissolved in about 1894, and he did not work there after that time. His employment in and about the firm was as porter. He says that he did nothing else, but claims that he did as other members of the firm did. The extent of his interest in the business was $500,

but, when pressed as to that, he says that he worked the first two years for wages, receiving $25 and then $30 per month, and that he did not become a partner until the expiration of that time. It appears that the defendant drew money from the store to the extent of about $50. Otherwise, he insists that he did not receive any of his wages, and that, when the store closed, he lost all that he had in the business. He produces one witness, a Chinaman named Ham Dock, who testifies that he (witness) was a member of the firm when the defendant first arrived in San Francisco, and that the latter began working therein. Witness remained with the firm about one year, and removed to Portland. Later he went back to San Francisco on two occasions prior to the closing of the store, and he testifies that the defendant was working in the store upon each occasion. Another witness, Charles Peck, testified that he saw the defendant about the store, and that he was one of the boys engaged therein.

To my mind it is very problematical whether the defendant ever had an interest in the store, as he alleges, or engaged in the mercantile business in this country. He first admits explicitly that his occupation about the store was as porter only, and then he testifies that the understanding was that the firm should pay him wages, which understanding existed throughout the continuation of the business. True, he says he received "profits" from the business; but, when he explains further that the firm paid him but $50 while he was engaged with them, and that he called that "profits," it is apparent that he did not know what was meant by the word, and that all he received was in the way of wages. At any rate, the showing fails to satisfy me either that defendant was a merchant when he came to the United States, or that he ever engaged in business here as a merchant, so that he has not established his right to remain in this country.

The judgment will therefore be in accordance with that rendered by the commissioner, and the defendant will be deported.

BEALS v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court, E. D. Illinois. April 12, 1907.)

NEW TRIAL—GROUNDS—ERRONEOUS SUBMISSION OF QUESTION OF LAW TO JURY.

The erroneous submission to the jury of a question, which, under the evidence, was one of law, entitles the defendant to a new trial where a general verdict for plaintiff was returned, and it does not appear that it was not based on an erroneous finding on such question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 56.]

At Law. On motion by defendant for new trial.

Mabin & Morris, for plaintiff.
Hamlin & Gillespie, for defendant.

WRIGHT, District Judge. At the trial both parties requested the court to charge the jury on the law of the case, conforming in substance and effect, to the definition and rules relative to fellow serv-

ants, as adopted and applied by the Supreme Court of Illinois, and this the court endeavored to do. Previous to the submission of the case to the jury, the defendant's counsel had moved the court to direct a verdict for the defendant, but the court overruled the motion. At the time of the disposition of such motion, the court was of the opinion, and then had it in mind, that the case ought not to be submitted to the jury on the question of fellow servant, but the motion, as then understood by the court, was general, and did not separate this issue from the other issue made by the pleading and the evidence, namely, the alleged negligence of the defendant in retaining in its service a servant who, as then contended, was in the habit of being intoxicated, to which intoxication the injury to the plaintiff was attributed, and so the court denied the motion, then intending (although perhaps not stated), to submit the latter issue alone in its charge to the jury, and would have done this but for the intervention of both sides by requests for instructions containing the substantial elements of the doctrine of fellow servants held by the Supreme Court of Illinois. In doing this, however, the court went further than it had been requested by the defendant, and submitted to the jury, as a question of fact, the question whether Bean, the one who negligently failed to flag the train of plaintiff, was then a fellow servant of the plaintiff. To this action of the court the defendant has excepted, and has argued this point in support of its motion for a new trial.

In endeavoring to reach a proper conclusion upon which to dispose of the motion for a new trial, the court has tried to invoke the rule that where both sides have requested substantially the same instructions to the jury, and the court was thereby induced to give such charge, although it might afterwards appear to have been prejudicial and erroneous to one of the parties, neither party is in a position to complain, because of having participated in inducing the court to do the very thing complained of. But, in recurring to such rule, as against the defendant here, I am as constantly reminded that it did not request the court to submit to the jury, as it did, as a question of fact whether plaintiff and Bean were fellow servants. It may be argued that, under the Illinois rule of fellow servants, invoked by the defendant in its requests for instruction, it is an integral part thereof that who are fellow servants is a question for the jury, and that the defendant ought not to be heard against the action of the court in that respect. There is doubtless great force in such position, but the verdict of the jury, however, is a general one, and, by the motion for a new trial, it is challenged as a whole. It is impossible for the court now to determine whether the jury found Bean and the plaintiff not to be fellow servants, and that the master was liable for the negligence of Bean, or whether the jury found the relation of fellow servants to exist, and that the master was negligent in retaining Bean in its service because of habits of intoxication. If the verdict was based on the former alternative, and it is as reasonable to suppose that as the other, then, under the rules established by the federal decisions relative to fellow servants, it cannot be sustained, as it seems by those decisions the plaintiff and Bean were fellow servants. It is unnecessary for the court to cite numerous cases to prove this. In B. & O.

R. R. v. Baugh, 149 U. S. 384, 13 Sup. Ct. 920, 37 L. Ed. 772, it was said:

"Prima facie, all who enter into the employ of a single master are engaged in a common service and are fellow servants, and some other line of demarcation than of control must exist to destroy the relation of fellow servants. All enter into the service of the same master to further his interests in the same enterprise. Each knows when entering into that service that there is some risk of injury through the negligence of other employés, and that risk, which he knows exists, he assumes in entering into the employment."

In the case presented the plaintiff and Bean entered into the service of the same master, the defendant, to further its interests in the same enterprise, namely, safely running its trains upon the tracks of the railroad. Here, it is true, Bean and the plaintiff were upon separate trains running in the same direction, but the enterprise—the business—was the same, and not distinct or different; and the negligence of Bean—his neglect to flag plaintiff's train, in consequence of which the collision and injury occurred—was clearly the neglect of a fellow servant, and one of the risks plaintiff assumed in entering into the employment of the defendant.

It was wrong to submit this question to the jury, and their finding upon it is both against the law and the fact. Without proof of a breach of some positive duty of the master there can be no liability. There was evidence in the case tending to show that Bean was a person in the habit of being intoxicated, and that in a reasonable supervision of its business the defendant might have known this. This element in the case and the evidence upon it presupposed that Bean was a fellow servant of the plaintiff, and had the case been submitted to the jury solely upon this issue, and the same verdict returned, a different question would be presented from the one we are now considering, and concerning which it would be improper for the court to now express an opinion. The motion for a new trial is sustained.

Let an order be entered, setting aside the verdict and awarding a new trial.

THE HEATHGLEN.

(District Court, D. New Jersey. March 4, 1907.)

MARITIME LIENS—PAINTING VESSEL IN FOREIGN PORT—CONTRACT.

A libelant *held* not entitled to a maritime lien for the painting of a British vessel in the port of New York, where the work was not ordered by the master, but by a firm in Glasgow, Scotland, with whom libelant had previously had business dealings, and was done, as the evidence tended to show, upon their credit, and not upon that of the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, § 48.]

In Admiralty.

Wray & Callaghan, for libelant.
Convers & Kirlin, for claimant.

CROSS, District Judge. The libel filed herein is for materials furnished and work and labor performed in painting the steamship

Heathglen, a British vessel, while in the port of New York in the month of February, 1905. The vessel arrived in that port the latter part of January or early in February of that year, and her bottom was painted while she was in the dry dock at Erie Basin. The libelant's claim amounts to $502, besides interest. There is no serious dispute over the amount of the bill. The libelant undoubtedly painted the ship and supplied a portion of the necessary materials at or about the time mentioned. The chief defense set up is that the work was not ordered by the captain, but by a firm in Glasgow, known as Dick & Parker, to whom, rather than to the vessel, libelant gave credit. It may be said at the outset that the testimony of the libelant, which is uncorroborated for the most part, was so evasive and contradictory that little reliance can be placed upon it; but, were it otherwise, I think it is clearly established by the weight of the evidence that the work was performed by him for and at the request and upon the credit of the above-mentioned firm. He admits that he received a communication from them prior to the time of the arrival of the Heathglen in New York. Mr. Parker, of the firm of Dick & Parker, testifies that while they had no written contract with Dean Foster & Co., who were the general agents at London, of the owners of the vessel, it was nevertheless understood between them that, if the Heathglen docked at New York, that firm was to supply paint with which to paint her, and get some one to apply it, and adds that they had a general understanding with Michelson, founded upon their previous course of business with him, that, if they supplied him with the paint, he would see that it was applied; and it elsewhere appears in the case that a portion of the paint he applied came from that firm. That libelant did not perform the work pursuant to any instructions of the master of the vessel is manifested by a letter which he admits he wrote to the captain of the Heathglen while she was lying in Boston prior to her arrival at New York. This letter is dated January 16, 1905, and in it the libelant says:

"I am to paint the bottom of the S. S. Heathglen when she comes to N. Y., and no doubt you have received instructions to this effect from your owners. Please keep me posted when you are about to leave Boston, so as I can be on hand to paint the steamer."

This letter, as above stated, was written before the steamship had reached New York, and before the writer had had any interview with her captain. Coming, now, to the time when the vessel lay in dry dock at New York, Michelson's account of what transpired between him and the captain is as follows: The captain said, "I want you to give me a good job on that ship," to which Michelson replied, "I will," which was quite consistent with the fact that he had already been employed to do the work. He further says that the work was supervised by the first and second officers of the vessel, and that it was satisfactory. The captain explicitly denies that he employed libelant to do the work, and furthermore says that the libelant admitted that he represented Dick & Parker, and that they had instructed him to do the work. That Michelson understood that he was working for Dick & Parker, and that the work was done upon their credit, is also manifested by

his subsequent conduct. A bill for the work made out by him upon his printed billhead February 3, 1905 (the very day the work was completed), reads thus: "Messrs. Dick & Parker, Glasgow, Dr.," to which, but below, and with double-ruled lines intervening, was added the following: "S. S. Heathglen." Then follow the various charges. Not only was this bill made out to the Glasgow firm, but Michelson admits that subsequently, and probably within two or three weeks from the date of the bill, he drew a draft for the amount of it upon that firm, and deposited the same for collection with his New York bank, which draft, however, was not honored. It is claimed on the part of the libelant that the above bill, properly interpreted, was against the Heathglen, but I cannot yield to that contention. The bill was made to Dick & Parker, and the addition below of the name of the steamship was descriptive of or intended to identify the work; but, had the bill been made unquestionably to the vessel, that fact would not be controlling.

The question would still remain: How and by whom was the work ordered, and to whom was credit actually extended? Michelson appears to have thought that Dick & Parker were part owners of the steamship. He says that they told him so, and this may account for his conduct in accepting their order and making the charge to them, or he may have relied upon his previous course of dealing with them, concerning which a member of that firm testified. But, if Michelson thought he was dealing with the owners, he would not be entitled to a lien without a mutual understanding to that effect. When repairs are made by order of the owners of a vessel in a foreign port, the presumption is against the right to a maritime lien, and the burden of proof is on the libelant to show the contrary. Judge Dallas, speaking for the Circuit Court of Appeals, in The Havana, 92 Fed. 1007, 35 C. C. A. 148, says:

"Where repairs are ordered by an owner even in a foreign port, a lien for their cost is not presumed to have been contemplated, and cannot be created by any act of the party doing the work which he may claim to be indicative of a design on his part to look to the vessel for his compensation, unless it also appears that the other party had so understood that act, and had at least impliedly assented to its purpose."

To the same effect is the opinion of the same judge in the same court, in The Now Then, 55 Fed. 523, 5 C. C. A. 206. See, also, The Wandrahm, 67 Fed. 358, 14 C. C. A. 414.

Under the facts as I find them, the libelant has no right to a lien upon the vessel. The work was not ordered by the master, and was not performed upon the credit of the vessel, but upon that of the Glasgow contractors.

The libel will be dismissed, with costs.

THE ALLIGATOR. THE ALLIGRIPPUS. THE PHŒNIX.

(District Court, D. New Jersey. April 15, 1907.)

TOWAGE—LIEN—SERVICES—CONTRACT WITH OWNER.

The owner of a tug which rendered towage and other services in attendance on three dredges, under a contract made with the owner of such dredges in his office, on account of which bills were rendered and general payments made from time to time based on the agreed hire per day for the tug, and without reference to the particular vessel to which the service was rendered, is not entitled to a maritime lien on the dredges for a balance of hire due in the absence of any agreement or understanding therefor merely on his testimony that it was his custom, and his intention in this particular instance, to look to the vessels for payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 9.

Maritime liens, see note to The George Dunmois, 15 C. C. A. 679; The Nebraska, 17 C. C. A. 102; The Electron, 21 C. C. A. 21.]

In Admiralty.

Benedict & Benedict, for libelant.
Hudspeth & Carey, for intervener and claimant.

CROSS, District Judge. It was stipulated by the proctors of the respective parties that the testimony taken in one of the above cases should be used in each of the others. The libels and answers are substantially the same, and the cases were argued together. It is alleged on behalf of the libelant that the steam tug Harold rendered services at different times during certain portions of the years 1904, 1905, and 1906 in and about towing and otherwise assisting the dredges Alligator, Alligrippus, and Phœnix; that the services were of a maritime nature; that they have not been fully paid for; and that libelant has a lien against the dredges for the unpaid balance of his claim. There was no written contract between the parties. The evidence shows that the libelant owned the tugboat Harold which rendered the services, and that in the fall of 1904 he made a verbal contract with a Mr. Potter, the owner of the Alligator, Alligrippus, and Phœnix for the employment of his tugboat for general towing and waiting on the above-named dredges. The tug was to do whatever the captains of the dredges required, "such as getting coal and water, waiting on them in general, pumping scows and taking scows to them, and generally bring them away and general work." The dredges had no motor power of their own. The price agreed upon for the service was $20 per day, which included all expenses for coal and water and use of the men on the tug. The libelant claims that the services rendered by him under the above contract amounted in all to the sum of $5,370, of which sum there still remains due a balance of $2,820; that of said sum of $5,370 there was due from the Alligator for services rendered her $3,080, of which sum there has been paid on account $1,275, leaving $1,805 due; that from the Alligrippus there was due for like services rendered her $2,060, of which $1,275 has been paid on account, leaving $785 due, and that from the Phœnix there was due $230 for like services, no part of which has been paid. The dates when the above payments were made are for the most part not given,

but they were made by checks and notes as follows: Check, $350; note $400; note $500; check $100; note September 9, 1905, $600; note November 17th, $600. Libelant also produced three unpaid notes made by Potter to his order as follows: December 26, 1905, $612; February 21, 1906, $609; April 24, 1906, $621. He admits that the payments were general and were arbitrarily applied by him against the amounts claimed to be due from the several dredges. The evidence on behalf of the libelant shows that the dates when the Harold was engaged in the services of the dredges was put down by its captain in a book which is said to have been subsequently stolen from the tug; that reports were made by the captain from this book monthly or semimonthly, which original reports have been destroyed. Certain statements, however, testified to have been copied from them are produced and have been offered in evidence. The captions of nearly all of them are of the following general form: "Report of tug Harold; a/c Thos. Potter, waiting on dredges Alligator, Alligrippus and Phœnix," or one or all of the dredges, as the case may be. Then follow the dates for the particular month covered by the report. A report in substantially the above form is made for each month embraced in the term of service. One report, however, is made "Tug Harold for Thos. Potter"; another "Report of Tug Harold Jan. 1905, waiting on dredge Alligator at Elizabethport"; another is like the last, except it says "Waiting on dredges Alligator and Alligrippus"; while one has no heading, but simply gives the days of the month when the alleged services were rendered, without stating for what dredge or dredges. These reports afford the only information as to how the charges were entered.

The point is made on behalf of the claimant that the charges are so made that it cannot be told therefrom with legal accuracy what portion thereof was chargeable against each dredge, and that the libels must be dismissed for that reason. In the view I take of the case, however, it is unnecessary to determine that point, since in my judgment the evidence is insufficient to support the liens against the several dredges or any of them. There was but one contract proven, and that of the nature above indicated. It was made in Jersey City at the office of the owner of the dredges, and with him personally. The only evidence tending to show that the services were rendered upon the credit of the dredges, and not of the owner, is that of the libelant himself, and, put in a narrative form, it is substantially as follows: "I knew Mr. Potter was not in very good financial standing at the time; that he owed a large amount of money to different parties. I did not think he was good pay at the latter end. I knew the dredges were all right, and I thought they were good enough for my pay. I knew that at the time. I thought they were responsible for any small amount I would charge." He then adds that he had been about the harbor and in the shipping business for a good many years, and knew what it was to collect bills against a vessel and vessel owners; knew that a vessel is responsible herself for certain kinds of debts she contracts; that he had collected money in that way at different times; and, quoting him literally, "We always looked to the vessel for our money, and did in this case." Being asked on cross-examination,

"When did you first make up your mind you were going to look to the vessel," answered, "We always do that, that is our general way of doing business"; but subsequently adds that he made up his mind when he made the bargain with Mr. Potter that he was going to hold the dredges responsible, that he made up his mind that Mr. Potter was irresponsible, but nevertheless made the bargain with him. This is the sum total of his testimony. The only circumstances, therefore, relied upon to sustain the position that the credit was extended to the vessel rather than to the owner is the alleged irresponsibility of Potter and libelant's custom.

There is not a word of testimony in the case to show that there was any agreement or mutual understanding between the parties that the dredges should be held liable for the services. The question was not mooted and the circumstances do not warrant the inference of such an understanding. The charges, if they can be dignified by that name, were really made for the most part against the owner of the dredges, and the payments were always made by him by note or check in a general way, and without application to any specific vessel or vessels. It is hardly conceivable that the owner, if he had understood that his dredges were to be held liable, would not have made specific payments on account of the different dredges, or at least would have directed the application of the payments in his own interests. The libelant's idea evidently was that dredges, no matter what the contract, or with whom made, were always responsible for services of this character, and it is apparent that he is seeking to establish a lien against these dredges, pursuant to his general custom, and not because there was any understanding or agreement express or implied that credit was to be extended to the vessels, rather than to the owner. Moreover, the evidence intended to show the financial irresponsibility of the owner is neither satisfactory nor convincing; but, if it were, it would only be a circumstance to be considered in connection with the other testimony for the purpose of determining the understanding of the parties. Libelant said that he knew that Potter owed a large amount of money to different parties, but says nothing about his assets. He might have owed $100,000 and still have been worth $1,000,000. Again, when libelant was asked by his counsel the specific question, "Did you know whether he was good pay or not?" answered, "Well, I did not think he was at the latter end." The only inference that can properly be drawn from this answer is that he thought Potter was good pay at the beginning—that is to say, when the contract was made—and that seems to have been the fact, as nearly one-half of the claim was paid. Moreover, he had known Mr. Potter for several years and had done some work for him before. In the case of The Columbus, 67 Fed. 553, 14 C. C. A. 522, towing services rendered under a contract were sought to be recovered by libel in rem. Judge Dallas, speaking for the Circuit Court of Appeals for the Third Circuit, said:

"The material inquiry is not whether the libelant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance of it."

And the same learned judge, speaking for the same court in The Havana, 92 Fed. 1007, 35 C. C. A. 148, says:

"Where repairs are ordered by an owner even in a foreign port, a lien for their cost is not presumed to have been contemplated, and cannot be created by any act of the party doing the work, which he may claim to be indicative of a design on his part to look to the vessel for his compensation, unless it also appear that the other party had so understood that act, and had at least impliedly assented to its purpose."

The Supreme Court of the United States said in The Valencia, 165 U. S. 264, 271, 17 Sup. Ct. 323, 41 L. Ed. 710:

"In the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived."

That case also holds that a lien will exist outside of an express agreement only when there existed "circumstances justifying the inference that the supplies were furnished with an understanding that the vessel itself would be responsible for the debt incurred." To the same effect is the decision of the Circuit Court of Appeals for the Ninth Circuit, in Alaska & P. S. S. Co. et al. v. C. W. Chamberlain & Co., 116 Fed. 600, 54 C. C. A. 56, and that of the Circuit Court of Appeals for the First Circuit in Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288. Also Prince v. Ogdensburg Transit Co. (C. C.) 107 Fed. 978; The Now Then, 55 Fed. 523, 5 C. C. A. 206. The case under consideration does not involve any question of necessary supplies or repairs, but is one of plain contract between the libelant and owner. There is in this case no presumption of right to a lien existing in favor of libelant; on the contrary, the presumption is against such right, and such presumption must be overthrown by evidence which directly proves or reasonably warrants the inference that by mutual understanding credit was extended to the dredges, rather than to the owner. There is no reason why the law should be strained in a case like this. The libelant apparently never broached the question of a lien to the party with whom he was contracting, or said or did anything that would suggest that he was giving credit to the vessels. That idea I believe was an afterthought; but, if it existed, it existed only in his own mind, and was never in any degree given outward expression.

As I find nothing in the evidence which entitles the libelant to maritime liens against these dredges, or any of them, the libels will be dismissed, with costs.

MUNDY v. SHELLABERGER.

(Circuit Court, W. D. Missouri, W. D. April 22, 1907.)

No. 2,963.

SPECIFIC PERFORMANCE—HOMESTEAD—RIGHTS OF WIFE.

Rev. St. Mo. 1899, § 3616 [Ann. St. 1906, p. 2034], establishes the homestead of every housekeeper or head of a family, and declares that the husband shall be incapable of selling the homestead, and every such sale shall be void, unless the wife joins in the conveyance. *Held* that, where

a husband contracted to transfer his homestead and other real estate in exchange for certain corporate stock, in which contract his wife did not join, and the homestead constituted one-fourth in value of the property agreed to be transferred, the contract was invalid, and specific performance thereof would not be decreed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 33.]

John J. Jones, Halbert H. McCluer, John T. Harding, and Omar E. Robinson, for complainant.

M. A. Fyke and A. S. Marley, for defendant.

PHILIPS, District Judge. This is a suit in equity for the specific performance of a contract for the conveyance of certain real property situate in Kansas City, Mo. The contract is expressed in a proposition from the complainant to the defendant, of date June 18, 1904, whereby the complainant agreed to deliver to the defendant 100,000 shares of the Logan Oil & Gas Company stock, of the par value of $1 each, fully paid, and nonassessable; also 60,000 shares of the Northern Petroleum Company stock, of the par value of $1 each, fully paid, and nonassessable; and 13,125 shares of the Clermont Oil Company stock, par value $1, fully paid, and nonassessable, for the following described property, alleged to be owned by the defendant:

"Your Winnifred Court, 541 Brooklyn Ave., upon which are 16 brick cottages, and your residence, 135 Park Ave. Said properties free of all mortgages. You to retain possession of your residence for 90 days if necessary, free of rent. Deeds for such properties to be delivered within ten days from this date, or as near that date or sooner if possible. You to bring abstracts down to date. All stocks I agree to deliver to you inside of 10 days."

Which proposition, the bill alleges, the defendant then accepted.

The answer tendered various defenses to the bill, among which is that the property designated as the defendant's residence, 135 Park avenue, was the homestead of the defendant, who then had, and yet has, a wife living with him on said resident property. It is conceded by counsel for complainants that the resident property at the time of the making and acceptance of the proposition was and now is the homestead of the defendant, with the wife living thereon, and that his spouse did not join in the contract. This fact the complainant knew when the contract was entered into, as he theretofore examined the property and it is stated in his written proposition that the Park avenue property was then the defendant's residence. The statute of Missouri (section 3616, Rev. St. 1899 [Ann. St. 1906, p. 2034]), establishes the homestead of every housekeeper or head of a family which, in cities like Kansas City, shall not include more than 18 square rods of ground, or exceed the total value of $3,000. It then expressly declares that:

"The husband shall be debarred from and incapable of selling, mortgaging or alienating the homestead in any manner whatever, and every such sale, mortgage or alienation is hereby declared null and void: Provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying, mortgaging, alienating, or in any other manner disposing of such homestead, or any part thereof."

Such statutes are in recognition and enforcement of the public policy of the state to secure to the family the beneficent protection of the homestead law. The courts are quite in harmony under similar statutes in declaring that all sales or contracts looking to the alienation of the homestead by the husband without the co-operating assent of the wife are null and void. Newton v. Newton, 162 Mo. 173–183, 61 S. W. 881. It would be quite absurd to say that the statute did not apply as well to a contract of sale as to an alienation by deed, as the contract is made the basis for the claim to a specific performance on which the court may compel the execution of the deed or make its alternative decree. Under a like declared policy of the state the Supreme Court of Kansas, in Thimes v. Stumpff, 33 Kan. 53, 5 Pac. 431, said:

"The Constitution of the state, as well as the statute relating to exemptions, provides that the homestead shall not be alienated without the joint consent of the husband and wife, when that relation exists. In interpreting and applying the above provisions it has been uniformly and consistently ruled by this court that, so long as the premises are impressed with the homestead character, no lease, mortgage, deed, or other contract, intended to alienate the homestead or interfere with its use and occupancy as a homestead, made and executed alone by the husband and without the consent of the wife, is valid or effectual for any purpose whatsoever. * * * If a party cannot convey the homestead by mortgage or deed without the consent of his wife, he certainly cannot make a contract agreeing to convey that will be valid or binding without her concurrence."

The Missouri homestead law is well understood to have been fashioned after that of the state of Vermont, where it is held that a mortgage contract made by the husband alone on the homestead was void ab initio for all purposes when made, because the wife did not join in its execution. Martin v. Harrington, 50 Atl. 1074, 73 Vt. 193, 87 Am. St. Rep. 704. That the rule applies as well to a contract to convey as to a deed of alienation is generally recognized. Barton v. Drake, 21 Minn. 299; Law v. Butler, 47 N. W. 53, 54, 44 Minn. 482, 9 L. R. A. 856. The answer made to this situation by complainant's counsel is that, as there is no homestead interest in the Winnifred Court property, the contract is susceptible of specific performance as to that, and that, as to the homestead lot, a court of equity can ascertain the value thereof and decree that as damages to the complainant. The court makes no question of the general rule in the proceeding for specific performance of contracts for the sale of several parcels of land that where as to one of the parcels, separable from the others, the vendor is unable to specifically perform, as where he has no title at the time when the decree is reached, if the vendee be willing to accept that part to which the vendor has an acceptable title, the chancellor may compel performance as to that, and ascertain the amount and award damages as to the residue. But, does the rule obtain in this case where the contract as to the one-fourth part in value of the premises is absolutely void, being in contravention of the public policy of the state? When the text-writers and the courts speak of the right to commute in damages as to a part of the contract not susceptible of specific performance, they have in mind a contract of a party, sui juris, which he had a right to make, not forbidden by the law, and which he could perform

if he had the title, or where he has by some act disqualified himself from performance. The ascertainment and awarding of damages in lieu of the specific thing in equity presupposes a contract valid, and one enforceable in an action at law. Whether the suit be in equity for specific performance with the incidental jurisdiction to proceed to the complete adjustment of the subject-matter of the controversy by awarding damages as to that part of the property embraced in the contract not capable of being conveyed for want of title, or the like, or whether it be an action at law for damages consequent upon failure to entirely perform, the underlying basis of the right to relief is the existence of a valid contract. It is inconceivable to the judicial mind how a contract void, especially when it contravenes the public policy of the state where made, can ever form the basis of a suit recognizable either in equity or law.

While there may be found some utterances by courts, based upon peculiarities of the local statute, where an action for damages may lie in such cases, they are so opposed to correct principles and the weight of authority as not to commend them to my approval. The following authorities, in effect, hold that a contract growing out of the husband's attempt to alienate the homestead without the wife's concurrence cannot form the basis of relief for damages: Thimes v. Stumpff, supra; Hodges v. Farnham, 49 Kan. 777, 31 Pac. 606; Webster v. Warner et al., 78 N. W. 552, 119 Mich. 461; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817; Cowgell v. Warrington, 66 Iowa, 666, 24 N. W. 266; Barnett v. Mendenhall, 42 Iowa, 296; Wap. Homestead, 384–394, and note 6; 15 Amer. & Eng. Enc. of Law (2d Ed.) 670; Miller v. Gray, 68 S. W. 517, 29 Tex. Civ. App. 183; Meek v. Lange, 91 N. W., loc. cit. 696, 65 Neb. 783.

In Curry v. Whitmore, 110 Mo. App. 204, 84 S. W. 1131, the writer of the opinion, in a single sentence, gives expression to the view that damages might be awarded on a contract to convey the homestead; but as the assertion is not buttressed by other authority or enforced by any plausible argument, the utterance, not coming from the highest court of the state, while it may be entitled to respectful consideration, does not command obedience. The Supreme Court of Michigan, in Phillips v. Stauch, 20 Mich. 369, under a homestead law with provisions similar to the Missouri statute, held that a deed by the husband alone to premises which included the homestead would not only have been voidable merely as to that (i. e., as to the homestead interest), but would have been wholly void; and that a contract by the husband to make such a conveyance intended to have a direct and present operation will not be specifically enforced. The court then proceeding to make a practical application of the law to the case in hand said:

"The farm in question in this case contains a little over 92 acres, and is valued by complainant at a trifle over $6,340, and by the defendant at about $4,600. To give relief on the principle of compensation as contended for, would exempt from the conveyance the homestead right of the value of $1,500, and embracing the dwelling house, and would leave the balance of the premises subject to the contingent right of dower of defendant's wife. This would necessarily exclude from the conveyance a very material part of the subject-matter of the contract, and almost certainly result in great pecuniary injury to all parties interested. The adjustment of the compensation would be quite

difficult in a case like this, and especially that part of it founded on the contingent dower right. That is quite different from the case where the right is consummate. The interest of defendant's wife would also be exposed to some detriment by partial alienation. These considerations taken together inspire the opinion that the case is not one in which the court ought to compel a conveyance with compensation."

This ruling was followed in Hall v. Loomis, 63 Mich. 709, 30 N. W. 374, aptly expressed in the syllabus as follows:

"A contract for the sale of land occupied as a homestead, not executed by the wife, is a nullity, so far as the homestead is concerned, and the fact that the value of the property exceeded the statutory limit will not render the contract enforceable as to the residue."

There is another decision by the Supreme Court of Michigan (Engle v. White, 104 Mich. 15, 62 N. W. 154), to which attention may be directed, but which is quite distinguishable from the case at bar. In that case, a father owned and occupied a farm consisting of three subdivisions of 40 acres each, and, in addition thereto, he owned 69 acres of adjoining land. Becoming incapacitated to operate the farm, to induce his son to return to the farm, he entered into a written agreement with him, which provided that the father was to give to the son 69 acres, and the latter was to work the farm on shares, keep it in repair and care for his father and mother, with the promise that, at the father's death, the son was to have a deed to the farm. The son moved upon the 69 acres, and for 18 years, during which time the mother died, and the father married and again became a widower, fully performed the terms of the contract. The buildings occupied as a homestead were situated upon one of the 40-acre subdivisions, which was treated as his homestead. Disagreements arising between the father and son, the father sought to eject him from possession of the 69 acres, whereupon the son filed against him a bill in equity for specific performance, which only asked the court to decree specific performance "in so far as it can now be done." Inasmuch as no question of dower interest was involved or to be considered, and no right or interest was sought to be enforced as to the 40-acre tract embracing the homestead estate, and the other tracts were entirely disconnected therewith, it was held that decree for specific performance as to the independent tracts might go, the complainant presumably accepting the same in full satisfaction of his rights.

But in the case at bar, not only are the marital rights of the wife of the defendant involved, but the bill includes the homestead in its prayer for relief; and, on the hearing at bar, the court inquired of counsel for complainant if he was willing to take decree of specific performance for the Winnifred Court property alone, and he promptly answered "no." This bill cannot, for the reasons above given, be sustained in its entirety. Beyond this, on the whole merits the inclination of my mind is that the exercise of a sound discretion on the part of a chancellor might well warrant a refusal to specifically enforce the contract. In view, however, of the conclusion reached on the first proposition involved, further discussion will not be pursued.

It results that the bill of complaint must be dismissed.

In re BELFAST MESH UNDERWEAR CO.

(District Court, D. Connecticut. April 11, 1907.)

No. 1,714.

BANKRUPTCY—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER.

The appointment of a receiver for a corporation under Pub. Acts Conn. 1903, p. 158, c. 194, § 26, which authorizes proceedings for the dissolution of a corporation and the appointment of a receiver therein on various stated grounds, which do not include insolvency by name, or for other "good and sufficient reason," may constitute an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3a (4) 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683], where the record and findings in the state court show that the appointment was in fact, although not in name, made "because of insolvency."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 80.]

In Bankruptcy. On report of special master.

On September 28, 1906, a petition was filed in the District Court in proper form, asking that respondent corporation be adjudicated a bankrupt. The pleadings therein raised two distinct issues. First. Was said respondent corporation insolvent at the time of the filing of the petition and at the time when it is alleged that it committed an act of bankruptcy? Second. Did the respondent corporation commit an act of bankruptcy, in that on or about the 4th day of August, 1906, a receiver of said corporation was appointed because of its insolvency, which receiver was put in charge of its property under the laws of the state of Connecticut? The matter was referred to Frank B. Munn as a special master to take the evidence and report his findings upon said issues to the court. His report finds upon the first issue that the respondent was insolvent as alleged, and upon the second issue that the respondent committed the act of bankruptcy as alleged. The opinion of the court which follows is based upon the theory that the finding upon the second issue is substantially based upon the record of the state court which was put in evidence before the master, and that the finding of insolvency under the first issue is merely incidental and explanatory.

Charles Phelps, for petitioners.
L. J. Nickerson, for respondents.

PLATT, District Judge (after stating the facts). The only decision in this circuit which offers aid in reaching a conclusion upon the matter under consideration is In re Spalding, 139 Fed. 245, 71 C. C. A. 270. The law of New York under which, in that case, a receiver was appointed to take charge of Spalding's property, did not cover insolvency as a jurisdictional fact. The creditors' petition therein was granted upon other distinct grounds, and insolvency was only brought in incidentally, and could not influence, much less control, the judgment. In New York a corporation could have been proceeded against because of insolvency, but an individual could not.

Under the laws of Connecticut there is no provision for alleging insolvency eo nomine as the cause for obtaining a receivership over the property and affairs of a corporation. Section 26, c. 194, p. 158, Pub. Acts 1903, contains the local law pertaining to receiverships of corporations:

"Sec. 26. Receivership of Corporation. Whenever any corporation having a capital stock has willfully violated its charter or exceeded its powers, or when-

ever there has been any fraud, collusion, or gross mismanagement in the conduct or control of such corporation, or whenever its assets are in danger of waste through attachment, litigation, or otherwise, or such corporation has abandoned its business and has neglected to wind up its affairs and to distribute its assets within a reasonable time, or whenever its stockholders or directors have voted to discontinue its business, or whenever any good and sufficient reason exists for the dissolution of such corporation, any stockholder or stockholders owning not less than one-tenth of its capital stock or, in the case of a corporation not having capital stock, any member of such corporation may apply to the superior court in the county wherein such corporation is located, for the dissolution of such corporation and the appointment of a receiver to wind up its affairs. Such court may, if it finds that sufficient cause exists, appoint one or more receivers to wind up the business of such corporation, and may at any time, for sufficient cause shown, make a decree dissolving such corporation and terminating its corporate existence. Whenever such decree of dissolution is passed, it shall be the duty of the receiver or receivers to cause a certified copy thereof to be filed in the office of the Secretary of the State, and said Secretary shall thereupon record such certified copy in a book kept by him for that purpose. Such court, in every case in which it appoints a receiver, shall by its order limit a time, which shall not be less than four months from the date of such order within which all claims against such corporation shall be presented, and all claims not presented within such time shall be forever barred. When such receivership shall be terminated by the court, the receiver or receivers shall file with the Secretary of the State a certificate similar to the final certificate required of directors in section 34 of this act, and said Secretary shall thereupon record such certificate in a book kept by him for that purpose."

An inspection of section 26 shows that, if the facts of this case do not warrant an adjudication, the beneficent purposes of the bankrupt law can never be extended to a Connecticut corporation, no matter how hopelessly insolvent it may be, if the stockholders owning not less than one-tenth of the capital stock prefer to avoid the embrace of the federal arms. It is true that, upon a proper allegation, the state court might say that insolvency was a "good and suffitient reason," but such an allegation would be subject to the whim or caprice of the stockholders. The practical situation is precisely as above outlined.

The essential part of the record in the state court is as follows:

"Paragraph 3 of the complaint is as follows: 'Said Belfast Mesh Underwear Company, Incorporated, is indebted to various persons and corporations, and said indebtedness is long past due. A large quantity of its finished product in the city of New York has been attached by one of its creditors, and other creditors are threatening to attach its property and machinery, unless their claims are paid immediately and the assets of said Belfast Mesh Underwear Company, the defendant, are in danger of waste through said attachments, and threatened attachments and litigation growing out of the same.'

"Paragraph 4: 'The best interests of the creditors and stockholders of the defendant corporation require dissolution of the Belfast Mesh Underwear Company and the appointment of a receiver forthwith to wind up its affairs.'

"Under these allegations the plaintiff claimed: '(1) The dissolution of the corporation. (2) Appointment of a receiver of said corporation to hold the business and all of the estate and property belonging to said corporation, and with power to dispose of, manage, and apply the same to, and collect all the debts for, the benefit of all parties entitled thereto, and to account for the same to this court as by law provided.'"

And asking such further decree as shall be found necessary by the court.

Section 1044 of the General Statutes, Revision of 1902, provides:

"When any action shall be brought to, or pending in, any court of equitable jurisdiction, in which an application shall be made for the appointment of a receiver, either judge of such court or of the Superior Court, when such court is not actually in session after due notice given may make such order in the premises as the exigencies of the case may require and may from time to time rescind and modify the same. * * *"

Under section 1044, after due notice, Judge Gager on August 4th found that "the exigencies of the case" required the immediate appointment of a temporary receiver, and, having found paragraphs 3 and 4 of said complaint true, appointed such receiver.

It seems to me that upon this record alone it must be apparent to any reasonable mind that the facts found by that court show that it was "because of insolvency" that the receiver was appointed. The record certainly does not show conclusively that insolvency was not the cause, or one of the causes, which led to the appointment. It may be said to exhibit a prima facie showing of insolvency of sufficient force to put the respondent corporation in this court upon its proofs. If such a rule be adopted, no harm can come to any one hereafter. If applications shall be made to the state courts for receivers in cases where beyond question the corporation is solvent, the record in the state court will undoubtedly proclaim the fact in a convincing way. The situation is so serious that I cannot bring myself to believe that the spirit of the bankruptcy law will permit such a technical construction of section 3, subd. 4, of the bankruptcy act of July 1, 1898 (30 Stat. 546, c. 541 [U. S. Comp. St. 1901, p. 3422]), as the respondents ask for; nor can I believe that the spirit of In re Spalding commands such action, although I am bound to admit that its letter might not unreasonably be so interpreted.

The exceptions to the master's report do not deal with essentials from the viewpoint which I take, and are therefore overruled. The uncriticised portions of the report present enough facts to warrant an adjudication. Let one be entered forthwith.

THOMAS v. FLETCHER.

(District Court, D. Maine. April 8, 1907.)

No. 33.

1. BANKRUPTCY—FRAUDULENT TRANSFERS.

A transfer of a merchant's stock and all his attachable property to his wife for a nominal consideration for the purpose of preventing the levy of attachments, more than four months prior to the filing of a bankruptcy petition against him was fraudulent, and subject to be set aside at the instance of the trustee.

2. FRAUDULENT CONVEYANCES—TRANSFER TO WIFE—CONSIDERATION.

A bankrupt and S. acquired the right to remove the timber from certain land, each paying $500, which they obtained from a bank on their joint and several unsecured note. The last renewal note signed by the bankrupt matured October 1, 1905, a month after he transferred his interest in such timber to his wife, while insolvent. She testified that the bankrupt was desirous of surrendering to S. all right in the timber, but that

she objected, and that the consideration for such transfer was her agreement to substitute her name on the note to the bank, instead of that of the bankrupt, which was subsequently done. *Held*, that the consideration for such transfer was insufficient to support it, but that the same was fraudulent as against the bankrupt's creditors.

Albert S. Woodman, for complainant.
Nathaniel B. Walker, for respondent.

HALE, District Judge. This suit in equity seeks to set aside certain transfers alleged to have been made by the bankrupt to his wife, Annie M. Fletcher. The facts in the case are sufficiently set forth in the report of the special master. The substantial part of the report is as follows:

"Elias Thomas, Jr., and Edwin I. Littlefield, were examined as witnesses for the plaintiff, and the respondent was examined in her own behalf. The schedules filed by John W. Fletcher in bankruptcy, and the testimony of his wife in the proceedings before the referee, were admitted as evidence by agreement. It was admitted that John W. Fletcher, the bankrupt, was insolvent on the 1st day of September, 1905, that he then owed $2,700, and that on that day he conveyed all his attachable property to his wife, the respondent herein, for a nominal consideration. The property was a small stock of groceries in the store kept by him in Kennebunk, together with the book accounts due him. Of these a bill of sale was given. The other property was the equal right with one Smith to remove the growth from a lot of land in Wells, Me., at any time within three years from May 29, 1904. Howard K. Smith and John W. Fletcher bought this lot from one Towne for $1,000 cash, each paying therefor $500. It has been frequently held in this state that such conveyances are prima facie fraudulent as to creditors, and the burden of proof is placed on the transferee to show the contrary. Wheelden v. Wilson, 44 Me. 18; Robinson v. Clark, 76 Me. 493; Horner Gaylord Co. v. Miller & Bennett, 17 Am. Bankr. Rep. 257, 147 Fed. 295.

"There are no circumstances connected with the case that rebut this presumption of fraud. The witness Edwin I. Littlefield, a York county sheriff, testified that about September 1, 1905, he went to the Fletcher's store with a writ to make an attachment. Mrs. Fletcher told him that the property had been transferred to her, and said it was done to prevent attachments. Fletcher paid that claim, and a few days later Littlefield went with another writ and attached the stock of goods. Mr. Fletcher gave him the key to the store, which he retained till after the adjudication in bankruptcy of Fletcher. He then gave the key to the trustee. An involuntary petition in bankruptcy was filed by creditors January 11, 1906. After the adjudication, Mr. Fletcher filed his schedules, properly sworn to, and in them he claims the groceries and book accounts as his own. The trustee took possession of these, and sold the goods and has collected the accounts in part.

"The respondent, called in defense, testified clearly that the sole purpose of the transfer of the property to her was to prevent attachments, that her husband was harassed by debts and attachments and could not go on with his business, and they thought the transfer to her would end the trouble. Her statement that she did not intend to defraud his creditors seems quite immaterial.

"As to the transfer of the right to cut timber on the Towne lot, she testified that the consideration was the substitution of her name for that of her husband on a note held by the Ocean National Bank. The $1,000 paid by Fletcher and Smith for that right had been hired from that bank on their joint and several unsecured note in May, 1904. This was a four-months note, and was kept alive by renewals. The last note signed by Mr. Fletcher matured October 1, 1905, a month after the date of the deed to his wife. She testified that her husband was desirous of giving up to Mr. Smith all right in the wood lot, but that she objected to it, and agreed that, if the bank would consent, she would put her name on the note together with Smith's when the next renewal

came. She was uncertain whether this arrangement was made after the deed of the lot to her or before. Mr. Smith was consulted and got the consent of the bank to the substitution of Mrs. Fletcher's name for her husband's on a new note which was given and signed by her October 1, 1905.

"It is impossible to come to the conclusion that this was any consideration for the transfer of the property to her when it was made; and a decree should be entered voiding that deed and the other conveyance, and the respondent ordered to transfer and convey to the complainant the property described in the conveyances free and clear from all incumbrances.

"Lewis Pierce, Special Master."

The principal contention in the case arises over the transfer of the interest in real estate. It is urged by the respondent that the motives of the vendor are not shown to have been fraudulent; that, in any event, the vendee did not assist in carrying into execution any fraudulent intention; and that there is no evidence of a lack of good faith in the proceedings.

The case has been heard by a special master of great experience and ability. He has had before him the parties and their witnesses, and has heard their testimony. So certain did he feel of his conclusions that he ordered the respondent on the spot to make the transfers prayed for by the complainant. His opinion is entitled to great weight. I have examined the testimony with care, and fully agree with the special master.

In Wheelden v. Wilson, 44 Me. 18, cited in the report, the court said:

"The plaintiff presented himself as a witness upon the stand in his own behalf, and was permitted by the court, against the objection of the defendant, to answer the following interrogatory proposed by his counsel: 'What was your motive in taking the mortgage?' The validity of the mortgage, with reference to which this inquiry was made, was a material fact in issue between the parties. It was assailed by the defendant on the ground of fraud. Whether it was fraudulent, so far as the plaintiff was concerned, depended entirely upon the intent or motive with which he received it. If it were received for the honest purpose of securing a debt from the mortgagor, or to protect himself from liabilities which he had assumed for the mortgagor, and for no other purpose, the law will uphold it. But if taken by the plaintiff for the purpose of aiding or assisting the mortgagor to defraud or delay his creditors, or if such purpose constituted any part of the motive which induced him to take the mortgage, then it was fraudulent and void as to creditors. The question of motive or intention was a question of fact, to be determined by the jury."

I have had occasion before, when issues of this sort have been presented, to refer to Blennerhassett v. Sherman, 105 U. S. 100, 26 L. Ed. 1080, in which the court said:

"It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must also be bona fide. If it be made with intent to hinder, delay, or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration."

In Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289, Mr. Justice Brown, in speaking for the Supreme Court, said:

"It has been the accepted law ever since Twyne's Case, 3 Coke, 80, that good faith, as well as a valuable consideration, is necessary to support a conveyance as against creditors. In that case Pierce, being indebted to Twyne in £400, was sued by a third party for £200. Pending such suit, he conveyed

all his property to Twyne in consideration of his debt, but continued in possession, sold certain sheep, and set his mark on others. It was resolved to be a fraudulent gift, though the deed declared that it was made bona fide. Most of the cases illustrative of this doctrine, however, have been like that of Twyne, wherein a debtor, knowing that an execution was to be taken out against him, had sold his property to a vendee having knowledge of the facts, for the express purpose of avoiding a levy, or receiving a consideration which could not be reached by execution. In such cases the fact that he receives a good consideration will not validate the transaction, unless at least the creditor has obtained the benefit of the consideration."

In the case at bar the questions of motive and of good faith were questions of fact, and have been passed upon by the special master. Upon a careful examination of the testimony, I am satisfied that his finding should be sustained.

The questions of law arising in the case are fully covered in the citations to which I have referred. Upon an examination of the testimony of the respondent alone, and giving her the full benefit of all she has claimed, it is impossible to sustain either of the transfers to which the bill in equity is directed.

The transfers and conveyances enumerated in the bill in equity must be held to be fraudulent, and intended to hinder and delay the creditors of the bankrupt. Transfers to the trustee are ordered as prayed for. The decree must be for the complainant, with costs.

THOMAS G. PLANT CO. v. MAY MERCANTILE CO.

(Circuit Court, E. D. Missouri, E. D. February 4, 1907.)

No. 5,196.

1. TRADE-MARKS AND TRADE-NAMES—FRAUDULENT USE BY ANOTHER—INJUNCTION.

   A manufacturer of shoes which has adopted and uses the name "Queen Quality" as a trade-mark or name exclusively for its shoes of superior grade, selected by it and stamped with such name, is entitled to be protected in such manner of use and to an injunction restraining a purchaser of shoes of its manufacture, but which it had rejected for such grade and stamped with a different name, from advertising, offering for sale, and selling the same under the name of "Queen Quality" shoes.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 76.]

2. SAME—SUIT FOR INFRINGEMENT—INJUNCTION.

   Where a defendant continued to make use of complainant's trade-mark after notice to desist and contested a suit brought to compel it to do so, complainant's right to an injunction is not defeated because defendant had, in fact, ceased such use before the suit was brought, which fact was not known to complainant.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 110, 111.]

In Equity.

Geo. H. Maxwell, for complainant.

Nathan Frank and Richard A. Jones, for defendant.

FINKELNBURG, District Judge. Owing to the number of cases submitted at this term and other intervening and pressing duties, I

find it impracticable to attempt to write opinions in full without unduly delaying litigation. I will, however, dictate an informal memorandum, indicating some of the reasons which have led me to the conclusion finally arrived at in this case.

No question is raised in this case as to complainant's legal right to the trade-mark "Queen Quality" at the time of the acts here complained of. That right had been previously established in the case of the Plant Company v. May Company, reported in 105 Fed. 375, 44 C. C. A. 534, and for the purpose of this case is practically admitted by the answer.

No question is raised as to the advertisement and sale of the shoes in controversy under the name of "Queen Quality" shoes; on the contrary, it is insisted by defendant that it had a right to do so. It will be perceived from the pleadings and evidence that the wrong complained of in this case is not that defendant has sold an article of its own under complainant's trade-mark, but that defendant has sold an inferior article of complainant's manufacture under a trade-name adopted by it to indicate a superior article of complainant's manufacture as in the case of Gillott v. Kettle, 3 Duer (N. Y.) 624, in which the defendant bought pens of one grade and sold them as a higher grade. In that case, Mr. Justice Bosworth, in granting an injunction, said:

"The fraud to the extent that it may be successful is twofold. The public is defrauded by being induced to buy the inferior for the superior article. The plaintiff is defrauded by an unjust destruction of confidence that his pens are put up for sale and assorted with reference to quality indicated to dealers by the labels on the boxes which contain them."

See, also, Hennessy v. White, Cox, Manual Trade-Mark Cas. 377, No. 650, and Russia Cement Co. v. Katzenstein (C. C.) 109 Fed. 314.

As to the knowledge of defendant concerning the character and grade of goods here in controversy, the facts are about as follows: The first letter with which negotiations for sale began (Rosenburg to Porter, May 23, 1905) speaks of the shoes as "Wos. Queen Quality Pat. Colt. Ox." restamped "Ladies' Favorite" and as "slightly weather cracked." The letter of Rosenburg to Hamburger Bros., May 27, 1905, says: "The imperfections are very, very slight." This letter also mentions that they are restamped "Ladies' Favorite." It is admitted that each pair of shoes was packed in a carton marked "Ladies' Favorite" on the outside. Defendant's shoe buyer (Mr. Wilkinson) who made the purchase admits that he knew the character of the Plant Company's shoes, and he knew they were very particular about their Queen Quality brand of shoes. In its advertisement of June 11th, in the St. Louis Globe, defendant admits that the shoes are stamped "Ladies' Favorite." It further appears that on June 16th, when complainant had been advised of the advertisements of Queen Quality shoes which appeared in the St. Louis newspapers, it notified defendant that the use of the name "Queen Quality" was unauthorized, and that the shoes in question were not "Queen Quality," but defendant through its counsel June 20th insisted on its right to continue the use of the name, and to sell under that name, and defendant, in fact, put another advertisement in the St. Louis Post-Dispatch after that time

(June 22, 1905) again offering these shoes for sale as "Queen Quality" shoes. Granting that in the so-called "job lot" of shoes of complainant's manufacture purchased by defendant there were some genuine Queen Quality shoes, that fact would not justify defendant in offering, advertising, and selling all the other shoes under that name. Defendant cannot use genuine Queen Quality shoes in aid of a sale of a spurious article under that name, and thereby avoid responsibility. See decree in Plant Company v. Memphis Shoe Company, U. S. Circuit Court, Western District of Tennessee (Record, p. 268). In the St. Louis Globe advertisement of June 11, 1905, there is the admission that the Queen Quality shoes offered for sale are "for obvious reasons" stamped "Ladies' Favorite." What the "obvious reasons" were is not explained. If any considerable portion were not stamped "Ladies' Favorite," presumably this admission would not have been made. I cannot escape the conviction that this advertisement was misleading, and, even if not an intentional fraud, amounts to such a constructive fraud as a court of equity is in duty bound to suppress. In other words, I cannot escape the conclusion that defendant advertised and endeavored to sell shoes as "Queen Quality" shoes which it had reason to know had theretofore been condemned by the manufacturer as not up to that standard and which had been restamped and sold by him as of an inferior grade, viz., "Ladies' Favorite."

I find therefore from the evidence in this case and the law applicable to the state of facts disclosed by the evidence (1) that complainant is entitled to have and maintain its trade-mark "Queen Quality" as applied to shoes, and to apply the same exclusively to the grade of shoes selected by it as a grade of superior quality, and to enjoy the exclusive right to its use and the manner of using it; (2) that defendant has infringed on complainant's rights aforesaid by advertising, offering for sale, and selling shoes as "Queen Quality" shoes which had been theretofore rejected by complainant and restamped "Ladies' Favoite," because not up to the standard fixed by complainant for its "Queen Quality" brand, and that defendant had knowledge of these facts.

Defendant claims that it ceased selling these shoes before the bill of complaint was filed. Aside from the fact that this could not be known to complainant, I do not think that it can defeat an injunction in a case of this kind where the defendant continued to sell after notification and has contested complainant's right throughout this suit. See Hutchinson v. Blumberg (C. C.) 51 Fed. 829. I do not think that the truth or untruth of the representations made by complainant as to the merits of the shoes called "Ladies' Favorite" should affect the determination of defendant's liability for infringing on the "Queen Quality" trade-mark. I do not think that the defense sought to be interposed that this is a suit to enforce a contract in restraint of trade, and hence in violation of the anti-trust laws, is sustained by the evidence of the law applicable thereto.

My decision therefore is that there should be a decree for an injunction and an accounting in the usual form. Such a decree may be prepared by counsel for complainant and submitted to the court.

THOMAS G. PLANT CO. v. HAMBURGER et al.

(Circuit Court, E. D. Missouri, E. D. February 4, 1907.)

No. 5,197.

In Equity.

Geo. H. Maxwell, for complainant.

Augustus L. Abbott and J. B. Edwards, for defendants.

FINKELNBURG, District Judge. This case was argued and submitted with the case of the Same Complainant v. May Mercantile Company (No. 5,196) 153 Fed. 229, and grows out of the same transaction. Although the evidence in this case varies in some particulars from that presented in the case of the Same Complainant v. May Mercantile Company, still I think the record presents substantially the same situation and calls for the same conclusions, so that following the general reasoning indicated in my memorandum filed in the May Company Case I decide this case in the same way.

A decree may be entered against defendants for an injunction and an accounting, and such a decree may be prepared by counsel for complainant and submitted to the court for approval.

HO NGEN JUNG v. UNITED STATES.

(District Court, W. D. Texas, El Paso D. April 30, 1907.)

No. 109.

ALIENS—CHINESE—EXCLUSION—NATIVITY—EVIDENCE.

In a proceeding for deportation of a Chinese person, evidence *held* insufficient to establish that such person was born in the United States.

[Ed. Note.—Citizenship of Chinese, see note to Lee Fook Sing v. United States, 1 C. C. A. 212; Lee Sing Far v. United States, 35 C. C. A. 332.]

Appeal from an Order of Deportation Entered by the Commissioner.

William H. Burges and Volney M. Brown, for appellant.

S. Engelking, Asst. U. S. Atty.

MAXEY, District Judge. The appellant, Ho Ngen Jung, a Chinese person, was arrested and brought before the commissioner for being unlawfully in the United States. He resisted deportation on the ground that he was born in the United States, and hence was a citizen and entitled to remain. The question of fact was decided by the commissioner against him, and an order of deportation followed. From the order thus made this appeal was taken.

By section 3 of the act of May 5, 1892, it is provided:

"That any Chinese person or person of Chinese descent, arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States." Act May 5, 1892, 27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1320].

To establish his claim of citizenship the appellant offered himself as a witness, and introduced in evidence the depositions of Gong Shee and Li Gow. Both Gong Shee and Li Gow reside in San Francisco, and both testify that appellant was born in San Francisco, and that Gong Shee is his mother. It appears, however, from the record that prior to the taking of the depositions in the present case Gong Shee, who is the surviving wife of Hoo Hoong, deceased, was examined by government officials at San Francisco and then testified that the appellant was her adopted son, and that she did not know where he was born; that he was the son of Ho Ming Jai, who died in China. She gave as a reason for his adoption that she had no male child of her own. In explanation of her inconsistent testimony, she stated that the officers threatened to arrest her unless she testified adversely to the appellant. The charge of threats, or coercion, or undue influence, is absolutely denied by McClymont, who was present as interpreter at the time she made the statements, and there is nothing in the record to impeach the veracity of McClymont, or to discredit his testimony. Moreover, the daughter of Gong Shee, Ho Quan Oy, whose depositions were taken by the government, testified using her own language, as follows: "Ho Ngen Jung is my kind of foster brother or adopted brother, not a born brother; neither from the same mother nor the same father. He is my uncle's son." In answer to the question, "Do you know where he was born?" she replied, "I do not know. I have never seen appellant, but only his photograph. I do not know where he was born." A slight effort was made by the appellant to discredit the testimony of Ho Quan Oy. But the attempt was fruitless, and the court is impressed with the belief that she spoke truthfully touching the matters about which she testified. Comparing the testimony of the appellant with that of Gong Shee, the alleged mother, there appears an apparent inconsistency not readily understood. The former stated that he had written to his mother but once after the San Francisco fire, but that prior to the fire he wrote to her frequently from El Paso. Gong Shee, on the other hand, testified that she had never received a letter from the son. It is true that letters occasionally fail to reach their destination, but it is scarcely probable that such failures would be of frequent occurrence. Li Gow, the remaining witness for the appellant, testified that he is appellant's godfather; that appellant was born in San Francisco, and that he first knew him about one week after his birth; that appellant is the son of Gong Shee and the brother of Ho Quan Oy. The witness, according to his own statement, has been in the United States 33 years, and has acquired no knowledge of the English language. He now resides in the same house, although not in the same room, with Gong Shee, and has been an intimate friend of the family for many years.

While in cases of this kind, where the right to remain in the United States is based upon the claim of citizenship, it is not indispensable to make the necessary proof by white persons, still, if the testimony of Chinese persons be relied upon, it should be of such character as to satisfy the judicial mind of its truth. The testimony in the present case failed to satisfy the commissioner that the appellant was born in

the United States, and after a careful examination of the record the court is unable to say that the ruling of the commissioner was erroneous.

The order of deportation is therefore affirmed.

SOUTHERN RY. CO. v. SIMON.

(Circuit Court, E. D. Louisiana. June 9, 1905.)

No. 13,300.

COURTS—FEDERAL COURTS—RESTRAINING ENFORCEMENT OF STATE JUDGMENT.

A federal court is not precluded by Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], from granting a preliminary injunction restraining a defendant from enforcing a judgment of a state court where necessary to preserve the rights of parties in a suit properly before it until final hearing therein.

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

In Equity. On application for preliminary injunction.

This is a case in which a bill in equity was filed on February 6, 1905, to enjoin the execution of a judgment rendered in the civil district court for the parish of Orleans, state of Louisiana, in favor of Ephraim Simon and against the Southern Railway Company, a corporation of the state of Virginia; the said judgment having been rendered on account of damages sustained by the plaintiff, Ephraim Simon, in an accident on the said railway, and having been rendered by default before a jury, no answer or other pleading being filed by the said Southern Railway Company in the state court. The complainant railway company sets up in its bill of complaint, among other grounds alleged, that there was no valid service of said railway company.

Harry H. Hall, for complainant.

Lazarus, Michel & Lazarus, for defendant.

PARLANGE, District Judge (after stating the facts). A restraining order having heretofore issued herein, the matter now before the court is whether or not a preliminary injunction shall issue.

The main contention on behalf of the defendant is that this court is precluded from issuing an injunction in this cause because of the prohibition of section 720, Rev. St. [U. S. Comp. St. 1901, p. 581]. It is thoroughly settled that the statute just mentioned has no application to such a cause as the instant one. See Massie et al. v. Buck, 128 Fed. 27, 62 C. C. A. 535, settling the question in this circuit. See authorities cited in that case. See National Surety Company, etc., v. State Bank, etc., 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Terre Haute, etc., Co. v. Peoria, etc., Company (C. C.) 82 Fed. 943; Garner v. Second Nat. Bank, etc., 67 Fed. 833, 16 C. C. A. 86; Circuit Judge McCormick, in Central Trust Company v. St. Louis, etc., Company (C. C.) 59 Fed. 386; Julian v. Central Trust Co., 193 U. S. 112, 24 Sup. Ct. 399, 48 L. Ed. 629, and other cases. Section 720, Rev. St., applies only to cases where the jurisdiction of the state court has attached first. Justice Field, in Sharon v. Terry (C. C.) 36 Fed. 365, 1 L. R. A. 572; Justice McKenna in President, etc., v. Merritt et al. (C. C.) 59 Fed. 7; Lanning v. Osborne (C. C.) 79 Fed. 662, and other cases. Notice Whitney v. Wilder, 54 Fed. 554, 4 C. C. A. 510. In the federal courts a trial

judge in such a cause as the instant one has the right, in the exercise of a sound discretion, to issue a preliminary injunction in order to preserve the status quo until the final determination of the cause. Circuit Judge Shelby, in Massie v. Buck, supra; Railroad Commission, etc., v. Rosenbaum, etc., Company, 130 Fed. 110, 64 C. C. A. 444; Northern Securities Company v. Harriman, 134 Fed. 331, 67 C. C. A. 245; Kerr v. New Orleans, 126 Fed. 924, 61 C. C. A. 450.

The meaning of section 720, Rev. St., is perfectly plain. That statute was intended only to prohibit the federal courts from attempting to act as courts of review over the state courts. But Congress never intended that the federal courts in matters of which they have jurisdiction should be deprived of any power of injunction necessary for the assertion and maintenance of that jurisdiction. The federal courts would be infirm and impotent, indeed, if when causes are brought to them which they are competent to decide they could not afford the ancillary protection without which the relief sought in the causes could not be given. In such cases the federal courts certainly have the same powers that the state courts would have if the causes were brought to them.

It is conceded in the argument, and the matter is obvious without the concession, that the complainant in this cause could have brought this action in the state court, coupling therewith a prayer for an injunction. This being unquestionably true, why cannot the complainant, being a citizen of another state, apply to this court and obtain from it the same remedies which the state court would grant it? The present action was brought first to this court. That action is not now pending in the state court, and has never been in that court. The matter is so clear that further discussion of it would be futile. Notice that the case of National Surety Company, etc., v. State Bank, etc., 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394, cited supra, is very similar to the instant cause.

Other secondary matters urged on behalf of the defendant are either without force, or else are questions which do not properly arise at the present stage of the litigation.

A preliminary injunction will issue on complainant's giving bond with security in the sum of $2,000, the restraining order to remain in force until the issuance of the preliminary injunction.

In re KEHLER.

(District Court, W. D. New York. April 13, 1907.

No. 2,626.

1. BANKRUPTCY—DEFINITION OF TERMS.

The term "bankrupt," as used in Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], includes a person against whom an involuntary petition shall not abate because of his death or insanity.

[Ed. Note.—What persons are subject to bankruptcy law, see note to In re Taylor, 42 C. C. A. 2.]

2. SAME—INSANE PERSONS—SUBSEQUENT ADJUDICATION—ABATEMENT.
Where an involuntary bankruptcy petition was filed prior to the bankrupt's being adjudged insane, such subsequent adjudication did not abate the proceedings nor preclude the court from administering the bankrupt's estate, if the court's jurisdiction was based on acts of bankruptcy committed while the bankrupt was sane.

In Bankruptcy. Motion to dismiss involuntary petition on ground of insanity of the bankrupt.

John A. Van Arsdale, for petitioning creditors.
C. E. Berger and S. M. Enterline, for committee of bankrupt.

HAZEL, District Judge. The involuntary petition was filed in this court before Kehler, the alleged bankrupt, was judicially adjudged a lunatic by the court of common pleas of Schuylkill county, Pa. Upon the instant of filing the petition this court acquired jurisdiction over the property of the bankrupt, and it came under its control and direction. A receiver was subsequently appointed to take the property of the bankrupt found in the Western district of New York into his control and safely keep the same subject to the provisions of the bankrupt act. The term "bankrupt" includes a person against whom an involuntary petition shall not abate because of his death or insanity, but the same shall be conducted and concluded in the same manner, as far as possible, as though he had not died or become insane. The inquisition under the statute of the state of Pennsylvania relating to lunacy beyond doubt was conclusive as against later acts by the bankrupt, but the retrospective findings of the jury did not include the period of time when such acts are claimed to have been committed. True, an insane person cannot commit an act of bankruptcy; but, if Kehler was compos mentis at the time the acts were committed, the petition by creditors being filed before he was adjudged insane, I think the court acquired jurisdiction of the proceeding.

Counsel for the general guardian of the lunatic place stress upon In re Funk (D. C.) 101 Fed. 244, where it was broadly held that a court of bankruptcy will not entertain jurisdiction of a petition by creditors to have a person adjudged a bankrupt who prior to the filing of such petition had been regularly and duly adjudged insane. In that case, however, the court expressed the opinion that in cases where the insanity had not been adjudged, and creditors sought the adjudication of the bankrupt, a court of bankruptcy might properly exercise jurisdiction and could hold the party responsible for acts committed prior to the ascertainment of his mental incapacity. This principle, in which I concur, would seem to justify a continuance of this proceeding. In re Eisenberg (D. C.) 117 Fed. 786, the court declined to entertain jurisdiction in proceedings in bankruptcy instituted by the committee of a lunatic on the ground that he was not a qualified person to perform the duties required of him by the provisions of the bankruptcy act. That lunatics may not file a voluntary petition in bankruptcy except in lucid intervals has frequently been decided. In re Weitzel, Fed. Cas. No. 17,365; In re Pratt, Fed. Cas. No. 11,371. And in Re Stein, 127 Fed. 547, 62 C. C. A. 272, the ques-

tion whether he could be adjudicated a bankrupt was mooted. See, also, In re Burka (D. C.) 107 Fed. 674.

The bankrupt act provides that any natural person may be adjudged an involuntary bankrupt, and the word "person" has been construed not to include an infant or lunatic. But, where it is shown in the creditors' petition that the bankrupt was qualified at the time the act of bankruptcy was committed, and such petitioning creditors, having reason to believe him capable of transacting his business, dealt with him, and he immediately thereafter concealed his property or committed other acts of bankruptcy without paying his debts, the petition will not be set aside until after searching inquiry as to the debtor's mental capacity (where it is claimed in his behalf that he was a lunatic) at the time the alleged act of bankruptcy was committed. No harm can result to him. His interests will be protected under the supervision of the court by a guardian ad litem, committee, or next friend. As the jurisdiction of the court attached, as hereinbefore stated, before the bankrupt was adjudged insane under the writ de lunatico inquirendo, and in view of the presumption of the bankrupt's sanity at the time the acts of bankruptcy were committed, the motion to dismiss the petition must be denied.

CLEMMENTS v. GERMAN INS. CO.

(Circuit Court, W. D. Missouri. November, 1906.)

INSURANCE—CONDITIONS AVOIDING POLICY—WAIVER.

An insurance company cannot be deemed to have waived a condition in a policy of fire insurance making it void in case there was other insurance on the property, unless otherwise provided by agreement indorsed thereon or attached thereto, because of notice of concurrent insurance given to the agent who issued the policy, who had no authority under its terms to waive such condition, where such information was not communicated by him to the company; nor does the fact that he reported to the company certain of the policies on the property then in force, to which no objection was made, affect the right of the company to insist upon the condition in respect to another policy for a substantial amount, which was not so reported.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 968, 969, 991.

Waiver of condition against other insurance, see note to United Firemen's Ins. Co. v. Thomas, 27 C. C. A. 46.]

In Equity.

James T. Burney, for complainant.
Fyke & Snider, for defendant.

CARLAND, District Judge. The above cause has been submitted to the court upon the pleadings and proof. A careful reading of the testimony and a consideration of the argument of counsel have not changed the views of the court, which were intimated at the close of the oral argument.

Under the decision of the United States Supreme Court in the case of Northern Assur. Co. v. Grand View Building Co., 183 U. S.

362, 22 Sup. Ct. 133, 46 L. Ed. 213, no recovery could have been had upon the policy which the complainant seeks to have reformed, if all the insurance that was on the property described in the policy, on February 14, 1903, had been correctly reported to the agent of the company who issued the policy, providing the information in regard to the other insurance had not been communicated to the company itself. In this case, however, it appears that the agent who issued the policy transmitted to the head officer of the company in his daily report a list of other insurance policies that were upon the property. The insurance company failed to make any objection to the other insurance, and allowed the policy to stand. So that the court has no hesitation in finding that, as to the policies which were actually reported to the company by the agent, there was an agreement between the company and the insured that the policy in question should stand as valid, notwithstanding the other policies upon the property; and the complainant has a clear right to have the policy reformed so as to contain a provision that the policies mentioned in the daily report should be excepted from the operation of that provision of the policy which rendered the policy void by reason of the taking of other insurance.

It appears that there was insurance to the extent of about $4,000 upon the property at the time the policy in question was issued, which was not reported by the agent to the company in his daily report. As to this insurance, the court cannot find that there was any contract between the company and the insured that the policy issued should be valid notwithstanding that insurance. An additional insurance of $4,000 was a very material matter for the insurance company to know, in view of the fact that there was a large insurance upon the property outside of the policy about to be issued. And as, under the terms of the policy, the agent had no power to waive any condition therein, and no condition could be waived without an indorsement in writing upon the policy itself, the court cannot find that the insurance company agreed that the policy in question should be valid, notwithstanding any amount of insurance that might be upon the property at the time of its issuance. This would not be giving the officers of the company credit for ordinary business sense, and would be in contradiction of the facts in the case. If we concede that Bolster did present to the agent of the company a full list of all insurance, still the agent could not bind the company, except by performing his duties according to the provisions of the policy; and, as he did not report to the company all of the insurance, it cannot be said that the insurance company made any contract with the insured that the policy issued should be valid, regardless of the amount of insurance then on the property.

In regard to the name of the insured, there seems to be no real contest over that proposition; it being immaterial to the insurance company whether its liability is to F. E. Clemments & Co. or to F. E. Clemments.

A decree may be entered in conformity to the views herein expressed.

In re HAUPT BROS.

(District Court, S. D. New York. April 15, 1907.)

BANKRUPTCY—POWERS OF COURT—PROPERTY FRAUDULENTLY TRANSFERRED.

Where it clearly appears, in an involuntary proceeding in bankruptcy, before adjudication, from the examination of persons to whom the alleged bankrupt has transferred property, that such transfers were fraudulent, and that the property will be recoverable by the trustee when appointed, under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690], the court of bankruptcy has power, without the institution of a plenary suit therefor by the creditors, to direct its receiver to take possession of and hold the property pending suit, when such action is obviously necessary to prevent its loss to the estate.

In Bankruptcy. On motion that receiver be directed to take into his possession, pending adjudication, certain property in the possession of the persons proceeded against.

James, Schell & Elkus, for the motion.
Maurice M. Greenstein, opposed.

HOUGH, District Judge. A few days before the filing of a petition against Haupt Bros., they sold their stock in trade and assigned their open accounts to one Samuel Schachter. The sale was in bulk, the grantors were retail merchants, and their actual fraud and fraudulent intent entirely clear. Schachter borrowed part of the money paid to the Haupts from Schachter & Son, a firm composed of his father and brother, and shortly after the sale was consummated he repaid that debt with goods obtained by the purchase. Immediately after selling out to Schachter, the alleged bankrupts disappeared. The subpœna is in process of service by publication, but no adjudication has yet been entered. A receiver having been appointed, Samuel Schachter and his brother have been examined, under section 21a, Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], and from their own testimony it appears that if all the Schachters did not have actual knowledge of Haupt's fraud, and did not actively participate therein, they had far more than reasonable cause to perceive and believe Haupt's fraudulent intent. Certain of the goods received from the sale referred to are still in the possession either of Samuel Schachter or Schachter & Son. The solvency of the Schachter family seems very doubtful. Motion is now made to direct the receiver to take into his possession the goods so found, and likewise the open accounts; to keep the former and collect the latter, pending adjudication and subsequent suit by the trustee to set aside the sale above described.

Under section 67e there is a probability almost amounting to certainty that the transaction above outlined is null and void against creditors, and there is almost absolute certainty that, unless the property in question be now impounded, suit by the trustee will be futile. To this situation all the reasoning of Horner & Gaylord Co. v. Miller, 17 Am. Bankr. Rep. 257, 147 Fed. 295, seems to me to apply. Before adjudication the institution of a suit in this court by some of Haupt's creditors appears wholly unnecessary. The transaction complained of

is, I believe, void as against creditors, and, of course, equally void as against the trustee to be appointed. The filing of the involuntary petition is in itself the institution of an action, and it is just as plenary an action within the limitations imposed by the statute as is any other proceeding at law or in equity. It is familiar law that property is impounded to await the result of litigation by process, warrant, or order based upon ex parte affidavits. In this case the court is moved by the depositions of the substantial defendants themselves.

As against the Schachters, the motion is granted; order to be settled upon notice. The remedy here asked for is confessedly a most drastic one. It should never be used, except in the clearest case, and to prevent obvious loss through equally obvious fraud. I am not convinced that by his own statement the fourth party proceeded against (Abraham Newman) stands in the same position as do the other three, and as to him the motion is denied.

UNITED STATES v. MORRIS' HEIRS et al.

(Circuit Court, E. D. Louisiana. April 1, 1907.)

No. 13,466.

APPEAL AND ERROR—ACTION ON APPEAL BOND—INVALIDITY OF BOND.

An appeal bond, given on an appeal from a judgment at law in a federal court, which was a nullity and ineffective to stay execution or for any purpose, is without consideration, and will not support an action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4729–4733.]

W. W. Howe, U. S. Atty., and Rufus E. Foster, Asst. U. S. Atty., for plaintiff.

Carroll & Carroll, for defendants.

SAUNDERS, District Judge. This is a suit on an appeal bond given in 1867 in favor of the government. The appeal was taken from a judgment in a common-law suit in the District Court. The Circuit Court, when its attention was called to the fact that the matter had been brought before it by appeal and not by writ of error, dismissed the appeal. The defendant then sued out a writ of error, on which nothing was done for 35 years, when the government filed the transcript and had the appeal dismissed on the writ of error.

This suit is now brought on the appeal bond. Under the decision in Saltmarsh v. Tuthill, 12 How. 387–389, 13 L. Ed. 1034, the proceedings by appeal in a common-law case were mere nullities. The plaintiff could have sued out execution notwithstanding the granting of the appeal, and the appeal would unquestionably not have operated to restrain the execution of the judgment. I do not think that the appeal bond did, in law or in fact, restrain the government from executing the judgment it had obtained. There was no consideration for the appeal bond. It effected nothing in law, and the government had therefore no right to sue upon it.

For these reasons, I sustain the exception, on the ground that the appeal bond was a mere nullity, and dismiss the suit.

ARMOUR & CO. v. SKENE.

(Circuit Court of Appeals, First Circuit. February 19, 1907.)

No. 671.

1. WITNESSES—CROSS-EXAMINATION—COLLATERAL MATTERS.

It was not an abuse of discretion for the trial court to permit a witness on cross-examination to be asked, for the purpose of discrediting him, whether he had been drinking on the day of the injury and at the time of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1106–1108.]

2. EVIDENCE—EXPRESSIONS OF PAIN.

In an action for injuries, statements of witnesses as to plaintiff's expressions of pain were competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 377–382.]

3. APPEAL—HARMLESS ERROR.

In an action for injuries to plaintiff by defendant's runaway team, a witness testified that C., defendant's superintendent, was at the scene within a few minutes after the accident and identified the team as belonging to defendant, and, in reply to a general question as to what the superintendent said, the witness answered: "This is Armour's team that has done this, and we are liable." On objection, the court allowed the answer to stand de bene, and stated that he would instruct the jury, without further testimony, that it had no effect, and as to the question of liability it had no probative value. During the trial it was admitted that C. was defendant's local superintendent, and that the team belonged to defendant, and the court expressly charged that C.'s statement could not be considered at all as an admission of liability. *Held*, that defendant was not prejudiced, under such circumstances, by the admission of such answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170, 4178–4184.]

4. SAME.

Where, in an action for injuries to plaintiff by a collision with defendant's runaway team alleged to have been negligently permitted to remain unattended in a street, the evidence establishing the identity of the team as belonging to defendant, and that the horse was left at the curbstone with the reins thrown over his back, and later started to run, and came into collision with plaintiff's vehicle and caused the injury, such facts warranted a verdict in favor of plaintiff, and hence defendant was not prejudiced by a technical error in the admission of evidence that the driver was relieved by defendant of his employment nearly a year after the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

Putnam, J., dissenting.

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

Philip B. Adams and Arthur P. Hardy, for plaintiff in error.

Charles H. Fiske, Jr. (Andrew Fiske, on the brief), for defendant in error.

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

ALDRICH, District Judge. Agnes Skene was injured in Waltham by a runaway team, which came into collision with a buggy in which she was sitting. It was alleged that the team belonged to Armour & Co., and that the injury resulted from the carelessness of its agents. The particular act of negligence, pointed out in the proofs, was that the driver threw the reins over the horse's back, and went away leaving him unhitched in the street.

There are over 40 assignments of error in this case, something, at least, unusual in an ordinary personal injury case. We do not think it necessary, nor would it be useful, to discuss the merit of the various assignments seriatim. We do not characterize the exceptions as a whole as frivolous, but it is true that they are largely frivolous, and controlled by principles of law and rules of practice so familiar as not to require discussion. As, for instance, the exception with reference to the cross-examination of Macdonald, the driver, who was asked if he had been drinking on the day of the injury, and whether he had been drinking at the time of the trial, is something controlled by a familiar rule of practice. It is quite true that whether he had been drinking on the day of the trial, something like six years after the injury, was clearly collateral to the question of negligence at issue, and had nothing to do with it; but it is not unusual or improper on cross-examination to resort to reasonable collateral expedients for the purpose of discrediting a witness. It is unquestionably within the discretion of the trial judge to give reasonable scope in that respect, and it is a discretion not reviewable except in cases involving extreme and clearly unwarrantable latitude. And the exception with reference to the city ordinance, which was received and properly explained as something not conclusive, but as a piece of evidence to be considered with the other proofs in the case as bearing upon the alleged fact of negligence which the jury were to determine as an ultimate question, and the numerous exceptions with reference to the opinions of nonexperts and the statements of witnesses as to the plaintiff's expressions of pain, involve no unfamiliar or unsettled questions.

The only two assignments of error which we feel called upon to consider at length are those which relate to the admission of evidence both of which involve technical error.

It was a necessary element of Miss Skene's case to show that the team belonged to the company. To do this, as properly might be done, a witness was called to show that Mr. Cunningham, the local superintendent of the company, was at the scene within a few minutes of the accident, and identified the team as one belonging to Armour & Co. The question, which we think we ought to accept as intended to identify the team, an identification competent to be proven by the admissions of the superintendent, was rather broad, as the witness was asked the general question as to what Cunningham said, and the witness replied: "This is Armour's team that has done this, and we are liable." Although there was no direct proof as to the relation which Cunningham sustained to the Armour & Co. business, it did appear in various ways that he assumed direction of affairs, and at the end of the trial the fact was not at all in controversy that he was local superintendent. Therefore the first part of the answer as to the identity of the team was com-

petent as relating to something within the scope of his authority. Moreover, this part of the exception is based upon the merest fiction, because it was practically conceded before the trial ended that it was an Armour & Co. team that injured Miss Skene. It was necessary, however, for the plaintiff at the outset to offer proofs tending to connect the injury with an Armour & Co. team, because it was a thing then apparently not conceded. This being so, it was not an unusual thing to allow that part of the answer of the superintendent to stand de bene, and, when upon the whole case it became a conceded fact without direct proof that he was local superintendent, so much of the answer as related to the identity of the team was rendered competent. But while that part of the exception relating to identity became mere fiction at the end of the trial, because it relates to a thing not remaining in controversy, it is still of significance upon the question as to what the purpose was in putting the original question. At the stage of the trial at which the question was asked, the matter of identity was something requiring proof, and we think it hardly reasonable to assume, because the fact of identity became a conceded fact later on, that the purpose of counsel was alone to develop the incompetent matter as to liability.

The last part of the answer as to liability was incompetent. But we think it only reasonable to assume that the incompetent part was not brought out intentionally. Objection was promptly made, and the court said: "I shall admit it de bene, and I shall instruct the jury that, without further testimony, it has no effect, and as to effect including liability it may not be of the least probative value." Thus the court removed present consideration so far as it could, and left the answer to stand, to be made good as to the question of identity, provided Cunningham's relation to the company should be established, at the same time making a distinction against that part which related to liability as something which might not be of the least probative force under any circumstances. Later, by way of instruction, the court limited the statement to the admission that the team belonged to the defendant, and expressly and emphatically told the jury that it could not at all be considered as an admission of liability. We think a formal and impressive statement of that kind by way of instruction is quite as effective in the direction of removing inadvertent, incompetent matter, especially when made in support of an admonition given at the moment of its being delivered from the witness stand, as any of the various means adopted for relieving a trial from the influence of accidental and incompetent statements made in the hearing of a jury. Trials can only be as fair as "the lot of humanity will admit," and it often happens that witnesses in answering, unwittingly and to the surprise of counsel, mix incompetent matter with the competent, and the only relief, as trials go, is through removing the effect by proper caution and admonition.

We must presume that the jurors understood the court to mean what it said, and considered the case independently of the statements of Cunningham as to liability, as the court told them they should do. If there were anything in such a situation leading to a reasonable suspicion that the incompetent matter was purposely brought out, the verdict would, of course, be set aside, partly upon the ground of punishment, and partly upon the ground that it made the trial an unfair one. It often happens

as trials go, and it cannot be otherwise in the very nature of things, that incompetent, and in a sense prejudicial, matter crops out accidentally and without design on the part of anybody. It usually comes from untrained witnesses who have no knowledge as to what is competent and what is incompetent, and such matter is generally removed by a ruling, and nothing more is thought about it. These things are inevitable, and it is necessary in the administration of justice that the trial should be accepted as a fair one, if the effect is cured by proper cautions and instructions from the trial court. It sometimes happens that incompetent matter is ruled in, after discussion and deliberation, as something competent for the jury to consider, and, when found later in the trial to be incompetent, that it is withdrawn from the case under strong cautions to the jury, and the authorities are numerous which sustain verdicts as based upon a fair trial under such circumstances. Furthermore, as to the matter under consideration, it cannot with technical exactness be said that error was committed, because the evidence in question was never in fact admitted; it at most was only allowed to stand de bene under caution. But, quite aside from this, we think we ought to hold that the effect of what Cunningham said about liability was eliminated by what was said by the court.

The next point which we consider relates to alleged error in permitting the plaintiff to show that the driver was discharged from Armour & Co.'s employment about a year after the runaway which caused the injury. This point is upon a different ground, because the evidence was admitted and allowed to stand.

In former times, under a rule existing in many jurisdictions, it was competent to show in personal injury cases that highways, sidewalks, and appliances upon railroads and in mills were immediately repaired upon knowledge of the injury. Such evidence was received as showing something in the nature of an admission by the town, city, or railroad alleged to be at fault. The old rule has been overthrown in many jurisdictions where it was formerly administered, and unquestionably does not exist in the federal courts; but, when trials were had under the old rule, proofs of repairs to be admissible must not be remote in point of time, and, in order to have any weight or probative force whatever with the jury, necessarily must have been closely related to the time of injury, because it stands to reason that nothing would be proven by way of admission to show that ice or snow was removed from the sidewalk a year after an injury by ice, or that a hole in a country road was repaired a year after an injury in question. This results because such conditions are necessarily and naturally subject to change of seasons, and it is therefore understood that it was necessary under the old rule to connect the situation at the time of the change with the situation at the time of the injury in order to make repairs or changes competent evidence as admissions of any weight whatever for the jury.

If the evidence as to the driver's discharge bore at all upon any question which the jury had to decide, it would be upon the ground that the discharge was in the nature of an admission that he was careless at the time of the accident. We are quite unable to see that a discharge from employment a year after this runaway could have

possibly influenced the jury one way or the other upon the question of care, or want of care, in respect to the accident in question. If the discharge had immediately followed the injury, it is possible that the jury might have been influenced by the inference that he was discharged because he was careless; but proof of the discharge a year afterwards, without in any way connecting it with the circumstances of the accident, could not, as we look at it, have influenced the jury in any substantial manner upon questions which it had to decide. A hundred things may have happened during the year to cause the discharge. It may have been that he was discharged because he was profane, or because he demanded more pay or less hours, or because he advised co-employés to demand more pay or less hours. It requires no greater stretch of imagination to connect the discharge with one of these things than it does to connect it with the accident. The conclusion therefore is that, while the admission of the evidence of discharge involved technical error, it was so immaterial and shadowy in respect to the questions of fact which the jury was to decide that it should be treated as harmless.

The doctrine of harmless error, which seems to be a growing one in the evolution of law, apparently does not offend the idea of a fair trial. A collateral thing, connected immediately with the time or thing in question, may sometimes be treated as not remote, and admitted as something having a tendency to show where the fact is; but, on the contrary, the same thing may be so remote in point of time or nature as to be wholly immaterial and inadmissible, because if admitted it would have no weight, and if excluded would do no harm, and under such circumstances, if its admission involves technical error, it may be treated as harmless. The whole theory, of course, is that the trial, under such circumstances, is a fair one, because the result, after all, is uninfluenced by the technical error with respect to a thing not having substance. If we were persuaded that harm had been done in this case, or if we had any substantial doubt upon the question, we should feel bound to direct a new trial; but, upon the whole, we cannot see that we have a substantial doubt. There was a long trial before a jury. The plaintiff called a witness who saw a team, which it is true she did not identify as Armour's team, but one which she described as "a yellow team with black marks on it, black letters"; a gray horse and yellow wagon. The witness further testified that she saw it drive up Felton and Williams streets; and that she saw the driver throw the reins over the horse's back and go into a saloon, leaving the horse unfastened. It was not so much a question of identifying the man as the team. The substantive weight of the evidence came from the fact that she saw a driver, not a particular driver, and that the driver left the horse unfastened, and that, while the driver was in the saloon, the horse ran like a flash down Williams street. As we have already pointed out, it was not so material to identify the man as the team, with the gray horse and the yellow wagon with black letters, in a runaway down Williams street. Another witness, Addie M. Hagar, who heard a disturbance and went to the door recognized the large heavy team of Armour's in collision with the buggy in which the plaintiff was sitting, and in a few moments Mr. Cunningham,

the superintendent, was at the scene of the accident, and recognized the team as one belonging to Armour & Co. True, as argued, the witness who described what occurred, when the horse was left in the street unhitched, and what occurred as the horse started, did not recognize the driver at the trial, but she did describe the horse as gray, and the wagon as yellow with black marks and letters. It is also true that she could not see that Armour & Co.'s name was on the wagon, because she could not read, but the fact that she could not read made the question of identity through a description of the color of the horse and the wagon none the less reliable and effective, and, if her description did not fix the identity, it was easily open to attack. The train of circumstances unexplained—the gray horse and yellow wagon with black letters, at the curbstone, with the reins thrown over the back of the horse, the same witness or witnesses seeing the same team in a start from the curbstone in a runaway, and a team of the same description, seen by other witnesses, involved in a collision which caused the injury—makes the case a strong one for the plaintiff, and we do not think the technical error at all changed the result from what it would have been if the technical error had not been made. Therefore it would not seem to conserve justice to disturb the verdict. The chances are very decidedly in favor of the idea that, if a new trial was had, at the expense of time and money, the result would be the same.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

PUTNAM, Circuit Judge (dissenting). This case relates to two admittedly plain errors, unless cured as to one by the subsequent rulings of the court. Those errors were the result of evidence offered by the plaintiff below, whom we will hereafter call the plaintiff, admitted under circumstances we will explain in full, and persistently put in by her. The evidence erroneously admitted was put in by the plaintiff with so much persistency that it is plain that she regarded it as advantageous, and therefore as prejudicial to the defendant; and the only ground upon which a new trial can be refused is that the court is asked to be wiser than the plaintiff, and thus find that it is clear that the evidence offered was not prejudicial to the defendant, although the plaintiff evidently acted on an opinion to the contrary, and notwithstanding she knowingly and persistently led the court into the errors complained of, and therefore presumptively ought not to be excused from the results thereof. A judgment here for the plaintiff would be so seriously in avoidance of the absolute rules of law, and the practical application thereof, firmly fixed by the Supreme Court, and would also do so much injustice to the defendant, that we are compelled to dissent from the result which the court has reached.

This is an action at law in tort, in which Armour & Co. was the defendant in the Circuit Court. The verdict and judgment were for the plaintiff. There are several counts in the declaration, all alleging that the plaintiff was run down by the defendant's wagon or horse, and injured; but the case as made was that the defendant's horse was negligently left by its driver unfastened, and thereupon ran away, and came into collision with the wagon in which the plaintiff was

sitting, causing the injury. The negligence is not alleged to have been that of the corporation per se, but of its "servants and agents." No particular servant or agent was named, but the evidence showed that the defendant's team was in charge of its driver, one Macdonald. The injury occurred at Waltham, in Massachusetts, in May, 1900, while suit was brought on June 27, 1905, more than five years after the accident, and the case was tried in March, 1906, nearly six years after it. The plaintiff is a lady 71 years of age, residing in Massachusetts, and the defendant is a corporation publicly known to be very wealthy, and against which a very considerable public impression has been created of late through the newspapers. In view of these facts, and especially in view of the long time between the event and the trial, there were special reasons why the jury should have been guarded against loose and improper inferences, and the case tried on the legitimate facts properly proven.

The plaintiff contended at the trial that the driver went into a saloon to get a drink of intoxicating liquor, and meanwhile left his horse unhitched, and the horse ran away. The case for the defendant was that the horse slipped on a cross-walk for some reason for which the defendant was not liable, and thereupon the horse, being frightened, ran away. The defendant was supported on this point by the testimony of the driver, Macdonald, and by that of one Halloran, who seems to have been an unchallenged witness, and who testified unqualifiedly that he saw the horse slip on a flat flagstone crossing, and fall, and that then, notwithstanding the driver's efforts to hold him, he got away from him. The barkeeper at the saloon where the driver was claimed to have gone for his drink testified that the driver was not there that day. Of course, this was negative testimony, while that of Halloran was positive. On the other hand, the only evidence in behalf of the plaintiff as to the origin of the accident was that of one Katrine Boudro, who testified that she saw the driver throw the reins over the horse's back and go into the saloon. She also testified that the horse started to run, and that some of the men came out of the saloon and ran after him; but, although she was cross-examined carefully on this point, she could not identify Macdonald in any way, even when he stood up in court in her presence. This was the entire proof in behalf of the plaintiff as to the way in which the accident originated. Under these circumstances, it is natural that the conclusion of the jury on the main issue, as to which the testimony could hardly be reconciled, was quite certain to be determined by the improper, though impressive testimony admitted into the case, first, that the driver Macdonald was afterwards discharged by the defendant, and, second, the proof of the statement of Cunningham, the defendant's local superintendent, that Armour & Co. was at fault.

The testimony of Macdonald to which we have referred was given by him when a witness for the defense. On cross-examination by plaintiff, he was asked whether he was then a drinking man. This was objected to by the defendant, but was admitted on the ground that it was preliminary to asking him whether he was a drinking man on the day of the accident. The answer was not insisted on, but the topic was pursued as follows:

"Q. Were you or not at that time a drinking man? A. Yes, sir.
"Q. Had you drank on the 2d day of May? A. No, sir.
"Q. You have been drinking now, haven't you?"
This was objected to by the defendant, but the court admitted it, and an exception was taken; and it was answered, "Yes, sir."

Mr. Cunningham, the local agent of the defendant corporation, was previously called as a witness by the plaintiff, who questioned him with reference to Macdonald's drinking. All this shows that the plaintiff deemed it for the interests of her case to maintain that Macdonald was a drinking man at the time of the accident, and ever so continued down to and including the trial, and that the plaintiff was persistent in bringing out facts establishing that line of proof. We shall refer to this again in connection with the precise exception by the defendant to certain other testimony to which this present line of examination was intended to lead the jury.

The case therefore turned on the question of the negligence of the driver, with the very important incidental issue with reference to his habits. Notwithstanding this, the plaintiff was permitted to prove by Cunningham, the local agent of the defendant at Waltham, where the accident happened, called as her witness, that Macdonald was discharged about a year or so after the accident. This was put in notwithstanding five distinct objections by the defendant, so that the plaintiff was acting with her eyes open, and under such circumstances that she ought to take the consequences of what she did. The bearing of this evidence was not explained by the court to the jury; neither was the fact that it was not to be regarded by the jury on the question of liability pointed out to them.

Very likely neither the court nor the plaintiff's counsel had in mind the change in the general practice to which we will hereafter refer, and they were therefore governed by the earlier practice in accordance with which such testimony was often admitted without question. On being interrogated at our bar, counsel for the plaintiff gave no reason for the introduction of the testimony, except that he understood that Macdonald, the driver, would be called by the defendant. If Macdonald had subsequently been called by the defendant, the plaintiff, of course, could have asked him, or any other witness, whether he was still in its employment, for the purpose of enabling the jury to give proper weight to his testimony, but she had no right to anticipate in this way the possibility of his being called; and it is plain that there was no reason whatever for bringing out the fact that he had been discharged, except for the purpose of influencing the jury on the issue of negligence, and the subordinate issue of the alleged habits of the defendant's driver, a topic which the plaintiff so persistently sought to bring to the attention of the jury.

On that issue, it is natural to suppose that the jury accepted the evidence as an admission on the part of the defendant that the driver was either negligent in this occurrence, or that his habits were continuously bad; and such an admission as to either would, in the natural course, have induced the jury to render a verdict against the defendant in the contradictory condition of the direct proofs, pro and con, to which we have referred.

It is suggested that the fact that the discharge was a year after the accident may have had effect in preventing the testimony from prejudicing the defendant. On the other hand, it seems to us that the impression which would be made on the minds of shrewd men on the jury would be the reverse, and would intensify prejudices, because, in one view, some of them would naturally reason that the driver had been kept for a year, until the probability of a suit was passed, and also the probability of the defendant's needing his testimony, and had then been discharged. But this suggestion is fully met by the persistency with which the plaintiff sought to bring out the alleged improper habits of Macdonald, both at the time of the injury and at the time of the trial, thus covering the intervening period, including the year during which he remained in the employment of the defendant. All this must have been intended to impress the jury that Macdonald's habits were continuously those of a drinking man. It may, perhaps, well be said that a test of his habits on the day of the injury, and the question of his leaving his horse on that day to go into a saloon for a drink of intoxicating liquor, could not properly have been exhibited to the jury in the reflected light of his subsequent continued habits, as sought to be proved by the plaintiff; but the plaintiff thought otherwise, and persistently conducted her case accordingly. There is nothing in the record showing that the court undertook to parry the effect of this testimony, or that the plaintiff, after persistently putting it in, did not work it for every advantage which she could possibly gain from it. It is difficult to conceive that, taking it all together, the jurors' minds did not probably carry the impression that Macdonald was discharged on account of persistent habits as a drinking man, if not in fact for his alleged carelessness on the day of the injury to the plaintiff, thus practically strengthening the presumption, in favor of the plaintiff's case, that his habits in that respect led him to neglect the team at the critical time.

Both the Supreme Court of the United States and the Supreme Judicial Court of Massachusetts have, for a very considerable time, practiced on the changed rule which we have stated, and, since this became recognized as the approved practice, no case can be found in either court involving questions of this character where, after a ruling admittting evidence of this kind, on a full objection and proper exceptions, a new trial has been refused. A marked case in the Supreme Court is Columbia Railroad Company v. Hawthorne, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405, where a new trial was granted on this point alone; the opinion concluding as follows:

"As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the judgment be reversed."

It will be noticed that this excerpt applies the settled rule of the Supreme Court to the effect that, where either party seeks and obtains a ruling which proves to be erroneous, the burden is on the party asking the ruling to establish the proposition that it could not have improperly influenced the verdict. The cases in the Supreme Court on this point are numerous, and it is hardly necessary to go

through them. It is sufficient to say that they are summed up in the opinion rendered in behalf of the Circuit Court of Appeals for the Sixth Circuit, in Inman Bros. v. Dudley Lumber Co., 146 Fed. 449, 455, as follows:

"We have no right to speculate as to the prejudicial effect of a plain error. If its nonprejudicial effect is not so clear as to exclude every reasonable doubt, we should reverse."

If any one is curious to see how firmly the rule as thus stated by the Circuit Court of Appeals for the Sixth Circuit is embedded in the federal practice, a mass of authorities can be found in National Biscuit Co. v. Nolan, 138 Fed. 6, 9, 10, 70 C. C. A. 436, and the long list of cases there cited could be added if desired. It, perhaps, is well enough to quote from the opinion rendered in Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299, as follows:

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal would be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."

Whatever might be the result if the error was one of the court, without the solicitation of either party, the rule applies here, if necessary to resort to it; but this is not necessary, because we have shown that, in a case balanced as this one is, the jury should have been carefully guarded against any improper influences, and the natural inference is that this testimony weighed heavily with the jury in behalf of the plaintiff.

We have stated that the rule announced in the case of Columbia R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, is established in Massachusetts. We need cite only Hewitt v. Taunton Street Railway Company, 167 Mass. 483, 485, 486, 46 N. E. 106 which was in substance the same as the case at bar, only in one respect less favorable for the plaintiff, because, instead of proving directly that the motorman whose alleged negligence was in issue there had been actually dismissed by the defendant, the evidence objected to left on the jury only an impression, or an opportunity for an inference, that he had been "virtually discharged." For this reason alone the verdict was set aside, and a new trial granted.

The plaintiff claims, however, that there was no objection made to the question which brought out the answer to the effect that Macdonald had been discharged, so that no valid exception was taken. She says that the counsel for the defendant made no objection until after the question and answer were in, and then did not move to strike out, so that, therefore, it has no ground for exception; but the whole line of examination had been strenuously objected to, with exceptions noted. It was all brought out on re-examination by the plaintiff of one Cunningham, who was the local superintendent of the defendant, and who was called by her. The first question was as follows: "Is Mr. Macdonald in Armour's employ now?" Thereupon defendant's counsel said: "I object to that. It has no bearing on this case at all." This objection was sufficiently particular, even under

the federal practice. The court allowed an answer, and an exception was reserved. The answer was not definite enough. Then came the following question: "For what reason did he [Macdonald] leave your employ?" Defendant's counsel said: "I object to that. How can that possibly be binding on the defendant?" The court said that he might answer, and an exception was reserved. Then the witness responded: "He did not leave." Then came the question by the plaintiff: "What did he do? A. I discharged him." Then followed a renewal of the defendant's objection, and an exception was allowed; no objection being made at the time to the allowance of the exception. Ordinarily, this is a sufficient allowance of an exception without requiring the objecting party to move to have the testimony stricken out. However, the exception was in the most formal manner to the question as well as to the answer, because the whole line of examination and the question to which the final answer strictly responded, inquiring for what reason Macdonald left the defendant's employment, were properly and fully objected to, and an exception allowed. These were broad enough to cover the whole topic.

Under the circumstances, the evidence was prejudicial, and, even if not clearly so, it is not shown not to have been otherwise. It has been recognized, as we have seen, as of a class which alone is sufficient to require a new trial. It was objected to in various forms, and yet persistently called out by the plaintiff, and she should stand the consequences of her own persistent requirement in this direction. A new trial should be granted on account of this exception, if for no other reason.

The next question relates to the conversation with Cunningham already spoken of. It is plain that his position was not of that character which authorized him to bind the defendant corporation by a mere admission, and it is not now claimed that it was. Notwithstanding a long discussion between the counsel and the court, and notwithstanding that all objections were expressly reserved by the court, with the observation by it that the exceptions had been fully stated and all rights were saved, a witness called by the plaintiff was permitted to testify that Cunningham said a few moments after the accident that the colliding team was Armour's, and that Armour & Co. was liable.

This came into the case under the following circumstances: The plaintiff called a witness, Addie M. Hagar, who testified that the plaintiff lived with her at the time of the trial, and had lived with her for 10 years. Therefore we must assume that the plaintiff and her counsel knew fully what the witness would testify, so that any answer brought out by any general question to her must be assumed to have been deliberately sought, and not to have been brought into the case in a manner which surprised the plaintiff or her counsel, or which was not anticipated. She testified that she met Cunningham, apparently the first time, the day of the accident. She was permitted to testify that she had a conversation with him, which was, of course, properly admitted as preliminary. Then this question was put: "What did he say to you?" It is true that this was a general question; but, as we have already said, the plaintiff must be charged with knowledge of what the answer would be. It does not appear that either the court or the defendant had any

knowledge in reference thereto except as it was suggested, as we will show, in the discussion relative to the question which occupied, first and last, nearly four printed pages of the record.

The defendant immediately objected, on the ground that the subject-matter was "incompetent, irrelevant, and immaterial, and not a part of the res gestæ." Thereupon counsel for the plaintiff said: "We have been over all that, and your honor has ruled de bene that it was admissible." This going over, and the ruling de bene esse that was referred to, do not appear in the record; but this is of no consequence, because the whole matter was discussed in what does appear. Thereupon the court said: "I do not know what the witness says. I do not know whether it would have any bearing. I do not know what his relations were to the parties"—meaning by the word "his" Cunningham. The court repeated that he would allow the question de bene, and then added: "I shall try to properly instruct the jury as to its effect, that it must be connected before it shall have any effect, and that they shall not be prejudiced by any statement until it is connected." Thereupon the defendant made further objections, especially to the point that the testimony was allowed to go in before it was properly connected, in the following language:

"We make the further objection that it is not admissible at this time, because it tends to prejudice the jury if it should not be connected, and for the further reason that there is no connection shown between Cunningham and the accident, and no authority on his part to bind the defendant by any statement that he sees fit to make; and we object to it as being prejudicial to the defendant to offer it in evidence at this time without having been properly connected with them, as being highly prejudicial to the jury. Supposing this witness will testify that Cunningham ran up there and said: 'We are liable for this whole thing, we are at fault.' Now, we never can get that away from the minds of this jury, because they still have that with them. They will remember it, Cunningham's statement; and, if it is not lawful for that to be introduced in evidence, then it should not go to the jury at all. They should not have it under the guise of connecting it later on with some authority from Armour & Co. to make some such statement as that. Why is it not fair to the defendant, if they want to prove that, to show Cunningham's authority and relation with the company, show that first, and make it conditioned that they shall show that before they show any such statement? We are perfectly willing that this witness may be excused and called back, if they want to prove that."

Our observation as to this is that it appears from it that the defendant had some understanding of what the witness would probably include in her testimony, and most specifically objected to bringing that out; and that the defendant also clearly brought out the reasons why the court should not permit the evidence to go in unless it was first connected, and the manner in which the order of proof would prejudice the jury. In this respect the plaintiff clearly brought herself within the intimation in Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938, which we will refer to hereafter.

This was immediately followed by the plaintiff's counsel, as follows: "I do not see any objection to that, your honor." Just what he means by the word "that" is not clear. Then he continued:

"But it seems to me, under the assurances that I have given both to you and my brother Adams, that I shall show what Cunningham's connection with the matter was, whether or not he was an employé, and what his duties were,

by various witnesses—it seems to me that it is perfectly competent to let it go in now."

Then, after some conversation, the court asked the plaintiff's counsel: "Have you summoned Cunningham?" To which counsel replied: "No, I understood he was here in court." Then the court continued:

"You must conduct the testimony in your own way. I will allow you, if you desire to, not expressing my opinion as to what the better process would be in the order of testimony, but, if you desire, as a counsel in this court, to ask that question, saying that you intend to connect it in the proper way with the transaction, I will allow you to ask that question, and will allow the witness to answer."

Thereupon the defendant's counsel inquired as follows: "In order to make the record straight, may I renew my objection?" The court replied: "It may be regarded—I will state it fully that your objections are noted, and the rights of the defendant are saved." Then the exception was properly noted, and the question, "What did Cunningham say to the witness," was put. Defendant's counsel thereupon renewed his objection, and the court said: "That is renewed, and the exceptions are stated fully, and your rights are all saved." Then came in the objectionable testimony, and the defendant made a new motion to strike out; but the court still adhered to its ruling to permit the testimony de bene esse, and to afterwards instruct the jury that without further testimony it would have no effect as to liability. This was again excepted to, and the court replied: "I have only ruled so far de bene, that question and answer may not be stricken out."

This, therefore, went in under the positive assurance of plaintiff's counsel that he would properly connect Cunningham with the defendant corporation, which assurance was so far from being carried out that, so far as the record shows, not even any attempt was made in that direction. Under the circumstances, the court should have reverted to its caution to the plaintiff's counsel involved in the language which we have already given, namely, "saying that you intend to connect it in a proper way with the transaction," and should not have allowed the case to go to the jury, or, as it was allowed to go to the jury, the verdict should, in consequence of the broken pledge from the plaintiff's counsel to the court, have been set aside if for the plaintiff, and, in addition thereto, the plaintiff's counsel might well have received a reprimand for the manner in which this objectionable and prejudicial evidence got before the jury. Subsequently, at the close of all the testimony, and before the charge was given the jury, the defendant again moved to strike out the conversation with Cunningham "so far as he stated that Armour & Co. were responsible for the accident, and were liable." The court refused to strike it out, but it stated that it would charge the jury not to consider it. The court evidently thought that the interests of the defendant required that it should not strike out. Thereupon the defendant again reserved an exception. We do not note this motion, and the ruling and exception in reference thereto, except so far as it shows that the defendant never yielded its rights with reference to the admission of this conversation.

A suggestion was made in behalf of the plaintiff that, perhaps, this conversation might be regarded as a part of the res gestæ. Possibly it

was, so far as the mere ownership of the team was concerned; but this was not insisted on, and, as submitted to us, the only plausible answer to the exception is that the court finally instructed the jury to disregard the testimony so far as it bore on the question of liability. The statement as to liability was not only inadmissible (Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 105, 7 Sup. Ct. 118, 30 L. Ed. 299; Union Insurance Company v. Smith, 124 U. S. 405, 423, 424, 8 Sup. Ct. 534, 31 L. Ed. 497) but it was of the gravest character so far as its influencing the jury was concerned, and it is difficult to believe that its effect was ever eradicated. It is true, as said in Hopt v. Utah, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708, and in Throckmorton v. Holt, 180 U. S. 552, at page 557, 21 Sup. Ct. 474, at page 476 (45 L. Ed. 663), that the general rule is that a direction of the presiding judge to the jury to disregard evidence improperly drawn out in the course of a trial cures the error; but it is also true, as further said, that there are instances where such a strong impression is made by such testimony that a subsequent withdrawal does not remove the effect caused by its admission.

Waldron v. Waldron, 156 U. S. 361, 15 Sup. Ct. 383, 39 L. Ed. 453, arose on an exception taken to argument of counsel. There the court directed the jury to disregard the improper expressions, and yet neither there, nor in Holt v. Throckmorton, was the verdict saved. In the case at bar, it is difficult to conceive that, in view of the peculiar conditions, the impression made on the mind of the jury was ever effaced. Here was, as we have shown, a case where it was very difficult for the ordinary jury to reconcile the conflicting testimony; yet the representative of the defendant was said to have made a statement which was, in fact, a verdict in favor of the plaintiff on the whole issue. Looking at the reasonable probabilities, this would be seized on by the jury in such a way that the jurors' minds were satisfied about it, and that satisfaction would not be impaired by anything that subsequently occurred.

After so strong an assurance as there was here that the testimony would be connected, in view of the fact that it was of such an impressive character that, presumably, it was impossible to eradicate the effect of its introduction, it would be a gross injustice not to allow the defendant clear and full relief. As well observed by the Supreme Court, in an illustrative way, in Dunlop v. United States, 165 U. S. 486, 498, 17 Sup. Ct. 375, 41 L. Ed. 799, slips are liable to occur in the heat of argument and otherwise in every trial, which must be regarded as such, and which, if remedied to the extent of the ability of the court and counsel, must be overlooked, or justice could rarely be done; but, in the case at bar, this testimony, as we have shown, was called out under such circumstances that the plaintiff is presumed to have known what it would be, and to have been seeking to draw it out deliberately. In addition to this, the testimony was ruled in after a discussion which occupies nearly three pages of the printed record, and after a positive assurance by the plaintiff's counsel that he would show what Cunningham's relation to the corporation was, an assurance which he did not follow up by even the slightest attempt to accomplish it. Therefore the whole was done deliberately.

It is true that it may be plausibly claimed that, as the court admitted it de bene esse, it was an incident of the right of the court to determine the method in which the testimony should be educed; that is, the order of proof. While this right is a general one, it is not without exceptions, as may be inferred from Clark v. Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938, where it is said that a judgment will not be reversed because of an error in directing the order of testimony, "unless it clearly appears that the complaining party has been injured by what was done." Moreover, we think there can be no question that there was such prejudicial result in the present case, although the error may not have been strictly an error of the court, in view of the assurance of counsel for the plaintiff which was not made good, yet it stands in the same condition as the improper statements of counsel to the jury in Waldron v. Waldron, supra; so that, although, strictly speaking, the court itself may not have committed an error, yet there was prejudicial error in the trial from which the defendant ought not to suffer.

It is, however, insisted that Cunningham's statement covered the question of the ownership of the team, and that that portion of the statement relating to liability slipped in in such a way as is common with witnesses who do not quite appreciate what is admissible and what is not admissible; so that it would be unjust to deprive the plaintiff of her verdict on account thereof, in view of the caution given by the court to the jury. But it did not slip in, because, as we have shown, the relations of the plaintiff with the witness were so intimate that she is presumed to have known all that her witness would testify to, and the question was put broadly, "What did he say to you," and thus in such a way as to bring out whatever was in the plaintiff's mind. Moreover, as we have shown, plaintiff's counsel was cautioned against so sweeping a question by the suggestion made by defendant's counsel that the witness might testify that Cunningham said: "We are liable for the whole thing. We are at fault."

Moreover, there was no issue as to that portion of Cunningham's alleged statement which related to the ownership of the team, which was "that it was Armour's team that done it." This did not mean that it was Armour's team that was left by some driver who went into the drinking saloon, if there was any such team or any such driver, for Cunningham knew nothing about that; but it did mean only that it was Armour's team which came into collision with the plaintiff. On this there was no controversy, because the bill of exceptions commences with a statement as follows:

"The defendant admits that its horse ran away on the date named, and that the wagon to which it was attached ran into, and collided with, the wagon in which Miss Skene was sitting, and threw her out upon the sidewalk; but denies any negligence on its part."

Apparently this is an agreed statement of the real issue, and the only issue, tried by the jury, and this apparent condition is fortified by the charge to the jury, in which the learned judge, in commenting on Cunningham's alleged statement, said that, "if he said what is alleged, it bears on the question only * * * whether it was their team, the defendant's team, which I understand them to have admitted." Moreover, in the long discussion with reference to the admission of the testi-

mony as to Cunningham's statement, there was no proposition or suggestion of any kind that the plaintiff offered it for the purpose of proving the identity of the colliding team, or had any need to use it therefor; and, subsequently, on the various motions of the defendant to strike out this testimony, there was no offer on the part of the plaintiff to limit it in any particular. There was, as we have already said, a question of the identity of the man who went into the drinking saloon, if any person went in there, and an examination of the witnesses which bore on this particular issue; but the record nowhere shows any question as to the identity of the team which collided with the plaintiff. On the other hand, what we have referred to leads to the just conclusion that there was no such issue. Therefore, in that respect, the error comes within the ruling of the court in Waldron v. Waldron, 156 U. S., already referred to, at page 384, of 156 U. S., at page 389 of 15 Sup. Ct. (39 L. Ed. 453), where it was said that it was true that the matter improperly put in by the counsel, which resulted in the new trial, related in one particular to a material issue; but, as that issue had been confessed by the pleadings, and was admitted in open court, it was wholly inadmissible. Under all the circumstances, it seems plain that this evidence was introduced for an improper purpose, and only for an improper purpose, so that the plaintiff should stand by the consequences of her act.

An exception was taken by the defendant to the admission of an ordinance of the city of Waltham imposing a penalty for allowing a horse to remain standing in the street, not in the care of some competent person, unless properly weighted or securely fastened. As we understand the case, this was admitted merely on the question of negligence, and, as we understand the common practice in Massachusetts, ordinances of that character are admissible in evidence for the purpose named.

Forty-three errors are assigned, covering nearly 19 printed pages. Many of them relate to opinions of nonexperts and to expressions of pain, all of which were admissible in evidence, within the rules shown by Insurance Company v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Northern Railroad Company v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587; McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358; and other cases of the same character, some of which are grouped in Chase's Stephen's Evidence (2d Ed.) 141, 142. The other errors assigned, to which we have not referred, were not brought to our attention in such manner as to demand our investigation of the record with reference to them. For example, one was that the court refused to direct a verdict for the defendant, as to which all said to us was merely that this brought up "the whole question of the defendant's negligence, and the plaintiff's freedom from contributory negligence," without anything further in reference to it. In like manner, eight assigned errors are disposed of in the defendant's brief by a mere reference to the fact that they were assigned, with a claim that the jury should have been fully and clearly instructed in regard to the subject-matters thereof. Of course, such treatment of alleged errors not only fails to meet the rules of this court, but also to conform to any practice which would require attention from any appellate tribunal. We think, however, that we have disposed of everything which is likely to arise on a new trial, or to which, for any reason,

it is necessary to give particular consideration. We have called attention to the different methods of alleging negligence in the several counts of the declaration. On account thereof the defendant moved before trial that the plaintiff elect between the counts, which motion was denied, and the defendant excepted. Clearly, according to the settled rules of practice, this, under the circumstances, was within the discretion of the Circuit Court, and forms no basis for an application to us.

On the whole, notwithstanding the numerous alleged errors which do not demand attention, the writer of this dissenting opinion is of the firm conviction, for the reasons herein stated, that, by refusing the defendant a new trial, great injustice is done it, and the rules of law, as settled and applied by the Supreme Court, are violated.

NOTE.—The following is the opinion of Hale, District Judge, on defendant's motion for a new trial:

HALE, District Judge. In this case the only question requiring a written opinion of the court is upon the motion to set aside the verdict because the damages were excessive. The plaintiff was a woman 65 years old at the time of the injury. The trial of the cause was some six years after the injury. The jury found for the plaintiff, and awarded damages in the sum of $10,000. When the verdict was rendered, I was of the opinion that the damages awarded by the jury were excessive, and that, in the exercise of a sound, judicial discretion, it would be the duty of the court to reduce the verdict or set it aside. After a very careful study of the case, I am still of the same opinion. I am, on the whole, of the belief that the jury must have been influenced by partiality during the conduct of the cause, and have rendered a rather larger verdict than the evidence fairly sustains. It is just, however, to say that, in my opinion, the evidence warrants a substantial verdict for the plaintiff. Neither the plaintiff nor her counsel attempted, during the trial, to arouse prejudice or passion against the defendant, or to inflame the jury's mind by any undue or unauthorized appeal to them. The plaintiff, at the time of the trial, was over 70 years old. She told her story in a simple, straightforward, and evidently truthful manner. The evidence justified a substantial award for doctors' bills, care, and nursing during the six years from the time of the injury until the time of the trial, and a very considerable sum for the plaintiff's personal suffering, both physical and mental. In reference to her suffering, the plaintiff did not undertake to exaggerate or to appeal to prejudice or sympathy. She showed that she had suffered severely during the several weeks when she lay in bed; that she had suffered ever since from weakness; and, for a considerable part of the time, from dizziness, nausea, bleeding from the nose, and from constant apprehension and fear of the recurrence of fainting and dizzy spells. The evidence of the plaintiff's physicians tends to show that the injuries are permanent in their nature, and tends also to show that she will suffer during the remainder of her life, although she was in good health before the injury. It is fair to say, too, that the medical testimony is not of an exaggerated character.

I could see, at the time of the trial, that the very simplicity and directness of the plaintiff's manner of giving her testimony, and of the testimony itself, had a great effect upon the jury, and would be likely to win from them a very large verdict. I therefore instructed the jury that, if they came to a question of damages, it was their duty to exercise great care in that branch of the case. I went so far in my charge as to say to them that, while juries should be just in the estimation of damages, they were not permitted to be generous, and that juries more often than otherwise were accustomed to err in the direction of unreasonably high verdicts.

There were some things in the conduct of the case, on the defendant's part, that might tend to influence the jury in the direction of high damages. As a matter of fact, they did render a verdict for larger damages, I think, than can be warranted by the evidence; but the plaintiff is clearly entitled to a verdict

for a very considerable sum. She is entitled to a reasonable amount for what she has paid her physicians, and for reasonable bills for nursing and attendance during the six years. The large element of damages, however, is for her suffering. The peculiarity of the plaintiff's case in this regard is that she has shown six years of actual suffering, part of the time of a severe character; for this she should have compensation. The testimony of her physicians tends also to show that she will have some suffering in future during the expectation of her life; and for this she should recover something.

The great question in the case is: How much should be allowed to the plaintiff for her six years of suffering? Upon this question there has been very extended argument by the learned counsel in the cause, who have cited a very great number of cases where the question of excessive damages has been considered by the courts. Two cases exactly alike cannot, however, be found in judicial literature; and the whole matter must come to a question of judicial discretion. It is undoubtedly my duty in this case not to grant a new trial unconditionally, but only in the event that the plaintiff shall not file a remittitur. If the question of allowing a remittitur were a new question, the objection might be raised that a court cannot order a remittitur, without invading the province of the jury, so that the result would be a verdict of the court, and not of the jury; but the practice of federal courts makes it clear that the court may correct a verdict of the jury in respect to excessive damages, and is not limited to granting an unconditional new trial. This court in this circuit has lately, and many times, had to pass upon this question. The Supreme Court has fully considered it. In Blunt v. Little, 3 Mason, 102, Fed. Cas. No. 1,578, Mr. Justice Story, while admititng that the exercise of the discretion of the court to disturb the verdict of the jury was full of delicacy and difficulty, recognized it to be a duty to interfere when it clearly appeared that the jury had given damages that were excessive. See Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 646, 6 Sup. Ct. 590, 29 L. Ed. 755; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; Daigneau v. Grand Trunk Ry. Co. (a recent opinion by Judge Brown) 153 Fed. 593.

While, in the exercise of a sound, judicial discretion, I cannot allow the verdict of $10,000 to stand, it is my duty to carefully review the testimony, and to allow plaintiff to retain as large a portion of this verdict as the evidence will, in my opinion, warrant. I am of the opinion that there is a reasonable basis in the testimony for a verdict of $6,500. If the verdict had been for that amount only, I should not have set it aside.

A new trial will be granted, upon the ground of excessive damages, unless, within 14 days, the plaintiff shall remit the sum of $3,500, and consent to judgment for the plaintiff for the sum of $6,500, and costs.

MANSON v. DAYTON et al.

JARMUTH v. SAME.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1907.)

Nos. 2,427, 2,428.

1. EVIDENCE—CONTRACTS—VARIANCE OF WRITING BY PAROL.

In the adjustment of private reciprocal rights, where the parties have deliberately put into writing their mutual convention, such expression of their intention and understanding is final and conclusive, and cannot be varied or controlled by any antecedent negotiations or declarations in pais.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756.]

2. PROPERTY—REAL OR PERSONAL—MANNER OF TREATMENT BY OWNER.

Slag, dumped as refuse from an ore smelter or mill while ordinarily appurtenant to the land on which it is dumped, may be treated by the owner of both the land and dump as personalty, and may be sold and delivered as such.

3. SALES—CONTRACT FOR CONDITIONAL SALE—REMEDY OF SELLER FOR BREACH.
Where the right to reclaim property conditionally sold is reserved to the seller in the event of the failure of the purchaser to make payment of any installment of the purchase price, he may not retake and appropriate the property, and also recover the unpaid installments of the purchase price; but his remedy is in the alternative, unless the contrary is so clearly provided as to leave no reasonable doubt that such was the intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1418–1438.]

4. SAME—CONSTRUCTION OF CONTRACT.
The owner of land on which there were dumps of slag and smelter products entered into a contract denominated a "lease," by which he purported to lease the land for a stated term, with the right to remove the dumps on payment of a series of notes maturing at intervals through a portion of the term. The contract provided, in effect, that removal of the dumps should proceed only in proportion as payments were made, that when all the dumps were removed the lease should terminate, and that on payment of all the notes on or before maturity the lessee should be entitled to a bill of sale of the dumps, with the right to remove the same within a specified term. It further provided that: "It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or keep any of the agreements herein, * * * or any failure to pay immediately when due any one or more of said 100 promissory notes, * * * shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right * * * to declare each and every one and all of the said 100 promissory notes, or whatever number of the said notes may remain unpaid, * * * immediately due and payable, and * * * to collect the same, * * * and in case of forfeiture as aforesaid all work done and money expended by the said party of the first part shall inure to the party of the second part as liquidated damages, * * * and the said party * * * may thereupon * * * enter upon said premises and dispossess all persons occupying the same." *Held*, that such transaction was not a lease, but a conditional sale of the material in the dumps, which gave the owner alternative remedies for breach of the contract, and that, where he declared a forfeiture and took possession because of default in payment of notes, he could not also collect the notes maturing thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1327–1331, 1431.]

5. CONTRACTS—CONSTRUCTION—SUBSTITUTING "OR" FOR "AND."
To prevent an absurd or unreasonable result, the word "and," used in a contract, may be read "or," or vice versa.

Sanborn, Circuit Judge, holds that the contract gave the seller the right to collect the entire purchase price, and also to retake and hold the property sold, but concurs in the result on the ground that such provision was so unconscionable that it would not be enforced by a court of equity or bankruptcy.

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

On the 23d day of March, 1905, an agreement in writing was entered into between the Independence Smelting & Refining Company, a corporation of Colorado, as party of the first part, and Adolph J. Jarmuth, of Denver, as party of the second part, the essential parts of which contract are as follows:

"That the said party of the second part, for and in consideration of the sum of one dollar to him in hand paid by the said party of the first part, the receipt whereof is hereby acknowledged, and for and in consideration of the further sum of forty-nine thousand and nine hundred and fifty ($49,950) dol-

lars, to be paid according to the tenor of one hundred (100) certain promissory notes made by the said party of the first part to the said party of the second part, each of the said notes being of even date herewith, and each of said notes being for the principal sum of five hundred ($500) dollars, except that certain promissory (note) falling due the 28th day of January, 1907, which shall be for the principal sum of four hundred and fifty ($450) dollars, and for and in consideration of the agreements and undertakings of said party of the first part herein expressed, has demised and let unto said party of the first part, for the purpose of taking and using, for a term of five years and no longer, commencing March 28, A. D. 1905, and ending March 28, 1910, all the slag, slag dumps and all materials and smelter products, belonging to said first party, situated upon the following described land at Golden, Jefferson County, Colorado: [Here follows a description of the land by metes and bounds]; being the slag, slag dumps and all materials and smelter products situated about three thousand (3,000) feet southwesterly from the smelter now operated by said first party.

"And the second party, for the consideration named herein, hereby grants to said first party, its agents and employees, free access to said slag, slag dumps and all materials and smelter products upon said land, and full and free right of way over, upon and across said land at any and all parts thereof, for wagons and wagon roads, tramways and tramway tracks, railways and railway tracks, aerial tramways, pole lines and bucket lines during the term of this lease, for the purpose only of loading, taking out and carrying away said slag, slag dumps and all materials and smelter products in accordance with the terms and objects of this agreement, provided, however, that this lease shall terminate as soon as all the slag, slag dumps and all materials and smelter products shall have been removed from said land, whether the said five years shall have expired or not."

Provisions reserving right of access in party of second part.

Further provision regarding the method of working and removing the slag and smelter products, in blocks of 100 feet parallel with the tracks of the Colorado & Southern Railway.

Provision as to the payment of the notes consecutively, and, after May 8, 1905, within six weeks after maturity, with interest after maturity at 1 per cent. per month, "providing no slag, slag dumps or other materials or smelter products shall be removed from said land by said first party after any of the said notes are past due one week and unpaid"; with the further agreement that, if the first party desires an extension of any note, written notice shall be served upon the second party by registered letter or in person, before the maturity of such note.

Then a provision regarding the discount of any one or more of the notes, by payment before maturity.

"It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given, or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any (one) or more of the said one hundred (100) notes shall remain unpaid, shall work a forfeiture of all rights of the said party of the first part under this agreement, and the said party of the second part shall have the right, on giving a three days' written notice to the said party of the first part to declare each and every one, and all of the said one hundred (100) promissory notes, or whatever number of the said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same from the said party of the first part and in case of forfeiture as aforesaid, all work done and money expended by the said party of the first part shall inure to the benefit of the said

party of the second part as liquidated damages for the failure of the said party of the first part to keep the agreements in this writing; and the said party of the second part, or his agent, may thereupon, with or without demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law, or, at the option of said party of the second part, the said party of the first part, its officers or agents, and all persons found in occupation, may be proceeded against as guilty of unlawful detainer."

Provision that in case of forfeiture the first party shall have 15 days thereafter to remove improvements, etc., placed by it upon said land for the purpose of the lease.

Provision that in case the first party shall be unable to carry out said contract by reason of acts of God, accidents, strikes, fire or causes beyond the control of the first party, affecting the smelter plant at Golden operated by it, the times for the maturity and payment of said notes shall be extended for a period not exceeding 90 days in the aggregate, "provided, however, that said first party shall not remove or take away from said land any of said slag, slag dumps or other materials or smelter products hereby leased during the time in which the said notes shall be extended as aforesaid."

"And in consideration of the acceptance of the foregoing lease and the expenditures to be made hereunder, and the well and faithful keeping of the covenants hereof, the said party of the first part shall have the right to purchase the said slag, slag dumps and other materials and smelter products by the payment, on or before the said 28th day of January, A. D. 1907, to the said party of the second part, in addition to the payment of all of the aforesaid one hundred (100) promissory notes, aggregating the payment of said sum of forty-nine thousand nine hundred and fifty ($49,950) dollars, part consideration, as aforesaid, of the within lease, of the further sum of fifty ($50) dollars.

"And the said party of the second part shall, at the time of the signing of the within lease and bond, make and execute unto the said party of the first part a good and sufficient bill of sale to all the hereinabove described slag, slag dumps and other materials and smelter products situated on the said above described land, which said bill of sale shall give said first party until the 28th day of March, 1910, to remove said slag, slag dumps and all materials and smelter products, and shall be deposited, together with a copy of this agreement, in the United States National Bank, in the city and county of Denver, state of Colorado, in escrow, to be delivered to the said party of the first part, or its assigns, on the payment in full of the aforesaid notes and said sum of fifty ($50) dollars, on or before the 28th day of January, 1907, as evidenced to the United States National Bank by the presentation of the said one hundred (100) notes cancelled."

Provision regarding the execution to the second party by the first party of said 100 notes; the first falling due on or before Monday, March 6, 1905, and the others each succeeding Monday thereafter, for 100 weeks, each of said notes to be for $500, except the note falling due on or before January 28, 1907, which shall be for $450, and each of said notes bearing no interest, except at 1 per cent. per month after maturity.

Memorandum of fact that the first party has, prior to the signing of the agreement, already used about 1,000 tons of slag from said slag dump, without payment; and that only in the event of forfeiture of all rights under the agreement shall the second party be entitled to compensation for said slag.

"It is further understood and agreed by and between the parties hereto that the said party of the first part, while any one or more of the said one hundred (100) promissory notes shall remain unpaid, shall not take or use more than at the rate of five hundred (500) tons per week of and from the said slag, slag dumps and other materials and smelter products."

Provision that time is of the essence of the agreement, and the covenants to bind the heirs, executors, administrators, successors, and assigns of the parties.

After the execution of said contract, the said company took possession of said dump and proceeded to remove about 3,867 tons thereof, and paid to the said Jarmuth the sum of $4,500, represented by the first notes. The purchase

price of the dump being about $1 per ton, the company more than fully paid for the amount removed.

On May 12, 1905, Jarmuth notified the said company, in writing, that they had failed to pay, when due, the promissory note for the sum of $500 maturing on the 8th day of May, 1905; and that within three days after the service of the written notice, according to the provisions of the contract, he would declare all of the 100 promissory notes referred to in the agreement, given to pay for the lease, remaining unpaid, immediately due and payable. And thereafter, on the 17th day of May, 1905, he gave to the company written notice of the failure to pay the note as aforesaid, and of the giving of the notice of May 12, 1905, and declared each and every one of said promissory notes "given to pay for the said lease, and now remaining unpaid, immediately due and payable, and you are hereby further notified that I do hold you liable to and for all the obligations, forfeitures and liquidated damages mentioned in said agreement of lease, etc., of date March 23, 1905." Shortly thereafter the said Jarmuth re-entered and took possession of said property and appropriated the same to his use and benefit.

On August 18, 1905, the said company was adjudged a bankrupt in the United States District Court for the District of Colorado. On September 5, 1905, the appellant, William O. Manson, presented for allowance against the estate in bankruptcy a claim for the sum of $44,450, based on 89 of the unpaid promissory notes in the sum of $500 each, except one for $450; and the said Jarmuth presented for allowance against the estate one of said unpaid promissory notes for the sum of $500. The consideration recited in Manson's proof of claim for the execution of the notes was that he had sold to said Jarmuth certain real estate and personal property in Jefferson county, Colo., in return for said 89 promissory notes and others executed by the Independent Smelting & Refining Company under date of March 23, 1905, prior to the bankruptcy, which were delivered to said Jarmuth in return for an agreement of five years' lease and bond of the same date, for "all the slag, slag dumps, and all materials and smelter products." The consideration for Jarmuth's note was alleged to be cash paid for said note to said Manson; the facts being that said Manson was the real party in interest in the contract respecting the sale of said dump or slag to said company—Jarmuth having rather a representative interest than a real one.

The referee disallowed these claims, on the principal ground that the vendor or lessor, whatever he may be termed, after re-entry and reclaiming the slag, which was the consideration for the notes, was not entitled also to collect the full amount of the purchase money. This finding of the referee was, on review, affirmed by the District Court. To reverse these judgments the said claimants have prosecuted separate appeals. As the cases depend upon the same facts and principles of law, they will be disposed of in one opinion.

Edward P. Costigan (Horace N. Hawkins, on the brief), for appellants.

Daniel B. Ellis and Jesse H. Sherman (Henry T. Rogers, Lucius M. Cuthbert, Lewis B. Johnson, and Charles A. Stokes, on the briefs), for appellees.

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

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

On the hearing of the claims before the referee in bankruptcy, there was considerable testimony offered respecting the negotiations between the parties preceding the execution of the written agreement in question. The settled rule of law is that all bargainings, proposals, and counter proposals of the parties preceding and leading up to the execution of the written contract are conclusively presumed to be expressed

in the written instrument. Any and all matters discussed between them, or their understandings not contained in the writing, are presumed to have been abandoned or changed in the ultimate expression of the minds of the parties. Therefore the terms of the contract, in the absence of fraud or mistake, cannot be varied or controlled by any antecedent negotiations or declarations in pais. It is the concensus of the best considered cases that in the adjustment of private, reciprocal rights, where the parties have deliberately put to writing their mutual convention, such expression of their intention and understanding is final and exclusive. Tait's Evidence, 326, 327; 1 Greenleaf on Evidence, § 275; Bast v. Bank, 101 U. S. 96, 25 L. Ed. 794; Pearson v. Carson, 69 Mo. 550; State ex rel. Yeoman v. Hoshaw, 98 Mo. 358, 11 S. W. 759; Tracy v. Union Iron Works Company, 104 Mo. 193, 16 S. W. 203.

It, therefore, only remains to determine what is the true import of the terms employed by the parties in the written contract in question. The claimant, William O. Manson, was interested in a large quantity of slag, dumped from an ore smelter or mill, which he desired to sell, and which the Independent Smelting & Refining Company wished to buy. Adolph J. Jarmuth seems to have been but a dummy for Manson in the transaction. After much dallying in the negotiations, the sale or transfer took the final form of said written agreement.

Question is made as to whether this slag or dump was regarded by the parties as real or personal property. It may be conceded that material of this character, dug from the earth and deposited on the surface thereof, adheres to and becomes appurtenant to the land, and ordinarily belongs to the owner of the fee; but it is equally the law that the owner of material like slag, the refuse of mineral deposit dug from the earth, run through a mill, and then dumped on the surface of contiguous land, may be treated and dealt with as mere personalty, which the owner may sell and deliver as any other personal property susceptible of manual delivery.

"Though there is no actual physical severance, articles and structures which have become part of the realty by annexation may be made to resume their character of personalty by acts of the landowner alone, or in conjunction with others, which will be effective at least as between the parties to the transaction. A severance may be brought about by the treatment of articles annexed as personalty by the persons interested therein." 13 Am. & Eng. Enc. of L. (2d Ed.) p. 616.

There is no estate or right of any kind conveyed or conceded to the realty upon which the slag was deposited, except a right of way for the purpose only of loading, taking out, and carrying away the slag.

It is not essential, where the article is to be removed by the purchaser, that the sale should be evidenced by deed of conveyance, and so the parties to this transaction regarded and treated the slag. It was provided in the contract that simultaneously with the execution of the contract the party of the second part should "make and execute unto the said party of the first part a good and sufficient bill of sale to all the described slag, slag dumps, and materials and smelter products situated on said above-described land, which said bill of sale shall give

said first party until the 28th day of March, 1910, to remove said slag, slag dumps, and all materials and smelter products, and shall be deposited together with a copy of this agreement in the United States National Bank * * * in escrow, to be delivered to the said party of the first part, or its assigns, on the payment in full of the aforesaid notes," etc.

It matters little what name parties to such contracts may give the transaction. Mere names are often insignificant; sometimes they are not even descriptive. The words "bond and lease" have become so stereotyped in contracts in Colorado, touching mines and mining material, that they are at times employed where they have no relation to the proper legal significance of the terms. To call a simple unsealed contract a "bond" does not make it a bond. To call a contract a "lease," which has for its underlying purpose the sale of property on specified conditions, intended to secure the payment of the purchase money and for the better protection of the vendor in case of reclamation of the property, does not create a lease. Nor does calling the installment payments therefor, "rent," create the relation of landlord and tenant between the parties. The amount of purchase money in this case was named in round numbers, and, if on the day of the execution of the contract the conditional purchaser had tendered the whole contract price, the property would have passed to it beyond the power of the vendor to revoke. The only remaining obligation of the purchaser, then, would have been to remove the slag within the specified time.

This transaction was not a lease, for the reasons: (1) The deferred payments did not cover the entire period of occupancy for the removal of the slag; (2) the contract gave the company the right not only to remove, but to absolutely consume, the slag, if only it paid its notes, without any provision for the return of the slag at the end of the so-called term; and (3) the time of occupancy of the premises was to end when all the slag should be removed.

In Hervey v. R. I. Locomotive Works, 93 U. S. 664, 672, 23 L. Ed. 1003, the court, in discussing a transaction respecting the transfer of personal property to be paid for in installments, retaining the title by the vendor until the payments were made, said:

"Nor is the transaction changed by the agreement assuming the form of a lease. In determining the real character of a contract, courts will always look to its purpose, rather than to the name given to it by the parties."

Then referring to the case of the sale of a piano, reported in Murch v. Wright, 46 Ill. 488, 95 Am. Dec. 455, the court said:

"The court held 'that it was a mere subterfuge to call this transaction a lease,' and that it was a conditional sale, with the right of rescission on the part of the vendor, in case the purchaser should fail in payment of his installments. * * * It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid are for rent; but this form was used to cover the real transaction."

In Contracting & Building Co. of Kentucky v. Continental Trust Co. of New York, 108 Fed. 1, 47 C. C. A. 143, locomotives were delivered to a railroad company on payment of a specific amount and the execution to the builders of 12 promissory obligations, called in the

contract "lease warrants," maturing at intervals of one month up to a specified date. The written instrument was in the form of a lease, in which the installment payments were called "rentals," with the legal title retained in the so-called lessor. The contract further provided that on the payment of the last lease warrant the lessee might, at its option, purchase the locomotives for $1, on the payment of which the lessor was to execute a bill of sale therefor to the lessee. Judge Lurton observed of that:

"It is too obvious for discussion that the arrangement under which the railroad company acquired the 10 locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated, and that the retention of title was intended as a mere mode of securing the payment of the purchase price. The real character of such transactions has been often the subject of judicial construction, and their rank in relation to the claim of creditors considered with reference to the registry laws of the states within which the property is situated. [Citing authorities.] The real transaction was a bargain and sale; the title being retained as security for the purchase money. Being property susceptible of separate ownership and separate liens, it passed under the after-acquired property clause of the existing mortgage, subject to the lien of the vendor," etc.

In Unitype Company v. Long, 143 Fed. 315, 74 C. C. A. 453, the contract was in the form of a lease of a machine for the term of three years, for a total rental of $1,260, payable in monthly installments, for which notes were given, with an option to the lessee to extend two years more at the same rental and to buy the machine at any time during the three years for $1,700, less the amount paid in rental. It was held to be nothing more than a conditional sale of the machine. The court said:

"Although called a lease, the transaction was intended to be, and in effect was, a conditional sale; the vendor reserving the title until the final payment should be made, and the right of rescission, in case the purchaser should fail in the payment of any installments of the so-called rent, or an additional amount to make the total sum $1,700."

The same view of such transaction obtains in the state of Colorado. Gerow v. Costello, 11 Colo. 561, 19 Pac. 505, 7 Am. St. Rep. 260.

It is the universally recognized rule of law, instinct with the spirit of justice, that where a right to reclaim property conditionally sold is reserved to the vendor in the event of the failure of the vendee to make payment of any installment due on the purchase price, he may not retake and appropriate the property and also recover the whole purchase price; and the retaking of the property by the seller defeats his right to recover unpaid installments. "A vendor under a conditional sale cannot have both the property and the purchase price. Where he has elected to retake the property absolutely, the consideration for the obligations or security given for the purchase price fails, and he can neither collect upon the one nor enforce payment of the other." White v. A. W. Gray's Sons, 89 N. Y. Supp. 481.

In Seanor v. McLaughlin, 165 Pa. 150, 30 Atl. 717, 32 L. R. A. 467, the plaintiff delivered to the defendant certain machines, the price of which was $1,700, retaining the title. On payment of $750 the agreement was to pay the balance in three yearly payments. The contract provided that the plaintiff could resume possession of the machines

on default, and for that purpose enter the defendant's premises. The defendants concurrently therewith gave the plaintiff a judgment bond for $1,000 for such installments, as collateral to secure the rentals for machines leased by the obligors from the obligees. It was held that on default the plaintiffs might take judgment and collect by execution, or rescind the contract and resume possession; but they could not adopt both remedies. The court said:

"The contract was to pass the possession of the machine to the defendant, and to make secure the payment of its value to the plaintiffs. Its value, as fixed by both parties, was $1,700. It is fair to presume the plaintiffs intended by the contract to get this sum once, and that the defendant did not intend to pay it, or any part of it, twice. Parties may, in contracting, provide penalties for nonperformance; but, unless they do so in unmistakable language, courts will not insert them."

After reviewing the provisions of the contract, the court further said:

"The plaintiffs had two distinct remedies, either of which they might adopt to enforce their right. They parted with the possession of the machine at the price of $1,700; $750 of this to be paid in hand, which they received. They still retained title, with the right to resume possession on default in either payment of $316.67; but, the subject of the contract being a movable chattel, and its security being, at best, little more than a chattel mortgage, they took a personal judgment bond, with power of attorney to enter it and confess judgment in any court of record. * * * Either remedy was complete in itself, and the plaintiffs, on default, could adopt either; but they were not cumulative—they could not adopt both—unless it was plainly expressed in the contract, or a necessary implication from its terms. * * * On default of payment, the plaintiffs were not bound to accept the machine or take possession of it. They could have entered judgment on the bond, levied on the machine and any other property of defendant, in satisfaction of their demand. But they rescinded the contract by retaking into their possession the subject of it, which they had a right to do, and then immediately entered their bond and issued execution to levy on other property of defendant, which they had no right to do, for the contract or obligation to which the bond was collateral no longer existed."

In Minneapolis Harvester Works v. Hally, 27 Minn. 495, 8 N. W. 597, the harvester works made a sale of machinery, taking therefor a promissory note for $240, bearing 12 per cent. interest per annum; the written contract containing a condition that the ownership and right of possession should not pass from the harvester company until the note and interest were paid in full. "And the said Minneapolis Harvester Works, or their authorized agents, are hereby fully authorized and empowered to proceed to collect the same at any time they may reasonably deem themselves insecure, and, even before the maturity thereof, may take possession of said machine, sell the same, and apply the proceeds towards the payment of this note, after paying all costs and necessary expenses; also this note to become due upon the removal of its maker from the county wherein he now resides." The vendor afterwards took possession of the machine from the defendant. The court said:

"It appears from the undisputed evidence on both sides that the machines have been taken from the possession of the defendant by the plaintiff and sold. The result is that there is a total failure of the consideration expressed in the instrument. The case is one of a conditional sale; that is to say, of a

transaction which was to take effect as a sale, so as to pass the title of the reapers and the right of possession upon payment therefor, and not otherwise. The defendant not only never acquired any title, ownership, or right of possession of the machines but he has by the act of the plaintiff been deprived of the power of acquiring any by paying the price specified in the instrument."

See, also, Moultrie Repair Company v. Hill, 120 Ga. 730, 48 S. E. 143; Turk v. Carnahan, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 42 Pac. 435.

The foregoing rule applies with equal rigor to contracts of lease. If the lessor enter for condition broken, and resume possession of the premises, he cannot hold the premises and collect accruing rent, for the reason that the use of the property is the sole consideration for the obligation to pay. He cannot have both, for he is not entitled to be twice paid. Watson v. Merrill, 136 Fed. 359, 69 C. C. A. 185, 69 L. R. A. 719.

It is not contended that parties who are sui juris, competent to contract, may not confer upon the vendor or lessor the double remedy for failure to pay; but the assertion of such cumulative right is so harsh, oppressive, and unjust that courts will never recognize and enforce it, unless it is so clearly nominated in the bond as to leave no reasonable doubt that such was the intention of the parties.

Turning to the provisions of the written agreement under review, it is to be observed that the first requirement was that the work on the slag dump was to be performed in a thoroughly workmanlike manner. This was inserted evidently for the better protection of the vendor in the event of the failure of the vendee to pay the installment notes, so that if the vendor had to reclaim the property as little injury as possible would be done thereto by the manner of its use. This is followed by the provision:

"That any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the said 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any one or more of the said one hundred (100) notes shall remain unpaid shall work a forfeiture of all rights of the said party of the first part under this agreement."

The meaning and purpose of this was that on failure to do the given acts the purchaser's right to hold and remove the dump would be gone. This then is followed by the provision that:

"Said party of the second part shall have the right, on giving three days' written notice to the said party of the first part, to declare each and every one, and all of the said 100 promissory notes, or whatever number of said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same."

Here is a single provision respecting the right to mature all the notes in case of default in the payment of one, with a right to immediately collect the same. It is a complete remedy within and of itself.

There are two noticeable facts in the foregoing provisions: (1) It is expressly stated that the notes to be matured were "given to pay for the within lease" (that is, for the right to remove and appropriate the slag) and, therefore, if immediately collected, the slag, which constituted the consideration for the notes, would belong to the payor; and (2) it is expressly declared that the work done and money already paid should be forfeited as liquidated damages. On the maxim "Expressum facit cessare tacitum," the idea of treating the whole purchase price as liquidated damages is excluded. This becomes obvious by the provision authorizing a re-entry being immediately preceded by the conjunction "and," coupling it with the forfeiture as aforesaid, of all work done and money paid as liquidated damages.

It is an ordinary provision in contracts of conditional sales, where the vendee shall have made some preliminary payment, and should fail to meet the balance as required, to declare that what has been paid shall be forfeited to the vendor as liquidated damages, and is not inconsistent with the additional right of reclamation.

Indeed, this provision in the contract respecting the forfeiture of work done and money paid is but expressive of the general rule of law that the purchaser in default will not be permitted to "both withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity to be restored to the possession." Hansbrough v. Peck, 5 Wall. 497, 505, 18 L. Ed. 520. In this case the court holds that, in default of the payments of the installments of purchase money, the vendor has two remedies: (1) he may sue upon the contract and recover judgment for the purchase money, and may levy execution upon any property of the defendant, including the property sold; or he may bring an action for the recovery of possession; or he may go into a court of equity in the first instance and call on the purchaser to pay the money due, and thereafter be foreclosed from setting up any claim to the property. "And no rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done."

In the case at bar the installments to be paid would not greatly exceed the quantity of slag removed, and, as the value of the work done preparatory to its removal might be difficult of ascertainment, it was reasonably declared that these should be forfeited as liquidated damages in case of re-entry and retaking. As these were the only matters to be forfeited as liquidated damages, the idea is precluded that the residue of the purchase money could be also claimed to be forfeited as liquidated damages in case of re-entry. Such a construction of the contract would be so incongruous and oppressive that courts, consistent with the expression, would, if possible, so construe the whole contract as to harmonize all its parts and avoid inconsistencies, harsh and oppressive results.

Among the rules of construction to prevent incongruities and absurdities is that the word "and" may be read "or," and vice versa, as "these words are said to be convertible with each other as the sense of the enactment (or contract) and the necessity of harmonizing its provisions may require." Endlich on Interpretation of Statutes, § 303. This rule is predicated of the assumption that it could not have been intended to produce absurd and unreasonable results; "and consequently, when such effects would follow a literal construction of the statute, the conjunctive particle may be read as disjunctive, or vice versa, on the theory that the word to be corrected was inserted by inadvertence or clerical error." See, also, Thomas v. Grand Junction, 13 Colo. App. 80, 84, 85, 56 Pac. 665; Kitchen v. Southern Railway Company, 68 S. C. 554, 48 S. E. 4.

From the contract as a whole, it is manifest to our minds that it could not have been the purpose of both parties to the contract that the right to collect the entire purchase money was given in addition to the right to re-enter and retake the property which constituted the consideration for the notes. This unreasonable, absurd, and confiscatory result is avoided, under the foregoing rule, by substituting the word "or" for "and," which occurs immediately after the words "shall work a forfeiture of all rights of the said party of the first part under this agreement," so as to make the provision of the contract in question read as follows:

"It is mutually agreed that all work on the said above described slag, slag dumps and materials and smelter products shall be performed in a thoroughly workmanlike manner, and that any failure of the said party of the first part to do or to keep any of the agreements herein, including the above described agreement to work said slag dumps in blocks of one hundred (100) feet, or any failure to pay immediately when due any one or more of the said one hundred (100) promissory notes maturing on or before the 8th day of May, 1905, or failure to pay the rest of said one hundred (100) promissory notes within six weeks after the same becomes due according to the tenor of the same, provided notice of extension, as aforesaid, shall have been given, or the taking or using of more than five hundred (500) tons per week of and from the said slag dumps as hereinafter provided while any one or more of the said one hundred (100) notes shall remain unpaid, shall work a forfeiture of all rights of the said party of the first part under this agreement, or (the other alternative provision) the said party of the second part shall have the right, on giving a three days' written notice to the said party of the first part, to declare each and every one, and all of the said one hundred (100) promissory notes, or whatever number of the said notes may remain unpaid, given to pay for the within lease, immediately due and payable, and shall have the right, immediately, to collect the same from the said party of the first part, and in case of forfeiture as aforesaid (that is, if the alternative forfeiture requiring an immediate collection of the remaining notes is chosen), all work done and money expended by the said party of the first part shall inure to the benefit of the said party of the second part as liquidated damages for the failure of the said party of the first part to keep the agreements in this writing; and the said party of the second part, or his agent, may thereupon, with or without demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law, or, at the option of said party of the second part, the said party of the first part, its officers or agents, and all persons found in occupation, may be proceeded against as guilty of unlawful detainer."

Had it been intended that the vendor should be entitled to a forfeiture and also to collect the remaining notes, the natural and easy

way to have expressed such purpose would have been, just as in the case of work done and money expended, by saying the notes should be immediately collected as liquidated damages; or by some other apt expression, as by saying that such re-entry shall not work a forfeiture of the right to collect the unpaid purchase money as aforesaid, or the like.

The case of Grommes v. St. Paul Trust Company, 147 Ill. 634, 35 N. E. 820, 37 Am. St. Rep. 248, cited by appellants' counsel, aptly illustrates the distinction under discussion. That was an ordinary lease of a building for a given term at a fixed monthly rental, containing the following express provision:

"It is further agreed by and between the parties hereto that should said party of the second part fail to make the above mentioned payments as herein specified, or to pay any of the rent aforesaid, when due, or shall fail to fulfill any of the covenants herein contained, then and in that case, it shall be lawful for the said party of the first part to re-enter and take full and absolute possession of the above rented premises, and to hold and enjoy the same fully and absolutely, without such re-entry working a forfeiture of the rents to be paid and the covenants to be performed by the said party of the second part, or any of the same, during the full term of this lease."

The court, after discussing the rule that such re-entry would extinguish the future rental, observed that "such cases are distinguishable from the case at bar in that here the lease, which is signed by the tenant, and under the terms of which he entered into possession of the demised premises, provides that the re-entry by the landlord shall not work a forfeiture of the rents to be paid after such re-entry." As in that case the lessor had relet the premises after the resumption of possession, the court said:

"The provision does not contemplate the collection of double rent, but the rent due from the original lessee is to be credited with such rent as is realized from the reletting. The lessor is entitled to such sum as shall be equal to rents required by the terms of the lease to be paid during the full term, and not to any greater sum."

There is no provision in the agreement at bar that in the event of default Jarmuth might take possession of the slag as the agent for the benefit of the company, or that he might relet the same. On the contrary, the evidence is that he disposed of the same absolutely.

The case of Lamson Consol. Store Service Company v. Bowland, 114 Fed. 639, 52 C. C. A. 335, is quite pertinent. The lease was of a store service apparatus, reserving a stipulated annual rental, payable quarterly in advance. It provided that, if any installment remained unpaid for 90 days, the rental for the entire term should become at once due. It declared that the lessee should make no alterations in the mechanism, or remove the apparatus, or use it elsewhere than in the store. The agreement concluded as follows:

"That in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may enter and take possession of the system. * * * No removal of said system made by the lessor during the term on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of the lease."

The day before a certain installment of rent became due, a petition in involuntary bankruptcy was filed against the lessees, and they were adjudged bankrupt. The installment falling due the day next after the filing of the petition in bankruptcy was not paid in full, and the lessors retook possession. It was held that the resumption of possession for any reason other than termination of the lessees' tenancy prevented the lessor from collecting future rents. The court said:

"The lessors invoke the third clause of the lease contract, which provides that: 'If any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable.' It is entirely competent to contract that the consequence of a default in the payment of an installment of interest for the use of money, or of rent for the use of property, shall be the precipitancy of the maturity of the principal of the money loaned, or of future installments for the rental of the property in respect to which default has been made. Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the letter. But in this case the letter demands that the lessee shall continue to pay rent, although it has repossessed itself of the thing for the enjoyment of which the rent is to be paid. The resumption of possession by the lessor operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise provided. A covenant in a lease authorizing a landlord, on default of rent, to take possession, and relet, if possible, for the benefit of the tenant, and that in such case the tenant shall remain liable for the deficiency, or for the whole rent if a reletting is impossible, has been held valid. In case of a covenant such as that just mentioned, the lessor's possession would be as agent for the lessee; and the liability of the lessee would be contingent upon a deficiency, and clearly not such a fixed and absolute liability as would be provable in bankruptcy. In the lease here under consideration, the lessor has reserved the right to resume possession in quite a number of contingencies, the effect of which the contract declares shall be to 'determine all right and interest the said lessee may have in said system.' Without more, it cannot be that the lessee shall be liable for the future rents, when the effect of the act of the lessor has been to determine all his right and interest in the subject of the lease. Forfeitures are never favored, and when it is claimed that the lessor of property may resume possession of the subject-matter of the lease, and continue to hold the lessee liable for future rents, although deprived of the use and enjoyment of the thing leased, the terms of the bond must be exceedingly plain. Liability under such circumstances for future rents would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessee was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it."

It is a noticeable fact that, in the petition for the allowance of the claims in question against the bankrupt estate, there was a singular omission in stating what was the consideration of the notes sought to be allowed against the estate, as required by the bankrupt law; the petitioner contenting himself with stating that the consideration was for the transfer of the notes to him by Jarmuth. The palpable reason for this omission in the statement of his case was that he would have had to disclose that the consideration for the notes as between the original parties was the right to remove and use the slag dumps. The evidence in this case shows that the notes paid by the vendee, up to the time of the forfeiture, fully covered all the slag removed, and the petitioners' evidence tended to show that the slag in the dump was actually worth more than the contract price; and, yet, while the vendor

took back and appropriated the entire remaining property, thereby taking away from the vendee and its creditors the very means of paying the notes given therefor, the petitioners come into a court of bankruptcy to have allowed against the estate the entire unpaid contract price, amounting to about $45,000.

In our judgment the right to such extraordinary exaction is not clearly so nominated in the bond, and the decree of the District Court in disallowing the claims should therefore be affirmed.

It is accordingly so ordered.

SANBORN, Circuit Judge (concurring). In my opinion the contract here in question evidences a conditional sale wherein the parties intended to agree, and did agree, that upon default in payment of any of the installments the vendor might collect the entire purchase price and might also retake and hold the property sold. It is only by a change in the decisive word of the agreement which seems to me to make the contract mean the very opposite of what the parties intended and clearly expressed and by an extended argument that a different construction is justified. I am content to take the agreement as the parties made and executed it without change. But such a contract is so unconscionable that it may not be enforced in equity, and a proceeding in bankruptcy is a proceeding in equity. In such a contract the vendor has the option to retake the property sold, to keep the payments already made, and to abandon collection of the future installments, or to keep the payments already made, to enforce the collection of the future installments by the sale of the property which he has taken back on the theory that it is security for the payment of the installments, to apply the proceeds to their payment and collect the balance, or to leave the property sold in the possession and ownership of the vendee and to collect the entire future installments. He may not, however, retake and retain the property sold, and then recover in equity the future installments of its purchase price, because the sale of the property is the consideration of the notes given or the promise made to pay the price.

On this ground I concur in the affirmance of the decree below.

BROCK et al. v. FULLER LUMBER CO.

(Circuit Court of Appeals, First Circuit. February 12, 1907.)

No. 659.

1. WRIT OF ERROR—PROCESS—AMENDMENT.

A writ issued out of the federal court described plaintiff's citizenship, but omitted to state the citizenship of either of the three defendants. Defendants moved to dismiss for want of jurisdiction because of this omission, whereupon plaintiff asked leave to amend the writ by inserting after the description of the "plaintiffs" the words "citizens and residents of." This motion was allowed, all parties treating the word "plaintiffs" as intended for "defendants," after which defendants, who were represented by the same counsel, filed a special plea denying that one of them was a citizen of Massachusetts, which plea was heard and overruled. *Held*, that the error in the motion to amend was unsubstantial, and that plaintiff, as

defendant in error, was entitled to correct the record by substituting the word "defendants" for "plaintiffs."

2. JURY—RIGHT TO JURY TRIAL—WAIVER.
A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under Rev. St. § 961 [U. S. Comp. St. 1901, p. 699], declaring that, when the sum for which judgment shall be rendered in such suit is uncertain, it shall, if either party request it, be assessed by a jury.

3. SAME—PROCEEDINGS—REQUEST FOR JURY—TIME.
Plaintiff sued on a contractor's bond to secure performance of a written contract. On the trial, defendants' attorney stated that defendants might be defaulted, but that he "would like to be heard on the question of damages," and immediately thereafter suggested that the case be sent to an auditor. This was agreed to, and, though a jury was then present, an auditor was appointed, and no request was made for a jury trial at any time during the term, nor until four months after default, and after defendants had learned that the auditor's report was unfavorable, when they applied for an assessment of damages by a jury, as authorized by Rev. St. § 961 [U. S. Comp. St. 1901, p. 699]. *Held*, that the finding of the Circuit Court that the request for a jury trial was too late should not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 163½, 164.

Right to trial by jury in federal court, see note to O'Connell v. Reed, 5 C. C. A. 603; Vany v. Peirce, 26 C. C. A. 528.]

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

Thomas Hunt (Gaston, Snow & Saltonstall, on the brief), for plaintiffs in error.

Charles F. Choate, Jr. (Frederick H. Nash and Choate, Hall & Stewart, on the brief), for defendant in error.

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

BROWN, District Judge. This is a writ of error to review the rulings of the Circuit Court in an action on a bond given to secure the performance of a written contract. The plaintiffs in error (defendants in the Circuit Court) contend that the Circuit Court erred (1) in denying their motion to dismiss for lack of jurisdiction, and (2) in denying their claim for a jury trial on the question of damages.

The writ properly described the plaintiff as the Fuller Lumber Company, a corporation duly organized under the laws of New Hampshire, and a citizen of New Hampshire, but omitted to state the citizenship of either of the three defendants. Upon this omission the defendants based a motion to dismiss for want of jurisdiction. The plaintiff then filed a motion to amend its writ. In this motion it asked that the writ be amended by inserting after the description of the "plaintiffs" the words "citizens and residents of." The use of the word "plaintiffs" was obviously a mere slip of the pen. The plaintiff was already properly described; and the use in the motion of the plural in "plaintiffs," and in "citizens and residents of," shows clearly that it was intended to amend, not as to the single plaintiff, whose citizenship was already properly alleged, but as to the several parties defendant. There is no

doubt that, in overruling the motion to dismiss, and in granting the motion to amend, it was assumed by the court that the amendment related to the parties defendant. This slip of the pen apparently was noticed neither by the court nor by counsel on either side. The defendants were all represented by the same counsel, who, upon the overruling of the motion to dismiss and the granting of the motion to amend, filed a special plea in behalf of one of the defendants denying that he was a citizen of Massachusetts, which plea was heard and overruled. The error is so obvious, and it is so clear that the error was overlooked by every one in the Circuit Court, that we cannot regard this point as substantial. The motion of the defendant in error to correct the record by inserting, instead of the word "plaintiffs," the word "defendants," is granted.

The principal question in the case is whether the Circuit Court erred in denying a jury trial upon the question of damages. The bill of exceptions states the facts as follows:

"The defendants filed, by way of answer, a general denial. The case was then placed upon the list of actions for trial by jury. When the case was called for trial before Aldrich, J., counsel for plaintiff arose and said he was ready for trial. Counsel for defendant stated to the court that as far as the liability in the case was concerned he would agree that the defendant might be defaulted, but that he would like to be heard on the question of damages. The defendants were thereupon defaulted.

"Immediately afterwards, counsel for defendant addressed the court on this question, and suggested to the court that this case appealed to him as a proper case to send to an auditor. The court then said that he thought it was a proper case for an auditor, and asked counsel to agree upon an auditor."

Subsequently there was filed the following agreement, signed by counsel for both parties:

"It is agreed that Irving McD. Garfield, of Boston, may be appointed auditor in this cause."

A rule to auditor was entered December 1, 1904, in the following terms:

"And now, to wit, December 1, 1904, by agreement of parties, it is ordered by the court that Irving McD. Garfield, Esq., be and hereby is appointed auditor in the above-named action, to hear the parties and examine their vouchers and evidence and to state the accounts and make report thereof to the court."

The case was heard only upon the question of damages by the auditor, who, on March 24, 1905, filed his report. March 29, 1905, a motion was filed by the plaintiff that the report be confirmed, and that execution issue for the penal sum named in the bond. March 30, 1905, the defendants claimed in writing a trial by jury upon the question of damages. March 31, 1905, the defendants moved to recommit the report of the auditor for errors of law. April 15, 1905, the defendants filed exceptions to the report of the auditor, and on the same day filed the following motion for trial by a jury:

"And now come the defendants in the above-entitled action and move and request that the sum for which judgment shall be rendered herein be assessed by a jury in accordance with the provisions of section 961 of the Revised Statutes [U. S. Comp. St. 1901, p. 699]."

The case was heard by the court upon exceptions to the auditor's report, and the motion for trial by jury. The motion for a jury trial was denied, and exception duly taken. March, 28, 1906, judgment was entered for the plaintiff for the penal sum named in the bond.

The plaintiffs in error base their claim to a jury trial upon section 961 of the Revised Statutes [U. S. Comp. St. 1901, p. 699]:

"In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury."

Upon the default of the defendants, it became the duty of the court to render judgment for so much as was due according to equity. Juries were then sitting, but the defendants did not request a jury trial. In Aurora City v. West, 7 Wall. 82, 104, 19 L. Ed. 42, it is said:

"But if the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or, what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain, if neither party request the court to call a jury for that purpose. Common-law rules were substantially the same, except that 'the court themselves might, in a large class of cases, if they pleased, assess the damages, and thereupon give final judgment.'"

The defendants' request for an auditor was not preceded by a request for a jury trial. The case stood for trial by the court on the question of damages, unless affirmative action should be taken by the defendants to procure a jury trial. The defendants' counsel did not state that the auditor was desired to prepare the case for jury trial. We think that the court was entitled to assume that the appointment of an auditor was requested, and was agreed upon simply as a convenient step in the assessment of damages by the court. The statement of defendants' counsel, "that he would like to be heard on the question of damages," certainly conveyed no indication of a desire for a jury trial. On the contrary, we think it might well have been understood by the court to indicate a desire to be heard by the court.

It is contended by the plaintiffs in error that the right to a jury trial upon the question of liability, by express provision of Rev. St. §§ 648, 649 [U. S. Comp. St. 1901, p. 525], can be waived only by stipulation in writing; and that there is no possible reason why the rule as to the question of damages should be different. This is contrary to the decision of the Supreme Court in Kearney v. Case, 12 Wall. 275, 20 L. Ed. 395, in which it was held that parties may waive a jury trial without filing a written stipulation, and by implied consent, though in such case no error can be considered in the action of the court on such trial. It was said (page 283 of 12 Wall. [20 L. Ed. 395]):

"In those courts where juries are called from a great distance and detained at a heavy sacrifice, the courts usually give jury trials the preference. The benefit, therefore, of an announcement by which the number of these trials is diminished and the case placed in an attitude to be taken up at the conven-

ience of the court and the parties is obvious. We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation," etc.

The case stood for trial by a jury upon the question of damages, as well as upon the question of liability. The defendants, previous to the date fixed for trial, had taken no steps to procure an auditor for the purposes of a jury trial. Had a request been made to take the case from the jury, or for a continuance, on the ground that the case was of such a nature as to require the services of an auditor to put it in shape for a jury trial, the court might well have refused such a request on the ground that it had not been made seasonably. Had the plaintiff been informed that it was then the intention of the defendants to claim a jury trial on the question of damages, it might well have resisted the motion for the appointment of an auditor, and have insisted that, if a jury trial was to be had, it should be before the jury then present for the trial of the case which the plaintiff was ready to try. As a practical matter, we think that if the defendants desired both a hearing before an auditor and a trial before a jury on the question of damages they should have stated that desire seasonably; and that, failing to state that desire, and, on the contrary, stating merely a desire to be heard, both the court and opposing counsel were entitled to assume that the request for an auditor was made by the defendants not to prepare for a jury trial, but to prepare the case in the most convenient way for its disposal by the court.

Counsel for the plaintiffs in error contends that a reference to an auditor contemplates a regular trial in the future. We think that this may be conceded; also that his report is only prima facie evidence to be used upon a subsequent trial before the court or jury. Stone v. Sargent, 129 Mass. 503, 512. He relies, also, upon Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313, a decision of this court, to support the proposition that an auditor is an officer appointed to prepare the case for a jury. He argues, therefore, that a reference to an auditor cannot be inconsistent with or a substitute for a jury trial. The case of Fenno v. Primrose did not decide, however, that an auditor can be appointed only for the purpose of preparing a case for a jury trial. Reference to an auditor may serve the convenience of counsel, and may be regarded by counsel quite as desirable when the case is ultimately to be decided by the court as when it is ultimately to be decided by a jury. As certain kinds of questions can be more conveniently tried to the court than to a jury, so certain questions may be more conveniently tried before an auditor than before the court. Counsel familiar with the practice in equity before a master, whereby the evidence may be fully prepared for final hearing by the court, may desire to secure in a law trial the same advantage. We are of the opinion that the request for an auditor cannot be regarded as in any way indicating a desire for a jury trial.

It was not until after the plaintiffs in error were apprised of the auditor's findings, and not until after a motion had been made for a

confirmation of the auditor's report and for the issue of execution, that they indicated any desire for a jury trial. Default was made November 28, 1904. Four months elapsed before the making of a claim for a jury trial. Had the auditor's report been satisfactory to the defendants, we think they might well have contended that a claim at that time by the plaintiff for a jury trial would have been too late, and we think that no act of the defendants which preceded their claim for a jury trial gave them any greater right than the plaintiff. The default was at the November term, 1904. No claim for a jury trial was made during that term. It is well settled, as we have seen, that parties may waive a jury trial without stipulation in writing by submitting the case to the court for hearing, even when the right to a jury trial is secured to them by statute without affirmative request. In this case the defendants' right to a jury trial was conditional upon their expressly claiming it. Where a party suffers a case to stand for the assessment of damages by the court for so long a period as four months, during which the court has taken steps towards the assessment of damages, we think it is within the discretion of the trial court to decide that the request for a jury trial is too late.

Though the statute itself fixes no limit of time within which a request for a jury trial must be made under section 961, it does not follow that the time is unlimited. In Re Grant (D. C.) 143 Fed. 661, it was held that the right of review or appeal for which the statute fixes no time limit is, nevertheless, not unlimited, but requires of a person seeking a review the duty of proceeding with some degree of diligence, and the failure to so proceed must be construed as an abandonment of the appeal. We do not decide, of course, that a request for an auditor is in itself a waiver of jury trial; nor do we decide that the mere failure to request a jury trial before asking for an auditor is necessarily a waiver of jury trial, for it is undoubtedly true that the appointment of an auditor is in itself not more suggestive of the final assessment of damages by the court than by the jury. But we do decide that the request for a jury trial under section 961 must be made seasonably, and cannot be delayed indefinitely, and that parties should not be permitted by their action to make a practical abandonment of a claim for a jury trial, and, after an unfavorable result before an auditor, base a request for a jury trial upon an afterthought. The learned judge who heard the case in the Circuit Court found that a jury trial had not been seasonably requested. He had before him all the facts as shown by the record, among them the following: The case came on for a jury trial without any previous request by the defendants for an auditor to prepare for that trial; the jury was present for the trial of the question of damages as well as that of liability, yet no request was then made for a jury trial; the request for an auditor was preceded by no intimation that a jury trial was desired, or that the auditor was desired to prepare the case for a jury, counsel stating merely that he "would like to be heard on the question of damages"; no request was made for a jury trial at any time during the term at which default was made, nor until four months after default, and after the defendants had learned that the auditor's report was unfavorable and had cause to be apprehensive that judgment

might speedily follow against them. Considering all the circumstances shown by the record, we are of the opinion that it cannot be said that the finding that a jury trial was not seasonably requested was erroneous.

The judgment of the Circuit Court is affirmed, and the defendant in error recovers costs in this court.

COLE et al. v. CARSON.*

(Circuit Court of Appeals, Eighth Circuit. April 17, 1907.)

No. 2,450.

COURTS—FEDERAL COURTS—ADOPTION OF STATE PRACTICE—PLEADING—JURISDICTION—DIVERSITY OF CITIZENSHIP—DENIAL BY ANSWER.

Rev. St. Mo. 1899, § 596 [Ann. St. 1906, p. 622], provides that the only plea on the part of the defendant is a demurrer or answer. Section 604 declares that the answer shall contain, first, a general or special denial; and second, a statement of any new matter constituting a defense or counterclaim. Section 605 authorizes a defendant to set forth, by answer, as many defenses and counterclaims as he may have. *Held*, that since the enactment of the conformity act (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), it is not necessary for a defendant in a suit in a federal court sitting in Missouri to raise the question of jurisdiction by plea in abatement, but that an answer containing a general denial, etc., was effective to put in issue the allegations of diverse citizenship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 921.

Conformity of practice in common law actions to that of state courts, see note to O'Connell v. Reed, 5 C. C. A. 594; Mederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

In Error to the Circuit Court of the United States for the Southwestern Division of the District of Missouri.

M. R. Lively and W. R. Robertson, for plaintiffs in error.

Hiram W. Currey and George V. Farris, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The trustee in bankruptcy of the Missouri Development Company, incorporated under the laws of the state of Indiana, brought his action in the court below against the defendants, charging them with the conversion of certain property belonging to the bankrupt. It was alleged in the petition that the trustee and the bankrupt were citizens of the state of Indiana and that the defendants were citizens of the state of Missouri. The latter appeared to the action and filed an answer, denying each and every allegation of the petition, and pleaded some affirmative defenses. The case was tried to a jury resulting in a verdict for plaintiff. Many errors were assigned by the defendants, who are prosecuting this writ of error; but in the view we take of the question of jurisdiction these need not be considered. Although issue was joined on the allegation of diversity of citizenship of the parties, no proof was produced tending to establish the affirmative of the issue so tendered, and defendants now urge the want of such proof as ground for reversal of the judgment.

*Rehearing denied June 11, 1907.

Prior to the enactment of the act of June, 1872 (Rev. St. § 914, [U. S. Comp. St. 1901, p. 684]), known as the "Conformity Act," if the requisite citizenship of the parties was properly alleged in the petition, it was deemed admitted by pleading to the merits without having first filed a plea in abatement denying it. Sheppard v. Graves, 14 How. 505, 14 L. Ed. 518; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579. But since the assimilation of the practice in the national courts to that in the state courts by the conformity act, in those states where the answer takes the place of all pleas at common law, and where it must contain a general or specific denial of each material allegation of the petition controverted by the defendant, the common-law requirement of pleading matters in abatement of the action before taking issue on the merits has become obsolete, and a denial in the answer of all the allegations of the petition puts each and all of them in issue, whether they be matters in abatement or bar. Roberts v. Lewis, supra. Yocum v. Parker, 66 C. C. A. 80, 130 Fed. 770; Roberts v. Langenbach, 56 C. C. A. 253, 119 Fed. 349.

The determination of the question now under consideration, therefore, depends upon whether the Code of Missouri, whence this case came, requires matters of abatement to be pleaded as a part of an answer to the merits, or whether the rule of the common law on the subject is applicable to them. The Code provides that "the only plea on the part of the defendant is either a demurrer or an answer" (section 596, Rev. St. Mo. 1899 [Ann. St. 1906, p. 622]); that "the answer of the defendant shall contain first a general or special denial of each material allegation of the petition controverted by the defendant or any knowledge or information thereof sufficient to form a belief; second, a statement of any new matter constituting a defense or counter-claim in ordinary and concise language and without repetition" (section 604, supra); that "the defendant may set forth by answer as many defenses and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both" (section 605, supra). The foregoing provisions of the Missouri Code, in our opinion, clearly indicate that everything constituting a defense to an action, whether in abatement or to the merits, must, unless the defect appears on the face of the petition, be presented in an answer, which is the only pleading other than a demurrer, recognized by the statute.

But it is contended that the Supreme Court of Missouri has held otherwise, and our attention is called to the following cases: Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337; Rippstein v. St. Louis Mut. Life Ins. Co., 57 Mo. 86; Rogers v. Marsh, 73 Mo. 64; Baier v. Berberich, 85 Mo. 50; Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254, and others in support of that contention. These have been critically examined, and, while in some of them, noticeably the Rippstein Case, countenance is given to plaintiff's view, others are disposed of on the ground that certain specific objections not apparent on the face of the petition must be taken by answer or be held waived.

But whatever sanction may have been given to that contention in the Rippstein and other cases appears to have been distinctly repudiated in Little v. Harrington, 71 Mo. 390, wherein the Supreme Court, by Chief Justice Sherwood, considered the question, and after adverting to the statutory provisions supra says as follows:

"It is evident from these statutory provisions that only one answer is contemplated, and this to contain whatever defense or defenses the defendant may have, thus dispensing with the common-law rule that a plea in bar waives all dilatory pleas, or pleas not going to the merits. * * * Matter in abatement is as much a defense to the pending actions as matter in bar, and to say that the defendant may reserve the latter until a trial shall have been had upon the issues, in regard to the former would interpolate what is not in the statute; would be inconsistent with its plain and simple requirements."

To the same effect are Byler v. Jones, 79 Mo. 261; Young Men's Christian Association v. Dubach, 82 Mo. 475; Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267; State ex inf. v. Vallins, 140 Mo. 523, 41 S. W. 887.

In the last-mentioned case, which was an information in the nature of quo warranto, the following language is employed:

"The assertion is made by counsel for respondents, in substance, that inasmuch as proceedings in quo warranto are governed here by the common law that, in consequence of this, it was not admissible to plead at the same time to the jurisdiction and also to the merits, and the intimation is given that there are other matters yet held in reserve and to be brought forward in resistance to the information. On this it is enough to say that, although the present proceeding is in effect as it was at common law, yet at the same time it is but a civil action, as we have often declared, and, being such, there is but one answer allowable in such cases, and that must contain all the defenses the party has, no matter what their nature, whether in abatement or in bar."

From the foregoing there can be no doubt as to the present attitude of the Supreme Court of Missouri on the question under consideration, whatever it may have originally been. The statutes so construed by that court are substantially the same as provisions found in the Code of Civil Procedure of Nebraska, which were under consideration by the Supreme Court in Roberts v. Lewis, supra. Mr. Justice Gray, in delivering the opinion in that case, makes use of the following language:

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the circuit court depended, the judgment must be reversed, with costs for want of jurisdiction," etc.

This court in Yocum v. Parker, supra, had under consideration the question we are now considering, and reached the conclusion which we now reach. We might well have disposed of the present case by reversing it on the authority of that one; but, as counsel have earnestly argued the question anew in the light of Missouri statutes and authorities, we have carefully considered it again with the result indicated. Our attention is called to Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 801, and Every Evening Printing Co. v. Butler, 144 Fed.

916, 75 C. C. A. 657, and cases therein cited, as authority against the conclusion now reached, but on examination they are not found to raise the question now before us as to the effect of code pleadings.

The judgment will be reversed, and the cause remanded to the Circuit Court, with directions to dismiss it unless by some appropriate proceeding jurisdiction is made to appear. It is so ordered.

In re WYLIE et al.

(Circuit Court of Appeals, Third Circuit. April 29, 1907.)

No. 19.

BANKRUPTCY—RESALE OF PROPERTY—RIGHTS OF PURCHASER.

A sale of property by a trustee in bankruptcy was set aside by an order directing a resale of the property "free and discharged of and from all incumbrances," and requiring the petitioner to give security to bid an advanced price offered, and, in addition, such sum as might be awarded to the prior purchaser. Pending an appeal from such order the court vacated a prior order staying execution on a decree of foreclosure previously entered in a state court, but requiring the petitioner, with its consent, to make a similar bid at the foreclosure sale. It became the purchaser at such sale at a price largely in excess of that which it had undertaken to bid. *Held*, that it was entitled to the property free of incumbrance, the same as though the sale had been made by the bankruptcy court; and that the amount awarded to the former purchaser, and the costs in connection therewith, as well as the accumulated taxes on the property, should be paid by the trustees from the proceeds of the sale.

Appeal from the District Court of the United States for the District of New Jersey.

Robert Adrain, for appellants.
George S. Silzer, for Joseph Allgair.
J. Hill Brinton, for Sayre & Fisher Co.

Before DALLAS, GRAY, and BUFFINGTON Circuit Judges.

DALLAS, Circuit Judge. When this matter was before us upon the petition of Joseph Allgair for annulment of an order of the District Court, dated July 24, 1905, setting aside a sale of the property of the bankrupt which had been made by the trustees to said Allgair, that order was affirmed, with direction for further proceedings in connection therewith; and if, in pursuance thereof, the trustees in bankruptcy had again sold the property, the questions now presented by their petition for revision could hardly have arisen. Allgair v. William F. Fisher & Co., 143 Fed. 962, 75 C. C. A. 148. The taxes in dispute would unquestionably have been for payment by the trustees; and it is quite clear, we think, that the sum to be paid to Allgair, and the costs incurred in determining its amount, would have been payable from the proceeds of the required bid of "not less than the sum of $60,000, and, in addition thereto, such sum" as might be awarded to Allgair.

But shortly after the making of the order of July 24, 1905, Joseph Allgair appeared in the District Court and (as explained by the learned judge of that court) "offered to place the property in the

possession of the bankrupt's trustees, on terms not necessary now to be stated, to be held by the trustees pending the appeal, which offer was accepted. There were at that time two mortgage incumbrances upon the bankrupt's property—the first for $24,000, with accrued interest, and the second, which had been foreclosed in the New Jersey court of chancery, and merged into a final decree, for something over $15,000. Sale under the execution issued upon this decree had long been stayed by this [the District] court. Feeling that the stay ought not to be continued during the pendency of the appeal above mentioned, an order vacating the stay was signed on August 14, 1905. As the making of this order rendered it possible for the complainant in the foreclosure case to sell the property under the execution issued in that case, and thereby defeat the purpose of the order of July 24, 1905, which was to secure a sale of the property for a larger sum than $55,000, another order, dated back to July 31, 1905, the terms of which were agreed to by the Sayre & Fisher Company, was made." The provisions of this latter order are sufficiently set forth in the opinion of the District Court, and need not be repeated. In re William F. Fisher & Co. (D. C.) 148 Fed. 907. Of its general purpose, and that of the agreement respecting it, we have no doubt. The manifest intention was to permit a sale under the foreclosure proceedings, at which the Sayre & Fisher Company was to bid in substantial accordance with the agreement it had made when a resale by the trustees was contemplated. Accordingly the foreclosure sale did take place, and, as was anticipated, the Sayre & Fisher Company became the purchaser. It paid for the property a larger sum than it had undertaken to pay, and the bankrupt's creditors have been correspondingly benefited. Its obligation to bid at least $60,000, and, in addition thereto, the sum due to Allgair was fully discharged, and, except by so bidding, it had not agreed to provide in any way for the Allgair claim, or to bear any costs in connection with it. So, too, as to the taxes. There was no agreement by the Sayre & Fisher Company to pay them, and the foreclosure sale, in its relation to the bankruptcy proceedings, was but a substitute for the resale which the order of July 24, 1905, had directed the trustees to make. Therefore, though the order of July 31, 1905, was silent on the subject, we think that the Sayre & Fisher Company, having redundantly performed its undertaking to bid, had a right to assume that, if it became the purchaser, it would take the property, as the order of July 24, 1905, had provided, "free and discharged of and from all incumbrances."

The order to which this petition for review relates is affirmed.

UNITED SHOE MACHINERY CO. v. GREENMAN.

(Circuit Court of Appeals, First Circuit. March 27, 1907.)

No. 663.

1. PATENTS—ANTICIPATION—ABANDONMENT OF MACHINE.
A machine fully embodying a device subsequently patented by another does not lose its effect as an anticipation because its use was abandoned, solely for the reason that the product in making which it was employed was not successful, where it is shown that the machine operated successfully, and that the maker did not abandon the invention embodied therein.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 73.
Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

2. SAME—CLUTCH.
The Davey & Ladd patent, No. 672,056, for a clutch for starting and stopping machines, is void for anticipation by the clutch previously employed in the Stiles-Thomson machine for setting lacing studs in shoes.

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

For opinion below, see 145 Fed. 538.

William K. Richardson (Joseph Warren, on the brief), for appellant.

T. Hart Anderson, for appellee.

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

COLT, Circuit Judge. This is a suit for infringement of the Davey & Ladd patent, No. 672,056. The patent was applied for March 31, 1897, and issued April 16, 1901. The court below dismissed the bill, and the case is now before this court on appeal.

The Davey & Ladd patent is for an improvement in clutches for starting and stopping machines. The improvement relates particularly to the stopping feature of the clutch. The specification says:

"This invention relates to a clutch and is shown as embodied in a clutch adapted to be used on sewing-machines, nailing-machines, and in machines in which it is desirable to stop the machine at a definite point in its cycle of movements—as, for example, in the case of the sewing-machine when the needle is at its highest position, or in the case of a nailing-machine after the nail is driven and when the parts are in the position to receive the material or at a position to receive the nail to be driven at the next operation of the machine. * * * The machine is thus stopped automatically at a definite point in the rotation of the main shaft, a, and therefore at a definite point in the cycle of operations of the instrumentalities actuated by said main shaft."

In machines to which the Davey & Ladd clutch is adapted, the machine should not stop while performing its cycle of operations, as, for example, in a nailing-machine during the various operations necessary to drive the nail. The characteristic feature of the Davey & Ladd clutch is that the machine is always stopped at the completion of its cycle of operations. Since the cycle of operations takes place at each revolution of the main shaft, this result is accomplished by so organizing the clutch that the machine is stopped at the same pre-

determined point on the main shaft. In one form of the device, the machine may be stopped at the completion of any number of revolutions of the main shaft, or at the completion of one revolution, depending on the will of the operator. In the other form of the device, the machine is automatically stopped at the completion of a single revolution of the main shaft.

In the organization of the Davey & Ladd device, we find a clutch member provided with a frictional surface at each end. This clutch member is connected with the main shaft, and is capable of a longitudinal movement thereon. When the operator presses the treadle with his foot, the clutch member is moved by a spring into contact with the frictional surface of the driving belt pulley, and the machine is set in operation. When the operator removes his foot from the treadle, the clutch member, by means of a cam on the main shaft and connecting mechanism, is moved away from the driving belt pulley, and into contact with the frictional surface of the stationary brake, and the machine is stopped. In a modified form of the device, the connecting mechanism between the cam and the clutch member is so arranged that, when the operator presses the treadle with his foot, the machine is automatically stopped upon the completion of one revolution of the main shaft. It is by means of the cam and connecting mechanism co-operating with the clutch member and stationary brake that the machine is stopped at a predetermined point on the main shaft, or when it has completed its cycle of operations.

The charge of infringement is limited to claims 2 and 6 of the patent. Claim 2 reads as follows:

"(2) The combination of the driving clutch member of the machine provided with a friction-surface; with the main shaft, and a driven clutch member connected to rotate therewith but capable of independent longitudinal movement thereon and provided with friction-surfaces at its opposite ends; and a stationary friction-surface or break, and means for impelling said driven clutch member into engagement with the friction-surface of the driving member, and connecting mechanism between the main driven shaft and driven clutch member for moving said driven clutch member out of engagement with the driving member and into engagement with the brake, substantially as described."

Claim 6 is substantially the same as claim 2, except that it specifies that the clutch is engaged with the brake "at a predetermined point in the rotation of said main shaft, whereby said main shaft is stopped in a predetermined angular position."

The combinations described in these claims comprise six elements: (1) The main shaft; (2) the driven clutch member connected with the main shaft and capable of longitudinal movement thereon, and with frictional surfaces at each end; (3) the driving clutch member; (4) the stationary brake; (5) means for impelling the driven clutch member into engagement with the driving member; (6) connecting mechanism between the main shaft and the driven clutch member for moving the latter away from the driving clutch member and into engagement with the brake.

The main defense to this suit is anticipation. The defendant has introduced in evidence the clutch mechanism of the prior Stiles-Thomson lacing stud setting machine as a full and complete anticipation of the

patent in suit. A comparison of this clutch with the Davey & Ladd clutch shows the substantial identity of the two structures. On this point, Mr. Browne, complainant's expert, says:

"On comparing the Stiles-Thomson machine with claims 2 and 6 of the Davey & Ladd patent in suit, I find in said machine all the features recited in each of these claims."

While the identity of the mechanism of the two clutches, except in details of construction, is apparent, the complainant contends: First, that the Stiles-Thomson machine was only an abandoned experiment; second, that there is no evidence that the clutch part of this machine was ever operated or ever tested as to its capacity for stopping the machine; and, third, that the subsequent Stiles patent is evidence of an intention on the part of Stiles to abandon the form of clutch embodied in the Stiles-Thomson machine.

The history and use of the Stiles-Thomson machine, as disclosed by the evidence, may be stated as follows:

The Stiles-Thomson machine was designed for setting bifurcated or two-pronged lacing studs in leather shoes. It was constructed from drawings, which are in evidence, by George A. Stiles, between September and November, 1893, in the factory of the Judson L. Thomson Company. The Thomson Company was engaged in the manufacture of rivets, clasps, and other hardware supplies. In order to meet competitors, it was desirous of manufacturing and putting upon the market a bifurcated lacing stud. It was the intention of the Thomson Company that the machine should be used by its customers. It was found, however, that a lacing stud with two prongs was not as good as a tubular lacing stud, because the prongs would not hold firmly enough in the leather to withstand the pull and strain of the lacing, and it was for this reason that only one machine was built, and that this use of this machine was discontinued.

"We found," says Mr. Bartel, treasurer of the Thomson Company, "that two prongs on the stud would not hold as well as a stud with a tubular shank. A bifurcated stud simply held the stud on two sides, where a stud with a tubular shank would split in six equal parts, holding all around."

Again, Mr. Bartel testifies:

"Q. Can you state any reason why the company built only one such machine? If so, please do so. A. I can. The reason only one machine was built was because the goods we intended to use the machine for were defective, and after experimenting for some time we abandoned putting the goods upon the market."

And to the same effect is the testimony of Mr. Thomson, president of the company:

"Q. Can you state why the said company built only one of these lacing stud setting machines? A. Because the two prongs would not hold firmly enough in the leather of the upper of the shoe so but what it would pull out under the strain of lacings, as it had only two sides or prongs, instead of a tubular form that had always been in general use, and it was thought best to abandon that kind of a lacing stud."

The machine was operated in the factory of the Thomson Company for a short time during the month of December, 1893. It was then laid

aside in the pattern room, where it remained until about the time it was introduced in evidence in the present suit.

As to the operation of the machine, Mr. Bartel testifies as follows:

"Q. To your personal knowledge, was defendant's Exhibit 'Stiles-Thomson Machine' used for setting bifurcated lacing studs in the uppers of shoes? If so, when was it first so used? A. In the latter part of 1893.

"Q. Where was the machine used for setting bifurcated lacing studs in the uppers of shoes? A. In the factory of the Judson L. Thomson Manufacturing Company, at Waltham, Mass."

"Q. Did the Judson L. Thomson Company put out any studs having bifurcated shanks? A. They never sold any.

"Q. So far as you know, can you state, of your own personal knowledge, whether the Stiles-Thomson machine operated successfully to set the lacing studs having bifurcated shanks? A. I think I can. I saw the machine operated, and it set the studs successfully in leather and in uppers of shoes."

To the same effect, Mr. Unbehend, the superintendent of the Thomson Company, testifies:

"Q. Do you remember whether the machine which you recall as being finished in December, 1893, was operated; and, if so, state what the said machine operated upon? A. I saw it operated on lacing studs; that is, for fastening lacing studs to shoes."

Upon the same point, Mr. Thomson testifies:

"Q. What did Mr. Stiles do after he completed the Stiles-Thomson machine? A. He worked the machine for me in the superintendent's office.

"Q. Did you see the Stiles-Thomson machine in operation setting lacing studs? A. I did.

"Q. When? A. During the fall of 1893."

"Q. Did you personally set any lacing studs with the Stiles-Thomson machine? A. I believe I did."

These witnesses are not interested in the present suit.

This evidence establishes these facts: The Stiles-Thomson machine was built in the fall of 1893, and successfully operated during December of that year. Only one machine was built, and that machine laid aside, not because it was not practical, or would not set bifurcated lacing studs, but because this form of lacing stud was inferior to the tubular form, in that it was liable to pull out of the leather under the strain of the lacings.

The complainant insists, however, that the evidence does not show that the Stiles-Thomson machine was run by power, or that the clutch mechanism operated successfully. The answer to the first proposition is that the machine was built to run by power, and in no other way, and that it could not have been operated by hand, because there is no device shown for so operating it. The answer to the second proposition is that, if the machine operated to set lacing studs, it necessarily follows that the clutch must have been practically operative, since it is the mechanism provided for starting and stopping the machine; in other words, the machine as organized could not have performed its function of setting lacing studs except through the instrumentality of the starting and stopping mechanism. Since it is established that the machine set lacing studs practically, it must be concluded that the clutch mechanism was a practical success. Again, the fact that the Davey & Ladd clutch in suit is practically operative

raises a strong presumption that the clutch of the Stiles-Thomson machine was practically operative, since the two clutches are substantially identical.

On July 21, 1894, some seven months after he built his machine for the Thomson Company, Stiles filed his application for a patent, which was granted August 11, 1896.

This patent covers the lacing stud mechanism of the Stiles-Thomson machine, but does not cover in terms the clutch embodied in that machine. With respect to the clutch mechanism, the patent may be viewed from three standpoints: From the standpoint of the drawings; from the standpoint of the specification; and from the standpoint of both the drawings and the specification.

First. Figures 2 and 3 of the drawings show the clutch of the machine; that is, the clutch as it appears when looking at the machine. On this point the complainant's expert, Mr. Mayo, testifies:

"Q. I will ask you to examine the Stiles-Thomson machine, and compare it with the drawings of the Stiles patent, and ask you whether or not these drawings of the Stiles patent do not correctly and truly illustrate the Stiles-Thomson machine in so far as the starting and stopping mechanisms of that machine are concerned? A. The lines in the drawing correctly represent a side view of the machine assembled, but they do not show a drawing in sections of the clutch mechanism.

"Q. As I understand your answer, what is shown in the Stiles patent drawings is a correct and true representation of the Stiles-Thomson machine, as you would observe that machine without taking it apart? A. Yes, sir."

The letter k in these drawings, which points specifically to the brake, may fairly be considered, if we confine our attention to the drawings, as referring to the clutch mechanism as a whole, for the term clutch in this art sometimes refers to the driven clutch member, and sometimes to the group of devices which comprise the clutch.

Second. The specification, on the other hand refers to the letter k of the drawings as the friction clutch k, meaning the driven clutch member; and it fails to describe or to make any reference to the stationary brake.

Third. Looking at the specification and the drawings together, there is a plain inconsistency between them which cannot be reconciled. In the attempt to harmonize the drawings with the specification, the complainant has constructed a so-called model of the clutch of the Stiles patent. This model is not built according to the drawings of the patent, and its defects as a practical device are obvious. It clearly does not serve to prove that there is no repugnancy between the drawings and the specification, but rather tends to strengthen the belief that Stiles intended to patent the clutch of his machine. The probability is that, in taking out his patent, Stiles paid little attention to the clutch, which is a common device in machines, and that his mind was directed mainly to the mechanism for setting lacing studs. He says in his patent that his "invention relates to machines for setting lacing studs in fabrics," and "incidentally" to "a start and stop mechanism."

While the Stiles patent cannot be regarded as an anticipation of the Davey & Ladd clutch in suit, it manifestly cannot be taken as evidence of any intention on the part of Stiles to abandon the clutch embodied in his machine.

Our conclusion is that the clutch of the Stiles-Thomson machine is a direct anticipation of the Davey & Ladd patent. The Stiles-Thomson machine was produced at the hearing in the Circuit Court, and also at the hearing in this court, and the substantial identity of the two clutch mechanisms was established by concrete proof. The evidence also shows that the clutch of the Stiles-Thomson machine was not used for purposes of experiment, or to gratify curiosity, or to see whether it was successful, or whether anything more was to be done to perfect it; but that it was put to use in ordinary business as a thing which was completed, and that the reason why it was only used for a short time has no bearing on the question of its practical operativeness. It thus fulfills the tests with respect to anticipation which the Supreme Court, adopting the views of Judge Shipman in the court below, applied in Brush v. Condit, 132 U. S. 39, 47, 48, 10 Sup. Ct. 1, 33 L. Ed. 251, and is also within the rules laid down in Deering v. Winona Harvester Works, 155 U. S. 286, 300, 301, 15 Sup. Ct. 118, 39 L. Ed. 153, Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, and Westinghouse Company v. Stanley Instrument Company, 133 Fed. 174, 177, 179, 68 C. C. A. 523.

The decree of the Circuit Court is affirmed, and the appellee recovers costs in this court.

BRUNSWICK-BALKE-COLLENDER CO. et al. v. BACKUS AUTOMATIC PIN SETTER CO. et al.

(Circuit Court, N. D. Illinois, E. D. March 15, 1907.)

No. 27,748.

1. PATENTS—INVENTION—IMPERFECT OPERATION OF DEVICE.
   The fact that a patented device, designed for a novel use, does not work perfectly does not deprive it of invention where the principle is disclosed, and all that is necessary to its perfection is a more perfect or modified mechanical adjustment of parts.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 34.]

2. SAME—INFRINGEMENT—PIN SETTER FOR BOWLING ALLEYS.
   The Crawford patent, No. 644,546, for a device for setting pins in a bowling alley, discloses patentable invention, and is valid. Also *held* infringed by the device of the Backus patent, No. 771,963.

In Equity. On final hearing.

Offield, Towle & Linthicum, and Charles T. Linthicum, for complainants.

Benjamin T. Roodhouse, for defendants.

KOHLSAAT, Circuit Judge. Complainant files its bill to restrain infringement of claims 1 and 2 of patent No. 644,546, granted to Charles W. Crawford, February 27, 1900, which read as follows, viz.:

"(1) In combination, with the usual, spotted, end portion of the bed of a bowling-alley, a mechanism adapted to receive a set of pins and operating to place the said set of pins on the spots of the alley-bed and then move away, to permit the usual free use of the alley-bed and spotted pins; substantially as set forth.

"(2) In a mechanism for spotting pins on an alley-bed, a carrier adapted to receive a set of pins; means for moving said carrier, and its pins to the proper position to bring the bases of said pins onto their respective spots on the alley-bed; and means for then releasing said pins from said carrier; substantially as and for the purpose set forth."

It will be seen that claim 1 describes a mechanism entirely by reference to its operations, and refers to the specification for all particulars. Claim 2 is more specific, but still dependent almost entirely on the specification. The patent relates to a device for setting up ten pins in proper position with reasonable accuracy—not entirely supplanting the pit-man, but making the work more accurate and more speedy. The record discloses no prior patents nor any prior use. So far as appears, the patentee was a pioneer in the art, such as it is. The pins are placed on the round openings of a frame sustained above the spotted end of a bowling alley in such a manner as to cause the centers of the openings in the frame to coincide with the centers of the spots in a perpendicular line. The openings in the pin-spotter rack, which are made large enough to permit the body of the pin to pass through, carry a device for detaining the pin in the opening until released by another device which frees the pin as it reaches the spot. The frame is mounted between standards, upon which it moves accurately by means of proper guides or pulleys. The weight of the frame is offset by counterweights of somewhat less heft than the frame and its load of pins, so that when the pins are all placed in their respective frame openings—ten in number—it descends automatically to the spots upon the alley. When freed from its burden of pins, it is drawn up out of the way by the counterweights. The commercial article varies somewhat from the device described in the patent, but not essentially. The specification of the patent set out in detail the various steps to be taken as those which the patentee has "so far practiced" in accomplishing his object. He adds:

"Though it may, of course, be carried out in other specific forms of mechanism * * *. Having now so fully described the construction and operation of my new pinsetter, made in that form shown in the drawings, that those skilled in the art can easily understand and practice my invention in either said shown and specific form, or under some modified construction, what I claim as new and desire to secure by letters patent is," etc.

The defendants employ what is termed the "Backus device," which is that, in part at least, of patent No. 771,963, granted to John C. Backus on October 11, 1904. The difference between the two devices, relied on by defendants, consists in: (1) The fact that the Backus spotter requires some manual assistance in making its descent to the spots; i. e., carries a heavier counterweight or its equivalent. (2) The further fact that the openings in the frame for the reception of the pins are not provided with means to keep the pins from falling through, so that they are laid horizontally or nearly so, upon the upper edges of the openings. (3) The further fact that the rack is provided with a movable frame which is tripped by the contact of its long legs with the floor, and in turn throws the pins into a perpendicular position in the rack, whereby they are placed upon the spots. The

pin-spotter rack is then withdrawn by its counterweights, as in the case of the patent in suit.

Manifestly, the first alleged difference amounts to nothing. The addition or subtraction of a few pounds of counterweights is of no consequence, and does not even call for the application of the doctrine of equivalents. The other two alleged variations from the device before the court, can be almost literally read upon the claims in suit. Whether they may be deemed equivalents for the apparatus in suit must depend upon the construction to be placed upon complainant's patent. The art is a simple one, and the patent but a short step removed from what may be termed a mechanical advance. It seems to be the fact, however, that a spotter of some kind is welcomed by those indulging in bowling. The conception of the idea of supplying some means for lightening the work and improving the service in bowling alleys along the lines of the devices in suit, belongs, so far as the record discloses, to complainant's grantor. He gave it concrete existence. He first located the rack over the spotted end of the alley, provided with raising and lowering appliances. He first conceived the idea of making the pin-holding openings of the rack coincident in center alignment with the spots. He set out one way in which it could be done, while at the same time he calls attention to the fact that this way was only one of several ways for placing the pins. What he had in mind was the general method, rather than the details. There was nothing new in any of the elements employed. The thing was to make the rack place the pins upon the spots and leave them there.

Defendants' method may be the better way. The patent in suit may even be imperfect in some feature. If, however, it is described in such terms "as to enable any person skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound, and use the same," it is a full compliance with the statute. If, as contended by defendant, complainant's device failed to release the pins promptly so as to leave them over the spots, or some other element of the combination worked clumsily, yet if the principle was disclosed, and it were apparent that all that was needed was more perfect or modified adjustment of the elements employed in order to make the device effective, the invention might be complete. What the patentee made use of was a recognized means for doing the very thing which defendants' means accomplished. What, if anything, it lacked, required nothing more than mechanical skill to supply. The most that defendant did in any case, was to make an improvement upon a detail of the patent in suit. There are innumerable well known equivalents, which could have been employed for adjusting the pins when they are once brought up to device which will guide them onto the spots.

Taking the whole pin-setter into consideration, I am of the opinion that it was possessed of patentable novelty—of a low order, to be sure, but appreciable—and that such novelty could not be, and was not in any way to be, found in the mere form or apparatus for standing the pins upright in the openings of the pin-setting rack, at any time. There is some contention on the part of defendants that

complainants' device is not operative. It, together with that of defendants, was placed in demonstration before me. The difference in operation of the two was negligible. They both appeared to do what is claimed for them. What defendants conceived was nothing more than the alternative suggested by a consideration of complainants' apparatus.

The infringement is clear, and the prayer of the bill is granted.

GIBBS LOOM HARNESS & REED CO. v. HOWARD BROS. MFG. CO.

(Circuit Court, D. Massachusetts. May 7, 1907.)

No. 171.

PATENTS—INVENTION AND INFRINGEMENT—HEDDLE-MAKING MACHINE.

The Gibbs patent, No. 626,900, for a heddle-making machine, claim 15, was not anticipated and discloses invention in the mode and means shown for twisting the wire. Claims 4, 5, 6, 7, 8, 13, and 14 are void for lack of invention. Claim 15, also, *held* infringed.

In Equity

Louis W. Southgate, for complainant.
George A. Rockwell, for defendant.

BROWN, District Judge. This suit involves claims 4, 5, 6, 7, 8, 13, 14, and 15 of letters patent No. 626,900, issued June 13, 1899, to William H. Gibbs, for a heddle-making machine. The specification alleges:

"The object of my invention is to provide an automatic power-driven machine for making and finishing wire heddles of substantially the construction illustrated in letters patent of the United States to Herman Vogelsang, No. 527,165, granted October 9, 1894.

"To these ends my invention consists of the parts and combinations of parts, as hereinafter described, and more particularly pointed out in the claims at the end of this specification."

The defendant denies that either of the above claims discloses a patentable invention. Infringement is not denied if the claims are valid.

The Vogelsang heddle is a device made of wire, and is used to control the warp threads in the production of a woven fabric. It is composed of two strands of wire soldered together so that the material forms substantially one compound strand of wire. A length of this wire is so manipulated that it results in a finished heddle having two end loops for attachment to the frames or harnesses of the loom, and a thread-eye, intermediate of the loops, through which the warp thread is passed. In making the Vogelsang heddle by hand, the soldered wire was split by an awl or hand punch to form the thread-eye, the wire twisted at either side of the split portion by turning the awl, the ends bent over, and then twisted so as to form end loops. The thread-eye is at right angles to the loops in the finished heddle. The Vogelsang heddle itself constitutes a complete direction as to the kind of

wire to be employed, to wit, a double-strand soldered wire, and also indicates the operations to be performed on this particular kind of wire. The strands must be separated in the middle, the ends bent to form loops, and four twists be put into the wire; one twist at each side of the space forming the thread-eye, and one twist at each end to complete the end loops.

In the machine of the patent in suit, wire of this special kind is used. It is passed through feed-rolls which turn it flat side up. A pair of knives cut off a suitable length for the blank. The end benders operate, preferably simultaneously, to form the loops at the end. A reciprocating punch separates the two strands in order to form the thread-eye. The blank being held in its position, the punch remaining in the thread-eye, and the end loops being held firmly, four twisting-jaws engage the body portion of the blank, one on each side of the thread-receiving eye, and one where each end loop is bent back to the body portion of the heddle, and four twists are then simultaneously formed by rotating the body portion of the blank. Finally, the complete heddle is delivered sideways out of the machine. The machine is practical, increases the speed of production, and turns out a product much more perfect and uniform than is made by hand processes.

In the prior art, heddles had been made by machinery from a single strand of ordinary wire which was first fed to the machine in the form of a loop, and then twisted without a punching operation. The two parts of the wire blank being parallel at the place of the thread-eye, an "eye-former" was interposed between them to hold them apart while a twist was being put in at each side of the "eye-former" to make the thread-eye.

The principal prior patent is to Brown & Ashworth, No. 77,713, dated May 12, 1868. The specification is somewhat complicated and detailed, but it is enough to consider the twisting operation. Because the heddle is made of a single strand of wire looped throughout its entire length, the entire number of twists differs from the number of twists in the Vogelsang heddle. In Brown & Ashworth, however, three twists are put in simultaneously. Where the wire is bent back on itself, it forms a loop at (let us say) the right-hand side. A twisting-jaw brings the two parallel parts of the wire together and twists them to form one of the end loops; two twisting-jaws, one at either side of the "eye-former," twist the two parallel parts together at those points. Here are three twists made by twisting-jaws simultaneously engaging the body portion of the wire, and operating to put in three twists. The "eye-former" occupies the same position that is occupied by the punch in the machine of the patent in suit. At this first twisting operation there is formed the right-hand end loop and the thread-eye. At the other end (let us say the left end) of the heddle a different operation is necessary. It is necessary to join the two parallel portions of wire in two places to complete the left end loop. Whereas, in the Vogelsang heddle, each end loop is formed by benders which bend the end on to the body portion of the wire; in the Brown & Ashworth machine it is necessary to form the left end loop by first twisting the wire next the body portion, and then twisting the two ends of the wire together in order to complete the loop. Five twists

are necessary. The peculiar wire of Vogelsang obviates the necessity for the fifth twist for the formation of one of the end loops.

It is apparent, I think, that, if invention is to be found in the machine of the patent in suit, it must be in the mode of forming the twists and the means therefor. All operations up to this point seem to be obvious and familiar mechanical operations. The feature which does not seem to have been anticipated by the prior art is the following: A reciprocating punch, which has been used in the prior art only to split the soldered strands, remains in position to co-operate with twisting-jaws; the end loops are held firmly; four twisting-jaws simultaneously grasp the body portion of the wire and simultaneously put in the twists, the right-hand twist for the end loop being formed by holding the right-hand loop firmly and twisting the body portion upon it; the punch, in the formation of the thread-eye, co-operates with twisting-jaws at either side of the punch, the left-hand loop being formed by the co-operation of the left-hand twisting-jaws and the holder of the left-hand loop. Repeating: The wire blank, when subjected to the twisting process, is held firmly upon the punch and by the end holders, and the four twisting-jaws operate simultaneously upon the body portion of the wire in co-operation with the punch and with the end holders. While the use of twisting-jaws to twist the body portion of the wire is disclosed by the prior art, and the co-operation of an eye-former and twisting-jaws is shown, yet it may be fairly said that the prior art does not disclose the combination and co-operation of a punch, two end holders, and four twisting-jaws, for the simultaneous performance of the entire twisting operation. The machine is an embodiment of the conception of this novel co-operation of parts. That there is produced by these means a very perfect and very uniform type of heddle with a considerable speed is not denied.

While I agree with the defendant that the operations preceding the twisting of the wire might be regarded merely as such steps as would naturally occur to a mechanic, yet they are steps in the production of the heddle, and it has not been made to appear satisfactorily that the co-operation of parts following the splitting of the double stranded wire and the bending of the loops was so obviously the result of mere mechanical skill, as distinguished from invention, that the patent should be declared void for lack of invention.

Claim 15 is as follows:

"(15) In a heddle-machine, the combination of a feeding mechanism for feeding a double strand of wire into position to be acted upon, a twisting mechanism, end-benders for bending the ends of the wire into position to be engaged by the twisting mechanism to form the end loops of a heddle, and a punch for separating the wire strands to form a thread-receiving eye near the middle of the heddle, substantially as described."

This, in my opinion, is for a combination which is not anticipated, and in which there is a co-operation of parts different from that of the prior art.

Claims 13 and 14 are as follows:

"(13) In a heddle-machine, the combination of a feeding mechanism for feeding a double strand of wire into position to be acted upon, and a reciprocating

punch arranged to separate said double strand of wire to form a thread-receiving eye near the middle of the heddle, substantially as described.

"(14) In a heddle-machine, the combination of a feeding mechanism for feeding a double strand of wire into position to be acted upon, a vertically-movable punch, and a cam for actuating the punch, said punch being arranged to separate the strands of wire to form a thread-receiving eye near the middle of the heddle, substantially as described."

It is said that there is involved the conception of the use of a feeding mechanism that will necessarily feed and advance the double strand of wire in definite position in the machine, so that it will lie in proper position with respect to the center of the eye-splitting and forming punch. I am of the opinion that this is merely mechanical skill, and that these claims disclose nothing which was not substantially disclosed in the prior art.

Claims 4, 5, 6, 7, and 8 are as follows:

"(4) In a heddle-machine, the combination of end-benders for simultaneously bending back both ends of a wire blank upon the body portion thereof, and a twisting mechanism for rotating the body portion of the heddle while its ends are held stationary, substantially as described.

"(5) In a heddle-machine, the combination of a feeding mechanism for feeding a wire blank into position to be acted upon, end-benders for simultaneously bending back both ends of the wire blank upon the body portion thereof, and a twisting mechanism for rotating the body portion of the heddle while its ends are held stationary, substantially as described.

"(6) In a heddle-machine, the combination of twisting-jaws, end-benders for simultaneously bending back both ends of a wire blank upon the body portion thereof, and mechanism for actuating the twisting-jaws to engage with and rotate the body portion of the heddle while its ends are held stationary, substantially as described.

"(7) In a heddle-machine, the combination of formers, end-benders for simultaneously bending back both ends of a wire blank, and a twisting mechanism for rotating the body portion of the heddle while its ends are held stationary, substantially as described.

"(8) In a heddle-machine, the combination of a feeding mechanism for feeding a wire blank into position to be acted upon, end-benders for simultaneously bending back both ends of the wire blank, and a twisting mechanism for rotating the body portion of the heddle while its ends are held stationary, substantially as described."

These claims, it is said, cover the use of end-benders for simultaneously bending back both ends of the wire blank upon the body portion thereof, and a twisting mechanism which will rotate only the body portion of the heddle while its ends are held stationary. The simultaneous operation of the end-benders does not amount to patentable invention. U. S. Peg Wood Co. v. F. B. Sturtevant Co., 125 Fed. 378, 60 C. C. A. 244. Rotation of the body portion of the wire is shown in Brown & Ashworth, and the claims do not include the punch, which seems essential to any combination or operation which is of substantial novelty. In view of the prior art, I am of the opinion that, without the co-operation of the punch, a combination of end-benders and a twisting mechanism to rotate the body portion of a wire would not involve a substantial or patentable novelty.

While I regard the question of invention as close, yet claim 15 is for a combination which is new, and which seems to me to have a mode of operation which may be regarded as the result of an inventive conception.

I find claim 15 valid and infringed. I find claims 4, 5, 6, 7, 8, 13, and 14 invalid for lack of invention.

A decree may be entered accordingly.

In re REYNOLDS.

(District Court, W. D. Arkansas, Harrison Division. April 27, 1907.)

1. CHATTEL MORTGAGES—BILL OF SALE—DUTY TO RECORD.

A bill of sale conveying the grantor's stock of goods, fixtures, storehouse, and lot, as security for money loaned, was, in fact, a chattel mortgage, within Kirby's Dig. Ark. § 5396, declaring that a mortgage shall be a lien only for the time it is filed for record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 23–41.]

2. SAME—ACKNOWLEDGMENT—RECORD—RIGHTS OF CREDITORS.

A bill of sale, which was in fact a mortgage, covered the grantor's stock of merchandise, fixtures, storehouse, and lot; the grantor being left in possession with power to sell the merchandise in the ordinary course of business, and to purchase additional goods to keep up the stock. *Held* that, though such mortgage was fraudulent and void as to the stock of goods, it was valid as between the parties from the date of its execution, in so far as it covered the fixtures and real property, though not acknowledged or recorded, and as to such property was valid as to the grantor's creditors from the date the grantee took possession, though the creditors might have had prior actual notice of its existence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 152, 372–392.]

3. BANKRUPTCY—LIENS—CHATTEL MORTGAGE—PREFERENCE.

Where a bill of sale of a merchant's stock, fixtures, storehouse, and lot, which was in fact a mortgage, was not acknowledged or recorded, as required by the laws of the state, and was only valid as between the parties in so far as it affected the fixtures and real property, and as against creditors only after the grantee took possession, which did not occur until after the grantor had become insolvent, and within four months prior to the institution of bankruptcy proceedings, such sale was void as a preference, as defined by Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689].

In the Matter of the Review of the Findings of the Referee Refusing to Allow the Claim of Mrs. Z. T. Poynter as a Secured Claim.

Alleyn Smith, for claimant.

Crump, Mitchell & Trimble, for opposing creditors.

ROGERS, District Judge. This case was tried before the referee on an agreed statement of facts. It appears from the agreed statement of facts, and other records before me: That on the 1st day of May, 1906, Mrs. Z. T. Poynter loaned to the bankrupt, John W. Reynolds, $1,200 in money, and at the same time Reynolds executed and delivered to her, as security for the money, the following paper:

"Bill of Sale.

"Know all men by these presents: That I, J. W. Reynolds, of Gassville, Baxter county, Arkansas, for and in consideration of the sum of twelve hundred dollars, to me in hand paid by Z. T. Poynter, of Gassville, Baxter county,

Ark., at and before the delivery of these presents, the receipt whereof is hereby acknowledged, do hereby bargain, sell, grant, convey, and deliver unto the said Z. T. Poynter the following property, goods and chattels, to wit: All of my entire stock of general merchandise, said stock located in the town of Gassville, Baxter county, Arkansas, said stock consists of hats, caps, shoes, dry goods, and notions, farming implements, hardware of all kinds, clothing, groceries, and the fixtures belonging to said stock 1 safe one store house and lot, located in the town of Gassville, Baxter county, Ark., owned by J. W. Reynolds. To have and to hold the same unto the said Z. T. Poynter her executors, administrators, and assigns forever. And the said J. W. Reynolds for myself and for my heirs executors and administrators do hereby covenant with the said Z. T. Poynter and with her executors, administrators, and assigns that I am the true and lawful owner of the said described property, goods, and chattels hereby sold, and have full power to sell and convey the same; that the title so conveyed is clear, free, and unincumbered; and, further, that I will warrant and defend the same against the claims of all persons whomsoever.

"Executed this the 1st day of May, A. D. 1906. J. W. Reynolds."

That no part of said debt has been paid. That between May 1, 1906, and March 19, 1907, Reynolds, the bankrupt, remained in possession of all the property described in the bill of sale, and continued to sell, and had the right to sell, in the usual course of business, whatever goods out of said stock of merchandise he wished, and bought and added to the same as he did before the bill of sale was executed, and all of these facts were known to Mrs. Poynter, and she gave no notice to any one of the existence of said bill of sale, which was never acknowledged or recorded at any time. That the bankrupt was insolvent on the 19th of March, 1907, and such fact was known to Mrs. Poynter at that time. That on the 19th of March, 1907, the bankrupt delivered to Mrs. Poynter possession of all the property described in the bill of sale, and she retained possession thereof until dispossessed by the sheriff of the county in which the property was situate under an attachment against the bankrupt, which occurred about three hours after Mrs. Poynter came into possession thereof. On March 23, 1907, the bankrupt made a deed, conveying to Mrs. Poynter the real property mentioned in the bill of sale, which was subsequently reconveyed, and all the property at the time the petition in bankruptcy was filed is in the possession of the trustee; and Mrs. Poynter now asks to have her claim allowed as a secured claim, to have priority over the general creditors. It is agreed that the sole question presented by this record is whether or not the failure to acknowledge and record the bill of sale more than four months before the filing of the petition in bankruptcy was cured by Mrs. Poynter taking possession of the mortgaged property before the proceedings in bankruptcy were instituted, and whether such possession related back to and had the effect of making valid the mortgage from the date of its execution.

It is conceded that the bill of sale was, in fact, a mortgage, and under the decisions of the Supreme Court of Arkansas that concession is correct. Bryan v. Hobbs, 72 Ark. 635, 83 S. W. 341; Land v. May, 73 Ark. 415, 84 S. W. 489; Sharp v. Fleming, 75 Ark. 557, 88 S. W. 305; James v. Mallory, 76 Ark. 514, 89 S. W. 472.

Section 5396, Kirby's Dig. St. Ark., is as follows:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

In Etheridge v. Sperry, 139 U. S. 276, 11 Sup. Ct. 569, 35 L. Ed. 171, the United States Supreme Court said:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity of rulings on this question by the courts of the several states, but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

To the same effect see In re H. G. Andrae & Co., 9 Am. Bankr. Rep. 135, 117 Fed. 561, decided by the United States District Court for the Eastern District of Wisconsin. For the correct determination of the question here presented, we must, therefore, look to the decisions of the Supreme Court of Arkansas construing the statute above quoted. Before doing so, it may be noted that the United States Circuit Court of Appeals for this (the Eighth) circuit, held in Eagan State Bank v. Rice, 9 Am. Bankr. Rep. 437, 119 Fed. 107, 56 C. C. A. 157, that:

"The legal effect of a mortgage upon a stock in trade where the mortgagor remains in possession with power to sell in the usual course of business, and he makes no attempt to comply with a provision therein that he shall make daily deposits of all sales to apply upon the debt secured, is to hinder and delay his creditors, and, if given within four months prior to the filing of his petition in bankruptcy is null and void under section 67e of the bankruptcy act, Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]."

In Lund v. Fletcher et al., 39 Ark. 325, 43 Am. Rep. 270, the court said:

"A mortgage of articles of merchandise left in the possession of the mortgagor, with power to sell in the ordinary course of business, is void, except between the parties to it; but, as to the other property not to be sold by the mortgagor, it is good."

See, also, Fink v. Ehrman, 44 Ark. 310.

These decisions strike down the mortgage in controversy, in so far as it applies to chattels left in the hands of the bankrupt with the right to sell in the usual course of business. The mortgage on the stock of merchandise left in the possession of the bankrupt with the right to sell in the usual course of business, and to buy and add new stock in the same manner, was void as to creditors ab initio, and continued void even after the possession was taken, for the reason that it was a fraud upon creditors under the Arkansas decisions. But the mortgage covered, in addition to the stock of merchandise, an iron safe and a house and lot, and fixtures. Under the Arkansas decisions the mortgage on the house and lot, fixtures, and safe, in the absence of fraud, is valid, and the lien fixed as between the parties from the date of its execution, although not acknowledged and recorded (Martin et al. v. Ogden, 41 Ark. 191), but it was invalid as to creditors until possession was taken

by the mortgagee, even though the creditors might have had actual notice of its existence from the date of its execution. Id.; Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732; Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Hannah v. Carrington, 18 Ark. 105; Carnall v. Duvall, 22 Ark. 136; Dodd v. Parker, 40 Ark. 536; Ringo v. Wing, 49 Ark. 457, 5 S. W. 787; Leonhard v. Flood, 63 Ark. 168, 56 S. W. 781; Smead v. Chandler, 71 Ark. 517, 76 S. W. 1066, 65 L. R. A. 353.

Under the agreed facts Mrs. Poynter gave no notice to anyone of the existence of the mortgage, and it must be found that no one had notice until possession was delivered to her by the bankrupt on the 19th of March, 1907. On that day, but three hours after she took possession of the property covered by the mortgage, the sheriff of the county dispossessed her under a writ of attachment; but she had then acquired, by the act of taking possession, a lien against all parties who subsequently acquired rights in the property. Apple White v. Harrell Mill Company, 49 Ark. 279, 5 S. W. 292. Did this right, so acquired, relate back to the execution of the mortgage so as to be valid against the creditors under the bankruptcy law? Under the laws of Arkansas, as we have seen, the lien does not attach as against creditors until the mortgage is filed for record, and in Birnie et al. v. Main, 29 Ark. 595, the court said, "The effect of recording a mortgage or other conveyance is not retrospective." Nor, in the opinion of the court, does the taking possession by the mortgagee of mortgaged property operate retrospectively. This conclusion is in harmony with the statute itself, which expressly provides that a mortgage, whether for real or personal property, "shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before." If the lien attached at all in this case, it was when the possession was taken, and not before, for the mortgage has never been recorded. In A., T. & S. F. Ry. Co. v. Hurley et al. (Eighth Circuit Court of Appeals of the United States, December Term, 1906) 153 Fed. 503, that court, speaking through Adams, J., said:

"The trustees stand in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. In Thompson v. Fairbanks, the Supreme Court said: 'Under the present bankruptcy act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act.'"

It was held by the United States Court of Appeals for the Seventh Circuit in Re Antigo Screen Door Company, 10 Am. Bankr. Rep. 366, 123 Fed. 249, 59 C. C. A. 248, that, in the absence of fraud, such a mortgage is valid under the laws of Wisconsin, as against the trustee under the bankruptcy act of 1898. An examination of the cases cited

in that opinion will show that other courts, notably Massachusetts, have held the same. The evidence does not disclose any fraud when the mortgage was executed as to the property now under discussion, or even that the mortgagor was then insolvent. It was executed for a loan then made. It took nothing away from creditors. The loan was made in good faith, and the mortgagee got possession under it before any liens attached, and before bankruptcy proceedings began, but within four months of the institution of bankruptcy proceedings. I do not find such a mortgage is void as to creditors under the Arkansas decisions, and, if not void as to creditors under the Arkansas decisions, it is not invalid under the bankruptcy act as to the trustee, unless made void by some positive provision of the act. Is the mortgage void, as against the trustee, by any positive provision of the bankruptcy act? This question, I think, has been answered conclusively by the Eighth Circuit Court of Appeals in the case of First National Bank of Buchanan County St. Joseph v. Connett, reported in 142 Fed. 33, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148. That case is, to all intents and purposes, on all fours with the case at bar. Indeed, the only difference is that, in that case, the mortgagor was insolvent when the mortgage was given, but the mortgagee was not aware of it. In the case at bar the testimony does not show whether the mortgagor was insolvent when the mortgage was given, or not. But he was insolvent, and the mortgagee knew it, when she took possession. The difference is immaterial, in the opinion of the court, and therefore the two cases are on all fours. In that case Judge Hook, speaking for the full court, said:

"Section 57g of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides that the claims of creditors who have received preferences voidable under section 60b shall not be allowed unless such preferences are surrendered. For the definition of a preference we must look to subdivision 'a' of section 60, and to subdivision 'b' for the element which makes it voidable. Section 60a provides, among other things, that a person shall be deemed to have given a preference if, being insolvent, he has *within four months before the filing of the petition* made a transfer of any of his property, the effect of which 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; also, *where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required.*"

By the amendatory act of 1903 the first of the italicized provisions was transposed from section 60b of the original act, while the latter is an entirely new feature. Subdivision "b" of this section, to which reference is made in 57g, provides that, if a bankrupt shall have given a preference and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee. The bankrupt was insolvent when he executed the mortgages and when they were recorded. The mortgages constituted a transfer of his property, and their effect was to enable the bank to obtain a greater percentage of its claims than other creditors. They were recorded within four months of the filing of the petition in bankruptcy. Therefore, assuming that a recording is required

by the law of Missouri, it follows that a preference arose under section 60a. And, in our opinion, it also follows that the preference arose when the mortgages were recorded, and not as of the date they were given. In other words, the amendment of 1903 was intended to remedy the evil resulting from secret instruments of transfer of the bankrupt's property, the withholding of them from record until shortly before the institution of bankruptcy proceedings, and the then assertion of them as of the prior date of their execution and delivery. And this was accomplished by making the rights of a creditor thus favored determinable by the conditions existing when he caused the transfer to him to be recorded as required by the state law rather than by those existing at the time he secured it. Under the act of 1867, not only the question of requirement to record a chattel mortgage, but also the effect of noncompliance therewith, were exclusively controlled by the law of the state. The same construction has been applied to the original act of 1898. Unless there has been some departure from this construction in its relation to voidable preferences, the amendment of 1903 of section 60a, upon which subdivision "b" thereof depends, is wholly without significance. Contrary to a presumed intent in legislative amendments, it serves no purpose and performs no office whatever. Such result can be reasonably avoided by this construction of the amendment. It affects only those instruments of transfer which the state law requires to be registered or recorded; and, as to those, where there is delay, it provides that upon the question of voidable preference they shall speak as of the day of compliance with the local law, and not as of the day they were given. This would preclude the application of the doctrine of relation, and it would entail a consequence upon a failure to record that might not be imposed by the law of the state; but we deem it to be not only within the letter of the amendment, but also within the intention to correct an evil which flourished under the construction of the original act. Within the meaning of amended section 60a of the bankruptcy act, the Missouri law (Rev. St. 1899, § 3404 [Ann. St. 1906, p. 1936]) required the recording of chattel mortgages. To be sure, an unrecorded mortgage is not pronounced void absolutely and under all circumstances, but it "is required to be recorded" in the sense in which that phrase is customarily used, and the language of requirement is similar to that employed in the registry laws of most of the states. The word "required," found in the phrase, "the recording or registering of the transfer, if by law such recording or registering is required," of the amendment of section 60a, has reference to the character of the instrument of transfer required to be recorded by the state law rather than to the particular individuals who by reason of adventitious circumstances may or may not be affected by an unrecorded instrument. Thus an affirmative answer would unhesitatingly be given to the inquiry: "Does the law of Missouri require the recording of chattel mortgages?"

This case was followed by the Sixth Circuit Court of Appeals in the case of Loeser v. Savings Deposit Bank & Trust Company (C. C. A.) 148 Fed. 975.

The conclusion reached is that the mortgage is void in toto under section 60a of the bankruptcy act of 1898 as amended by section 13,

Act Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689]. An order will be entered disallowing the claim of Mrs. Poynter in toto until she has surrendered all the property covered by the mortgage in controversy in her possession or under her control. Upon a compliance with this order her claim will be allowed as an unsecured claim.

The referee is further directed to proceed with the administration of the bankrupt's estate in conformity with this opinion and the provisions of the bankruptcy law.

BAUMGARTEN et al. v. ALLIANCE ASSUR. CO., LIMITED, OF LONDON, ENGLAND.

(Circuit Court, N. D. California. April 17, 1907.)

No. 14,234.

1. CORPORATIONS—CITIZENSHIP—RESIDENCE.

A corporation organized under the laws of any one of the United States is in contemplation of law a citizen and resident of the state in which it is incorporated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 141–147.

Citizenship for purposes of federal jurisdiction, see note to St. Louis, I. M. & S. Ry. Co. v. Newcom, 6 C. C. A. 174; Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. REMOVAL OF CAUSES—RESIDENCE—FOREIGN CORPORATIONS.

Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], provides for the removal of causes in which there shall be controversy between citizens of the state and foreign states, citizens, or subjects, and section 2 declares that all such suits may be removed to the Circuit Court of the United States for the proper district by the defendant or defendants therein being nonresidents of that state. *Held* that, where defendant was an alien insurance corporation, it was a nonresident of California within such act, though it had a branch office within the state for the transaction of business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 64–68.]

Edward Lynch and Bertin A. Weyl, for plaintiffs.
T. C. Van Ness, for defendant.

DE HAVEN, District Judge. This is an action to recover a personal judgment against the defendant, an alien corporation, upon certain policies of insurance against fire, executed and delivered by it to the plaintiffs in the city of San Francisco, state of California. The amount sued for exceeds, exclusive of costs and interest, the sum of $2,000. The action was originally commenced in the superior court of the city and county of San Francisco, in this state, and the defendant within the time allowed by law to plead to the complaint appeared in the state court, demurred to the complaint, and at the same time filed its petition for removal of the case to this court, as provided in Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and amended by Act August 13, 1888, c, 866, 25 Stat. 433 [U. S. Comp.

St. 1901, p. 508]. In its petition for removal the defendant alleges that when the suit was commenced, and at the date of filing such petition, the plaintiffs were and are citizens of the state of California, and that the defendant "was and still is a citizen of, and a corporation duly organized and existing under and by virtue of the laws of, and a resident of, the United Kingdom of Great Britain and Ireland." Upon the filing of the petition and giving the bond required by law, the state court made an order removing the case into this court, and plaintiffs have moved to remand the same to the state court.

It is provided in section 1 of the act above referred to that:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different states, * * * or a controversy between citizens of a state and foreign states, citizens, or subjects."

And it is further provided in section 2 of the same act that all such suits then pending, or which may be subsequently brought in any state court, "may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

As before stated, the petition for removal of the case to this court alleges that the defendant is a corporation organized and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland, and a resident of that kingdom. This is a sufficient allegation that the defendant is a nonresident of this state, if an alien corporation doing business in the state and having a branch office therein for the purpose of the transaction of such business is in the sense of the law to be deemed a resident of the country under whose law it was created and exists; and whether it is to be so regarded or not is the only question presented by the motion to remand. It has been held by the Supreme Court in a long line of decisions that a corporation organized under the laws of any of the United States is, in contemplation of law, a citizen and resident of the state in which it was incorporated. In Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274, the court, in speaking upon this subject, said:

"It [the corporation] must dwell in the place of its creation, and cannot migrate to another sovereignty. But, although it must live and have its being in that state, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another."

This is quoted with approval in Shaw v. Quincy Mining Company, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; the court saying:

"This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it."

It is claimed by the plaintiffs that this rule is not applicable to an alien corporation, and that such a corporation may properly be held

to be a resident of any state where it has an office and engages in the transaction of business through local agents. This was so decided in Miller v. Eastern Oregon Gold Mining Company (C. C.) 45 Fed. 348, and in Gilbert v. New Zealand Ins. Co., 49 Fed. 884, 15 L. R. A. 125. The argument in support of this proposition is thus stated in Miller v. Eastern Oregon Gold Min. Co. (C. C.) 45 Fed. 348, just cited:

"It is not probable that Congress intended to give a corporation, the subject of a foreign state, engaged in business, with a local habitation in the United States, the option of suing a citizen of the United States in a national court, and to deny such citizen having a controversy with or a demand against such foreign subject, engaged in business in the United States, the corresponding privilege. And yet, if a corporation, the subject of a foreign state cannot become an inhabitant of this district, because it cannot migrate here and become a citizen of the state, such result would follow."

I cannot concur in this view. In Barrow Steamship Company v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964, the court said:

"The object of the provisions of the Constitution and statutes of the United States, in conferring upon the Circuit Courts of the United States jurisdiction of controversies between citizens of different states of the Union, or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides."

It was for the evident purpose of effecting this object that Congress in section 2 of the act above referred to provided that any suit brought in a state court, in which the parties are citizens of different states, or in which the controversy is between a citizen of the state and an alien, may be removed into the Circuit Court of the United States of the proper district, when the defendant is a nonresident of the state in which the action is brought. The nonresident defendant may be either a natural person or a corporation; and, as to domestic corporations—that is, corporations organized under the laws of the several states of the Union—it is settled beyond all controversy in the federal courts that they are residents of the state in which they are incorporated; and why should there be a different rule when the question is as to the residence of an alien corporation? Both the domestic and the alien corporation are artificial persons, and there is precisely the same reason for holding in the one case as in the other that the legal residence of a corporation is in the country or state from whose laws its being is derived, and that such residence is not changed by doing business elsewhere. This conclusion is sustained by the decision of the Supreme Court in the case of In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211. In that case the court in construing that clause of section 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, which provides that no civil suit shall be brought before either a Circuit or District Court of the United States "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," held that such clause does not apply to an alien corporation, and a reading of the opinion will disclose that the reason for thus holding is that an alien corporation is not an inhabitant of any district of the

United States. In the case of In re Keasbey & Mattison Co., Petitioner, 160 U. S. 229, 16 Sup. Ct. 273, 40 L. Ed. 402, the court in distinguishing the case then before it from that of In re Hohorst, just cited, said:

"That case is distinguishable from the one now before the court in two essential particulars: First. It was a suit against a foreign corporation, which, like an alien, is not a citizen or an inhabitant of any district within the United States; and was therefore not within the scope and intent of the provision requiring suit to be brought in the district of which the defendant was an inhabitant. See Galveston, etc., Railway v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248. Second. It was a suit for the infringement of a patent right, exclusive jurisdiction of which had been granted to the Circuit Courts of the United States by section 629, cl. 9, and section 711, cl. 5, of the Revised Statutes [U. S. Comp. St. 1901, pp. 504, 578], re-enacting earlier acts of Congress, and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states."

It may be added in conclusion that in Howard v. Gold Reefs of Georgia (C. C.) 102 Fed. 657, and in Shattuck v. North British & Mercantile Insurance Co., 58 Fed. 609, 7 C. C. A. 386, it was distinctly held that an alien corporation is a nonresident within the meaning of the statute under consideration here, and entitled to have a suit brought against it by a citizen of a state in a state court removed to the Circuit Court of the United States for the proper district for trial. In the case last cited, the Circuit Court of Appeals for the Eighth Circuit, Caldwell, Circuit Judge, delivering its opinion, said:

"A corporation created by the laws of a foreign country does not become a citizen or resident of a state of this Union by merely opening an office in the state, and transacting business there; and a petition for removal which shows that the defendant is a corporation chartered by the laws of another state or a foreign country does not have to allege negatively that it is not a citizen or resident of the state in which suit is brought against it, because in legal contemplation its residence and citizenship can only be in the state or country by the laws of which it was created, although it may have an office and do business in other states whose laws permit it."

This, in my opinion, correctly states the law applicable to the question now considered, and it follows therefrom that the motion to remand must be denied. So ordered.

In re BISHOP.

Ex parte M. HORNIK & CO. et al.

(District Court, D. South Carolina. April 29, 1907.)

1. BANKRUPTCY—POSSESSION OF PROPERTY—RIGHTS OF LANDLORD.
   On an adjudication of bankruptcy against a tenant, the latter's property is in custodia legis, the landlord, being thereupon precluded from enforcing his rent claim by distress, is only entitled to proceed against the trustee in the bankruptcy court.
2. SAME—PREFERRED CLAIMS—RENT.
   Under S. C. Civ. Code 1902, §§ 2427, 2428, 2429, giving a landlord a preferred lien for rent on a tenant's personal chattels, situated on the leased premises, enforceable by distress, on the tenant's being adjudged a bankrupt, the landlord possessed a preferred claim as against the

proceeds of such property for rent due to the date of the bankruptcy adjudication, as provided by Bankr. Act July 1, 1898, c. 541, § 64, subd. 5, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], giving priority to debts owing to any person who by the laws of the state is entitled to priority.

In Bankruptcy.

A. H. Smythe, for landlord.
B. C. Bettinger, for creditors.

BRAWLEY, District Judge. W. L. Bishop was a merchant, doing business in the town of Bowman, in the state of South Carolina, occupying a store in that town, which he rented from Samuel Dibble at the rate of $20 per month. The rent had been paid up to the 1st day of September, 1906, but was due from that date. On February 4, 1907, Bishop was adjudged a bankrupt on his own petition, and the case was referred to the referee, John S. Bowman, Jr. On February 18, 1907, the first meeting of creditors was called, and N. A. Hunt was elected trustee. Dibble filed proof of his claim as landlord, claiming to be a preferred creditor, and entitled to the preference out of the sale of the goods. At that date the stock of merchandise belonging to the bankrupt was in the store, and remained there for several days after. No objection was made to the reception of the claim as a preferred claim. Hunt, the trustee, and his counsel, W. L. Glaze, were both present. It was agreed that as the store would probably be occupied until the 1st of March, the claim should be made as of that date. Dibble owed the bankrupt $8.12, so that this being deducted from the six months' rent of $120 leaves $111.88, for which amount Dibble filed proof, as landlord, as a preferred claim. The meeting was then adjourned until the 25th day of February. On that day, the goods having been in the meantime sold and removed, an order was made by the referee allowing the claim of the landlord for the amount of $111.88, and the same ordered to be paid by the trustee. Attorney for the trustee was present at this meeting, and made no objection to the order. It is conceded that the proceeds of the sale of the goods were largely in excess of the claim of rent, so that if the rent is a preferred claim, there is enough from the proceeds of the sale of the goods, in the hands of the trustee, to pay the rent in full and leave a surplus. Subsequently a petition was filed by N. A. Hunt & Company and M. Hornik & Company, asking to set aside the order by the referee on February 25, 1907, and disallow the preference claimed by Dibble. The court ordered the record certified by the referee, and upon the certificate and supplementary certificate and the record in the case, this hearing has been had.

The question presented is whether or not the claim of the landlord for rent since the 1st day of September is entitled to priority of payment out of the proceeds of the sale of the goods. The petitioners allege that inasmuch as he never exercised his right as landlord by a distraint, he has no lien or right to priority of payment. Section 64 of the bankrupt act of July 1, 1898, c. 541, 30 Stat. 563, [U. S. Comp. St. 1901, p. 3447], sets forth the order of priority of claims against the bankrupt act, and under subdivision 5 is classified:

"Debts owing to any person who by the laws of the states or of the United States is entitled to priority."

The question is whether the rent is by the law of the state of South Carolina entitled to priority over other claims. The history of the rights of the landlord in the matter of rent is stated by the Supreme Court of South Carolina in the case of Ex parte Knobloch, 26 S. C. 333, 2 S. E. 612, as follows:

"We derive our law of distress for rent from England. * * * The right is nowhere exactly given by statute, but it comes from the common law, which allowed the landlord without sanction of legal process to issue his own warrant of distress and deliver it to his bailiff, with authority to summarily seize all the goods and chattels, with certain known exceptions, which could be found on the demised premises, whether they belonged to the tenant or a stranger. This great power was defined, protected, and enlarged by certain statutory provisions, and notably by a statute * * * known as the 'Statute of Ann,' which, among other things, provided that if the tenant fraudulently removed his goods from the premises to escape distress the landlord, within five days, might follow and seize them under his warrant, 'provided that nothing within this act contained shall extend or be construed to extend to empower such lessor or landlord to take or seize any goods or chattels as a distress for arrears of rent, which shall be sold bona fide, and for a valuable consideration before such seizure made.'"

The provisions of the statute of South Carolina under which this priority of payment is claimed is to be found in section 2427 of the Code of Laws of South Carolina 1902, which is as follows:

"Sec. 2427. No goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liabe to be taken by virtue of an execution or any pretense whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution: Provided, that said arrears of rent do not amount to more than one year's rent; in case the said arrears shall exceed one year's rent, the party at whose suit such execution is sued out, on paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

In the following section (2428) the right was given to the landlord to take and seize the goods and chattels either upon the premises or within 10 days after they had been removed therefrom. The next section (2429) however, provides that the landlord should not be entitled to seize any goods or chattels as a distress for rent which had been sold bona fide and for valuable consideration, before such seizure was made.

In the Case of Knobloch, above quoted, the court held, where the tenant had executed a mortgage on the property, that after condition broken, it no longer belongs to the tenant in his own right, and therefore was not liable to distress. The result of these decisions was a proviso to section 2429, which, while protecting the rights of the mortgagee whose mortgage antedates the contract under which the tenant entered, postpones the claim of a mortgage made under such con-

tract to the landlord's prior right to distraint. In the case of Bischoff v. Trenholm, 36 S. C. 75, 15 S. E. 346, the question arose whether the landlord could distrain for rent after the tenant had made assignment for the benefit of his creditors, and the court held that, as the property no longer belonged to the assignor in his own right after assignment had been made, it was not subject to distress in the hands of the assignee. The result of this decision was a further amendment to the law, found also in the proviso of section 2429, which protected the rights of the landlord to levy and distrain on property in the hands of the assignee or the tenant.

While a voluntary proceeding in bankruptcy is in effect equivalent in some respects to an assignment for the benefit of creditors, there is this essential difference—that inasmuch as the adjudication of bankruptcy is a judicial act, and thereby the property is taken in custodia legis, the landlord cannot distrain upon such property. It would be a contempt of the court for any constable or any other agent of the landlord to interfere with the possession of the court. If such a levy was attempted, the landlord would gain nothing by it. In the case In re Duble, 9 Am. Bankr. Rep. 121, 117 Fed. 794, it was held that:

"A landlord, who, after his tenant, owing more than a year's rent, is adjudged bankrupt, distrains for the full amount of the rent due, takes nothing by the proceeding, as all the goods of the bankrupt are in custodia legis; but he is entitled out of the proceeds of the sale thereof to the year's rent, as a preferred claim under the Pennsylvania statute, and preserved by the bankrupt act."

See, also, In re Gerson, 2 Am. Bankr. Rep. 170.

The court, however, holds that inasmuch as by this action in taking possession of the property the landlord is prevented from making an actual levy and distress, that the court will permit him to present his claim as a preferred claim, and claim in priority what is due to him as landlord. In re Hoover (D. C.) 113 Fed. 137, the court, citing the act of Pennsylvania, similar in effect to the act of South Carolina, held:

"The bankrupt court having taken possession of this property thus liable for the rent, its process whereby the same was sold must, for the purpose of this statute, be regarded as an equitable execution. The case is within the equity of the statute."

And the claim for rent due at the time of taking such goods under the adjudication in bankruptcy, not exceeding one year's rent, was allowed.

If the court thus prevents by its seizure the distress by the landlord, has the landlord a lien which he can enforce by petition or proper proof of debt against the proceeds of goods in the hands of the court? In his valuable treatise on Bankruptcy (5th edition, p. 505) Collier draws a distinction between a lien and a debt entitled to priority, and says under the head of liens:

"As previously stated, mere liens are not priorities. As where under a statute a distress for rent creates a lien upon the property distrained, the lessor has no lien upon the property if the proceeding was instituted after the lessee was adjudicated a bankrupt, but is entitled to his rent as a pre-

ferred claim out of the proceeds of the sale of the property"—citing numerous authorities.

In the case of Lambert & Bro. v. De Saussure, Assignee, 4 Rich. Law, 248, the rubric is as follows:

"A tenant, against whom there was a fi. fa. under stay, made an assignment for the benefit of creditors of furniture in the house which he occupied as tenant. The execution creditor agreed that the assignee might sell the furniture and hold the proceeds subject to all legal liens. After the assignment, but before the removal and sale of the furniture, the rent fell due. Held that the assignee was bound to pay the rent in preference to the debt under the fi. fa."

In the case of In re Wynne, 1867, the question as to whether or not a landlord could be held to have a lien for rent due was considered by Chief Justice Chase under the laws of Virginia, which are practically the same as the laws of South Carolina. 4 Nat. Bankr. R. 23–31, Fed. Cas. No. 18,117. In the very learned opinion the Chief Justice discusses the question whether at the time of the filing of the petition in bankruptcy the landlord had any lien for rent upon the property of the bankrupt, and the court says:

"And in considering the question now to be disposed of, we may lay out of view the proceeding by distress warrant, and also the proceeding by attachment. As we understand the bankrupt act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold, under whatever title, whether legal or equitable, and however encumbered, pass to and devolve upon the assignee at the date of the filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property such jurisdiction will not be divested. Peck v. Jenness, 7 How. 612, 12 L. Ed. 841. Whether, therefore, the distress warrant, or the attachment, be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted. Buckey v. Snouffer, 10 Md. 149, 69 Am. Dec. 129. If a lien for rent existed, it was a lien to be discharged by the assignee and enforced in the United States Court of Bankruptcy. If it did not exist, it could not be brought into existence by any proceeding whatever.

"The real question is, were the goods on the premises demised to the bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment?

"Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given.

"We cannot doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation. It is upon the statute book, and the lien it creates must be respected and enforced."

Shortly thereafter the same question came up before this court, in Re W. J. Trim, 5 Nat. Bankr. R. 24, Fed. Cas. No. 14,174. In discussing the question the learned district judge cited and rested upon the opinion of Chief Justice Chase in the analogous case of Chas. H. Wynne, and after referring to that opinion says:

"This lien is not dependent on a distress warrant or an execution. The charge on the property, or the proceeds of the property, is a charge, because, by the statute, where there is an execution, the charge is paramount to the levy itself. It ranks the levy. The very fact that it is paramount to the levy proves that it is a lien. It is not necessary that in point of fact there should be an execution. But if there were, in the language of the Chief Justice, 'would it not be trifling with the plain sense of words' to say that 'the claim which by law is made superior to the lien is itself not a lien?' The statute creates a lien, not the execution. It creates a charge upon the property which excludes even an execution. The lien, so far from being created by the execution, ousts it. If it had not a previous existence, how could this be? The property then in the hands of an assignee is in the hands of the law, as much as if in the possession of the sheriff, and to be disposed of subject to this charge, and against all other liens; the highest possible lien being a levy which is the consummation or execution of an execution."

The same question afterwards came up before the Supreme Court of the United States in the case of Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451, under the statute of Pennsylvania, which is practically the same as the statute of South Carolina. The facts were similar to those in the case now under consideration. The opinion of the Supreme Court is as follows:

"The assignee acquired his title to the movable property found on the demised premises, subject to the rights of all other persons. The rent in question was for a period which terminated when the assignee took possession, and the entire period was within a year of that time. Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained; and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania of June 16, 1836, provides that, where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year shall be paid first out of the proceeds of the sale. This case is within the equity of that statute. The question presented is one belonging to the local law of Pennsylvania. We think it was correctly decided by the Circuit Court."

In the case of Wilson v. Pennsylvania Trust Company, 114 Fed. 743, 52 C. C. A. 374, the statute of Pennsylvania, to which reference has already been made, was under consideration. The court in discussing the question and the consequences that follow, as to the landlord's claim for rent where his tenant had been adjudged a bankrupt, says:

"In the first place, under the Pennsylvania act of 1836 the landlord will be entitled to priority of payment out of the proceeds of sale of the tenant's goods upon the demised premises to the extent of one year's rent."

In the case In re Mitchell, 8 Am. Bankr. Rep. 324, 116 Fed. 87, decided 1902 under the present act, the question is discussed at length with a full citation of the decisions bearing upon it, and the result as stated in the rubric is as follows:

"By virtue of the statute of Delaware (similar to the statute of South Carolina), a landlord has, as against creditors of his tenant, a lien, charge, or preference on the goods and chattels of his tenant on the demised premises for rent growing due for the balance of the renting year, and this right of the landlord will be recognized and enforced as against the proceeds of such goods and chattels when sold by a trustee, in proceedings in bankruptcy against the tenant."

It is therefore ordered, adjudged, and decreed that the landlord, Samuel Dibble, is entitled to be paid out of the proceeds of the sale of the goods the full amount of rent due him from the 1st day of September, 1906, to the 4th day of February, 1907, the date of the adjudication in bankruptcy, at $20 per month, deducting therefrom the balance due by him to the bankrupt of $8.12, amounting to $94.56, and that he be paid by the trustee as part of the expenses of administering the estate and from the funds of the estate rent for the said premises from the 4th day of February, 1907, the date of the adjudication in bankruptcy, to the date when the possession of the said property was turned over by the trustee to the said Samuel Dibble at the rate of $20 per month. Further ordered that, except as herein modified, the order of the referee made on February 25, 1907, be, and the same hereby is, confirmed, and that the petition of Hunt & Co. and Hornik & Co. be dismissed with costs.

FARMERS' LOAN & TRUST CO. v. MADISON MFG. CO.

In re MASSASOIT-POCASSET NAT. BANK.

(Circuit Court, N. D. Alabama, N. D. December 15, 1906.)

1. CORPORATIONS—MORTGAGES—BONDS—EXECUTION.
   In proceedings for the foreclosure of a mortgage securing bonds of a corporation, evidence *held* to sustain a finding that the entire issue contemplated and secured by the mortgage were outstanding obligations of the corporation.
2. SAME—BONDHOLDERS—ESTOPPEL.
   Where corporate bonds in controversy were issued under a certain contract, the holders of a part of the bonds were estopped, while claiming the right to enforce the same, to assert that others were unenforceable because of the alleged illegality of the contract.
3. SAME—BONA FIDE HOLDERS.
   Where a treasurer of a corporation borrowed certain money from a bank, which he used for the corporation's benefit, and pledged to secure the same certain of the corporation's bonds, the bank was a bona fide holder of such bonds, and entitled to enforce the same to the extent of the money so applied to the corporation's benefit, regardless of the treasurer's authority to execute notes for money borrowed for the corporation.
4. PAYMENT—RENEWAL OF NOTES.
   Where the treasurer of a corporation borrowed certain money from a bank for the benefit of the corporation, and pledged certain of its bonds as collateral, the fact that such treasurer and his firm gave new notes for such indebtedness, including further advances, the last of which stated on their face that the bonds were held as collateral, did not constitute payment of the original indebtedness.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 78–86.]
5. PLEDGES—BONDS—BONA FIDE PURCHASER—NOTICE.
   Certain corporate bonds, payable to bearer and duly certified by the trustee to have been properly issued, came into the hands of the corporation's treasurer, pursuant to certain reorganization contracts between the person controlling the corporation and himself, after which they were pledged by the treasurer to a bank to secure debts of his firm. *Held* that, in making such pledge, the treasurer acted personally, and not as an officer of the corporation, and, having possession of the bonds with all the indicia of title, the bank was not charged with notice of any infirmity

therein because it had knowledge of the treasurer's official connection with the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, §§ 48–50.

Rights and liabilities of pledges of corporate stock, see note to Frater v. Old Nat. Bank, 42 C. C. A. 135.]

In Equity.

Richard W. Walker and Robert E. Spragins, for claimant bank.

Milton Humes, Paul Speake, Lawrence Cooper, and E. H. Foster, Jr., for contestants.

SHELBY, Circuit Judge. On the 1st day of January, 1903, the Madison Manufacturing Company, an Alabama corporation, executed a mortgage or deed of trust on its real estate and personal property to the Farmers' Loan & Trust Company, a New York corporation. The amount of the indebtedness secured by the mortgage is $100,000, evidenced by the bonds of the company of the same date as the mortgage, each for $500, and payable 20 years from that date to the Farmers' Loan & Trust Company, or bearer, at its office in New York, with interest at 6 per cent., payable semiannually; each bond being signed by the president and secretary of the Madison Manufacturing Company, coupons for the interest being attached to each bond, and each coupon being signed by the lithographed signature of the treasurer of the Madison Manufacturing Company. The bond provided that it should not become "obligatory until the certificate thereon endorsed shall be signed by the Farmers' Loan & Trust Company, Trustee." The certificate to each bond was duly signed, and was in these words: "This bond is one of the series of bonds described in the within mentioned mortgage or deed of trust."

After the issuance and negotiation of the bonds, default was made in the payment of interest, and by the terms of the mortgage this default made the entire debt due. Thereupon, the Farmers' Loan & Trust Company filed the bill in this cause against the Madison Manufacturing Company to foreclose the mortgage. It is alleged in the bill that on the 1st of January, 1903, the company did "execute and issue its certain first mortgage bonds, dated that day, for the sums respectively of $500 each, aggregating the sum of $100,000"; and that "all of said bonds have been duly issued and are outstanding and existing obligations on the part of the mortgagor company in the hands of bona fide holders for value."

On September 21, 1905, a final decree of foreclosure was entered. Among other things, this decree adjudged that "there are secured by said mortgage bonds of the said defendant Madison Manufacturing Company to the amount of $100,000 of principal." After providing for the sale of the mortgaged property, the decree directs the disposal of the proceeds by the payment of certain prior liens and expenses, and then "to the payment of the amount found due upon the indebtedness secured by the said mortgage or the amounts of the indebtedness of the said defendant mortgagor company for which the said bonds may be pledged as collateral." It is, also, adjudged in the final decree "that all of the said bonds [referring to the $100,000 of bonds] se-

cured by said mortgage were duly executed by said defendant Madison Manufacturing Company, and certified and delivered by the plaintiff as trustee, and that some of said bonds so executed and certified were duly issued by said Madison Manufacturing Company as collateral security for moneys advanced to said company"; and the special master was directed "to ascertain and report with all convenient speed the names of the holders of said bonds, and which of said bonds are held absolutely and which as collateral security." It appears clearly from the bill and from the decree that "all of said bonds [referring to the issue of $100,000] have been duly issued and are outstanding and existing obligations on the part of the mortgagor company," but that some of them are "held absolutely," and that others are held "as collateral security." There is no question made in the pleadings in the original case, or left in doubt by the decree, of the fact that the entire $100,000 of bonds were issued and outstanding. The decree further provided that the holders of the bonds might present their claims in this cause. Pursuant to this decree, the Massasoit-Pocasset National Bank of Fall River, Mass., presented to the special master 50 of the bonds for $500 each, which it claimed to hold as collateral security to secure two notes, one for $10,000, and one for $6,500, made by the firm of Knight, Fyans, Fraser & Blackway Company.

Milton Humes, who intervened in the cause, made himself a party to the proceedings before the special master, and filed the following objections to the claims of the Massasoit-Pocasset National Bank:

"(1) That the said bonds were obtained by the said Massasoit Bank without their proper negotiation, and that the same are not entitled to any distribution from the fund in hand in this cause for distribution.

"(2) The said bank is not entitled to any distribution on account of the said $25,000 of bonds out of the fund now in the hands of this court for distribution in this cause.

"(3) The said Massasoit Bank got said bonds from Albert F. Knight and J. T. Fyans, who were directors of the Madison Manufacturing Company at the time and were known as such by the officials of the said Massasoit Bank, and there was no valuable consideration paid therefor by the said Knight and Fyans, or any one else, and the said bonds in the hands of the said Knight and Fyans, or their transferees or assignees, are not entitled to distribution out of any fund in this cause.

"(4) Said bonds were in the hands of the said Milton Humes, who held the same as security for the payment of indebtedness due to him by the said Madison Manufacturing Company, and the said indebtedness has never been paid, but the same is due and unpaid, amounting in the aggregate to more than the face value of said bonds and the coupons attached thereto, including principal and interest, and the said Knight and Fyans, under whom the said bank claims the said bonds, procured the same from the said Humes by fraudulent representation, and the said bonds so in the hands of the said bank are chargeable with the said misrepresentations of the said Knight and Fyans, and are not entitled to any portion of the fund in this cause arising from the sale of the property under the decrees of the court.

"(5) Said bonds there was never any consideration received therefor by objectant, Milton Humes, who is the legal and proper holder and owner thereof, and the same are held by the present holder, who has obtained the same from A. F. Knight and J. T. Fyans and associates by fraud and misrepresentation from the said Milton Humes, who is the proper and legal owner and holder of the same.

"(6) The said Milton Humes says that the said Massasoit Bank has no claim to or interest in the said bonds, but the same belonged to and are the prop-

erty of Milton Humes, who files these objections and exceptions to the claim of the said bank thereto.

"(7) The said bonds were held and owned by the undersigned Milton Humes for a valuable consideration, and he is now the party legally entitled thereto and to all distribution on account thereof of the fund now in hand in this cause, and the said Massasoit Bank, and those under whom it claims, are not entitled to any distribution of the fund in hand on account of the said bonds; the same having been procured from the said Humes by fraudulent conduct and misrepresentation of A. F. Knight and J. T. Fyans, from whom the said Massasoit Bank obtained the same, and without the said Knight and Fyans having paid any valuable consideration therefor. The said Knight and Fyans, at the time that they negotiated the said bonds with the said bank, were officers and directors of the Madison Manufacturing Company, which the officials of the said Massasoit Bank knew, and the said Knight and Fyans at that time held the said bonds and had procured possession of the same by fraudulent conduct and false representations and misrepresentations and without any consideration whatever, from said Milton Humes."

The First National Bank of Decatur, Ala., and seven others, the holders of other bonds of the Madison Manufacturing Company, subsequently filed objections to the bank's claim, adopting the grounds of objection propounded by Humes, and stating no others. The questions raised by these objections were referred to the special master.

On the hearing before him two contracts were offered in evidence, relating to the issuance and disposal of the bonds. It is necessary here to state their substance. The one dated November 11, 1902, between Milton Humes "and associates" and Albert F. Knight "and associates," states that Humes and associates own all the capital stock and bonds of the Madison Spinning Company, an Alabama corporation. It provides that the name of the corporation is to be changed to the Madison Manufacturing Company, and the stock increased from $100,000 to $300,000. Humes and associates are to contribute the property of the old corporation to the new. Knight agrees to furnish cotton machinery and supplies necessary for a 15,000 spindle mill, with 400 looms to be practically as good as new, a good deal of which machinery, it is stated in the contract, is now in what is known as the "Farnumsville Mill," in Massachusetts. Knight and associates are to furnish other machinery, all of which is to be subject to the approval of E. F. Green, a mill engineer. The contract further provides that $100,000 in preferred stock is to be issued, and $200,000 in common stock. The stock is all to be issued as fully paid up. Of the preferred stock, $25,000 was to be sold, and the proceeds placed in the treasury of the company. Humes was to get $50,000 of it, and Knight $25,000. Of the common stock, Knight was to get $102,500, and Humes $97,500. The company was to issue $100,000 in bonds, and the contract provides that the bonds should be sold at par, and that Knight was to get $60,000 of the proceeds, and the proceeds of the sale of the remaining $40,000 should go into the treasury of the company. It is shown in the contract that the Farnumsville Mill was incumbered in the sum of $38,000. Humes was to advance this sum and take a transfer of the lien upon the property. He also agreed to advance to Knight an additional amount, so as to make the entire amount advanced under the contract to Knight amount to $50,000; "it being understood that the said Humes and associates are to be reimbursed for this amount by the

return thereof out of the $60,000 the said Knight and associates are to get out of the proceeds of the sale of the said $100,000 of bonds of the said Madison Manufacturing Company." The evidence in the case shows that Humes advanced the sum of $38,000, as agreed, but failed to advance to Knight and associates the $12,000 additional.

While this was the business situation between them, on August 28, 1903, they made another agreement supplementing the first one, and it was under this last agreement that $25,000 of the bonds—being part of the $60,000 received by Humes—passed into the hands of A. F. Knight.

The second agreement is as follows:

"Whereas, Milton Humes for himself and associates, and A. F. Knight for himself and associates, did on the 11th day of November, 1902, enter into an agreement in reference to the Madison Spinning Company changing its name to the Madison Manufacturing Company, and increasing its capital stock to $300,000.

"Whereas, under and by the terms of the said agreement, Milton Humes agreed to advance the sum of $38,000, to pay off a mortgage on the mill plant of the Farnumsville, Mass., Cotton Mill, and was also to advance said Knight and associates an additional amount of $12,000, for the purposes mentioned in said agreement, and said Knight was to get $10,000 more of proceeds of said bonds when sold.

"Whereas, the said Humes has advanced the $38,000 and received the said $60,000 of bonds as security, contemplated and provided he should receive under said agreement, and has made other advances to the Madison Manufacturing Company, to enable it to complete its plant, but has not advanced to the said Knight and associates the $12,000 additional which he agreed to advance:

"Now this agreement witnesseth: That in consideration of the said Humes turning over to the said Knight and his associates $25,000 of the $60,000 of bonds received by him as aforesaid, the said Knight and associates releases the said Humes from his obligation to furnish said $12,000 and accepts said $25,000 of bonds for $22,000 of the $60,000 which they were to receive out of the proceeds of the sale of said bonds. Said Humes agrees to advance to the Madison Manufacturing Company an additional sum sufficient for the completion of the plant, retaining the unsold bonds of the company as security therefor; it being understood and agreed that the agreement of date November 11, 1902, is modified to the extent herein provided.

"It is further agreed: That if the said Humes at any time provides said Knight with said $12,000, in that event, said Knight, upon the receipt of said $12,000 agrees to return said $25,000 of bonds, and the agreement reverts to the original agreement of November 11, 1902, in regard to said bonds. Said Knight is to receive and hold said bonds subject to agreement signed by him and said Humes, giving to J. B. Cobbs option on said bonds.

"Signed in duplicate August 28, 1903. Milton Humes.
"A. F. Knight."

Soon after this last agreement was signed, on September 8, 1903, the $25,000 of bonds in question were sent by C. C. Harris from Alabama to Knight. The bonds had been left with Harris by Humes. Harris was at the time treasurer of the Madison Manufacturing Company. Knight, receiving the bonds, deposited them as collateral to secure money borrowed by his firm, Knight, Fyans, Fraser & Blackway Company, from the Massasoit-Pocasset National Bank.

The special master reported against the bank. He did not, however, report in favor of Humes. He reported that the $25,000 of bonds "are really the property of the Madison Manufacturing Company." He found that the bonds in question were turned over to Albert F.

Knight and J. T. Fyans by Milton Humes; that Milton Humes was the president of the company; that the bonds were delivered to Knight and Fyans for certain machinery which was to be furnished by them to the company upon a contract that the machinery was to be practically as good as new; that the machinery did not conform to this contract, but, on the contrary, was practically worthless for the purposes for which it was intended. As bearing on the question as to whether or not the claimant bank was a bona fide holder without notice of the bonds in question, the special master found the following facts: That Knight and Fyans were both directors of the Madison Manufacturing Company at the time they received the bonds and at the time they deposited them with the bank as collateral security; that the bank took the bonds with notice that Knight and Fyans were directors of the Madison Manufacturing Company. The special master concludes his report on this branch of the subject by holding that the claimant bank "has not shown good faith in acquiring and holding the bonds in question."

The claimant bank duly filed objections and exceptions to the report of the special master, and, among other grounds of exception, alleged the following:

"That said special master should have found from the evidence that $5,000 of the indebtedness, as security for which the claimant bank holds the bonds in question, was advanced by the claimant bank on the note of the Madison Manufacturing Company, secured by the indorsement of Knight, Fyans, Fraser & Blackway Company; that the money so advanced was placed by claimant bank to the credit of the Madison Manufacturing Company, and was drawn out on checks of said company issued for the uses and purposes of said company; that said note of said Madison Manufacturing Company has not been paid, but said Knight, Fyans, Fraser & Blackway Company had to give their note for the amount thereof; and that said bank is entitled to hold said bonds for security for the amount so advanced to said company thereon. And in support of this exception claimant bank refers the court to the testimony of E. W. Borden and A. F. Knight in reference to said note, and the use of the proceeds thereof."

"That the said special master in his said report finds that said claimant bank has not shown good faith in acquiring and holding the bonds in question; whereas, said special master should have found from the evidence that said bank received said bonds in pledge to secure money actually advanced on the faith thereof, and that the evidence wholly failed to show that said bank acquired said bonds with notice of a defect in the title, or in bad faith. And in support of this exception exceptant refers the court to the testimony of said E. W. Borden and said Knight and Fyans."

The foregoing statement of the pleadings, issues, and parts of the evidence gives an outline of the case. In discussing the several points presented, it will be necessary to make additional statements of fact which relate especially to the question considered.

1. The original bill in the cause asserted, and the decree of foreclosure adjudged, that the whole series of bonds is outstanding; that no part of them is retained in the treasury of the company. The company nowhere in the record denies that all the bonds are outstanding. Taking the objections filed by Humes and adopted by the bondholders, and construing them in the light of the record, they seem to raise a controversy as to whether the pro rata share of the proceeds of the foreclosure sale should go to Humes or to the claimant bank. In the sixth objection, for example, it is asserted that the claimant bank has

"no claim to or interest in said bonds [referring to the $25,000 of bonds in question], but the same belonged to and are the property of Milton Humes, who files these objections." This objection, and others like it, is adopted by the contesting bondholders. The first objection, however, is to the effect that the bonds "were obtained by the claimant bank without their proper negotiation," and that is construed in the argument of counsel to mean that the bonds were never issued, and are not outstanding. This contention, it will be observed, conflicts with the averments of the bill and the final decree, both of which are to the effect that the entire $100,000 of bonds are outstanding obligations; and it also conflicts with the uncontradicted evidence. The bonds are regularly signed; the proper certificate of their issuance is signed by the trustee; and the record shows that the entire series is receiving dividends in this case, except the $25,000 of bonds in controversy. The evidence shows that they are a part of the $60,000 that went to Humes as security for at least $38,000 that he advanced for the benefit of the company, and that $25,000 of this $60,000 of bonds passed from Humes to Knight to pay or secure $12,000. Can there be any doubt on the evidence that the bill and decree of foreclosure speak the truth, when they say that the entire series has been issued and is an outstanding obligation of the company? The evidence seems to me to be conclusive on that subject; but the question remains as to whether the claimant is entitled to the dividends on the 50 bonds.

2. It is contended in behalf of the contestants in their brief that the contract of Humes and associates with Knight and associates, made November 11, 1902, "affirmatively discloses that it is a promoter's contract, parceling between themselves the stock and bonds to be issued by the Madison Manufacturing Company"; and it is asserted that such "an instrument is wholly without any validity against the rights of creditors or stockholders of the company." This objection and argument is made by contesting banks who own $54,500 of the company's bonds. If the $25,000 of bonds involved here are made void by the illegality of the contract of November 11, 1902, the whole issue of bonds was subject to the same objection, unless, of course, they have passed into the hands of bona fide holders; for the whole series of $100,000 of bonds was issued pursuant to the terms of that contract. The contract, however, shows that the stock that was to be received by Humes was to be received in consideration of the interest which he held in the Madison Spinning Company and cash which he was to advance for the benefit of the company, and the bonds and stock which were to be received by Knight and associates were to pay for machinery which he was to furnish and services that he was to render. The $60,000 of bonds which went into Humes' possession was received by him in consideration of cash—$38,000, which, by the contract, he was to advance for the benefit of the company. I do not think that the court, on the issues here joined, is called on to decide, as between the parties to this suit, whether the contract in question is valid or not. The question is not raised here by any one except the bondholders themselves. Those who raise the question are in court in this case, receiving money on bonds of the same series with those they contest. They are, I think, estopped from alleging the invalidity of the bonds

because of the alleged illegality of the contract, when they are here to collect other bonds issued pursuant to the same contract, and just like those to which this objection is made. They cannot hold out an open hand to receive the cash proceeds of the transaction, and at the same time be heard to say that the very foundation of their own claim is invalid.

I do not understand that it is claimed that the contestant, Humes, a principal party to the contract, can gain any advantage by assailing it; nor do I understand him to dispute its validity. On the contrary, Humes' claim is based on the contract and on his averment that Knight has breached it.

3. The report of the special master refers to the fact that the bank held the note of the Madison Manufacturing Company for $5,000, and that the amount of this note was advanced on the bonds; but the report does not show whether this money was received by the company or not. Turning to the evidence of E. W. Borden, we find that he testifies that the bank, on the security of the bonds, lent "$5,000 on a note of the Madison Manufacturing Company on their indorsement" —referring to the indorsement of Knight's firm. The bonds were held to secure this sum advanced on the note of the Madison Manufacturing Company. What became of this money? The report is silent on the subject; but Borden, the cashier of the bank, who had charge of the business in question, testifies that the $5,000 was placed in the bank to the credit of the Madison Manufacturing Company, and was drawn out on the checks of that company, signed by its treasurer. A. F. Knight, the treasurer at the time, who drew the checks, was asked: "What did you do with that money?" And he answered: "I used it for the Madison Manufacturing Company, purchasing cotton, paying for labor," etc. And Knight testifies that entries as to these transactions were made on the books of the Madison Manufacturing Company. The company, in common justice, could not ask the bank to surrender the bonds till it paid this $5,000 and interest. There is now due the bank $16,500 and interest for money advanced that is unpaid. Whatever question there may be about part of this sum, the company itself, according to the evidence, received the benefit of the $5,000 advanced on its note on the security of the bonds in question. I do not overlook the evidence of two officers of the company that the treasurer had no authority to execute the note of the company for the $5,000, and that the treasurer was not authorized to sign the notes of the company. There is much other evidence tending to show that the company—those in charge of its affairs as its officers—expected Knight to raise money for it; but it is not necessary to decide the question of Knight's authority to sign the note. If the company received the proceeds of the note, got the $5,000, and paid it out for cotton and labor—and that is the uncontradicted evidence—it owes the amount advanced, and the bonds stand for it. It would be the same if no note was given. The receipt of the money is the substantial thing that charges the company. The company cannot enjoy the fruits of the transaction and repudiate its responsibilities.

In Tuskaloosa Cotton Seed Oil Company v. Perry, 85 Ala. 158, 166, 167, 4 South. 635, a corporation made the defense that its officer was

without authority to sign a note upon which money was obtained. The court said:

"The note having been made to borrow money for the corporation, which it received, and having retained for its own benefit the fruits of the transaction, the defendant is estopped to deny, as against the holder from whom the money was borrowed, the binding character of the obligation, and the authority of the president to make the transaction."

The acceptance of benefits arising from a contract, even when it is made by an unauthorized agent, ratifies the contract, if it is one capable of ratification by parol. This doctrine is applicable, not only to notes, but it is applied where a corporation receives and retains the consideration of an unauthorized mortgage on personal property. Despatch Line v. Bellamy M. Co., 12 N. H. 205, 37 Am. Dec. 203; 4 Thompson's Commentaries on the Law of Corporations, §§ 5258, 5304.

The fact that Knight, Fyans, Fraser & Blackway Company gave new notes for a sum including other advances and the Madison Manufacturing Company's $5,000 note, on which they were indorsers, does not constitute payment of the latter note so as to release the collateral. The last notes, the ones now presented, state on their face that the bonds are held as collateral. Such a renewal is not a payment; it appearing that it was not the intention of the parties that it should constitute payment. Cotton v. Atlas National Bank, 145 Mass. 43, 12 N. E. 850; Brewer Lumber Co. v. Boston & Albany R. R. Co., 179 Mass. 228, 60 N. E. 548, 54 L. R. A. 435, 88 Am. St. Rep. 375; Arnold v. Delano, 4 Cush. (Mass.) 33, 41, 50 Am. Dec. 754. See, also, Cordova v. Hood, 17 Wall. 1, 21 L. Ed. 587.

Regardless of other questions involved in the case, the claimant bank is, I think, entitled to share in the distribution of the fund until the $5,000 advanced to it on the bonds is paid.

The record shows, however, that the dividends going to the $25,000 of bonds will more than pay this $5,000, and it will be necessary, therefore, to consider the claimant bank's right to receive further payment.

4. The controlling question that goes to the whole case is whether or not the claimant bank is a bona fide holder of the bonds. Sixty thousand dollars of the series, duly executed, with the trustee's certificate duly signed, passed to the possession of Humes, to secure an advance by him of $38,000. Twenty-five thousand dollars of this $60,000 of bonds was delivered by Humes, through Harris, to Knight, under the contract of August 28, 1903. Under that contract, Knight clearly held the bonds as against Humes to secure $12,000. The correspondence in the record shows that Humes, before he discovered the defects in the machinery, made no claim to the bonds, except upon his offer to pay $12,000; and that Knight had pledged them, as I have before stated, not only for the $12,000 that his firm had borrowed of the claimant bank, but also for $5,000 borrowed for the Madison Manufacturing Company on its note. The only reason now urged why Humes is entitled to the bonds as against Knight is that Knight failed to comply with his contract of November 11, 1902, as to the delivery of machinery as good as new. But for that single fact, Humes would have no just cause for asking Knight, if he held them, to return the

bonds without the payment to him by Humes of the $12,000. There is no evidence in the record, nor findings by the special master, that the claimant bank had any notice whatever of the existence of the two contracts between Humes and Knight, or of the breach of the first contract by Knight. It does not even appear that, at the time that Knight pledged the bonds the Madison Manufacturing Company had discovered that the machinery delivered by Knight did not conform to the contract. What, then, are the facts that became known to the claimant bank which it is contended sustains the special master's conclusion that the claimant bank is not a purchaser in good faith? They are stated in the first and fifth findings of the special master: That Knight and Fyans were directors of the Madison Manufacturing Company at the time they received and pledged the bonds; and that the claimant bank had notice of that fact.

It may be well to note the general rule as established in the federal courts. The rule in these courts is that one who acquires mercantile paper before maturity from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that would cause him to suspect that the person from whom he obtained it had no interest in or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained these facts. The purchaser of negotiable paper does not owe to the party who puts it afloat the duty of active inquiry to avert the imputation of bad faith. Bank of Edgefield v. Farmers' Co-op. Mfg. Co., 52 Fed. 98, 2 C. C. A. 637, 18 L. R. A. 201; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193; Brown v. Spofford, 95 U. S. 474, 478, 24 L. Ed. 508; King v. Doane, 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84.

The contention is that knowledge of the fact that Knight and Fyans were directors of the Madison Manufacturing Company deprives the claimant bank of the rights of a bona fide holder of the bonds.

There is generally a presumption in favor of honesty and fair dealing, and I can see no reason why it should not apply to a director of a corporation. When he presents to a bank a certificate of stock or a negotiable bond of his corporation, signed by the proper officers, with the seal of the corporation attached, when it is a completed instrument the title to which passes by mere delivery, requiring no transfer on the corporation's books, and offers it for sale or pledge, representing himself as the owner of it, it is difficult to see any reason for a presumption that he is about to commit a fraud. Usually, one cannot be a director of a corporation unless he is a stockholder. Directors, familiar with the condition of their corporations, often subscribe for its bonds, or buy them on the market. Are they not allowed to dispose of them without exciting suspicion of fraud by the very act of sale or pledging? The establishment of such a rule would greatly lessen the negotiable availability of such securities. I think no such rule should prevail.

In Duncomb v. N. Y., H. & N. R. R. Co., 84 N. Y. 190, 202, Bailey bought $10,000 of corporation bonds of "E. F. Mead, who was, at the time, one of its directors." The court said that there was nothing to affect his position as a purchaser for value and in good faith, "unless

the fact that he knew Mead to be a director was enough to put him on inquiry and charge him with constructive notice of the defect in the title." And the court, responding to the question, held:

"We cannot so decide. A director may be the lawful and honest holder of the bonds of his company. There is no presumption to the contrary. The fact is not even just ground of suspicion."

In Rockville Nat. Bank v. Citizens' Gaslight Co., 72 Conn. 576, 45 Atl. 361, Risley, the treasurer of the company that issued the bonds, pledged them as collateral security to secure his own renewed note. The plaintiff, when he received the bonds in pledge, knew that Risley, the debtor who was pledging them, was the treasurer of the company that issued the bonds. The court held that:

"It is idle to claim that such facts, as a matter of law, charge the plaintiff with knowledge that Risley in truth holds the bonds in a fiduciary capacity, or has obtained possession of them through a secret fraud."

In that case, the bonds had, in fact, been paid before maturity, and the company had negligently failed to cancel them and left them in the hands of its treasurer.

The same view is taken by the Supreme Court of Georgia. In Kaiser & Bro. v. U. S. National Bank, 99 Ga. 258, 25 S. E. 620, that court held, Chief Justice Simmons announcing the opinion, that, where a promissory note executed solely for the accommodation of a bank, and intended by the makers to be used for its benefit only, was made payable to the order of its cashier and indorsed in blank, the mere fact that the president of that bank negotiated the note for his own personal benefit to a third person, who knew he was such president, would not of itself be notice to that person that this action of the president was unauthorized or improper; nor would this fact be sufficient, without more, to put the third person upon inquiry as to the legality or correctness of the president's conduct in the premises.

A case involving the same question has been decided by the Circuit Court of Appeals of this circuit. The bank in that case received the negotiable notes in question from Charles B. Lloyd, who represented himself as the owner, before maturity, for a valuable consideration and without notice, "except such notice as was given by the fact that the notes presented bore an indorsement in blank by the Brunswick State Bank, coupled with the knowledge that Lloyd who presented the notes, of which he claimed to be the owner, was the president of the Brunswick State Bank." The court, by Pardee, Circuit Judge, held, after quoting the general rule of the federal courts as to what is required to charge with notice a purchaser of commercial paper, that the evidence "does not show a case where the First National Bank of Brandon was charged with any such notice of outstanding rights and equities as put it upon further inquiry. * * *" Kaiser v. First Nat. Bank of Brandon, 78 Fed. 281, 24 C. C. A. 88.

The case of Germania S.-V. & T. Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118, on which contestants rely, is one in which the party receiving the securities from the officer of the corporation knew they belonged to the corporation issuing them (that they were then in its

treasury); and, to obtain the securities, he actively took part in the fraud perpetrated on the company. It was, of course, properly decided that, on these facts, he was not a bona fide holder.

Neither is one a bona fide holder who receives bonds or stocks from an officer of the corporation issuing them, when that officer, in the negotiation of the sale, pledge, or transfer, is exercising the functions of his office, and at the same time using the securities for his own purposes or for his own pecuniary benefit. Such cases are founded on the principle that an agent cannot lawfully act for his principal and himself in matters in which they have adverse interests, and it follows that every person dealing with an agent so acting is put on inquiry as to the agent's good faith and authority. Moores v. Citizens' National Bank (C. C.) 15 Fed. 141; Id., 111 U. S. 156, 169, 4 Sup. Ct. 345, 28 L. Ed. 385; Farrington v. South Boston R. R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222. The principles of these cases have no application when the officer or agent is acting for himself, and not even apparently acting in any manner for his principal or corporation.

There are cases cited in the briefs, relating to the transfer of fraudulent certificates of stock, which show on their face that they are transferable only on the books of the company, in which the purchaser failed to make inquiry at the company's office. Such cases are clearly distinguishable from the case at bar, which relates to the transfer of bonds payable to bearer, issued to pass from hand to hand like a bank bill. Long Island Loan & Trust Company v. Columbus, C. & I. C. Ry. Co. (C. C.) 65 Fed. 455.

The bonds pledged were payable to bearer. They were certified by the trustee as duly issued. Those who pledged the bonds were claiming to be owners of them, and in pledging them, although they were directors of the corporation that issued the bonds, they were exercising no functions of their office; they acted personally, not officially. Under the circumstances, I do not think that the knowledge of the claimant bank that Knight and Fyans were directors charged it with notice of any infirmity, if such infirmity existed, in the title of the pledgors.

The record shows that the dividends that will go on the $25,000 of bonds will not pay the amount due the bank, and will not equal the amount for which the bonds were transferred by Humes to Knight, together with the amount received on them by the Madison Manufacturing Company. No question, therefore, can arise as to any excess of dividends over these sums.

A decree will be entered conforming to this opinion, sustaining and allowing the exceptions of the claimant bank to the special master's report.

NOTE.—Since the foregoing opinion was written, the Circuit Court of Appeals for the Fifth Circuit has had occasion, in the case of Union National Bank v. Neill, 149 Fed. 711, to state and follow the rule prevailing in the federal courts as to the diligence required of a purchaser of negotiable paper before maturity, and as to what consti-

tutes notice to the purchaser of an infirmity in such paper in the hands of the prior holder. In that connection the recent case of First National Bank v. Moore (C. C. A.) 148 Fed. 953, is also referred to.

THE DISA.

(District Court, S. D. New York. April 12, 1907.)

1. SHIPPING—CHARTER HIRE—TIME OF REDELIVERY.

Where, at the time of an oral charter of a steamer to carry a cargo of fruit at a monthly hire, she had fittings for the cargo which had been left therein by a former charterer, and which, with some additions, were also left by the later charterer when she was redelivered, the owner is not entitled to recover hire thereafter during the time of a dispute as to the duty of the charterer to remove such fittings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 194.]

2. SAME—BREAKDOWN OF MACHINERY—LIABILITY FOR INCIDENTAL LOSS TO CHARTERER.

Under a charter of a steamer to proceed to Cuba for a cargo of fruit, which exempted the owner from liability due to any accident to the machinery, his failure to promptly notify the charterer of a breakdown at sea which delayed arrival at the port of loading for several days, did not render him liable for a loss of bananas which had been cut in anticipation of her earlier arrival; there being no provision of the charter requiring such notice.

In Admiralty.

Wheeler, Cortis & Haight, for The Disa.

Hulbert & Webb, for respondent and cross libellant.

ADAMS, District Judge. The first of the above entitled actions, Rederiaktieb Disa against Miguel S. Arrue, was brought to recover the hire of the steamship Disa, owned by the former, from the 29th day of August, 1906, until such time as she should be duly redelivered to the libellant, which at the time of bringing this action, October 8, 1906, was claimed to be $1,334.40. This sum was reached by charging hire at the rate of £425 per month, the agreed rate, and crediting a payment of $1,004.87 on account, and an allowance of $752.62, for time lost by reason of her breakdown in the Atlantic Ocean en route to Cuba. There is no dispute about hire being due to October 1st. The libellant, however, claims that there was no redelivery of the steamer until October 17th and hire continued to that time.

The action was defended and a claim of $4,000 damages made in the 2nd above entitled action, Miguel S. Arrue against Rederiaktieb Disa, on the grounds: (1) that a former charterer for the same trade left a quantity of fittings on board, which were there when the respondent took her and were left in conformity with the custom of the fruit trade in which she was engaged; (2) that a contract provided for a charter upon the same terms and conditions as set forth between the libellant and the previous charterer, except that the respondent had the option of renewals for successive trips provided he should give notice at Baracoa, Cuba, before the steamer should sail from that port, and the hire was to be less 2½ per cent. address commission and should

not commence to run until the steamer should begin to take in coal, to be furnished by the respondent, at the port of New York, which was August 29, 1906, early in the morning and she sailed on that day about 11 o'clock in the forenoon; that on the following day the respondent paid to Bowring & Company, the agents of the steamer the said sum of $1,004.87 but the agents refused to sign a charter party in accordance with the terms of the agreement made between the respondent and the master of the vessel; (3) that on or about the 1st of September, 1906, when about 300 miles southeast from Wilmington, North Carolina, the machinery of the vessel broke down so that she was obliged to put into that port for repairs which detained her there about 13 days, when she proceeded on her way to Baracoa where she arrived on the 18th of September, was loaded with a fresh cargo of bananas and cocoanuts and set sail for New York on the 25th of September; that she arrived in New York and completed the discharge of her cargo by the 1st of October, and on that day was delivered, with said fittings on board, to the libellant who accepted the same; (4) that the libellant has failed to credit the respondent with the value of the coal used by the vessel during her breakdown amounting to $125; (5) that upon the departure of the vessel from New York, the respondent cabled advice to his representative in Baracoa that the vessel was expected to arrive at that port on Wednesday, September 5th; that at the time the respondent had two steamers under charter, which sailed from New York to Port Antonio, Jamaica, respectively the 30th and 31st of August and arrived September 6th and 7th and he also could have chartered a Munson Line steamer lying in a port near Baracoa at any time up to the 5th of September, but owing to the neglect of the libellant to immediately advise him of the Disa's breakdown, he was unable to utilize any of the steamers; that he did not receive any notice of the breakdown until September 6th, when it was too late to take any steps to save the cargo which had been cut and gathered for the Disa and the bananas became a total loss and the cocoanuts badly shrunk and damaged, whereby the respondent suffered to the extent of $4,000.

The contract here was made orally between the master of the vessel and the respondent who was engaged in the business of shipping fruit, principally bananas, from Cuba to New York. Up to the time of making the charter in question here, the steamer had been operated to and from the West Indies under a five months charter to a Mr. Cuneo at the rate of £425 per month. The new contract contemplated the same service at the same rate but for a shorter period and what that was to be is one of the controverted questions in the case. The libellant contends the agreement was for consecutive trips, while the respondent contends that it was for one round trip to Baracoa, with the option on his part for renewal as stated above (2).

The master testified in this connection:

"Q You have stated that the new charter was to be on these same general terms? A The same conditions, yes sir, only that Mr. Arrue said he would let me know in Cuba, when I was in Baracoa, if he wanted the ship the following trip; I should have that much time to get other freight.

"Q I don't understand exactly, captain, about the agreement with Mr. Ar-

rue; were you to receive notice in any event, whether he was or was not to use the boat? A He was to let me know if he wanted the boat.

"Q And if not? A He should let me know that he did want her, because that is just the question, I should know whether he did or not. I said there might be a telegram come while I was not there; I wanted him to let Bowrings know.

"Q I want to be clear in my mind; was Mr. Arrue to notify you providing he did want the ship, or providing he didn't want it, in any event? A As I understood, any how, whether he wanted it or not. I was afraid there would be a telegram come while I was gone and I said you had better notify Bowrings about that; I might not get it."

Mr. Arrue testified:

"Q Did you have any conversation with the captain about chartering his boat? A Yes sir.

"Q Will you state what you said to him and what he said to you? A I told the captain I would charter him for one round trip to Cuba with the option of one trip, option of another trip and option of a third trip; I told him that I would take him at same terms and conditions as per Cuneo's charter party; I was to get 2½% address commissions and the time of charter to start when the stevedore started to put coal in the bunkers.

"Q What was said, if anything, about notice to the captain if you desired the vessel for another trip? A If I was to avail myself of the option of another trip, I was to telegraph him at Baracoa, Cuba."

The latter is corroborated by his bookkeeper and there is so little difference between the master's version and that of the others that I think it may be accepted as true that no contract was made for more than the one trip and the respondent was entitled to relinquish the vessel when that was completed, which was October 1st at 4 P. M. She entered upon the charter August 29th at 6.15 A. M. and served through till the former date, excepting the time consumed for repairs in consequence of a breakdown of her machinery. On the way to Cuba, September 1st, about 11 A. M. a bolt in the feed pump broke. Time was consumed until 5 P. M. in repairing this break and she proceeded on the voyage. As this breakdown was less than 24 hours in duration, the charterer is not entitled to claim for it, but at 9.25 P. M. a more serious accident occurred, the opposite bolt to the former broken one giving away, which also disabled the first one, with the rods to the feed pump and connections, so that the steamer was completely incapacitated. She worked her way by means of steam from the donkey engine into Wilmington, North Carolina, where she repaired, consuming time until the 13th at 3 P. M., and proceeded on her voyage, reaching Baracoa September 18th at 5.30 A. M. The steamer earned hire from August 29th at 6:15 A. M. until September 1st at 9.25 P. M. and from September 13th at 3 P. M. until October 1st at 4 P. M. The respondent is entitled to deduct from this for the time consumed by the steamer in returning from Wilmington to the place where she broke down.

Save in respects herein pointed out the Cuneo charter expressed the contract between the parties and has been marked in evidence.

1. The question of fittings.

When the steamer was under a previous charter in the same trade she had been fitted up below decks for the transportation of fruit by the charterer. When the respondent took her, she still had these fit-

tings in place and they were used by him with some additions which were made by him at Baracoa before the cargo was taken aboard. Those left over from the former charterer's use either belonged to him or to the steamer and the respondent acquired no title to them. When the former charterer relinquished the vessel, the owner apparently took possession of the fittings. The legal situation then apparently was that the first fittings had been abandoned to the owner, who accepted them. The transaction between the owner and the new charterer was without much regard to legal rights. Both seemed to assume that title to all the fittings, including those put in by the former charterer and the additions made by the respondent, was not in the owner. It seems that such fittings should have been supplied by the owner. Dene Steam Shipping Co., Ltd. v. Tweedie Trading Co. (D. C.) 133 Fed. 589; Tweedie Trading Co. v. Dene Steam Shipping Co., Ltd. (D. C.) 140 Fed. 779, affirmed 143 Fed. 854, 74 C. C. A. 606. The charter provisions in those cases were not as explicit as they are here. The charter under which the steamer was working contained this clause:

"11. * * * That the steamer shall be provided with loose planks, 2 to 2½ inches thick, to make a platform or deck, all through the vessel's hold, and also provided with beams for such temporary platform or deck to rest on, building the same strong enough to hold tiers of fruit."

The parties, however, depended rather upon the testimony than their charter rights. It was contended by the owner that on account of the refusal of the charterer to remove the fittings, the vessel was constructively in his possession until the 17th of October, when the owner undertook to remove them, after notice to the charterer that he would be held liable for the continued hire. The charterer's claim of a custom to leave fruit fittings is not sustained but otherwise the testimony rather tends to sustain the charterer's view, but in any event, I have no doubt that the owner was not entitled to continue the hire while he was deciding what to do about the fittings. No hire should be allowed after the first of October.

2. The question of commissions.

It appears that the respondent's right to recover 2½ per cent address commission was recognized by the agents of the steamer when the first payment of hire was made and the same percentage should be deducted from any further allowance of hire.

3. The question of breakdown.

This has been hereinbefore considered and nothing more need be said.

4. The value of coal used during breakdown.

This has not been discussed here and may be considered and determined by the commissioner.

5. The claim of the cross libellant for loss arising from damage to fruit caused through the delay of the steamer in arriving at Baracoa owing to her breakdown.

This claim is based upon an allegation by the charterer that timely notice was not given him of the breakdown of the steamer and he consequently lost an opportunity to save the fruit he had ready for shipment by forwarding it on another steamer.

When the machinery of the steamer became disabled she started for Wilmington. En route there, the master sent the pilot ashore at Southport, North Carolina, with a telegram to the steamer's agents in New York, Bowring & Company, advising them of the steamer's condition and directing them to inform the charterer. This they first attempted to do by telephone and one of the disputes in the case to which much testimony and discussion have been directed, was whether Bowring & Company did telephone or not. They have produced apparently reliable witnesses to show that the respondent's office was called up immediately upon receipt of the message and some one there advised of its contents. The identity of the alleged recipient was not established and the only person who was actually in the respondent's office, denied the receipt of the message. Conversing by telephone has in recent years become a recognized means of business communication. When the identity of what is called the antiphonal speaker is established and he is shown to have been the party or his agent, there can be little doubt of the propriety of admitting the conversation in evidence. See Greenleaf on Evidence, § 430q, p. 533; Wigmore on Evidence, § 669 (8); Jones on Telegraph and Telephone Companies, § 697. Here the identity of the person spoken with was not established conclusively and any presumption which might have arisen from the respondent's office having been called and responded to is overcome by the unqualified testimony of the one person in the office that no such message was received. I think that any claim of notice by telephone must be disregarded. The telephone was followed up by what was called a confirmatory letter, which was as follows:

"New York, Sept. 5, 1906.

Mr. M. S. Arrue, Bridge Street, New York.

Dear Sir:—S. S. DISA. We regret to have to advise you that we have just received telegraphic advices from Southport, North Carolina, that this steamer has put in there with machinery out of order, and is proceeding to Wilmington, North Carolina, for necessary repairs. We shall promptly advise you when we have any further advices.

We are Yours faithfully

Bowring & Company
L. L. Richards
Manager S. B. Dept.
Agents."

Instead of sending this letter by hand to the respondent, a few minutes distance away, it was mailed and postmarked "Sep 5, 6 P. M." and did not reach the respondent until the next morning at 10 o'clock. He contends that owing to the delay in advising him of the accident to the steamer, loss was suffered. Without waiving any rights to his claim for damages caused by neglect to notify him promptly of the breakdown of the steamer, he consented to use her further and she continued her voyage to Cuba.

My attention has not been called to any provision of the contract which imposed upon the libellant such a duty as is claimed here by the respondent. In section 5 it is said that: "Captain to report at charterers office at least once a day" but that obviously was only intended to be in force when the vessel should be in port and I find nothing imposing any obligation upon the master to immediately report a disaster at

sea. Of course there was a duty upon the libellant to let the charterer know of any accident which would interfere with his profitable use of the vessel. The master was to be furnished with instructions and sailing directions and that required a knowledge of her movements but it is quite a different thing from the duty claimed to have existed in this case. The respondent testified that he directed the master to call August 29th at 10 A. M. to sign the charter and receive sailing instructions but the master called earlier in the morning and not finding the respondent sailed without instructions, which the respondent was obliged to cable to Cuba and he notified his agent that the steamer would arrive there the next Tuesday, September 4th, and not to cut the fruit before that time. It was cut that day for delivery Wednesday the 5th. At this time the steamer was broken down and there was no probability of her reaching Baracoa for several days. If the respondent had known this, he might have done something to save the fruit. The steamer, however, was not able to communicate with the shore until September 4th, not in time to prevent, through New York, the cutting of the fruit, though perhaps in season to arrange for its forwarding by another steamer, but this is not clear enough to be made the basis of a claim for damages, which were doubtless due to the premature cutting of the fruit, which was the proximate cause of the loss.

It is doubtful, moreover, if any recovery could be had from the libellant. The case is very similar to Nine Thousand Bunches of Bananas, 55 Fed. 1003, 5 C. C. A. 386, where it was held that a cutting of bananas in the case of a breakdown and delay of the steamer Curlew, in this trade between Baltimore and Jamaica, was due to a premature cutting of the fruit. In that case, as here, there was a provision in the charter party for exemption of the steamer from liability due to an accident to the machinery and it was held that there could be no recovery for a loss arising from decay of the bananas.

There will be a decree for the original libellant, with an order of reference. The cross libel will be dismissed.

PURDOM NAVAL STORES CO. v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, S. D. Georgia, W. D. May 3, 1907.)

1. TELEGRAPHS—MESSAGES—FAILURE TO DELIVER—RIGHT TO SUE.

Where P., in sending a message, accepting a proposition for the sale of a business in his own name, was in fact acting as agent of plaintiff, plaintiff was entitled to sue the telegraph company for failure to deliver the message.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 37.]

2. FRAUDS, STATUTE OF—CONTRACT—MEMORANDUM—SUFFICIENCY.

The statute of frauds does not require that every detail of an agreement for the sale of chattels shall be in writing at the time the contract is made, but only requires that some memorandum or note thereof shall be in writing at some time prior to suit brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 210.]

3. CONTRACTS—ACCEPTANCE BY AGENT—TELEGRAM.
A telegram, accepting an offer for the sale of a business, signed by plaintiff's agent acting for plaintiff, was sufficient to make an enforceable contract.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 120.]

4. FRAUDS, STATUTE OF—RIGHT TO DEFENSE.
The benefit of the statute of frauds as a defense is personal, and cannot be availed of by a third person.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 344.]

5. CONTRACTS—OFFER AND ACCEPTANCE.
A corporation, operating a naval stores business offered its property on September 19, 1905, for $13,900, when the company had finished its year's business, the offer to be open for acceptance on or before October 4, 1905. On October 3d plaintiff forwarded a telegram of acceptance. *Held*, that the offer contemplated an immediate sale on acceptance, though possession was not to be surrendered until the expiration of the year's business, and hence the offer was not so conditional that its acceptance would not constitute a contract.

6. TELEGRAPHS—MESSAGES—FAILURE TO DELIVER—PLEADING.
Where a telegraph company failed to deliver a message, accepting an offer for the sale of the addressee's business, possession to be delivered on completion of the addressee's business year, a complaint for damages, failing to definitely allege the time when possession and delivery were to be accomplished, was defective.

7. SAME—DAMAGES.
Where a telegraph company failed to deliver a message, accepting a corporation's offer to sell its business for a specified price within a certain time, and the corporation thereupon refused after the expiration of the time to comply with such offer, the telegraph company was liable to the sender of the message for the difference between the price specified in the offer, and the value of the corporation's business at the time an acceptance was attempted.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 72.
Measure of damages in actions against telegraph and telephone companies, see note to Western Union Telegraph Co. v. Coggin, 15 C. C. A. 235; Western Union Telegraph Co. v. Morris, 28 C. C. A. 59.]

8. SAME—RULES—APPLICATION.
A rule of a telegraph company, that it would not be liable for damages in case of an unrepeated message, was inapplicable, where there was an utter failure to deliver the message at all.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 39, 43, 46.]

9. SAME—SUBSTANTIAL COMPLIANCE.
Where two messages in the same terms were sent to two different points a short distance apart, by which plaintiff attempted to accept a corporation's offer for the sale of its business, in either of which places the vendor could have been found, such telegrams constituted a substantial compliance with the rule of the telegraph company, requiring that a message be repeated in order to create a liability on the telegraph company.

George S. Jones, for plaintiff.
Joseph H. Hall, Warren Roberts, and Charles Akerman, for defendant.

SPEER, District Judge. The Purdom Naval Stores Company brings its action for damages against the Western Union Telegraph

Company for an alleged failure to deliver a telegram. The petition states that on September 19, 1905, the Pineville Naval Stores Company made to the plaintiff an offer in writing to sell its turpentine and naval stores business, with all property and effects, located at Hahira, Ga., for the sum of $13,900. This offer, after describing the property in question, is as follows:

"We offer the above property when we have finished our year's business for $13,900."

By agreement, these terms were left open for acceptance on or before October 4, 1905. On October 3d, I. W. Purdom, president of the plaintiff company, delivered to the defendant's agent in the city of Savannah, a telegraphic acceptance of the offer made by the Pineville Naval Stores Company. This was addressed to one J. F. Robinson, manager of the company, at Cecil, Ga., and is in this language:

"We will take your Hahira place. Will be home noon train tomorrow. Meet me.

"[Signed] I. W. Purdom."

The telegram was not delivered until October 12th, and the time for acceptance having expired, the Pineville Company withdrew their offer, and refused to sell. The plaintiff, therefore, claims as damages against the telegraph company the amount of $3,100. This is the difference between $17,000, the alleged market and actual value of the property, and the price at which the plant was offered.

The defendant has demurred to the petition upon the following grounds:

"(1) That it does not appear from the message that the Purdom Naval Stores Company ever had any contract with the telegraph company, or that I. W. Purdom, the sender of the message represented the plaintiff company.

"(2) On the special grounds, that the facts as alleged do not sufficiently show the value of the property, or how the damages claimed arose."

The telegraph company contends that it is not liable, as the identity of the sender was not disclosed to its agent at Savannah, because the message was sent by Purdom, the president, and not in the company's name. It further seeks in argument to set up the statute of frauds, on the ground that the memoranda between the plaintiff and the Pineville Company do not comply with the requirements of the statute, and therefore constitute no valid contract. The contention is also made that the Pineville Company could not have been bound, because the offer was not immediate and unconditional; but the sale was to be made only upon the termination of the year's business. The defendant company cannot then, it claims, be held liable for damages, which it insists the plaintiff would not have suffered.

From the pleadings it is obvious that Purdom was, in fact, the agent of the plaintiff company. It is the general rule that where an agent enters into a contract for his principal, without disclosing that principal's existence, the other party may, at his election, hold either the principal or the agent. In other words, the principal may be held liable at the party's option, but the agent also, by presuming to act in his own name, renders himself individually liable. Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24; Merrill v. Kenyon, 48 Conn. 314, 40 Am.

Rep. 174. The agent, however, being in a fiduciary relationship, cannot, by thus acting individually, defeat his principal's rights. The real principal, therefore, may avail himself of his agent's transactions in that capacity, and, if a contractual relation has been created thereunder with a third party, the principal may sue upon that contract. Dodd Grocery Co. v. Postal Telegraph Co., 112 Ga. 685, 37 S. E. 981; Taintor v. Prendergast, 3 Hill (N. Y.) 72, 38 Am. Dec. 618; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Wood v. Bank, 129 Mass. 358, 37 Am. Rep. 366. Obviously, then, the fact that the message was signed and sent by its agent will not of itself defeat the Purdom Company's right of action. Besides, if it be made to appear by the proof that Purdom was in fact acting for his company, it would suffice, so far as that question is involved, to maintain this action. The telegraph company was no party to the contract of sale. Its contract was to transmit and deliver the message for the usual toll. Nor can the telegraph company avail itself of the statute of frauds. To enforce such a contract, it is not necessary that every detail of the agreement, but only that some memorandum or note thereof, shall be in writing. This need not be at the time of making the contract. It may be at any time prior to the action. The statute merely states that "no action shall be brought." Failure to comply with its terms does not then render the contract void, but unenforceable. Bird v. Munroe, 66 Me. 337, 22 Am. Rep. 571; Townsend v. Hargraves, 118 Mass. 325. Since Purdom acted as agent for the company, his signature on the telegram of acceptance made an enforceable contract. Heffron v. Armsby, 61 Mich. 505, 28 N. W. 672; Williams v. Woods, 16 Md. 220. It is besides true that the benefit of the statute of frauds as a defense is entirely personal, and cannot be set up by third parties. Cahill v. Bigelow, 18 Pick. 369; Dailey v. Kindler, 35 Neb. 835, 53 N. W. 973; St. Louis R. Co. v. Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; Clark on Contracts (2d Ed.) 96. It follows that whether or not the statute was complied with by the parties to the proposed sale, that question cannot now be raised by the defendant company, which was no party to the transaction. The telegraph company, however, claims that there was no such unconditional offer as would make a valid contract, from the loss of which damages would flow. But it is clear from the alleged circumstances surrounding the transaction that there was an agreement for immediate sale in contemplation of the parties. It is true that possession was not to be surrendered until the expiration of the year's business; but this did not affect the validity of the agreement. This is clear from the fact that a time limit until October 4, 1905, had been affixed to the Pineville Company's proposition; but the acceptance by the Purdom Company within that time would have been complete had the message been transmitted.

As grounds of special demurrer, the defendant claims that it is not sufficiently apprised by the plaintiff's averments either as to the basis of value of the property, or the nature of the damages claimed. It further insists that the plaintiff is not entitled to the difference between the offered price and the market value, but only by way of nominal damages to the cost of sending the telegram. Since the familiar case of Hadley v. Baxendale, 9 Exchequer, 341, the principle of damages

for such breaches of contract has been clearly defined. The rule fixed is as follows: (1) A party is liable for such damages as he would contemplate at the time of making the contract as naturally and probably consequent upon its breach. (2) If peculiar circumstances beyond the ordinary course of events, from which special damages may ensue, are communicated to the party when the contract is made, he is liable to the full extent thereof. It is, however, true that he cannot be held for special damages arising from any unusual circumstances of which he was not apprised. All such remote, speculative, or consequential damages are not recoverable. The doctrine is discussed by this court, in Taylor Manufacturing Company v. Hatcher Manufacturing Company (C. C.) 39 Fed. 440, 3 L. R. A. 587. The plaintiff here, however, disclaims all right to recover profits.

It has been held that where a telegraph company fails to deliver a message ordering goods the measure of damages is the difference between the price due under the order, and that which the plaintiff was, or would be, obliged to pay at the same place, in the exercise of due diligence, to obtain a like quantity and quality. Dodd Grocery Co. v. Postal Telegraph Co., 112 Ga. 685, 37 S. E. 981; Western Union Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844; Mowry v. Western Union Telegraph Co., 51 Hun, 126, 4 N. Y. Supp. 666. In case of failure to sell, by the early English authorities, it was held that a party could recover as nominal damages only the amount of purchase money actually paid for the land. This restricted rule was varied only in case of palpable bad faith, where the owner sold the property to another, in which event the injured party might recover the difference between the original contract price, and that which the owner received for the property. This doctrine grew out of the unsettled condition of land titles in England prior to the registration acts. The vendor, on account of those conditions, often found it difficult to produce title deeds, and the vendee could not enforce a contract to sell. The English courts, therefore, often favored refractory vendors, and, upon a misconcption of these decisions, some courts of this country have allowed a vendee to recover only the amount of money actually paid. Under modern conditions, however, American courts have gradually recognized this rule as obsolete. It has been accordingly held that, where a telegraph company fails to deliver a message, and a party thereby lost the opportunity to purchase for $3,000 land which was worth $5,000, he might recover the difference; such damages not being remote or conjectural. Alexander v. Western Union Telegraph Co., 67 Miss. 386, 7 South. 280. See, also, Western Union Telegraph Co. v. Snow, 72 S. W. 250, 31 Tex. Civ. App. 275. The general rule, then, which the majority of courts now hold, seems to be that the proper measure of damages is the difference between the contract price and the market and actual value of the property at the time of the proposed delivery or execution of the contract. Essex Co. v. Pacific Mills, 14 Allen (Mass.) 389; Bozeman v. Rose, 40 Ala. 212; Phillips v. Ocmulgee Mills, 55 Ga. 633.

Under the allegations of the petition, the property was to be delivered when the Pineville Company had finished their year's business. In order, however, that it may meet, if it can, the averments and proof

of the plaintiff as to the market and actual value, it would seem in accordance with the rules of correct pleading that the telegraph company should be more definitely apprised of the time when possession and delivery were to be accomplished; that is to say, the time when the year's business was to be finished. An amendment will be required as to this feature; but upon the other grounds urged and argued, the demurrer will be overruled.

While interposing a demurrer, the defendant also, in a paragraph of its answer, alleged that the telegram in question was not repeated as required by a stipulation of the form on which it was printed. To this the plaintiff specially demurs. Upon this subject, in a case of error in transmitting a message, it has been held, in Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, that this requirement of repeating was reasonable, and should be enforced. That, however, was not a case of an utter failure to deliver a message. Here two messages were sent from Savannah—one to Sparks, and the other to Cecil. The telegraph company forwarded the message to Ocilla. It could scarcely be insisted that the plaintiff should not recover, because he did not repeat the message to a locality wholly different from that designed. The object of repetition is to make sure the verbiage of the message itself. The rule in Georgia, and in most of the states, differs upon the point in issue from that held by the Supreme Court, which we may safely assume was restricted to interstate messages alone. This message was intrastate; that is, from one point to another or others in Georgia. We think, however, that this is one of those questions of general commercial law, upon which the national courts make their independent judgment. It being not a failure to correctly transmit the message, but a failure to send it to the right destination, it does not seem that the failure on the part of the sender to repeat ought to defeat its right to recover. Besides, since two messages in identical terms were sent by the Purdom Company to Sparks and to Cecil—these localities in close proximity to each other—in either of which the vendor could be found, it is in substantial effect a repetition of the telegram.

For these reasons, this feature of the defendant's answer should be stricken, and it will be so ordered.

SHUMAKER v. SECURITY LIFE & ANNUITY CO. OF AMERICA.

(Circuit Court, E. D. Pennsylvania. May 10, 1907.)

No. 48.

INSURANCE—CONSTRUCTION OF LIFE POLICY—NONFORFEITURE PROVISION.

A policy of life insurance provided that on request of the insured the company would advance to him 30 per cent. of each premium, which should be a lien on the policy, also that, in case any premium was not paid when due, the same should be charged against the policy as a loan and the policy continued in force, if its loan value should be sufficient as shown by a table of values given therein, but that "these values shall be claimable only in case the full premiums have been paid in cash and there are no loans on the policy." *Held* that, where the insured obtained the 30 per cent. advance on the payment of each premium, on his subsequent de-

fault he was not entitled to the benefit of the automatic nonforfeiture provision.

At Law. On rule for judgment for want of a sufficient affidavit of defense.

This was an action on a policy of life insurance which contained, among others, the following provisions:

"(7) Special Provision.

"It is hereby agreed: First, that the company shall, if requested by the insured, advance for the insured thirty per cent. of each premium paid hereunder during the dividend period which shall be a lien against this policy, accumulating at three and one-half per cent. interest, compounded annually, until paid by the application of cash dividends or otherwise; and, second, that in the event of the death of the insured during the dividend period and while this policy is in force, a mortuary dividend equal to thirty per cent. of all premiums heretofore due hereon, accumulated at three and one-half per cent. interest compounded annually, shall be paid with the principal sum insured hereunder.

"(8) Right to Cash Loan.

"At any time after this policy has been in force for one full year and premiums have been paid up to the anniversary of the insurance next after the date when the loan is made, the company will lend upon demand, on the sole security of this policy the respective sum named in the table of cash loans herein, which shall include any previous loan then unpaid. Interest shall be at five per cent. per annum in advance.

"(9) Right to Automatic Nonforfeiture.

"If any premium shall not be paid when due, the same shall be charged against the policy as a loan, if the respective loan value be sufficient to enable such advance, after providing for the existing loans and accrued interest; provided, that if not sufficient to cover the entire premium due, a premium for a shorter period, but no less than a monthly premium shall be charged, if the available loan value is sufficient. Notice of such advance shall be mailed to the insured, and at any time while this policy is sustained in force, the payment of premiums may be resumed.

"(10) Right to Surrender Values.

"If this policy is surrendered at the end of any policy year after renewal, the insured shall be entitled to a paid-up non-participating policy, either (1) for a fractional amount of insurance, for the whole life of the insured, as per the table of paid-up insurance values below, or (2) for the full amount of insurance hereunder, but for a limited term as per the table of periods of extended insurance herein. These values shall be claimable only in case the full premiums have been paid in cash and there are no loans upon the policy. In event there are loans, the values claimable shall be computed upon the same basis as an equivalent to the unincumbered equity of the insured.

"(11) Table of Cash Loans and Paid-Up and Extended Insurance.

After End of Years.	Cash Loan.	Paid-Up Insurance.	Period of Extension.
1			0 yr. 1 mo.
2	$ 735	$1,125	3 3
3	1,065	1,920	5 9

* * * * * * * * * * *"

The supplemental affidavit of defense filed by defendant was as follows:

"Henry C. Brown, being duly sworn according to law, says: (1) That he is the secretary of the Security Life & Annuity Company of America, the de-

fendant in the above-entitled action, and, as such, is familiar with the affairs of the said company. (2) That the said company, as set forth in the plaintiff's statement of claim, issued on October 12, 1903, a policy of life insurance upon the life of Alvin P. Shumaker in the sum of fifteen thousand (15,000) dollars, a copy of which is hereto annexed marked 'A' and made part hereof, being No. 2763; that by the terms of the said contract of life insurance the said Alvin P. Shumaker agreed to pay the premium named in the said contract annually on, or within 30 days after, October 8th of each year, and did pay the said premium on October 8, 1903, part in cash and part by credit as hereinafter described, and October 8, 1904, part in cash and part by credit as hereinafter described; but that neither the said Alvin P. Shumaker nor any one for him or on his account did or ever has paid the premium, or any part thereof, due October 8, 1905, or within thirty days thereafter; but the said Alvin P. Shumaker did not pay the full premiums in cash on October 8, 1903, and October 8, 1904, when they were due, but, on the contrary, availed himself of paragraph 9 of his application for the policy which is made a part thereof, providing that while the annual premium was to be $542.70, payable in advance, yet that the policy was issued 'on the advance dividend plan under which the company agrees to advance' to him against the policy contract 30 per cent. of each premium during the advance dividend period of twenty years. The affiant avers that the said Alvin P. Shumaker availed himself of this clause in his application made part of his policy by paying on October 8, 1903, the sum of $379.95 in cash, receiving credit for the balance of his premium then due on the advance dividend plan, namely, for the sum of $162.75, and the affiant further avers that the same payment was made and no other on account of the premium due October 8, 1904, so that from the outset down to the present time the said Alvin P. Shumaker never paid the full premium in cash and accordingly the policy under its terms never had any surrender value. (3) That the said Alvin P. Shumaker died on December 12, 1905, without ever having paid and without any one ever having paid for or on his account the said premium, or any part thereof due October 8, 1905, or within 30 days thereafter. (4) That under paragraphs 9, 10, and 11 of the 'Privileges and Conditions,' which were a part of the said policy, the policy did not have any cash loan value unless or until the third annual premium, due at the end of the second year of the life of the policy, had been paid in cash, and that this third annual premium, due October 8, 1905, or within 30 days thereafter, was not paid as required by the terms of the policy either by the assured or any one for him prior to his death on December 12, 1905, and that the said payment never was made. Furthermore, under the said paragraph 10 the assured was not at the time of his death entitled to a paid-up nonparticipating policy for any amount because the assured was in default on his third premium as hereinbefore stated, and under the table of cash loans and paid-up and extended insurance in said paragraph 11 the policy until after the end of the second year had no cash loan or paid-up and extended insurance value, the premiums due not having been paid when due in cash, but having been paid only part cash as hereinbefore set forth, nor was the said policy surrendered under the said paragraph 10. (5) That under the terms of the said contract or policy of life insurance as hereto annexed, the said policy had lapsed by reason of the breach and nonfulfillment thereof by the said Alvin P. Shumaker above described so that at the time of his death on December 12, 1905, and never since has the said policy been a valid outstanding contract of life insurance for any sum."

Mason & Edmonds, for plaintiff.

Sydney Young, Theodore W. Reath, and Jos. I. Doran, for defendant.

BUFFINGTON, Circuit Judge. After argument and due consideration, we are of opinion the affidavits of defense disclose a good defense. The premium due at the expiration of the second year, viz., October 12, 1905, was not paid and the two prior premiums were not

paid in cash. Therefore, by the terms of the policy, no right to a cash loan on the policy or to an automatic nonforfeiture of the policy existed when the insured defaulted on the premium due October 12, 1905.

The rule for judgment is therefore discharged.

In re ROSENBLATT et al.

(District Court, E. D. Pennsylvania. April 22, 1907.)

No. 2,420.

1. BANKRUPTCY—COMPROMISE OF CRIMINAL PROSECUTION—APPROVAL.
A court of bankruptcy will not encourage or approve an agreement between the trustee and creditors of the bankrupts not to furnish any evidence against the bankrupts in any criminal prosecution, and not to institute such prosecution in consideration of certain transfers of property to the trustee and an increase in the assets by a fund raised by the friends and relatives of the bankrupts for their benefit.

2. SAME—DISPOSITION.
Where a court of bankruptcy refused to approve an agreement between bankrupts and their trustee and certain creditors, because it involved a compromise on the question of a criminal prosecution against such bankrupts in consideration of a payment of certain funds to the trustee by third persons, the court would not interfere with or control the disposition of the amount so paid among the creditors.

In Bankruptcy.

W. Horace Hepburn, for receiver.

Furth & Singer, for bankrupt.

Samuel Dickson, Arthur G. Dickson, and James McMullan, for Fourth Street Nat. Bank.

HOLLAND, District Judge. In this case the bankrupts were threatened with criminal prosecution. There were a number of claims held by relatives of the bankrupts which were disputed, and it was alleged that a number of payments and transfers of property within four months of the time of filing the petition in bankruptcy were preferential and recoverable by the trustee. The assets of the estate were appraised at $22,700. This was a very small percentage of the total liabilities, which amounted to the sum of $237,500. The trustee and creditors, anxious to increase the assets of the estate with the least possible cost and delay, and the bankrupts, equally solicitous to secure immunity against prosecution, entered into an agreement with others, bearing date the 9th day of March, 1906, by which it is stipulated that certain transfers of property shall be returned to the trustee, and, in addition, a sum in cash should be raised by the friends and relations of the bankrupts, to be paid to the trustee, and certain claims over which the bankrupts had some control should be withdrawn from the estate, in consideration of which the trustee stipulated not to furnish any evidence against the bankrupts in any criminal prosecution, and other parties agreed not to institute such prosecutions.

The primary object of the trustee in entering into this contract was,

no doubt, to increase the assets of the estate for the benefit of the creditors, and the bankrupts, by becoming a party to it, desired to avoid the dangers of a criminal prosecution. So that we are confronted with the question as to whether this court will encourage or approve the making of an agreement to stifle the prosecution of bankrupts for any violation of law of which they may have been guilty. It is urged the agreement enables the trustee to increase the assets of the estate. While this may be true, it would scarcely compensate for the demoralizing effect resulting from a knowledge that courts would approve compromises to suppress evidence or stop criminal prosecutions. It would encourage and protect many unfair methods resorted to by men in the commercial world, which the law has denounced as crimes. No compromises or agreements which stipulate for an immunity against criminal prosecution will be approved, however much it may in the particular case enable the trustee to increase the assets of the estate. Any agreement of compromise with reference to payments or transfers held to be preferential, or any compromise with regard to claims against the estate which will increase the assets and benefit the general creditors, and be an advantage to the estate, will, of course, be approved; but if it is coupled with any agreement not to furnish evidence in a criminal prosecution against the bankrupts, or in any way to stifle a prosecution that may be contemplated, the court will not approve the agreement.

The sum of $19,189.80 was raised by parties entirely outside of the bankrupts, and paid in cash to the trustee, with direction to appropriate the same to the payment of a certain percentage on certain claims, and the balance to the general creditors, and it is now urged that the court should order that the directions as to how this sum should be appropriated should be disregarded by the trustee, and make an order upon him to appropriate the entire amount to the general creditors, so that each shall have his proportionate share. We have already held that this court will not approve this agreement, because it involves a compromise on the question of a criminal prosecution, and as the payment of this amount to the trustee was made by third parties, and was part of it, the court will not interfere in any manner with its disposition.

The referee's approval, therefore, of this agreement, and his order directing the trustee to carry it into effect, is not approved, and the petition of the trustee for the approval of the same is denied.

FREEMAN et al. v. FREEMAN.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1907.)

No. 2,442.

1. TRUSTS—ESTABLISHING BY PAROL—KANSAS STATUTE.

Gen. St. Kansas 1901, § 7875, which provides that no trust concerning lands, except such as arises by implication of law, shall be created, unless in writing, etc., does not prevent a complainant from showing by parol that real estate conveyed to defendant was in part paid for by others, together with other tracts, and that the conveyance was pursuant to an agreement made in good faith between the purchasers that defendant should hold the same in trust for the benefit of the one to whom it should be allotted in a division; the trust in such case being one arising by implication of law under sections 7880 and 7882 of the statute as construed by the Supreme Court of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 62–65.

Construction of statute—State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71.]

2. SAME—EVIDENCE ESTABLISHING—IMPLIED TRUST.

In a suit by heirs to recover a lot, the title to which was alleged to be held in trust by defendant for the benefit of their decedent, it was shown that he and his family, consisting of his parents, two brothers, and a sister, the defendant, from time to time during a number of years had purchased lots and other real estate with the intention of holding the same in partnership until a division was made. All contributed to the payment of the purchase money, except perhaps the defendant, and toward paying off incumbrances. The title to all of the property was vested in the father and in defendant, who was unmarried and lived with her parents. The father, having reached an advanced age, conveyed the property standing in his name, including the lot in controversy, to defendant, as the evidence tended to show, on an agreement and understanding that she should hold the same in trust for the benefit of all until a division should be made. This deed was not recorded, but was known to the others. The sons having removed to a distance, defendant looked after the property and received and applied the remittances made by her brothers. After some correspondence respecting a division, she caused a deed to be executed to the decedent by her parents, conveying to him the lot in controversy, subject to a life estate in the grantors, which deed the decedent accepted as satisfactory. A few days afterward, and before his deed was recorded, he was killed, and defendant thereupon recorded her prior deed and claimed the property. *Held*, that such evidence, including the corroborative facts which were undisputed, was sufficient to raise an implied trust which entitled complainants to a conveyance of the lot from defendant, subject only to a life interest in her parents.

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

Rush C. Butler (Eldon J. Cassoday, O. J. Wood, and Alfred A. Scott, on the brief), for appellants.

Joseph G. Waters (A. H. Case, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This was a suit by the widow and children of John E. Freeman, deceased, against Harriet E. Freeman, to establish a trust and to compel a conveyance of a lot in Topeka, Kan. Upon final hearing the trial court dismissed complainants' bill, and they have appealed.

John E. Freeman and the defendant Harriet were brother and sister. The defendant's title, which was sought to be charged with the trust, came to her by warranty deed from her parents. The theory of the trial court in dismissing the bill was that complainants were seeking to establish an express trust in real property by parol evidence contrary to the provision of the Kansas statute (Gen. St. 1901, § 7875) that:

"No trust concerning lands except such as may arise by implication of law shall be created, unless in writing, signed by the party creating the same, or by his attorney thereto lawfully authorized in writing."

The case of Gee v. Thrailkill, 45 Kan. 173, 25 Pac. 588, was cited and applied. In that case Thrailkill conveyed real property to Mrs. Gee by absolute and unconditional warranty deed, and afterwards sought to show by parol evidence that the agreement at the time was that Mrs. Gee might sell or mortgage it to raise funds for him, and that whenever he so desired she should reconvey to him any part remaining in her hands. It was held that Thrailkill was endeavoring to establish an express trust by parol, and that the case was therefore within the statute.

This appeal presents three lines of inquiry: What trusts in respect of realty in Kansas are not controlled by the above section of the statute? What was the case stated in the bill of complaint? What was established by the proofs? Of these in their order:

Other sections of the Kansas statute (sections 7880, 7882) provide that when a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter, but that this provision shall not apply where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money, or some part thereof. It will also be observed that the section of the statute applied by the trial court expressly excepts from its operation such trusts as arise by implication of law.

Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501. In this case a farm consisting of a half section of land was purchased, and the deed taken in the name of Elijah Rayl, under an agreement that he should hold the title for his mother, himself, and a minor brother; that he and the brother were to manage the farm as partners; that the mother and the other minor children were to aid in operating and in paying for the farm and at the end of five years a designated quarter section should be conveyed to her. The mother and a daughter attended to the housework, and all the family and the farm hands boarded with her. Other members of the family helped in raising crops. The mother earned some money in weaving carpets and in keeping boarders. The results of her labors and of those whose services she was entitled to went to the payment of the land, and her contributions exceeded in value the purchase price of the part she was to have. When the time came for Elijah to convey he refused, and in defending her suit contended that she was endeavoring to enforce an express trust resting in parol. The Supreme Court

of Kansas held, however, that a trust arose by implication of law which could be established by parol evidence and enforced under the exceptions in the Kansas statutes.

Franklin v. Colley, 10 Kan. 260. In this case two women jointly purchased two lots; each furnishing an equal part of the consideration. But by agreement, and without any fraudulent intent, they had the deed made to one; she to hold the title until the other became of age. They jointly improved the property, and afterwards the one who held the title repudiated the right of the other. In a suit to establish the trust and to compel a conveyance, the court held that there was a resulting trust which might be shown by parol evidence, and that the statutes were not intended "as limitation, restriction, or prohibition upon the creation of what are known as resulting trusts, implied trusts or constructive trusts." It is also well settled in Kansas that when the legal title to real property has been acquired, and is being held wrongfully and in fraud of the rights of the equitable owner, a constructive or involuntary trust arises and may be established by parol evidence. Typical cases of trusts of this character are Howard v. Howard, 52 Kan. 469, 34 Pac. 1114, and Rose v. Hayden, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145.

Was the bill of complaint framed upon the theory of an express trust, or did it charge a trust arising by implication of law? If the former was intended, it must be said that the existence of the essential writings would have to be inferred, as the pleader made no mention of them in the bill of complaint. On the other hand, the voluminous averments of the circumstances surrounding the acquisition of the legal title by the defendant, the relations between the parties, and the contributions of moneys by complainants' intestate, show that the intention was to exhibit such a state of facts as would give rise to a resulting or constructive trust, as distinguished from one created by written agreement. While the averments of the bill are somewhat lacking in precision and definiteness in this particular, we are of the opinion that they are sufficient. The following appears to be quite clearly charged: Before the conveyance of the lot in controversy to the defendant, her father held the legal title to it, and also the legal title to other lands and property. During his lifetime he and his three children, John E. Freeman, the defendant Harriet, and a son Elijah, had purchased several tracts of land, and the title was taken in the name of the father for the benefit of all of them. Each of them contributed to the purchase price. John E. Freeman, the complainants' intestate, sent from time to time to the father and to defendant Harriet, who was managing the father's business affairs, large sums of money to be applied in the payment of certain notes, some of which were secured by mortgage upon the property held in the name of the father for the benefit of all of them, and those sums of money were so applied. Prior to the death of the father a division of the property so acquired and held was agreed upon by the parties in interest. Each one was to receive certain specific parcels. Under this agreement for division John E. Freeman was to have the lot in controversy, and the defendant was to have other property, exclusive of the lot, in full of her share in the common holdings. On April 7, 1897, the father conveyed to defendant Harriet

by warranty deed various pieces of property including the lot in controversy. The mother joined in the deed. This deed was made in furtherance of the relations between the parties with respect to the property, and with the understanding and agreement that Harriet was to hold the legal title in trust, and when the time for division came she was to convey accordingly. While the deed recited a consideration of $500, the defendant paid nothing at the time; the real consideration being as already mentioned. When the deed was made the father was of advanced age and in feeble health, and defendant Harriet was his confidential agent and adviser and attended to his business affairs. She assented to the trust condition upon which the legal title was placed in her, and agreed to make the conveyances to the others of their respective parcels, including a conveyance to John E. Freeman of the lot in controversy. She was also the trusted agent of her brother, John E. Freeman, but after his death, which occurred November 7, 1901, she repudiated the trust relation, and sought to defraud the complainants, who are his heirs, out of the property. There were also averments of a bona fide attempt by the defendant, during the lifetime of John E. Freeman, to execute the trust in respect of the lot in controversy, but which failed for reasons that will be mentioned in a discussion of the evidence. In our opinion these averments are of a trust arising by implication of law within the rule of Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501, which may be established by parol evidence. It was charged by fair inference that the consideration for the conveyance of the legal title to the defendant was not paid by her at the time the deed was executed, but consisted of the previous payments and contributions of money made by the three children, and particularly by John E. Freeman, and that by agreement, and without any fraudulent intent existing at the time, the lot in controversy conveyed to the defendant was to be held by her in trust for John E. Freeman.

In approaching a consideration of the evidence, it is proper to say that, while this suit directly involves but one piece of property, the actual dealings of the parties took a much wider range, embraced quite a number of parcels of land, and covered a period of more than 10 years. The particular transaction in question did not begin and end on the day the legal title was conveyed to the defendant. It was but a part of a comprehensive course of dealing, and, as it was inseparably related to and dependent upon other transactions of like character, a true conception of it requires a consideration of all its accompaniments. It should also be observed that it was not necessary to the creation of an implied trust that John E. Freeman should have paid all of the consideration for the deed from the father to the defendant, or that what he did pay should be separable from the remainder of the consideration and some specific and divisible part thereof have been intended to apply to the particular lot in question, as distinguished from the remaining property, all of which in the aggregate was the subject of their transactions, or that the consideration paid by him should have been paid at the precise time the deed was executed. If the evidence shows that John E. Freeman paid, in whole or in part, the consideration for the deed from the father to the defendant, and that by agreement and without any fraudulent intent the latter took the legal title

so conveyed in trust for those whose payments constituted the consideration, and it was afterwards determined that upon the apportioning of their interests John E. Freeman was to have the lot in controversy, we then have a trust arising by implication of law which need not be in writing signed by the party creating it, but of which the proof may rest in parol.

In 1888 the Freeman family consisted of the parents, three sons, and a daughter. The sons were Elijah, Henry, and the complainants' intestate, John E., and the daughter, the defendant Harriet. They were industrious and saving and accumulated considerable real property, consisting of improved and unimproved lots in Topeka and a farm of about 600 acres of land in Wabaunsee county, Kan. In July, 1888, John E. Freeman married the complainant Ida. A few days before his marriage he conveyed to his mother the real property which he owned in Topeka, consisting of a number of improved lots and an interest in others. This conveyance was voluntary and without any consideration moving from the grantee. The deed was recorded the day before his marriage. The title to the farm in Wabaunsee county stood in the name of his son Henry, until before his marriage he conveyed it to one of his parents. Elijah also owned some property which took a similar course, and there was some in the name of the defendant. In addition there was some property, including the lot in controversy, the title to which was in the name of the father. The result of these conveyances was that the title to all of the real estate in Topeka and the farm in Wabaunsee county belonging to the members of this family became vested in the parents and the daughter. The only credible explanation of the conveyances by the sons is that found in the testimony of the complainant Ida, who said that the purpose was that all the real estate of the family should be held in partnership; that thereafter the property was so regarded and dealt with; and that the members of the family called themselves the Freeman firm. Some of this property was incumbered, and from time to time the incumbrances were reduced and finally paid. Some of the lots conveyed by John E. Freeman to his mother were sold, and the proceeds in part applied to the discharge of mortgages. The property was handled and dealt with, taxes thereon paid, repairs and improvements made, and rents collected, as a common property, without regard to any individual ownership. About 18 months after his marriage, the son John removed to Chicago. He was accidentally killed November 7, 1901. Shortly before this Elijah removed to California. Henry, at some time not indicated by the record, removed to the farm in Wabaunsee county, where he died in 1896, leaving a widow. Harriet, who never married, remained in Topeka with her parents, looked after the common property, and received and applied the contributions from the other members of the family. The father died in the fall of 1902 at the age of 94 years. The mother was 80 years of age when she gave her testimony in 1905.

John E. Freeman had been in the service of the Santa Fé and St. Louis and San Francisco railroad companies for about 25 years. He was a cook in the private cars of the presidents of those companies, and his salary ranged from $60 to $95 per month with additions by

way of tips and presents. For many years, commencing before his marriage, and ending shortly before his death, a substantial part of his earnings was paid to his father and sister to be applied to their household expenses and to incumbrances, improvements, and taxes upon the real property. For the most part the remittances, aggregating several thousand dollars, were made direct to the defendant, and these remittances were continued although the family of John E. Freeman was growing in size and the cost of their support and maintenance was increasing, and although defendant and her parents who were living in the homestead were possessed of property worth nearly $20,000, if her testimony is to be believed. During her husband's absence from home, the complainant Ida drew his monthly wages and attended to the remittances to the defendant at Topeka. The son Elijah also contributed to the common account a part of his earnings, though the proof is not definite as to the amounts or dates, and while living in Topeka he devoted his labor to the repair and improvement of the property. A letter written by Henry Freeman in November, 1891, appearing in the record, indicates that he also was laboring in the common interest. A statement of his farm operations for the year showed the amount of his receipts, and that after paying the taxes and insurance and the cost of some improvements he had applied $1,200 upon an indebtedness in which they were interested and had but $81 left for household expenses. It is doubtful that Harriet personally contributed much of consequence besides her attention to her parents, to the property, and to the money contributed by the others. She testified that she kept lodgers and earned money in that way, and that she had accounts of her personal affairs and an account in bank, but she produced no evidence but her own words, which were indefinite, vague, and unsatisfactory. Notwithstanding all this, at the time of the trial, through deeds from her parents, the title to all of the property of the family stood in her name, excepting some parcels which she had previously conveyed to John E. Freeman as part of his share. The property in her name and which she claimed to own absolutely was at her own valuation worth over $17,000 after deducting incumbrances. She said that the farm had been conveyed to her by her parents by way of gift. The lot in controversy and other lots were conveyed to her for a recited consideration of $500. This is the deed which complainants attack as an absolute transfer and claim was a conveyance in trust. Defendant says she paid the $500, but our conviction is otherwise. The various letters written and the acts of the parties during the years preceding the controversy, and the testimony that is in harmony with those letters and acts, and therefore the more credible, have convinced us that the consideration for this deed and the other deeds to the defendant consisted in the contributions of all of the children, and that there was an unqualified agreement that she was to hold the title in trust pending a division among them. There was that verity in the correspondence and acts of the parties which renders futile the denials born of the temptation which arose upon the death of John E. Freeman. So much for the consideration which moved the father to make the deed to the defendant and the substantial participation of John E. Freeman in the payment of that consideration.

Most of the letters introduced in evidence were addressed to John E. Freeman, and were produced by the complainants. The defendant said that those she received from him had been destroyed; but her written words, when read in the light of admitted and proven facts, clearly show that during his lifetime she recognized the conditions upon which she acquired title, that he was entitled to a share of property, and that the lot in controversy had been set off to him in the division. Before referring to the letters bearing upon this feature of the case, it should be said that the deed to defendant of April 7, 1897, conveying the lot in controversy and other property, was not recorded until after the death of John E. Freeman, though he knew of its existence. On March 28, 1900, the defendant prepared a deed from the parents to John E. Freeman conveying the lot in controversy, subject to a life estate in the grantors, and when it was executed and acknowledged she signed as a witness to their signatures. This deed was not delivered to John E. Freeman until shortly before his death. The letters written by the defendant indicate that early in 1901 John E. Freeman was pressing for a division of the property. On February 25, 1901, she wrote him that the lot in controversy was his, and that she had on hand $1,100, including Elijah's checks and farm rent after payment of taxes. On March 11, 1901, she wrote him that she would answer him in full in a few days, and that she thought there was some way of adjusting their matter satisfactorily. On March 18, 1901, she wrote as follows:

"Mother says when we meet that the farm can be adjusted agreeable to all she thinks and the reason she said for the north lot to be Liges. You all are to have the lots at their death, but she thought if you took them now and improved them you of course would expect the income from your investment which is right. * * * We ask both of you all to give advice or some idea as to the division. Your last letter is the first we ever got. But I feel that things will be alright."

The evidence warrants the conclusion that the lots the defendant referred to in this letter were two adjoining lots on Kansas avenue, in Topeka, the south one being the one in controversy, and that it was the intention that Elijah Freeman have the north one. On October 13, 1901, she sent him the deed of March 28, 1900, purporting to convey the lot in controversy, also two deeds from herself, one for a part of the farm in Wabaunsee county, and the other for a small tract of land in Topeka. None of the deeds had been recorded. In the letters accompanying them she said that she would have attended to the matter sooner, but wished to be careful to make no mistakes; that she had done her utmost to adjust matters, and hoped she had. Evidently, John E. Freeman acknowledged receipt of the deeds and expressed his satisfaction, for on November 5, 1901, she wrote him that she received his letter and was glad that things met with his approval; that she should have attended to matters before, but as that was their final decision she supposed all was well, and she put it off for a convenient season. Two days afterwards John E. Freeman was killed; the defendant attended his funeral in Chicago on November 11th; and on the 14th, after her return to Kansas, she placed her deed of April 7, 1897, of record, and asserted that she owned the lot in controversy.

The three deeds to John E. Freeman were recorded December 4, 1901. The claim of defendant that the deed of March 28, 1900, was merely to secure John E. Freeman for moneys which he agreed to advance for the improvement of the property, and that as he advanced none he took no title, is not worthy of serious consideration. It is inconsistent with evidence that satisfies our judgment and with the whole atmosphere of the case.

In the fall, winter, and spring of 1901–02, a building was constructed upon the two lots on Kansas avenue; the south one being the lot in controversy. The work was commenced in September, 1901, before the defendant sent the deed of March 28, 1900, to John E. Freeman. To raise part of the cost she mortgaged both lots for the sum of $1,500. The mortgage was unsatisfied at the time of the hearing. The improvement of these lots by the construction of a substantial building was the subject of frequent discussion with John Freeman prior to his death. Details of construction, estimates of cost, and propositions for rental were submitted to him. The defendant has not shown that any part of the cost of this improvement above the proceeds of the mortgage referred to was paid from her personal resources.

Our conclusions are that when the title to the property of this family, including the lot in controversy, was vested in the defendant, a part of the consideration for the conveyances was paid by John E. Freeman; that when defendant acquired the legal title it was taken in good faith, without any fraudulent intent, and for the benefit of those who paid the consideration, and it was so taken upon the understanding and agreement that there should be an equitable division thereof; that in the division subsequently agreed upon the lot in controversy fell to John E. Freeman; that the defendant expressly recognized his right prior to his death; and that the deed of March 28, 1900, from his parents to him, which was prepared and witnessed by the defendant and sent by her to him in October, 1900, was intended to be in fulfillment of her trust obligation, but was ineffectual for that purpose because of her prior deed from the same grantors.

The decree of the Circuit Court is therefore reversed, with direction to enter a decree requiring the defendant to convey the lot in controversy to the complainants by sufficient deed, subject, however, to one-half of the incumbrance mentioned as being upon it and the adjoining lot, and also subject to the life estate of Letitia Freeman, the mother. The decree should contain the usual provisions in case of her refusal. If the mother is still living, there should be no decree for rents and profits, because after the payment therefrom of taxes, repairs, and the proper proportion of the interest upon the incumbrance the remainder belongs to her. In case she is not living, the decree should provide for an accounting of rents and profits for the period subsequent to her death.

In re REMINGTON AUTOMOBILE & MOTOR CO. et al.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 202.

1. BANKRUPTCY—CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—ASSESSMENT BY TRUSTEE.

Where a corporation, at the time it became a bankrupt, could have laid an assessment on certain of its stockholders, whose stock was not full paid, such right passed by the bankruptcy to the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 230.]

2. SAME—PROCEDURE.

Where, at the time a corporation became a bankrupt, certain of its stock issued was not full paid, the bankruptcy court, on the petition of the bankrupt's trustee for leave to levy an assessment on such stockholders, was bound to determine whether, at the time of the issue of any particular share, the full value was or was not paid in, whether any subsequent payments had been made on account thereof, whether the corporation was indebted in excess of assets, and the amount of such indebtedness.

3. JUDGMENT—RES JUDICATA—ISSUES.

In a plenary action by the trustee of a bankrupt corporation to recover an assessment levied against the holders of unpaid stock, the decision of the bankruptcy court, authorizing such assessment, was res judicata as to the amount paid by the stockholder for his stock, the indebtedness of the corporation, and the amount of the assessment, the stockholder being only entitled to make any individual defense he might have to such action.

4. BANKRUPTCY—CORPORATION—ASSESSMENT ON UNPAID STOCK.

An order authorizing the trustee of a bankrupt corporation to levy an assessment on certain of the corporation's unpaid stock should not provide for execution against the stockholders for the respective amounts found due on such assessment, which was collectible only by plenary action against the stockholders.

5. SAME—PROOF OF INDEBTEDNESS—CLAIMS.

On an application of the trustee of a bankrupt corporation for leave to levy an assessment on unpaid stock, the corporation's indebtedness was properly proved by presentation of the proofs of claim.

6. CORPORATIONS—LIABILITY OF STOCKHOLDERS—UNPAID STOCK.

Laws N. J. 1896, p. 284, c. 185, § 21, declares that where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts, each stockholder shall pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion thereof as is necessary to satisfy corporate debts. *Held*, that where a corporation directed the sale of certain of its stock of the par value of $100 per share at $25, and that the proceeds be used for regular expenses, the original purchasers of such stock were subject to assessment for the balance of the par value thereof, or so much as was necessary for the payment of corporate debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 879.]

7. SAME—STOCK ISSUED FOR PROPERTY—VALUATION—BONA FIDE PURCHASERS.

The stock of a corporation to the amount of $8,000 was issued for property valued at the time for only $6,000. This stock was marked "full-paid" and certain of it was thereafter purchased in the open market by persons who, on request for information, were informed by the corporation's manager at its office that the stock was full paid. *Held*, that such stockholders, on the corporation becoming a bankrupt, were not liable

to assessment to the amount of the difference between the value of the property and the par value of the stock.

[Ed. Note.—For cases in point see Cent. Dig. vol. 12, Corporations, § 973.]

8. SAME.

Laws N. J. 1896, p. 293, c. 185, § 49, authorized corporations to issue full-paid stock for property, and declared that, in the absence of fraud, the judgment of the corporation's directors as to the value of the property should be conclusive. A corporation organized under such act contracted with a city's board of trade to remove its plant to such city in consideration of the board's purchase of shares of the company's stock at a price less than par, and to furnish the corporation a free site for its buildings. Certificates purporting to be full paid were issued to the board and sold to subscribers at the same price the board paid for it; the board also procuring a conveyance to the corporation of the site, which was accepted in fulfillment of the contract. *Held*, that such stock would be regarded as full-paid, and that neither the board nor purchasers from it were liable to further assessments for the benefit of creditors of the corporation after bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 973.]

9. SAME.

A bona fide purchaser of certain of such board of trade stock from the corporation, under the belief that the stock issued to him was issued pursuant to the board of trade agreement, but which in fact had been issued by the corporation to be sold for cash at less than par, was not bound to pay future installments on such stock.

[Ed. Note.—Liability of transferrors and transferees of corporate stock for assessments, see note to Campbell v. American Alkali Co., 61 C. C. A. 322.]

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

This cause comes here upon appeal from an order of the District Court, Northern District of New York, which set aside certain contracts made by the bankrupt corporation with its various stockholders, found that certain of its shares represented stock which was not full paid, and ordered that a call and assessment be made upon the holders of such shares to an amount sufficient in each case to make the stock full paid. As to certain other of the stockholders it was further adjudged that they were not liable for any unpaid subscriptions. The opinion below is reported in 139 Fed. 766.

L. M. Southworth and George E. Dennison, for appellant.

F. G. Fincke, C. H. Searl, W. G. Miller, and Fuller & Miller, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The case is an intricate and complicated one, because of the issues of stock made from time to time to different individuals under different circumstances. The district judge has fully and carefully stated the facts necessary to be considered, and has set forth the relevant documents in full. It would be a waste of time to restate them here, except so far as may be necessary to an understanding of the different conclusions hereinafter expressed.

The Right to Make Assessment.

The Remington, etc., Company is a New Jersey corporation, and subject to the following statutory provisions (chapter 185, p. 277, Laws N. J. 1896):

"Sec. 21. Stockholders liable until subscriptions are fully paid.—Where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy its debts and obligations, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share, as fixed by the charter of the corporation, or such proportion of that sum as shall be required to satisfy such debts and obligations."

"Sec. 48. Nothing but money shall be considered as payment of any part of the capital stock of any corporation organized under this act, except as hereinafter provided in case of the purchase of property, and no loan of money shall be made to a stockholder or officer thereof; and if any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum so loaned.

"Sec. 49. Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock in any company or companies owning mining, manufacturing or producing materials, or other property necessary for its business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable for any further call, neither shall the holder thereof be liable to any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation to be published or filed this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported in this respect according to the fact."

Had the corporation not become bankrupt, it could have laid an assessment upon such of its stockholders as were liable for further calls to make up full payment, and the right to make an assessment and call passed by the bankruptcy to the trustee. The Supreme Court, in Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968, holds that the proper practice in such cases is for the trustee to file petition in the bankruptcy court for an order directing him to make an assessment and call upon the unpaid stock of the corporation for the purpose of paying its debts. In order to determine whether such an order should be made, it is necessary for the court to examine into and decide certain questions of fact, e. g., whether at the time of the issue of any particular share the full value was or was not paid in, whether any subsequent payments were made on account of it, whether the corporation was indebted in excess of assets, and what is the amount of its indebtedness. We are unanimously of the opinion that the practice followed in this case was correct, and that the decision of the District Court as to any question the decision of which was necessary to the making of the order will be res adjudicata in any subsequent proceeding between the trustee and any stockholder who received notice of the proceeding. Thus, in a plenary action against a stockholder to enforce assessment, he cannot be heard to question the findings made in this proceeding as to the amount paid for the stock, as to the indebtedness of the corporation, or as to the amount of the assessment; but he may present and make proof of any individual defense which he may have to such action. In this connection it may be noted that the phraseology of the order is such that it might be contended that execution for the respective amounts might be issued against the individuals named. This should be corrected.

The writer is further of the opinion that, inasmuch as the stockholder is to be concluded as to the amount of corporation indebtedness by

the finding in the bankruptcy court, he is entitled to have that amount proved by the best evidence, if he appears and asks for it. In the case at bar the indebtedness was proved merely by presentation of the proofs of claim. To this counsel for stockholders objected, and claimed the right to cross-examine whoever might swear to the debt. His contention was overruled and exception reserved. The writer is of the opinion that this was reversible error, but the majority does not think so.

The Ilion Stock.

Certain shares of stock were issued to citizens of Ilion, N. Y., under a resolution which directed that they "be issued to be sold at $25 per share, and that the proceeds of such sale be placed in the treasury to be used for regular expenses." Nothing further was ever paid in on account of such stock. The District Court held that each share of such stock was not issued as "full paid," and that each holder thereof was liable for $75. We are of the opinion that such stock was not full paid and is liable to assessment. A majority of the court find in section 21, quoted supra, sufficient warrant for such assessment without discussing the question on general principles of corporation law. We are all of the opinion that the amount of each individual assessment can be collected only by plenary action. The persons who hold such stock (except Taber, hereinafter referred to) are the original subscribers who took it under the resolution above referred to, and apparently under an express contract with the corporation that it should locate its factory and carry on its business in Ilion. This contract was broken by the corporation, and we express no opinion as to whether that breach of contract may be availed of as a defense to an action to recover the assessment from an individual stockholder.

The Quick Stock.

This was stock issued to the amount of $8,000 for property which was valued at the time at $6,000 only. The Circuit Court held that the original subscribers were liable for $25 a share, and no one disputes the correctness of that finding. Four persons who now hold the stock were not original subscribers. They bought in ignorance of the transaction, the certificates they received were marked "full-paid," and they were informed by the manager of the company, from whom they made inquiries before purchasing, that it had been issued for property and was full paid. Very many authorities are cited on the briefs, but not one of them holds that a stockholder, who is not a subscriber, but who buys in good faith in the open market stock which is marked full paid, and which he is informed at the office of the corporation is in fact full paid, can be held liable for the proportion of its face value which may be then unpaid. None of the New Jersey cases, construing the statute of that state, to which we are referred, deal with the question. They are concerned with stockholders, who were original subscribers. The authorities cited in Cook on Stock and Stockholders, §§ 50, 51, sustain the views above expressed. The decision of the District Court as to the four persons who bought shares of this "Quick" stock from original subscribers is affirmed.

The Chamber of Commerce Stock.

Several hundred shares of the stock were issued to persons designated by the Board of Trade (or Chamber of Commerce) of the city of Utica. Each person so receiving stock paid $30 a share in cash. The District Court held that they were not liable for the additional $70 per share, and a majority of this court concur in that conclusion. The documents will be found printed in full in the opinion below. The stock was issued under a resolution that:

"An option be given to the Utica Chamber of Commerce until February 23d for the securing of the permanent location of this company in the city of Utica upon condition that they supply us with $30,000 in cash through the sale of our stock at $30 per share, and upon further condition that they supply us with a factory site of from three to four acres to our satisfaction, the same to be deeded to the company free and clear of all incumbrances. The above conditions being complied with, 1,000 shares of our capital stock is to be issued, in the name of whoever the Utica Chamber of Commerce specifies at $30 per share, each share full paid and nonassessable."

This was subsequently modified by reducing $30,000 to $15,000, and 1,000 to 500. Thereafter the Chamber of Commerce did obtain an option to buy on reasonable terms a site with buildings upon it available for a plant (the original agreement called for a vacant site only), and tendered the same to the company with $1,000 as performance of its contract, which was accepted by the corporation. A majority of the court think the transaction was one directly with the Chamber of Commerce, and that it came within the provisions of section 49 of the New Jersey statute cited supra, and that the holders of such stock are not liable for assessments thereon, upon the theory that it was not full paid.

Taber Stock.

One W. E. Taber, a machinist of Utica, having heard of the arrangement made by the Chamber of Commerce, went to the secretary of that body and applied for 10 shares. The secretary gave him a letter to the manager of the company. He went to the latter and said he wanted 10 shares of Chamber of Commerce stock. The latter gave him a certificate for 10 shares, which he represented to be such stock and took $30 a share from Taber. As the district judge found:

"He acted in entire good faith and in the belief that he was obtaining the stock under and pursuant to the Chamber of Commerce agreement as set out in the circular, and that said Chamber of Commerce had provided for full payment of said stock. The certificates were delivered to him as Chamber of Commerce stock, paid for as such, and accepted as such."

The manager gave him a certificate which represented 10 shares of "Ilion" stock, which the original holders thereof had returned to the company. The liability of a subscriber or stockholder to pay future installments on his stock is wholly contractual. Taber certainly made no express contract to that effect, and we are of the opinion that the circumstances do not warrant the holding that there was an implied contract to do so.

As to the rulings of the District Court touching other issues of stock, no error was assigned.

With the exception of the Taber stock, therefore, the order of the District Court is affirmed, and the cause remitted, with instructions to add a clause to the effect that it shall be without prejudice to any defenses which individual stockholders may have to a plenary action to collect the amount of their respective assessments. As to the Taber stock, the order is reversed.

BRADLEY v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 154.

1. SHIPPING—LIABILTIY FOR LOSS OF CARGO—EXEMPTION UNDER HARTER ACT.

A carrier by water can only avail himself of the exemptions from liability for errors of management and navigation provided by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946], by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so, and such affirmative proof cannot be supplied by inferences or presumptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 492.

Statutory exemption of shipowners from liability, see note to Nord-Deutscher Lloyd v. President, etc., of Insurance Co. of North America, 49 C. C. A. 11.]

2. SAME.

Under a contract of affreightment to carry wheat to the port of New York and there deliver it on board a vessel for export, where the wheat on reaching that port was loaded into a canal boat for transport and delivery to the designated vessel by the carrier's tug, the carrier is liable for its loss through the sinking of the canal boat, whether resulting from unseaworthiness or from the negligence of the towing tug or of the master of the boat; its seaworthiness not being affirmatively shown.

3. CARRIERS—LIABILITY FOR LOSS OF GOODS—STIPULATION FOR INSURANCE.

A bill of lading provided that, in case of loss or damage to the goods, the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly or indirectly to the benefit of any carrier or bailee by stipulation in bill of lading or otherwise, and that it should be null and void to the extent of any amount recovered from any carrier or bailee. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." *Held*, that the provision of the bill of lading did not obligate the shippers to insure for the benefit of the carrier, nor, if they did insure to effect, such insurance as would protect the carrier, but that they were free to procure the insurance they did; that the advance made by the insurance company was not a waiver of the conditions of its policy, and did not extinguish the liability of the carrier nor constitute a defense to an action against it to recover for the loss.

4. PAYMENT—EFFECT OF PAYMENT BY THIRD PARTY—DISCHARGE OF OBLIGATION.

Payment of an obligation of another by a third party does not discharge it as between the original parties unless the payment is made and received with the intention that it shall do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 6, 136.]

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

Appeal in admiralty from a decree in personam (145 Fed. 569) adjudging the respondent liable for the loss caused to a cargo of wheat by the sinking of the canal boat upon which the wheat was being transported.

H. G. Ward, Wm. S. Montgomery, and Robinson, Biddle & Ward, for appellant.

Lawrence Kneeland and Black & Kneeland, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

WALLACE, Circuit Judge. The libelant is the assignee of Nourse & Co., who were the shippers of the cargo of wheat which was damaged by the sinking of the canal boat Dean. The wheat, when damaged, was in the course of transportation by the Lehigh Valley Railroad Company as a common carrier under a through contract of affreightment by which it was to be carried from Toronto, Canada, to the port of New York, and there be delivered on board a steamship for further transportation to Leghorn, Italy. It had been received by the railroad company at Communipaw, N. J., and there laden on board the canal boat Dean, and before daylight on the morning of January 23, 1903, the company's tug Mercedes took the Dean, together with the canal boat Igo, to tow them to the steamship, which was then lying in her slip at the foot of Forty-Second street, Brooklyn.

The libel proceeds upon two theories—one that the company was liable because the loss occurred by the negligent towage of the company's tug, and the other that it was liable as a common carrier for a breach of its obligation to safely transport and deliver the wheat. The court below was of the opinion that the loss was caused by the negligence of the tug in bringing the Dean into contact with the ice. The proofs show that, when the towage service was begun, the tide was flood, and the ice which had previously obstructed the channels had been carried up the North and East rivers so that the channels were free, but considerable ice remained in the slips, where the wind kept it from the action of the tide. When the tug and canal boats reached the slip at Forty-Second street, the vessels were stopped outside, and the tug pushed the canal boats into the slip slowly through the ice, until the master of the tug thought there was risk in pushing them further because of the thicker ice, and the tug was about to leave, when the master of the Dean insisted that she should be pushed further into the slip. The master of the tug, after objecting, yielded, and the tug pushed her further in. That there was some risk in doing this is apparent, because before leaving the Dean the master of the tug cautioned the master of the Dean to measure her water, in order to see if her condition was satisfactory. The latter measured, and reported that she was all right. About an hour later the master of the Igo, which boat was then lying alongside the Dean, noticed that the Dean was lower in the water than she had been, and he called her captain, and said, "Your boat has got about four inches

of water in her." The captain answered: "That's about right." About an hour later he again called the attention of the latter to the Dean's condition, and then she was found to be filling with water so fast that the pumps could not remove it. She sank soon after.

The Dean was an old boat, having been built in 1874. She had been rebuilt in 1888, and was overhauled somewhat in 1893. No evidence of her seaworthiness was given, except that on some previous occasion she had passed inspection and been classified by the underwriters as fit to carry grain, but at what time this was did not appear.

In the view which we take of the facts, it is not material whether the towage service was negligently performed or not. So far as appears, the tug would have left the Dean in a safe and proper place, and would have fully performed her towage service if the master of the Dean had not for his own convenience insisted upon having his vessel pushed further into the ice. If the tug was negligent, the railroad company as her owner was, of course, responsible. If the tug was not negligent, the company was responsible for the breach of its duty as a common carrier to carry the wheat safely on the Dean, because the disaster was caused in part at least by the conduct of the captain of the Dean. The contention of the appellant that this conduct was an error in the management of the vessel, and because of the provisions of the Harter act (Act Cong. Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) it was relieved of responsibility as a common carrier, cannot be sanctioned. There was no affirmative evidence to show that the Dean was seaworthy at the beginning of the voyage, or even at a time approximately near the beginning of the voyage. The carrier can only avail himself of the exemptions from liability for errors of management and navigation, provided by section 3, by affirmative proof that the vessel was seaworthy at the beginning of the voyage, or that due diligence had been used to make her so. This affirmative proof cannot be supplied by inferences or presumptions. The Wildcroft, 201 U. S. 378, 26 Sup. Ct. 467, 50 L. Ed. 794. The evidence in the present case failed to comply with the requirements of the rule.

It is contended for the appellant that the court below erred in overruling its defense founded upon a stipulation contained in the bill of lading under which the wheat was being transported. That stipulation was:

"That in case of loss or damage to the goods the carriers shall be given the benefit of any insurance for or on account of the owner of said goods, and shall be subrogated in their rights before any demand shall be made upon them in respect to such loss or damage."

There was an insurance on the wheat in favor of Nourse & Co., which had been effected with the Sea Insurance Company under a policy, which, among others, contained the following conditions:

"It is warranted by the insured that this insurance shall not enure directly or indirectly to the benefit of the carrier or other bailee by stipulation in bill of lading or otherwise, and that this policy shall be null and void to the extent of any amount paid or recoverable from any carrier or bailee."

After the loss occurred, and before the assignment of their demand by Nourse & Co. to the libelant, the insurer advanced to Nourse &

Co., $3,992.85, a sum equal to the amount of the loss, and took a receipt therefor, which recited that the amount had been received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." The appellant insists that this transaction should be regarded as a payment of the loss, and operated to extinguish any right of Nourse & Co. to recover therefor. Treating the transaction as a payment of the loss, it did not discharge the liability of the railroad company upon the theory of extinguishment. Payment of an obligation of another by a third party does not discharge it as between the original parties, unless the payment is made and received with the intention that it shall do so. Bleakley v. White, 4 Paige (N. Y.) 654; Muller v. Eno, 14 N. Y. 605; King v. Barnes, 109 N. Y. 289, 16 N. E. 332. The real question is whether the transaction defeated the right of subrogation of the railroad company secured by the stipulation in the bill of lading.

When the transaction took place, the insurance policy had become void at the election of the insurance company, because of the breach of the warranty. Although the insurance company was entitled to insist upon its right to treat its contract as nugatory, it could, if it chose, waive that right and treat the policy as a valid and existing one. By making an unconditional payment of the loss, it would have waived the breach, in the absence of some agreement or understanding to the contrary between the parties to the transaction. But the parties were at liberty to agree that the payment should not be unconditional, or that it should not operate as a waiver, or that it should be regarded as a loan or as a gratuity. The receipt indicates plainly that they did not intend the transaction to be an unconditional payment, or regarded as a payment of the loss in any sense. Its form was carefully devised for that purpose. It is industriously framed to show that the money advanced was not advanced in payment of the loss; and apparently to deprive the railroad company from obtaining any benefit from the insurance, and enable Nourse & Co., or some assignee or appointee of theirs, to recover the loss from the railroad company for the benefit of the insurance company. It is not important that Nourse & Co. may not have expressly consented to receive the payment as one not made by the insurance company in recognition of its liability. It suffices if the insurance company did not intend to recognize its liability. As is pointed out by Chief Justice Shaw, in Farlow v. Ellis, 81 Mass. 231, a waiver is the relinquishment of a right which otherwise the party making it would have enjoyed, and the voluntary choice on his part not to claim the benefit is of the essence of the waiver; and whether there has been a waiver is a question of fact, depending upon the intention of the party against whom the waiver is asserted. That the insurance company did not intend to waive its right to treat the insurance as nugatory can hardly be questioned. The struggle between carriers and insurers to escape ultimate loss when insured cargo has been damaged or destroyed while in the custody of the carrier has resulted in efforts by each to cast the burden upon the other by the insertion of astute provisions in their respective contracts with the shippers or owners of cargoes, and by availing themselves of every technical ad-

vantage to secure the benefit of their own provisions. To infer that an insurance company has intentionally foregone such an advantage would be to indulge in a violent and preposterous presumption.

Notwithstanding the stipulation in the bill of lading Nourse & Co. were under no legal obligation to effect any insurance for the benefit of the railroad company. The carrier is undoubtedly entitled by a stipulation in his contract to reserve to himself the benefit of any insurance which the shipper may effect or may have effected on the goods, although he thereby shifts from himself to the insurer the loss for which he is primarily responsible; but any stipulation which requires the shipper to procure insurance for the benefit of the carrier in case of loss is void. Inman v. South Carolina Railway Co., 129 U. S. 139, 9 Sup. Ct. 249, 32 L. Ed. 612; The Hadji, 22 Blatch. 235, 20 Fed. 875. The same reasons which forbid the enforcement of a stipulation requiring the shipper to insure for the benefit of the carrier would forbid the enforcement of one requiring him when he does effect insurance to procure such as will protect the carrier. The shipper cannot be circumscribed in his liberty to make such a contract with the insurer as he chooses. If he sees fit to make one which may be worthless to the carrier, it is his right to do so. The present stipulation does not purport to circumscribe that right. The contract which Nourse & Co. saw fit to make with the insurance company was framed so as to render the insurance worthless to the railroad company at the option of the insurer. Unless the insurance company waived that option, and made the advance to Nourse & Co., as a payment for insurance in recognition of its liability, Nourse & Co. never obtained any insurance, and there was none to which any right of subrogation under the stipulation in the bill of lading could attach when the present action was brought. We conclude that there was no defense to the action arising from the stipulation.

It is argued for the appellant that an erroneous basis for the computation of the loss was adopted by the court below in view of the stipulations in the bill of lading. We regard the case as controlled by the decisions of this court in The Styria, 101 Fed. 728, 41 C. C. A. 639, and the Manitou, 127 Fed. 554, 63 C. C. A. 109, and not distinguishable from these cases by the slight difference in the language of the stipulation.

The decree is affirmed, with interest and costs.

MOIT v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1907.)

No. 1,616.

1. MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—EVIDENCE OF MASTER'S NEGLIGENCE.

Where plaintiff, a car repairer employed by defendant railroad company, was injured while repairing the trucks which had been removed from under the end of a car by the falling of the end of the car which had been jacked up by other employés, and rested upon the jacks, there was no presumption of negligence on the part of defendant arising from the

accident itself, and no ground of recovery against it for the injury was shown, in the absence of any substantive proof of its negligence or of any evidence to show what caused the car to fall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898.]

2. SAME—UNSAFE PLACE TO WORK—NEGLIGENCE OF FELLOW SERVANTS.

The jacking up of the end of a railroad car for the purpose of repairing the trucks was not a part of the master's duty of providing a reasonably safe place for the employés to work, but a part of the duty of the servants making the repairs, and there can be no recovery against the master for an injury resulting to a fellow servant from their negligence in doing the work, the appliances furnished by the master not being shown to have been insufficient nor defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 352.]

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

Jere Horne, for plaintiff in error.

A. W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit for personal injury. The plaintiff below was a car repairer. He was at work under the trucks removed from one end of a jacked-up box car. While thus engaged, the end of the car fell upon his legs, which extended beyond the trucks. The court below directed a verdict for the railroad company on the ground that there was no proof that its negligence caused the injury.

The evidence below was limited to the plaintiff, George W. Moit, at the time of the accident employed as a car repairer in the shops of the Illinois Central Railroad Company, at Memphis, Tenn., and an employé who worked along with him, his so-called "partner," John K. Brigance. On February 18, 1905, Moit was ordered by his foreman to assist Brigance in placing a bolster on the trucks of a car then in the yard. When Moit and Brigance reached the car, they found one end of it jacked up and the trucks removed. These trucks were still partly underneath the jacked-up end. It was necessary for Moit and Brigance, in order to do their work, to remove the nuts from certain bolts connected with the trucks. These bolts held the bolster on. Moit found that the nuts could not be removed with a wrench; they had rusted, and the bolts would turn with the nuts. As a result, it became necessary to cut the nuts off, and Moit was under the trucks holding an iron maul against a nut while Brigance cut it off with a cold chisel, when the accident occurred. While Moit and Brigance were thus at work, Moit's legs extending to a point beneath the end of the car, the jacks gave way, and the end of the car fell. It struck the trucks, rolled them away, and fell upon Moit's legs, injuring them so severely that one had to be amputated, and the other was so crippled as to become almost useless.

The car was an ordinary freight or box car. It was jacked up in the customary way for an empty car. There was testimony tending to show that a loaded car, when jacked up, was ordinarily supported by

trestles. As to whether this car was loaded or not, Moit was without knowledge. The door of the car on his side, as he passed it going to his work under the trucks, was fastened. Brigance testified that "the car was loaded with shavings, sawdust, trash, out of the shed." But Brigance did not discover this until after the accident, and the testimony he thus gives is far from satisfactory upon the point that the car was "loaded" in the common acceptation of the term, and needed to be supported by trestles when jacked-up. Indeed, there is no proof whatever upon the latter point.

The only explanation given, or offered, of the cause of the accident, was by Brigance, who, when asked what caused the car to fall, said:

"I could not tell, without the ground was froze and kinder thawing that evening, and the jacks slipped. The car slued and caused it to fall, I think."

This is a mere conjecture on the part of Brigance, for he says his back was turned to the car when it fell. There is no other testimony on this point; nothing tending to show that the jacks were defective, or that they gave way, or the car slued because of any fault on the part of the company.

1. Plaintiff's case was based upon the alleged duty of the railroad company to provide the plaintiff with a reasonably safe place in which to work and reasonably safe appliances with which to work. It contended that the car fell, either because the jacks were defective or were used in an improper and inefficient way; and it insisted that under the doctrine of res ipsa loquitur the fact of the accident itself made a prima facie case of negligence which the court should have submitted to the jury.

In the recent cases of Illinois Central R. R. v. Coughlin, 132 Fed. 801, 65 C. C. A. 101, Cincinnati, etc., R. R. Co. v. South Fork Coal Co., 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533, and Carnegie Steel Co. v. Albert Byers (C. C. A.) 149 Fed. 667, we have had occasion to apply the rule laid down by the Supreme Court in Texas & Pacific R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, and Patton v. Texas & Pacific R. R. Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, wherein it was pointed out that what might make a prima facie case of negligence against a railroad company in favor of a passenger or a stranger would not apply as between the company and its employé. In the latter case there was no presumption of negligence arising from the accident itself, but the liability of the company to its employé must be made out by proof that the company was negligent, and this negligence brought about the resulting injury. If the testimony left the matter uncertain, indicating only that one of a number of things may have brought about the injury, for some of which the company was responsible, and for others not, it was not for the jury to guess between these numerous causes and find that the negligence of the company was the real cause, when there was no satisfactory foundation in the testimony for that conclusion. 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361. Thus, in the case of Carnegie Steel Co. v. Albert Byers, where a hydraulic jack used to elevate cars of molten metal, on which an electric locomotive partly stood, suddenly and unexpectedly, and without any apparent cause,

arose from its position, tipping the locomotive up and injuring an employé of the company who was upon it, we held that the mere fact that the elevator or jack arose without any apparent cause was not sufficient to make a prima facie case of negligence against the company. "The burden, however, was upon the plaintiff to make substantive proof of some negligence—the omission of some duty which the defendant owed to him. It was incumbent upon him to show either that the jack was an improper appliance, or that the company had been negligent in keeping it in reasonably safe repair. Looney v. Metropolitan R. R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Ill. Cen. R. R. Co. v. Coughlin, 132 Fed. 801, 803, 65 C. C. A. 101; Texas & Pacific R. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. There was no substantial evidence from which the jury might reasonably find that this accident was due to negligence. Its cause is wrapped in doubt and uncertainty. It may have happened from some cause for which the defendant was not liable or from actionable negligence. It was the duty of the plaintiff to make a case from which a jury might reasonably find negligence. This it did not do." 149 Fed. 673.

In the present case, there was no proof that the jacks were not reasonably safe appliances for the work for which they were designed. Nor was there any proof that they had been improperly used in jacking up the end of the car. We have referred to the proof respecting the loading of the car. The testimony of Brigance was not in our opinion sufficient to warrant the conclusion that the car was "loaded," in the sense that it required trestles to support the end which was jacked up. If it be urged that the car fell, and that is proof enough that either the jacks were defective or they were improperly used, it may be pointed out that any outside force which jarred the car and caused its lifted end to slue might have caused the jacks to give way. The chance of this happening was one taken by the car repairers. Indeed, the witness Brigance suggests an intervening cause which was purely external, namely, the thawing of the ground on which the jacks rested. Obviously, the unequal sinking of the jacks through thawing might disturb the equilibrium of the end of the car and cause it to slue and fall. Other illustrations might be given of the fact that the car might fall without any negligence on the part of the railroad company; but such negligence is essential, and must be supported by substantive proof in order to justify the submission of the case to the jury. Looney v. Metropolitan R. R. Co., 200 U. S. 480, 486, 488, 26 Sup. Ct. 303, 50 L. Ed. 564.

2. It is vigorously urged that in jacking up the end of the car the railroad company was providing a place for Moit to work, that whoever assisted in jacking up the car was doing the master's work, and, since the accident resulted from a failure to do this work, the company should be held responsible. This contention does not appeal to us. The jacking up of the end of the car for the purpose of removing the trucks and replacing a bolster was not a part of the master's duty of providing a reasonably safe place in which to work, but a part of the servants' duty of repairing the car. Wabash R. R. Co. v. Propst, 92 Ill. App. 485. That duty was intrusted to a number of employés,

including the plaintiff, Moit. It is true the car was jacked up and the trucks removed before Moit reached the ground. This work was done by his fellow servants. If they, or any of them, were negligent in doing it, it was the risk he assumed by reason of his employment. Of course, the rule of fellow servant does not apply to the condition of the jacks that were furnished by the railroad company for the purpose of lifting up the end of the car. That appliance had to be a reasonably safe one, and, if there were proof that the accident resulted from the negligent furnishing of insufficient or defective jacks, the railroad company would be responsible; but there is no such proof.

The judgment is affirmed.

REED v. MOORE & McFERRIN.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,617.

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff was employed in a box factory as a belt repairer and assistant to the machinery foreman, to whose orders he was subject. The freight elevator having fallen, plaintiff and the foreman started to repair it, and, without making any examination of the machinery, assumed that the elevator fell because of the breaking of the cord. A new cord was put in and a stop put on for the ground floor, when plaintiff and the foreman went up on the elevator to the second floor to put the stop on there, but before they could do so the elevator fell, injuring both of them. After the accident a complete examination of the elevator disclosed that the drum shaft was bent, and that the sprocket wheel and gearing were so broken as to be inoperative, either of which might have caused the accident. *Held*, that plaintiff assumed the risk in assisting to put the elevator in repair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551-558.

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

2. SAME—FELLOW SERVANTS.

Plaintiff and the foreman, while engaged in repairing the elevator, were fellow servants, so that plaintiff could not recover for the foreman's negligence in failing to discover the defects in the elevator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486-490.

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 Western District of Tennessee.

Jere Horn, for plaintiff in error.

C. L. Marsilliott and C. A. Lightner, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The plaintiff in error, J. H. Reed, was injured by the fall of a freight elevator in the box factory, at Memphis, Tenn., of the defendants in error, Moore & McFerrin. There was no substantial dispute as to the facts of the case, and the court be-

low directed a verdict for the defendants. The elevator was an old one, and had several times been repaired. Its gearing, consisting of the sprocket wheel, cogs, etc., connected with the shaft and constituting the operating mechanism of the device, was located on the ground floor and covered by a sheet-iron hood, which not only protected it from the dust, but screened it from observation. The elevator was used for the purpose of carrying material from the ground floor to the second floor only, a distance of about 12 feet.

The duty of keeping this elevator, and, indeed, all the machinery of the factory, in repair, was intrusted to one Antone, the foreman of machinery in the plant. The plaintiff in error was employed as a belt repairer, but he acted as an assistant to Antone in making repairs on the machinery, and in that sense was a subordinate of Antone, and subject to his orders. On September 13, 1905, the elevator suddenly fell from the second to the first floor. It was loaded when it fell, but no persons were on it. Antone was notified of the fall, and called upon Reed to go with him and assist in repairing it. When Antone and Reed reached the elevator, they found that the cord which shifts the elevator up and down, was broken. The elevator was then at the ground floor. They took the old cord off and replaced it by a new one. Then it was necessary to place the stops on the new cord, so as to stop the elevator at the usual places. They put the stop for the ground floor on, and then went up on the elevator to the second floor to put the top stop on; but, before they could do it, the elevator fell, injuring both of them.

It seems that no examination of the operating mechanism of the elevator, either that outside or under the hood, except the cable or cord used to shift the elevator, which they found broken on their arrival, was made by Antone or Reed. When they found the elevator on the ground floor after its fall, and the shifting cable broken, they assumed that the break in this cable was the cause of the accident, and made no further examination. After the accident, a complete examination of the elevator, both that outside and that under the hood, was made, and it appeared that the fall was not due to the break in the shifting cable, but to defects in the operating mechanism; it being due either to the fact that the shaft which held the drum that carried the cable was bent about an inch, or that the sprocket wheel and gearing were so broken as to be inoperative. The sprocket wheel and gearing were covered by a hood; but it seems that the bent shaft was observable outside. It is fair to state that there was some conflict as to whether the shaft was bent before or after the elevator fell. It may have been bent by the fall of the elevator. The defect was not noticed before the elevator fell. The testimony narrows the cause of the accident to either the bent shaft or the broken gearing. One of these causes was observable outside the hood; the other was covered by the hood. One or both of the causes must have existed before the elevator fell the first time; for, after the shifting cable was repaired, the elevator again fell, indicating it was not the break in this cable which caused it to fall.

The legal question involved is whether, under all the circumstances, Reed assumed the risk involved in assisting to put this broken elevator

in repair. The general rule is that the employer is obliged, not only to furnish his employés a reasonably safe place to work in, but reasonably safe appliances to work with. This rule, however, is subject to the exception that if the employé either knows or ought to know that the place or the machinery is in a dangerous condition, and he is engaged in the work of putting in repair, he assumes the risks incident to the work of repair. He cannot act upon the assumption that the machinery is in repair, when he was employed for the very purpose of putting it in repair. There are many cases illustrating different phases of this rule. The exception applies, not only to the work of repair, but also to the risks incident to the work of construction. Thus, in Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440, it was held that:

"The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants."

The case of Gulf, etc., Ry. Co. v. Jackson, 65 Fed. 48, 12 C. C. A. 507 (Eighth Circuit), grew out of the repair of a portion of the roadbed of the railroad which had been undermined. The accident was due to the obstructed condition of the ground where the work of repair was being done, and it was held that under the circumstances the injured person assumed the risks attendant upon such obstructed condition. In the case of C. & O. Ry. Co. v. Hennessey, 96 Fed. 713, 38 C. C. A. 307 (this circuit), where a servant was injured while handling a defective car which had been placed upon a special side track used for such cars, it was held that the placing of the car on the special side track was notice to the employé of its defective condition, and he was held to assume the risks of handling it. A somewhat similar case was that of Hauss v. Lake Erie & Western R. R. Co., 105 Fed. 733, 46 C. C. A. 94 (this circuit). Here a brakeman was injured through catching his foot in an unblocked frog on a part of the track under construction. Notice that work was being done on the track was held sufficient warning to the brakeman, and he was held to assume the risks of working about the track in its existing condition.

The case of Kelley v. Chicago, etc., Ry. Co., 35 Minn. 490, 29 N. W. 173, grew out of the handling by a brakeman of a disabled car. He was held to have assumed the risk. The case of Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28 Pac. 497, grew out of the repair of the railroad track. The servant engaged in the work of repair was held to have taken upon himself the ordinary risks incident to such work, but not latent risks known to the master, but not disclosed to him or discoverable by the use of proper diligence. Another repair case, but this time of a trolley line, was that of Broderick v. St. Paul City Ry. Co., 74 Minn. 163, 77 N. W. 28. In this case the work of repair was the replacing of a wooden by an iron pole. In the case of Brick v. Rochester, etc., R. R. Co., 98 N. Y. 211, the plaintiff's intestate was killed while riding upon a construction train used in the work of repair. The train ran off the track by reason of

frozen mud alongside the track. It was held that the rule of a safe piace did not apply, and the only negligence chargeable was that of a fellow servant. In the case of Dartmouth Spinning Co. v. Achord, 84 Ga. 16, 10 S. E. 449, 6 L. R. A. 190, it was held that a machinist employed to keep machinery in good order takes the risk of discovering its condition at the time he attempts to repair it. Said the court, speaking by Chief Justice Bleckley:

"While it is the duty of a master to furnish his servant safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe whilst repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired."

In Bedford Belt Ry. Co. v. Brown, 142 Ind. 659, 42 N. E. 359, the accident resulted from the slipping of a wedge in the track on a railroad bridge in process of construction. It was held that the rule of safe appliances did not apply. "The rule may be broadly stated that the master is never liable for failing to supply a safe place for the servant to work when the work consists in making safe the place and the condition of which he complains." 142 Ind. 666, 42 N. E. 361.

But it is contended that Reed could not be held to have assumed the risk of the elevator still being in need of repair, after the broken cable had been replaced and Antone had stated that the only thing still to be done was to put on the stops; that Reed had a right to rely on Antone, and did rely on him, and simply followed his orders, and was not bound to examine and ascertain for himself the real condition of the elevator. But, when Reed went to the elevator with Antone to repair it and put it in working order, he knew it was out of repair, and he assumed the risk of helping Antone repair it. He knew, when he went to work with Antone upon the elevator, that it was not a safe elevator, that it needed to be repaired, and that Antone, with his help, must put it in repair. In doing this work of repair, Reed became a fellow servant of Antone, and he assumed the risks resulting from that relation. American Bridge Co. v. Seeds, 144 Fed. 605, 75 C. C. A. 407; Kinnear Mfg. Co. v. Carlisle, 152 Fed. 933. If Antone was negligent, and as a result made a mistake, Reed could not hold the master responsible for that mistake in thinking the defect was repaired when in fact it was not. The master had a right, after calling upon Antone to repair the elevator, to rely upon Antone doing his duty, and not reporting or treating the elevator as safe until it was in fact repaired and in proper working order. That was what Antone was hired to do, was ordered to do, and had assumed the risk of doing, and Reed, who was hired to assist him, assumed the same risks; each taking upon himself the risk of repairing the broken elevator, and also the risk of the negligence of his fellow servant while the work was going on. Neither Antone nor Reed could complain of the elevator being defective, inasmuch as that very thing was the cause of their being there, and they undertook to set it right, being paid for the risk they ran and voluntarily incurring it. Frye, L. J., 18 L. R. Q. B. Div. 702.

The judgment is affirmed.

OHIO VALLEY BANK CO. v. SWITZER et al.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,653.

BANKRUPTCY—ORDER ON CLAIM FOR ATTORNEY'S FEES—MODE OF REVIEW.

An order of a court of bankruptcy passing upon the claim of a creditor for the allowance of counsel fees and expenses incurred in contesting claims and prosecuting suits on behalf of the estate is not one allowing or rejecting a "debt or claim" against the estate within the meaning of Bankr. Act July 1, 1898, c. 541, § 25a (3), 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], and appealable thereunder, but is an administrative order reviewable only on petition to revise in matter of law under section 24b.

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

A. L. Roadarmour, for appellant.

Hollis C. Johnston and E. D. Davis, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The controversy brought up on this appeal arose in the matter of the bankruptcy of Christian C. Mack upon a petition of the appellant, a principal creditor of the bankrupt, for the allowance of attorney's fees and expenses incurred by it in contesting claims of other parties who claimed to be creditors, and in proceedings to recover assets. The appellant alleged in its petition that these contests and recoveries were made by its own efforts in default of action by the trustees, and were successful in largely augmenting the estate. It claimed before the referee an allowance of $1,800 for attorney's fees and $1,200 for other costs and expenses. The referee allowed the petitioner $750 only. The petitioner, feeling aggrieved, caused the matter to be certified to the district judge for review. The district judge confirmed the action of the referee. Thereupon the petitioner filed an assignment of errors and a petition for the allowance of an appeal. This petition stated that it had undertaken to prosecute (contest, apparently was meant) claims against the estate with the consent of the trustees, had expended large sums of money, which had been in large part disallowed, and that the District Court had made an order allowing it to appeal from the judgment. The appeal was allowed, bond given, and citation issued and served. On the argument here the court failed to notice that the case came up by appeal, and not on a petition for review. But on taking the record in hand for further consideration we find that we are without jurisdiction; for the proceeding in the District Court was an administrative proceeding in the bankruptcy matter, and was neither a controversy arising in a bankruptcy proceeding within the meaning of section 24a of the bankrupt act of July 1, 1898 (30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3431]), nor the rejection of a claim against the estate under section 25a (3) of the act.

It has been already decided by this court in Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553, that such a claim as this is not a claim such as is intended by section 25a (3) from the disallowance of which

an appeal is given; and that the question of the allowance of such a claim is a question relating to the administration of the estate, and reviewable only under section 24b of the act upon a petition for review. We have therefore no alternative but to dismiss the appeal.

We must not be understood, however, as suggesting a remedy by a proceeding under section 24b, for it would seem that the controversy here is over a question of fact, while subdivision "a" of section 24 authorizes only the revision of matters of law.

Appeal dismissed, with costs.

In re WEINREB et al.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 252.

BANKRUPTCY—DISCHARGE—REFUSAL TO ANSWER MATERIAL QUESTIONS.

Under Bankr. Act July 1, 1898, c. 541, § 14b (6), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended in 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which makes it a ground for refusing a discharge that the bankrupt "in the course of the proceedings in bankruptcy refused * * * to answer any material question approved by the court," no more formal approval is required from the referee than the overruling of objections, if any are made, and the allowance of the questions, and the refusal of a bankrupt on his examination to answer a question as to what was done with a large sum of money drawn by him from the bank a short time before the bankruptcy, is sufficient to warrant the refusal of a discharge, although after such objection to the discharge was made he offered to answer the question.

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

See 146 Fed. 243.

Max J. Kohler and Joel M. Marx, for appellant.

Joseph Rosenzweig, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The district judge refused discharge under the sixth subdivision of section 14b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which provides for a discharge unless it appears that the bankrupt "in the course of the proceedings in bankruptcy refused to obey any lawful order of or to answer any material question approved by the court."

The question related to a payment of $18,200 in cash which the bankrupts alleged they had made to a person to whom they claim that they were indebted on open account. Manifestly it was material. It was put to Weinreb on examination before the referee on January 27, 1904. No objection was made to it, but he refused to answer, on the ground that it would tend to degrade and incriminate him. The same question was put to Merker on February 17, 1904, under the same circumstances and with the same result. On March 15th each

bankrupt was again asked the same question. Objection was interposed on the ground that it was "incompetent, irrelevant, and immaterial," but the objection was overruled by the referee and the question allowed. Each bankrupt thereupon refused to answer, on the ground that it might tend to incriminate him. On March 14th specifications in opposition to discharge were filed; one of such specifications being the refusal to answer this question. Thereafter at a hearing before the referee on April 5, 1904, without notice to the objecting creditors, and in the absence of their counsel, the bankrupts signified their willingness to answer said question and gave the name of the person inquired about. Under these circumstances, we concur with the district judge in the conclusion that their original refusal was sufficient ground for denying discharge. We do not assent to the appellant's contention that any more formal action than the overruling of objections (if any are made) and the allowance of the question is required from the referee. Upon hearing on application for discharge, the bankrupt has the opportunity to argue before the judge that the question put to him was not material, and his rights are thus as fully protected as if the referee should certify the objections to the question to the court in the first instance.

The order is affirmed.

THE FOLMINA.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 193.

1. SHIPPING—DAMAGE TO CARGO—BURDEN OF PROOF AS TO SEA PERILS.

Under a bill of lading which exempts the vessel from liability for injury to cargo through perils of the sea, where damage was caused by sea water, the burden rests on the vessel to show sufficient stress of weather to warrant the inference that such water found access to the cargo through a peril of the sea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 481. Loss by perils of the sea, see note to The Dunbritton, 19 C. C. A. 465; Southerland-Innes Co. v. Thynas, 64 C. C. A. 118.]

2. SAME.

A decree dismissing a libel to recover for damage to cargo affirmed where the evidence left it uncertain whether the damage was caused by sea water or by sweat and heat, and the bill of lading exempted the vessel from liability for injury caused by perils of the sea or from sweat or decay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 481, 484.]

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

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, brought to recover for cargo damage against the Steamship Folmina. The opinion below is reported in (D. C.) 143 Fed. 636. The steamship sailed from Kobe, Japan, for New York with No. 3 lower hold filled with rice in bags. During discharge the rice on the starboard side was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold which was dry, forward

from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat. The bill of lading exempted the carrier from "the act of God * * * loss or damage from * * * explosion, heat or fire on board * * * risk of craft or hulk or transshipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, decay, vermin, rain, spray." It is manifest upon the proofs, and no one disputes, that the damage was caused either by sweat and heat, or by sea water and consequent heat. The district judge found the evidence not sufficient to satisfy him as to which of these two causes was responsible for the damage. He exonerated the ship because she had "stipulated against damage from sea water," and also against damage from heat and sweat. He says: "If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship strongly aids the evidence that it did not enter. But that is left undecided. If the injury was the result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. If the injury arose from sea water, without the carrier's fault, he is released by the stipulation provided he shows the fact. * * * When the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened."

F. M. Brown and Butler, Notman & Mynderse, for appellants.

J. P. Kirlin, John M. Woolsey, and Convers & Kirlin, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The opinions of the three members of the court upon the questions presented in this case are so discordant that no good purpose will be served by any detailed statements of the reasons by which they reach their several conclusions. It will be sufficient to indicate what those conclusions are.

Evidently the conclusion of the district judge was arrived at by first determining upon whom the burden of proof rested; and it would seem that in determining that preliminary question he assumed that the bill of lading stipulated against damage by "sweat" and damage by "sea water." The stipulations, however, are in fact against damage by "sweat" and damage by "perils [dangers and accidents] of the seas." This court recently considered the question of burden of proof in the case of the Patria, where the exceptions were "perils of the seas" and "decay of any kind"; and expressed itself as follows:

"It is, no doubt, the rule, as appellant contends, that, when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate: If the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but, if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken, although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that the decay was caused by inherent defect. If, however, the sole damage

was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed." The Patria, 132 Fed. 971, 972, 68 C. C. A. 397.

One member of the court as at present constituted is of the opinion that, where the damage is caused by sea water, the statement of the rule as given in the above excerpt is too broad; that under the English authorities (Hamilton v. Pandorf, 16 Q. B. D. 633, 12 App. Cas. 523, and subsequent cases) the shipowner is relieved when he shows that the damage is caused by sea water and there is no evidence that any fault, negligence, or unseaworthiness of the ship allowed it to enter; and that the American cases (Hooper v. Rathbone, Taney 519, Fed. Cas. No. 6,676; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234) are in accord with this construction. Therefore, although not satisfied by the proofs that the damage was caused by sweat, he votes to affirm.

The other two judges adhere to the rule laid down in The Patria, but one of them is satisfied that the weight of evidence is to the effect that the damage was not caused by sea water but by sweat. Therefore he votes to affirm. The other judge is not persuaded by the evidence to a finding that the damage was caused by sweat, and believes that sea water was the cause. He does not think that, under the decision in The Patria Case, the shipowner need show just how the water got in, but that he must show sufficient stress of weather to warrant the inference that it came in because of the action of external causes. And, there being no evidence of such stress of weather, he votes to reverse.

The result is that the decree is affirmed, with costs.

NOTE.—Subsequently a reargument was ordered, and the question as to burden of proof was certified to the Supreme Court.

THE FERGUSON.

(Circuit Court of Appeals, Second Circuit. April 4, 1907.)

No. 218.

TOWAGE—TOWING SHIP FROM DRY DOCK—COLLISION WITH DOCK.

Evidence considered, and *held* to establish the contention of a libelant that a collision between a steamship and a dry dock from which the ship was being towed by a tug was due to the fault of the tug in hauling the stern too far to port and against the side of the dock, because of a miscalculation of the effect of a high wind blowing from that side.

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

C. S. Haight, Clarence Bishop Smith, and Wheeler, Cortis & Haight, for appellant.

C. C. Burlingham and Wing, Putnam & Burlingham, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The judge who heard and saw the witnesses in this cause has indicated in his opinion with characteristic frankness that the question of liability was an open one in view of the unsatisfactory, contradictory, and inconclusive character of the testimony. He says:

"The result of a careful consideration is that the evidence does not show with preponderating clearness that the master of the tug did miscalculate the force of the wind and haul his tug too far and forcibly to the westward and thereby produce the accident. A too free slacking of the port bow lines at an earlier stage of the removal would produce the same result."

In these circumstances, we have felt constrained to review all the evidence independently of the conclusions reached by the court below.

The situation presented was one where, while a steamship was being hauled out of a dry dock by a tug, she swung over in the teeth of a heavy opposing wind until her port quarter collided with the port side of the dock. The only explanation vouchsafed by the claimant on behalf of the tug was that the port bow lines on the steamship, which are usually kept taut in such circumstances during the operation of hauling out, were on this occasion slacked or cast off, with the result that the bow swung to starboard and caused the stern to swing to port and strike the dock.

There are various persuasive answers to this contention, namely:

1. There were two port bow lines out. Two witnesses testified to the slacking of one port bow line. One of them, as the court below says, "testifies that the port bow line was slacked so as to let the bow go to starboard, but he did not see the port side of the vessel go to port sufficiently to collide with the dock, and seems to admit that the slacking of the line could not have caused the collision. His evidence strengthens the existing uncertainty by adding features to the happening peculiar to his own observation." The other witness saw only one port bow line out and only one port bow line slacked.

2. The evidence is to the effect that, where there are two lines, both are not ordinarily slacked at the same time, but that it is customary to hold on to one line while the other is eased. There is some evidence that this custom was followed on this occasion. Claimant's witness Devereaux testifies that, when they let go the port bow line, her bow was then about 50 feet in the dock; that he thought one of the bow lines was taken in just after she floated and started out, then they worked the forward bow line, which was the only bow line out, down the dock; that he would not swear that, when he saw line X loosed off and signaled to stop, the tug that line Y was not in place, but that, if it was there, there was no strain on it at the time because all the strain was on line X, that was the line that held the ship. He further testified that it was customary to carry one line down the dock and make that fast, and then take the line farthest forward and lead that down and make that fast, and so work the ship out; that the tug stopped immediately upon signal from him; that the stern of the steamship was 350 feet out of the dock when that happened; that he stopped her there because he saw her coming over against the other part of the dock, the starboard side of the dry dock, and because the towboat pulling on the quarter would swing her bow harder against the dock; and

that when he ordered the boat to stop when she was all out but 50 feet, because they were slacking off the port bow line, that line had been made fast on the end of the dock or pretty near it.

3. With the heavy wind blowing broadside against the port side of the steamship, it would seem that any slacking of the port bow line which would have been sufficient to swing the stern against the dock would have caused the bow to swing so far to starboard as to collide with the starboard side of the dock or come close to it. The bow did not strike the dock, and all the witnesses agree that the swing of the bow to starboard was a very slight one. We do not agree with the statement of the witnesses that the letting go of the port bow lines would cause the stern to swing to port as on a pivot if the tug was hauling the steamship straight out or nearly so. But, even if this theory be accepted, the fact that the bow did not swing further over toward or against the dock indicates that no such slacking occurred.

4. If, on the other hand, the master of the tug miscalculated the force of the wind and hauled the stern at an angle too far to port, the accident would have occurred exactly as it did. Rodan, the master of the tug, testified that if the port bow line had been held perfectly tight, and he had pulled in the direction of the solid line (a line angling to port) at the stern, he would have pulled the whole ship right out against the side of the dock; that the tendency of the wind was to swing the whole ship bodily over toward the starboard side of the dock; that it would not tend to swing the stern in more than the bow, if she was properly taken care of; and that, if she was there without any ropes on, the whole ship would have to swing evenly to starboard under the influence of the wind blowing so hard. He further testified that the stern of the steamer did swing over to the left; that she fell back again afterwards to the right, and went back in the middle of the dock again because the wind shoved her right off. That the accident was caused by the fault of the tug in hauling the stern of the steamship too far to port is further indicated by the evidence that the tug started out at full speed, and at an angle to the dock, in order to overcome the heavy wind.

We conclude, for the reasons stated above, that the evidence conclusively shows that the slacking of the bow line alone could not have caused the collision, and, in view of the other evidence discussed, we are of the opinion that the negligence of the tug was the sole cause of the collision.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to enter a decree in accordance with this opinion.

MURRAY v. ORR & LOCKETT HARDWARE CO.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1907. Rehearing Denied March 15, 1907.)

No. 1,342.

1. PATENTS—SUIT FOR INFRINGEMENT—ALLEGED NEW INFRINGEMENTS.
   Where a patent has been adjudged valid and infringed and an accounting ordered, it is the better practice to require the complainant to set up any alleged new infringements by supplemental bill, which can be disposed of and the order of reference modified as required, rather than to extend the accounting to devices which have not been adjudged to infringe and entail costs upon the parties which may prove unnecessary.
2. SAME—MATTERS CONCLUDED BY DECREE.
   It is not open to a defendant on the question of additional infringements after a decree adjudging infringement by one device to refer to the prior art to limit the scope of the invention to less than was found by the court on the original hearing.
3. SAME—INFRINGEMENT—STORE SERVICE LADDERS.
   The Murray patent, No. 442,531, for a store service ladder, *held* infringed.

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

Josiah McRoberts, for appellant.
John G. Elliott, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. In Murray v. Orr & Lockett Hardware Co., 138 Fed. 564, 71 C. C. A. 68, we held that Murray's patent for store service ladders, No. 442,531, issued December 9, 1890, was valid and infringed, reversed the decree which dismissed Murray's bill, and remanded the cause "with the direction to the Circuit Court to enter a decree in complainant's favor for an injunction and an accounting." In that record the only infringement proven was defendant's sale of certain ladders known as the "Columbia." The Circuit Court entered a decree in conformity to our mandate and referred the cause to a master to take an accounting. On the hearing before the master complainant claimed the right to inquire into defendant's sales not only of Columbia, but also of Nox-em-all, Bon-Ton, and Victor ladders, asserting that these last named, equally with the Columbia, infringed upon the invention as it was defined in our opinion. Defendant insisted that the accounting be limited to Columbias. Thereupon the master asked the Circuit Court for instructions. The instructions were to proceed with an accounting as to all of the types, leaving the question of infringement by defendant's sale of ladders other than Columbias open to determination by the court after receiving the report of the master. The master reported separate amounts as to each of the types. On a hearing of exceptions to the report the court entered a decree awarding to complainant certain sums on account of defendant's sales of Columbia and Nox-em-all ladders, and denying relief as to Bon-Ton and Victor ladders on the ground that they do not infringe. From the latter part of this decree complainant appeals.

When the order of reference was made, the only infringement established by the decree was defendant's sale of Columbia ladders. We think it is better and cleaner-cut practice to require a complainant to set up alleged new infringements in a supplemental bill. Thereupon, if it should be found that the additional types contain only colorable departures from the adjudged infringing type, the decree for an injunction and an accounting and the order of reference could be extended to cover them specifically; or, if the changes should appear to be so radical that the pending suit ought not to be cumbered and delayed by practically a new issue, the supplemental bill could be dismissed with leave to the complainant to begin an independent suit. We deem this the better practice, because, if an accounting before the master is extended to devices that have not been adjudged by the court to be infringements, a very great and unnecessary consumption of time and burden of costs may be imposed upon the parties.

The decree in this case, made after an accounting was had, adjudging that the Bon-Ton and Victor ladders are not infringements of the patent, is determinative of complainant's rights, and therefore has properly been brought here for review.

The essence of the invention was thus defined in our opinion:

"The Murray patent is a store ladder whose weight is wholly upon the rollers upon the floor or base shelf; the upper fastening being a loose one, by means of hooks intended solely to keep the ladder from tipping over. * * * This new thought in the art of ladder making—the utilizing of the man's weight to adjust the center of gravity—clearly was in the mind of the inventor (letters patent, line 40 et seq.), and finds embodiment in the mechanical means adapted to that end."

And we held defendant's Columbia ladder to be an infringement, because the upper fastening, though not strictly a hook, performed in the combination the office of Murray's hook by "yielding itself, without destroying its usefulness, to the balancing motion of the man's body," so that the ladder, with the weight wholly upon the bottom rollers, might be propelled laterally without friction. When either side of Murray's hook touches the guide-rod, there is a rubbing contact. When one side of the Columbia hook touches, there is a rubbing contact; when the other, a rolling contact. On both sides of the hooks of the Bon-Ton and Victor, which are identical throughout except that one runs on the floor and the other on the base shelf, rollers are provided. In these hooks, as in the Columbia's, there is sufficient looseness to enable defendant to utilize and defendant does utilize the essential features of Murray's invention as we defined it. It was not open to defendant on the question of additional infringements to refer to the prior art to limit the scope of the invention to less than we had found it to be in determining the infringement of the Columbia ladder. As the changes from the Columbia type are only colorable, the part of the decree that is questioned on this appeal must be reversed.

A suggestion was made with respect to our ascertaining from the master's report the amounts that should be adjudged on account of these additional infringements. We think the assessment should be made by the Circuit Court.

Decree reversed for further proceedings.

Ex parte CHAPMAN.

(Circuit Court, D. Idaho. April 26, 1907.)

No. 446.

WITNESSES—PRIVILEGE—BOOKS AND PAPERS—PRODUCTION—BOOKS OF CORPORATION.

Petitioner was a stockholder and resident manager of a foreign corporation doing business in Idaho, and conducted on the corporation's behalf such transactions as it engaged in with reference to the acquisition of timber lands within such state, and the corporation's books, records, and and papers, showing such transactions in petitioner's possession, were made by petitioner or under his direction. *Held* that, if such records disclosed the commission of a criminal offense by the corporation in the acquisition of such timber lands, they also showed petitioner's complicity therein, and hence he was properly entitled to refuse to produce such books and records before the grand jury, for the purpose of enabling such body to determine whether an offense had been committed, because the production of such books would tend to incriminate him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1038–1040.]

Habeas Corpus.

The petition of L. G. Chapman for a writ of habeas corpus, alleging that he is unlawfully imprisoned and restrained of his liberty by the United States marshal for the district of Idaho, in the county jail of Ada county, Idaho, having been presented, and an order thereupon having been made and served upon the marshal requiring him to show cause why the writ should not issue as prayed for, there appear from the petition and the return of the marshal to the order to show cause the following facts and proceedings: On April 5, 1907, the petitioner was served with a subpœna duces tecum issued out of the District Court of the United States for the district of Idaho, commanding him to appear forthwith before the grand jury, then and there impaneled in said court, to testify and to produce before the grand jury the following: All books of account of every name, nature, and description of the Barber Lumber Company in Idaho; and all stock books or other records showing the owners, past and present, of the stock of the said Barber Lumber Company, and all transfers of the stock thereof; and all books, records, papers, and correspondence relating to the acquiring and perfecting of title to timber and other lands in the state of Idaho; and all records, accounts, and correspondence with every officer, employé, representative, agent, or attorney engaged in or employed for the purpose of acquiring title or perfecting title to timber or other lands in the state of Idaho for the said Barber Lumber Company, and all accounts with the payment or payments made to any and all of said officers, employés, representatives, agents, or attorneys; and any and all books, records, and papers showing the payment made on account of the purchase of any and all timber or other lands in the state of Idaho and to whom such payment or payments were made, and the manner of such pay ment; and any and all contracts and agreements made with any person, association, agent, officer, representative, employé, or attorney in reference to the acquiring of timber and other lands in the state of Idaho; and any and all cash books, ledger accounts, bank books, notes, canceled checks, and the stubs of any and all check books, showing all payments to any person, firm, or corporation on account of acquiring and perfecting title to timber and other lands in the state of Idaho by said Barber Lumber Company; and all correspondence had by you, as manager or otherwise, with any officer, attorney, employé, representative or agent of said company, in reference to the acquiring and perfecting of title to any timber or other lands in the state of Idaho: also the articles of incorporation of said Barber Lumber Company and the minutes and records of the meetings of the stockholders and directors of said Barber Lumber Company; and all maps, plats, and tract

or abstract books, showing the lands and timber on lands, owned by, claimed by, or held in trust for said Barber Lumber Company. The above to include the originals, duplicates, and all copies, letter-press, carbon, or otherwise, of any and all of the aforesaid books, records, documents, correspondence, and papers, from the organization of the said Barber Lumber Company down to and including the year 1906, now in your possession or under your control, or in the possession or under the control of any agent, employé, representative, attorney, or officer of said Barber Lumber Company in the state of Idaho.

The subpœna was addressed to John Doe, the Barber Lumber Company, a corporation, and L. G. Chapman, manager, Barber Lumber Company. On April 6, 1907, the grand jury made a report to the court that on that day, in pursuance to the subpœna, the petitioner appeared before the grand jury and under oath admitted that he had in his possession and custody and under his control certain of the books, records, papers, documents, and correspondence as called for in said subpœna, but that he then and there declined and refused to produce the same in obedience to said subpœna. Upon that report, the court on the same day ordered that the petitioner appear and produce said books, records, papers, documents, and correspondence as required by the subpœna, or show cause why he should not be adjudged in contempt of the court.

On the hearing so ordered, it was stated by the district attorney that the matter before the grand jury was the investigation of the alleged illegal procurement of timber lands of the United States now owned by the Barber Lumber Company, and to discover whether the books might not disclose that the Barber Lumber Company or some one else had acquired land illegally, and the district attorney said: "If they have any correspondence with any employé or agent or attorney or any one else that has appeared in connection with this acquiring of timber lands, we also want that." On the same day the court made the following order:

"It is hereby ordered that the said L. G. Chapman shall produce before the said grand jury all books, records, documents, papers, and correspondence relating directly or indirectly to the acquiring and perfecting of title to timber lands in the state of Idaho by the Barber Lumber Company; and all records, accounts, and correspondence with every officer, employé, representative, agent, or attorney, engaged in or employed for the purpose of acquiring title or perfecting title to timber lands in the state of Idaho for the said Barber Lumber Company; and all accounts with and the payment or payments made to any and all of said officers, employés, representatives, agents, or attorneys; and any and all books, records, and papers showing the payments made on account of the purchase of any and all timber lands in the state of Idaho and to whom such payment or payments were made and the manner of such payments; and any and all cash books, ledger accounts, bank books, notes, canceled checks, and the stubs of any and all check books showing any and all payments to any person, firm, or corporation on account of acquiring or perfecting title to timber lands in the state of Idaho by the said Barber Lumber Company; and all correspondence had by you as manager or otherwise with any officer, attorney, employé, representative, or agent of said company with reference to the acquiring and perfecting of title to any timber lands in the state of Idaho; and all maps, plats, tract, or abstract books, showing the land and timber on lands owned by, claimed by, or held in trust by said Barber Lumber Company; and shall produce all books, correspondence, and documents that have any connection, whether directly or indirectly, with the acquiring by the said Barber Lumber Company of timber lands in the State of Idaho. The object of the foregoing order being to produce all such evidence before the grand jury as pertains to the acquirement of timber lands by the Barber Lumber Company in the state of Idaho and showing all transactions in relation thereto."

On April 8th, the grand jury came into court and reported that upon the appearance of the petitioner before that body, with certain books, papers, and correspondence in compliance with the subpœna, he declined to allow the members of the grand jury or the district attorney to inspect the same for the purpose of determining for themselves as to what the books contained that was pertinent and material to the investigation. Counsel for the petitioner then,

in open court, said that the way the petitioner could tell whether he was obeying the order was to ascertain for himself, with the advice of his attorney, what was pertinent to the investigation, and said: "We will submit it to your honor very willingly, and let your honor determine what of those things pertain to the acquisition of timber lands." The court declined to do this, saying: "It is out of the question for the court to assume to act as the grand jury and to examine these accounts as counsel has suggested." The court said further: "It is not for the petitioner to assume to say what applies and what does not, but for the grand jury to say what applies and what does not apply;" and added: "The order now is that the grand jury shall be entitled to all the books and correspondence, and every item as named in that order there, and, without the authority to the manager of this company to determine what is pertinent, and what is not pertinent, that they shall have before the grand jury, and they shall determine whether it is pertinent to this issue or not. And if this order is not carried out in good faith, this manager will go to the county jail." And the court addressed the grand jury as follows: "Now, gentlemen, as fast as these books and papers come before you, if they do come before you, whenever you find any account or any paper that does not pertain to the investigation that you are now pursuing, you will lay it aside at once, and make no further investigation of it, but, whenever you find anything that in your belief pertains to the investigation that you are now following, that you will investigate carefully, and will not leave it to Mr. Chapman to determine whether it is pertinent or not. You are the judges to determine, and not Mr. Chapman."

On April 9th, the grand jury made a report to the court that the petitioner further appeared before the grand jury on that day, and, upon being interrogated, said he would refuse, and did refuse, to produce any of the books, papers, correspondence, or other documents of said Barber Lumber Company, and based such refusal upon his written answer, which is as follows:

"To the Foreman and Gentlemen of the Grand Jury:

"I shall have to decline to produce the documents called for in the subpœna served upon me and in the orders of the court in relation thereto:

"First. I am the general manager of the Barber Lumber Company, and also a stockholder in said corporation. I have been such general manager ever since said corporation commenced business in Idaho, and have represented the corporation in this state. As such general manager, I have knowledge of its dealings in relation to procuring the government timber lands in this state; and also of all its business affairs within the state of Idaho. I have had control and custody of all the books, papers and records called for in the subpœna served upon me and referred to in the orders of the court in reference thereto.

"Second. For the reason that the subpœna and order of the court contravene the fourth amendment of the Constitution of the United States; that said subpœna and order of the court directing the production of all the books, records and files in the office of the Barber Lumber Company is too general in its character, and is unreasonable and against the law.

"Third. That the subpœna served upon me, and the order of the court in relation thereto, gives me no information whatever as to the person or matters under investigation by the said grand jury, and therefore no intimation as to what documents would be material and should be produced by me before said grand jury.

"Fourth. That the district attorney, Mr. Ruick, stated in open court that there was evidence before the grand jury touching the acquisition of lands by the Barber Lumber Company of which the witness, Chapman, might be and very likely was ignorant, and therefore he could not be permitted to be the judge as to whether or not the evidence which he offered was pertinent.

"Fifth. That the records, documents and papers called for in said subpœna, and orders of the court made in reference thereto, contain, to a large extent, all the private business transactions of said Barber Lumber Company, and private and confidential correspondence which could in no manner be of any value or aid to this grand jury in any of their deliberations, and the production and exposure of said books, records and documents to said district attorney, his associates, and the grand jury, would invade the private busi-

ness affairs and private correspondence of myself and the Barber Lumber Company, and is therefore unreasonable and void. By the order of this court I am required to leave these records, documents and evidence in the possession of the grand jury and district attorney, in order that he may select, after an investigation of all these private matters, such parts thereof as he may deem material; and that said books, records and documents are to be taken from my possession and given into the possession of said district attorney for said purpose.

"Sixth. I shall also have to decline to produce or exhibit to the grand jury for their consideration, the records, correspondence and documents called for in said subpœna served upon me in this matter, and in the orders of the court in relation thereto, on the ground that the production of said records, correspondence and other documents might tend to incriminate me, and that the subpœna to produce the same, and the order of the court in relation thereto, and the production thereof would be contrary to the fifth amendment to the Constitution of the United States, which declares: 'No person shall be compelled, in any criminal case, to be a witness against himself.'

"The above and foregoing objections are made by me in good faith and without any disrespect to the court or grand jury, and without any intention, upon my part, to obstruct or in any manner interfere with the due administration of justice, but solely to protect my legal rights in the premises.

"L. G. Chapman."

Thereupon, on the same day, the court ordered that the petitioner be adjudged guilty of contempt of the court in refusing to comply with its order; that he be punished therefor; and that he be remanded to the custody of the United States marshal for the district of Idaho and be by him confined in the county jail of Ada county until he complied with the aforesaid order, or until some one on his behalf produce said documents and papers for the inspection of said grand jury, or until the further order of the court.

Albert A. Fraser and Lyttleton Price, for petitioner.
W. C. Bristol, for the United States.

GILBERT, Circuit Judge (after stating the facts). While the proceedings began with a subpœna duces tecum, directing the petitioner to bring before the grand jury the books and records of the Barber Lumber Company, they finally resulted in an ultimatum from the court ordering him to produce the books and papers and submit them to the inspection of the grand jury, and giving the grand jury the authority, which was expressly denied to the petitioner, to determine what was pertinent, and what was not pertinent, to the subject which was under consideration. That subject had been announced in open court to be the investigation of the proceedings whereby the Barber Lumber Company had acquired title to timber lands of the United States in the state of Idaho. It was not disputed that the Barber Lumber Company was incorporated without the state of Idaho, and that the petitioner was, and from the first had been, the manager of its business in the state of Idaho. It followed from this that the acquisition of title to timber lands must have been conducted on behalf of the corporation by the petitioner, and that everything that was done in that connection was done with his knowledge and under his direction. If, therefore, there was criminal violation of law in acquiring those lands, there is every reason to assume that the petitioner must necessarily have been implicated therein, and that an inspection of the books would furnish evidence against him. That was one of the grounds of his appeal to the protection afforded by the fifth amendment and his refusal to comply with the order of the court. The fifth amendment,

which provides that one may not be compelled in a criminal case to be a witness against himself, is closely allied with the fourth amendment, which inhibits unreasonable searches and seizures. Said the court, in Boyd v. United States, 116 U. S. 616–633, 6 Sup. Ct. 524, 534, 29 L. Ed. 746:

"We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

On page 631 of 116 U. S., page 533 of 6 Sup. Ct. (29 L. Ed. 746) the court said:

"And any compulsory discovery, by extorting the party's oath or compelling the production of his private books and papers to convict him of crime, or to forfeit his property, is contrary to the principles of a free government."

Elsewhere in the opinion, the court said:

"It is our opinion, therefore, that a compulsory production of a man's private papers, to establish a criminal charge against him or to forfeit his property, is within the scope of the fourth amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient and affects the sole object and purpose of search and seizure."

But it is said that while one may not be compelled in a criminal case to produce his own books and records, if they tend to criminate him, he can claim no protection under either the fourth or the fifth amendment when, as here, he is called upon to produce, not his own books, but the books of a corporation of which he is an officer. In support of that view reference is made to McAlister v. Henkel, 201 U. S. 90, 26 Sup. Ct. 385, 50 L. Ed. 671, in which the court said:

"Indeed, the authorities are numerous to the effect that an officer of a corporation cannot set up the privilege of a corporation as against his testimony or the production of their books."

But here the petitioner is not setting up the privilege of the corporation as against the production of its books. He is asserting his own privilege, for his own benefit, on the ground that the books of the corporation, of which he is the custodian, will tend to incriminate him.

In Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Hale, who was the secretary and treasurer of a corporation, had been subpœnaed to produce the books and papers of that corporation before a grand jury. He asked to be advised of the nature of the investigation in which he had been summoned. Upon being informed by the district attorney that it was a proceeding under the Sherman act to protect trade and commerce against unlawful restraint and monopolies, and that, under Act Feb. 25, 1903, c. 755, 32 Stat. 904 [U. S. Comp. St. Supp. 1905, p. 602], no person could be prosecuted or subjected to any penalty on account of any matter or thing concerning which he might testify, or produce documentary evidence in any prosecution under said act, the witness refused to answer questions or to produce the papers and documents called for in the subpœna, upon the ground that they might tend to criminate him. He was

committed for contempt, and habeas corpus proceedings were instituted for his release. On appeal to the Supreme Court, it was held, following Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, that the witness could not refuse to answer for the reason that the act of February 25, 1903, afforded him absolute immunity against future prosecution for the offenses as to which he was to be interrogated and was to produce books and documents. The court said:

"The interdiction of the fifth amendment operates only where the witness is asked to incriminate himself; in other words, to give testimony which may possibly expose him to a criminal charge. * * * If the constitutional amendment were unaffected by the immunity statute, it would put it within the power of the witness to be his own judge as to what would tend to incriminate him, and would justify him in refusing to answer almost any question in a criminal case, unless it clearly appeared that the immunity was not set up in good faith."

It is the clear meaning of these words, and the plain import of the decision, that, but for the immunity statute, the witness would, under the fifth amendment, have had the right to judge for himself as to what would tend to incriminate him, and would have been justified in refusing to answer almost any question. And such was the view of the court below in the decision from which the appeal in that case was taken. In re Hale (C. C.) 139 Fed. 496. In that case, Wallace, Circuit Judge, said:

"The contention for the petitioner, that the order of the court violates the constitutional prohibition against compelling a person to give evidence against himself in a criminal case, would be fairly sound, were it not for the effect of the immunity act of Congress of February, 1903."

There were further remarks of the court in that case which are particularly applicable to the present case. Said the court:

"In view of his official relations with the corporation, it fairly may be assumed that the petitioner had participated personally in some of the acts or transactions which were the alleged offenses of the corporation, and was therefore originally responsible himself."

When a question is propounded to a witness in the course of his examination in court or before a grand jury, he may be compelled to answer, unless there is reasonable ground to apprehend that his answer may furnish a link in the chain of evidence that might expose him to criminal prosecution. On the trial of Aaron Burr, 25 Fed. Cas. 38, No. 14,692e, it was contended on the part of a witness that he was to be the sole judge of the effect of his answer. Chief Justice Marshall held that this was too broad a claim, but also held that it would be too narrow a rule to hold that a witness can never refuse, unless the answer will per se convict him of crime, and that the correct rule is that a witness is not compellable to disclose a single link in the chain of proof against him. In Ex parte Irvine (C. C.) 74 Fed. 954, Judge Taft held that where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, might form a link in the chain of evidence to establish the commission of a crime by

the witness, the court can inquire whether the witness claimed his privilege in good faith, otherwise it is only where the incriminating effect of the question is doubtful that the witness' motive may be considered, for in such a case his bad faith would tend to show that his answer would not subject him to any danger. The reasons why a witness may not be required to answer a question which he claims may tend to criminate him apply with added force to a case where he is ordered to subject to the inspection of a grand jury books and papers which contain the record of his connection with transactions which are alleged to be criminal in their nature. In the present case, it is not perceivable that there can be any question of the good faith of the petitioner in declining to subject the books to examination. Although they are in fact the books of the corporation, they are nevertheless to all intents and purposes his own books. They are records made by him or under his direction, and are in his charge and control. They refer to transactions which he has conducted. If they show the method in which the corporation acquired title to timber lands, they necessarily disclose his own acts. It is not denied that the presentation of the books and their inspection by the grand jury is desired for one purpose only. This is fully shown by the record of the proceedings before the court. It is that they be resorted to to ascertain what individual or individuals may be subject to indictment for violation of the laws of the United States in acquiring title to timber lands. I think it very clear that if the books contained the evidence thus sought, tending to prove the violation of law, there was reasonable ground for concluding that they might have tended to incriminate the petitioner, and that therefore his plea of privilege should have been sustained.

The present case is plainly distinguishable from United States v. Collins (D. C.) 145 Fed. 709, recently decided by Judge Wolverton in this circuit. In that case a partner was subpœnaed to bring the partnership books before the grand jury. In the contempt proceedings which ensued, the subject-matter of the investigation before the grand jury was not disclosed; nor was it shown what relation the witness sustained thereto, or in what manner the investigation would affect him. It appeared that he claimed the protection of the fifth amendment before he had been sworn as a witness. The court held that, until he was sworn as a witness, so that his claim of a constitutional privilege might be made under the sanction of an oath, he could not assert it.

As the return to the order to show cause is precisely the same that the marshal must have made if a writ of habeas corpus had been issued and served on him, all the facts are presented, and it is possible to determine the right of the petitioner to be discharged as fully as if he were present under the writ and in the marshal's custody. Ex parte Yarbrough, 110 U. S. 653, 4 Sup. Ct. 152, 28 L. Ed. 274; Ex parte William Wells, 18 How. 308, 15 L. Ed. 421; Ex parte Watkins, 7 Pet. 571, 8 L. Ed. 786; Ex parte Bull, 1 Saund. & C. 141; Ex parte Cross, 2 H. & N. 354; Sims Case, 7 Cush. (Mass.) 285.

Under the authorities, I am compelled to hold that the judgment committing the petitioner for contempt is void, and that he is entitled to be discharged from custody.

It is so ordered.

THE CITTA DI PALERMO.

(District Court, S. D. New York. March 28, 1907.)

1. SHIPPING—CARRIAGE OF GOODS—VERBAL CONTRACT FOLLOWED BY BILL OF LADING.

Where a bill of lading does not conform to the original contract of shipment, it must yield, in the absence of proof that the parties intended thereby to create a new agreement.

2. SAME—BILL OF LADING—SIGNING UNDER PROTEST.

Where a bill of lading presented by the carrier to the shipper for signature, after the shipment has been made, does not conform to the original contract, but includes cargo not taken by the vessel as agreed, it is a proper course for the shipper to sign the same under protest, and such protest will preserve its rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 414, 416.]

3. SAME—DEAD FREIGHT—REFUSAL TO TAKE FULL CARGO.

Libelant and respondent entered into a verbal contract that one of respondent's steamers should load and transport a quantity of marble from Spezia, Italy, to New York. The marble was delivered, as agreed, alongside the steamer, which made the voyage with only a part of the cargo, insisting subsequently that libelant's agent should sign a bill of lading for the whole, describing the omitted portion as "short shipped," which bill the agent signed under protest. *Held*, that libelant was entitled to recover from the steamer the amount exacted in excess of the freight earned, and also the damages suffered by reason of the refusal to take the remainder of the cargo.

In Admiralty.

Wheeler, Cortis & Haight, and Clarence Bishop Smith, and John W. Griffin, for libelant.

Convers & Kirlin, for claimant.

ADAMS, District Judge. This action was brought by the Equi Valley Marble Company, Limited, against Walter F. Becker and the Steamship Citta di Palermo to recover the sum of $189.75, which it claims it was forced to pay to the respondent for the freight on a portion of certain marble he contracted to transport from Spezia, Italy, to New York, which was not actually carried, also to recover the additional sum of $300 as damages for the failure to transport all of the marble in conformity with the contract. The respondent, owner of the steamer, presented no testimony, alleging that he was not ready for trial. He had, however, been given ample opportunity to obtain any foreign testimony that was procurable and it was not considered that he was entitled to further delay. His defence, therefore, rests upon such facts as appear from the libellant's testimony, taken de bene esse, and documents identified therein and by witnesses for him here.

The testimony of the libellant's witness, Mr. Dempster, shows that he was the managing director of the libellant, engaged in quarrying marble and shipping it from Spezia; that in August, 1904, he made a verbal contract with the agent of Becker in Spezia to take 500 tons of marble in September for shipment to the United States at a certain rate, which included the loading, by the respondent's line of which the Citta di Palermo was one; that the respondent sent his vessel to Spezia about September 23, 1904; that the 500 tons were then ready in lighters for delivery alongside the ship; that the steamer took 295½ tons and sailed without the remainder; that a bill of lading was subsequently issued by the steamer and signed by the agent of the libellant at Spezia, one Joyce, which covered the marble actually shipped, also the 204½ tons not taken on board; that the total freight claimed by the steamer was £243.15.9 for marble on board and £99.1.6 for that left behind; that after the steamer took aboard the 295½ tons she left the port and ten days thereafter the respondent presented the bill of lading mentioned to the agent of the libellant for signature, which at first was refused because of the charges contained in the margin for dead freight on the 204½ tons but, after the respondent had refused to modify it, finally signed the bill of lading under a protest, of which the folllowing is a copy:

"We, the Equi Valley Marble Company, Limited, in the name of our responsible agent, Hilles Tally Dempster, resident at Spezia, Italy, do hereby protest against the action of one Becker, Quirola and Giacopini in causing to be issued and forcing the Company to accept inaccurate Bills of Lading covering a consignment of marble shipped by the Company and carried by the 'Citta di Palermo' from Spezia to New York and notice is hereby given that the Equi Valley Marble Company, Limited, will hold the said Becker, Quirola, Giacopini and their agents severally and jointly responsible for all loss or damage which may result from their action.

Signed for the Equi Valley Marble Company, Ltd.

by H. T. Dempster,
General Manager.

Spezia, Italy, October 15th, 1904."

Mr. Dempster further testified that the libellant was forced to sign the bill of lading in order to get the merchandise in the public stores in New York to save storage. It is urged by the respondent that it was not necessary to have the bill of lading for such purpose; that all the rights of the libellant could have been preserved without it and any controversy for the possession of the goods determined in an action instituted to achieve that end. The protests were, however, simple and natural courses for the libellant to pursue under the circumstances and I think preserved its rights incident to the failure of the vessel to take all the goods the respondent agreed to carry and the payments exacted on his account before the libellant could obtain possession of its goods in New York. Under the contract, it was the duty of the vessel to load the marble with its own appurtenances, and it, not the libellant, was responsible for the delay in loading and for the damages suffered by the libellant by reason of some of the shipment not being taken on board.

The respondent relies upon the bill of lading as a defence but a document of that character does not suffice to bind the parties to it

where it does not correctly represent the facts. This bill of lading was not the original contract between the parties but in a case of this kind merely evidence of it. Here an oral agreement for the carriage of the marble was first made in the expectation doubtless that a bill of lading would confirm it, but it did not. Where the bill of lading does not conform to the original contract, the former must yield in the absence of proof that the parties intended thereby to create a new agreement. It was said by Judge Brown in Crenshawe v. Pearce (D. C.) 37 Fed. 432, 434:

"The bills of lading are not, as the libellants contend, the only contracts between the parties. Even if they had been regularly issued, they would only have been in execution of the previous contracts of affreightment, which provided that bills of lading should be given. The bills of lading stand in the same relation to the original contracts of affreightment that bills of lading hold to the charter-parties under which they have been given. In the latter class of cases it has been long settled, not only that the bills of lading do not supersede the provisions of the charter-party in so far as they differ from it, but that they are controlled by the charter-party, in the absence of any proof of authority and intention to make a new contract. 1 Pars. Adm. 286; The Chadwicke (D. C.) 29 Fed. 524, and cases there cited; Ardan v. Theband (D. C.) 35 Fed. 620."

Here the signature to a bill of lading was obtained from the libellant after the goods were shipped, when its agent was under the impression that the bill of lading would be required in New York to obtain possession of the goods and he therefore signed it under a written protest, in confirmation of a previous verbal one, after the vessel's owner had refused to strike out the objectionable matter. This was a species of duress sufficient to coerce the libelant into signing and I do not think the respondent is now entitled to take advantage of it.

There will be a decree for the libellant, with an order of reference.

BOWMAN v. ALPHA FARMS et al.

(District Court, N. D. New York. May 11, 1907.)

BANKRUPTCY—PREFERENCES—VACATION—ACTIONS—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended by Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 799 [U. S. Comp. St. Supp. 1905, p. 689], provides that for the purpose of recovering a preference 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 a United States District Court as a court of bankruptcy has jurisdiction either at law or in equity to set aside a preference alleged to have been given after the amendment of the act, without the consent of the creditor alleged to have been preferred.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

Welch, Heine & Fall, for plaintiff.
W. B. Matterson, for defendants.

RAY, District Judge. The complaint in this action brought in this court by the trustee in bankruptcy of Frederick H. Tuting against

Alpha Farms and Romelia J. Sawdey, as executrix, etc., of O. Gilbert Sawdey, alleges that Alpha Farms is a domestic corporation of the state of New York, and that during August, 1906, and for a long time prior thereto, had had dealings and business transactions with Frederick H. Tuting, and had sold and delivered to him milk and cream, and that August 31, 1906, said Tuting was owing said Alpha Farms therefor the sum of $2,700; that said Tuting was then owing other creditors various debts aggregating about $8,000, and that said debts remain wholly unpaid, and have been proved in the bankruptcy proceedings hereafter referred to; that between the 1st and 14th days of September, 1906, said Tuting paid over in cash and checks said $2,700 to the agent and manager of said Alpha Farms; that the said money and checks were deposited in the First National Bank of Earlville, N. Y., in the account of O. Gilbert Sawdey, in which said personal account of said Sawdey all deposits of the defendant Alpha Farms were made, and that the account of said Alpha Farms and O. Gilbert Sawdey were thereby unlawfully increased in the sum of $2,700. The death of Sawdey and the proof of his will and the appointment and qualification of his executrix are duly alleged.

The complaint further alleges that at the time of such payments by said Tuting he was insolvent within the true intent and meaning of the bankruptcy act, and that said Alpha Farms had at the time reasonable cause to believe that Tuting was insolvent, and that said payments were intended to and did create a preference in favor of the defendant Alpha Farms, and that the effect of such payments and transfer of money and checks was to secure said Alpha Farms a greater percentage of its debt than that of any other creditor of the same class. The complaint also alleges a demand by the trustee in bankruptcy for said $2,700. The complaint further alleges that September 13, 1906, an involuntary petition in bankruptcy was filed in this district against said Tuting, who thereafter filed a voluntary petition, and that October 22, 1906, said Frederick H. Tuting was duly adjudicated a bankrupt; also, that thereafter, and on the 3d day of December, 1906, the plaintiff, Harold H. Bowman, was duly elected and qualified as trustee of the estate in bankruptcy of said Tuting, and that he entered upon the discharge of his duties as such and now is such trustee.

The defendants demur to this complaint on the ground that this court, the United States District Court of the Northern District of New York, has no jurisdiction of the subject of the action.

These transactions occurred subsequent to the amendments of the bankruptcy act, approved February 5, 1903, and the question involved is: Has the United States District Court jurisdiction of an action brought by the trustee of the estate of the bankrupt to recover a preference paid and given since the amendment referred to?

Subdivision "b" of section 60, as amended, provides 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."

It will be noted that the words, "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," were added to the subdivision of section 60 by the amendatory act of 1903. This amendment expressly confers jurisdiction upon the court of bankruptcy of an action to recover a preference, unless there is something somewhere in the act which limits the jurisdiction thus conferred. Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445].

Section 23 of the same act reads as follows:

"Sec. 23. Jurisdiction of United States and State Courts.—The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(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.'

"(c) The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

By subdivision "b" of section 23 certain actions cannot be brought in the courts of the United States unless by the consent of the proposed defendant. But by the amendment of 1903 to the act and to this section and above referred to, suits for the recovery of property or preferences under subdivision "b" of section 60, and just referred to, are specifically excepted, and hence an action to recover a preference brought under section 60 may be brought and maintained in the court of bankruptcy, the District Court, without the consent of the proposed defendant.

The cases decided prior to the amendment and the decided cases relating to causes of action which arose prior to the amendment have no application. In Gregory v. Atkinson (D. C.) 127 Fed. 183, Judge Adams held that by the amendment Congress conferred jurisdiction on the District Court without the consent of the proposed defendant in cases for the recovery of preferential payments mentioned in section 60, subd. "b," and to set aside fraudulent conveyances mentioned in section 67, subd. "e," provided the payments or conveyances were made within the four months prior to the filing of the petition. He says, "In all other cases I think the law is left as it was prior to the amendatory act." In Parker v. Black (D. C.) 143 Fed. 560, Judge Hazel held that the District Court had jurisdiction since the amendment of an action to recover a voidable preference. I think these cases well decided, and that the District Court now has jurisdiction. As the District Court is a court of equity, the action may be brought either at law or in equity as the facts justify. This demurrer does not raise

the question whether the facts here alleged constitute an action at law. That question will not be considered. The money seems to be, under the allegations of the complaint, in the bank account of O. G. Sawdey, where all the moneys of Alpha Farms were kept. The action is not brought to reach the specific fund. The action is not brought for an accounting. There is no allegation that the estate of Sawdey claims the money, or that it has appropriated it to its own use. The executrix may be a proper party, but, without deciding the question, I hardly see how judgment can go against the estate on the ground that it acts as custodian of the fund. These are matters that will come up later.

As stated, I think this court has jurisdiction of the action, and for that reason the demurrer must be overruled.

PEPPER v. ADDICKS.

(Circuit Court, E. D. Pennsylvania. May 17, 1907.)

No. 41.

1. CORPORATIONS—OFFICERS—MISAPPROPRIATION OF FUNDS.

Where defendant, an officer and director of a corporation, absolutely dominated its board of directors and induced such board to authorize the purchase of worthless bonds of other corporations in which he was interested, by which he was enabled to make a large individual profit, he was liable to account to the corporation's receiver for the profit so made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1393–1415.]

2. EQUITY—ACCOUNTING—APPOINTMENT OF MASTER—DISCRETION.

In a suit by the receiver of a corporation for an accounting of profits wrongfully made by defendant, an officer and director, by the wrongful use of the corporation's funds, the court, after determining defendant's liability, was not bound to appoint a master to take an account, but could do so or not, in its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 866.]

W. B. Bodine, Jr., and F. B. Bracken, for complainant
Herbert H. Ward and George L. Crawford, for defendant.

J. B. McPHERSON, District Judge. This bill in equity is brought by the receiver of the Bay State Gas Company, a corporation organized under the laws of the state of Delaware, against John Edward Addicks, to compel him to pay over certain profits which he is alleged to have made improperly by using the corporation assets for his individual purposes. The bill, as originally filed, sought to recover profits made in five groups of transactions that were averred to be illegal, but upon final hearing the complainant confined himself to the one group that is about to be described. From the admissions contained in the pleadings and in the briefs of counsel, and from the evidence laid before the court, I find the facts to be as follows:

(1) On April 24, 1889, the defendant caused to be chartered under the laws of the state of Delaware a corporation named the Peninsular Investment Company; this name being afterwards changed to the Bay State Gas Company (hereinafter called the Delaware Com-

pany). The authorized capital was originally $100,000—the shares being $50 each—which was subsequently increased to $1,000,000,000. Of this amount, shares aggregating a par value of $250,000,000 were issued from time to time, purporting to be full paid and nonassessable. How much cash was paid for these shares does not appear in the evidence. The charter authorized the company to begin business after 100 shares had been subscribed and $2,500 had been paid thereon. From its organization to December 4, 1901, except during the period from November 25, 1896, to September 24, 1897—when he was vice president and a director—the defendant was continuously the president, and also a director, of the corporation.

(2) On February 15, 1893, Henry D. Kirkover, Philo D. Beard, and Henry Altman organized the Queen City Gaslight Company (hereinafter called the Gas Company)—with a capital stock of $50,000, being 500 shares at a par value of $100—for the purpose of manufacturing and distributing artificial gas in Buffalo, N. Y. They laid a few pipes to hold their franchises, but for several years did no business and had no plant. As will hereafter appear, the plant was not built and ready for operation until the end of the year 1897.

(3) Meanwhile it became necessary to look about for capital, and to devise some scheme out of which the promoters might hope to reap a profit; and accordingly, as the first step in this direction, Kirkover and Beard, having acquired Altman's interest, agreed with the defendant to transfer the stock of the Gas Company to a construction company to be formed by him to construct a plant for the Gas Company; and in return for this transfer they were to receive a one-fifth interest in the construction company. At or about this time E. Stein—who had brought the defendant and Beard and Kirkover together—and Silas W. Pettit became associated in the enterprise.

(4) The defendant, on December 27, 1894, or thereabouts, caused the Queen City Construction Company (hereinafter called the Construction Company) to be formed as a limited partnership under the laws of Pennsylvania, with a capital stock of $300,000; the stock having a par value of $100. One share was issued to him for $100 in cash, one share to E. Stein for $100 in cash, and 2,998 full-paid shares, of the par value of $299,800, to W. Harry Miller for 450 shares of the stock of the Gas Company, leaving 50 shares of the Gas Company in the hands of Kirkover and Beard. The managers of the Construction Company were the defendant, Stein, and Miller; the defendant being chairman, and Miller being secretary and treasurer. Miller never had any real financial interest in the company, but merely allowed the defendant to use his name. He was the secretary of the Delaware Company from March, 1890, to December, 1896; its treasurer from November, 1895, to the time when the receiver was appointed; and a director from February, 1895, to November, 1895, and afterwards from October, 1900, to the date of the receivership.

(5) In accordance with the agreement concerning the distribution of the Construction Company's stock, Miller transferred 600 shares, or one-fifth of the total number, to Silas W. Pettit on December 27, 1894. On the same day, or soon afterwards, Pettit transferred 150 shares to Kirkover, 150 shares to Beard, and 250 shares to Lewis M.

Mintess, a clerk in the interest of the persons whom Pettit represented, namely, Pettit himself and Stein. When Kirkover and Beard received their shares in the Construction Company, they transferred the remaining 50 shares of the Gas Company's stock to the Construction Company, thus making the Construction Company the sole owner of the Gas Company's stock and making their interests identical. The corporate organizations continued to be separately maintained, but this was a mere formality, the Gas Company being absolutely owned by the Construction Company, and the Construction Company being completely owned and controlled by the defendant.

(6) There was some agreement, probably in 1896, before the month of July—but the date and details of it are not clearly proved, the written contract having apparently been lost—that the Construction Company should build a small plant for the Gas Company, in order to comply with the requirement of the latter company's franchise; and perhaps, also, that a larger plant should be afterwards built. For one or both of these reasons it was necessary to raise money, and, as neither the Gas Company nor the Construction Company had more than a small sum, if any sum at all, in its treasury, the defendant in the year 1896, from July or August to December, caused the Delaware Company, at various times, to lend the Construction Company, at 4 per cent., without security, sums of money aggregating $110,000. Out of this money the Construction Company built a small plant for the Gas Company, which was finished about December 1, 1897. As hereinafter stated, this loan of $110,000 was afterwards fully repaid to the Delaware Company by the Construction Company. Some other money was probably borrowed elsewhere by the Construction Company for the same purposes, but the amount does not satisfactorily appear. It is safe to say, I think, that at the most no more than $180,000 was ever invested in the Gas Company's affairs.

(7) Between September 11, 1897, and November 15, 1897, the defendant caused the Delaware Company to agree to buy at par from the Gas Company $1,000,000 of its 5 per cent. bonds, to be afterwards issued. On September 11, 1897, the purchase of $250,000 of these bonds was authorized, and on September 13, 1897, the Delaware Company drew a check for $250,000 in favor of Beard, who was then the treasurer of the Gas Company. He indorsed the check, and at the defendant's request it was deposited by Miller, the treasurer of the Construction Company, in the bank account of the latter company. On September 18th the purchase of another $250,000 of these bonds was authorized, and on the same day three checks, aggregating $250,000, were drawn by the Delaware Company to Beard's order, as treasurer of the Gas Company, which were indorsed by him and deposited by the defendant in the bank account of the Construction Company. On November 15th the purchase of $500,000 more of these bonds was authorized, and on the same day the Delaware Company drew a draft in favor of Beard, as treasurer of the Gas Company, on Brown, Riley & Co., who were brokers in Boston, and as such brokers had sold large quantities of the Delaware Company's stock, and had in their hands that amount of money belonging to the Delaware Company. Upon receipt

of this draft, Brown, Riley & Co., with whom the Construction Company also had opened an account, credited the Construction Company with $500,000, and charged the Delaware Company's account with that sum. None of this $1,000,000 ever went into the treasury of the Gas Company, even in form, or was used for its corporate purposes.

(8) In return for this $1,000,000 in cash that found its way into the Construction Company's treasury, the Delaware Company got an order from the Gas Company on the Central Trust Company of New York for the bonds, whenever they should be issued. The Gas Company never executed any mortgage, however, or issued any bonds. It did a little business, but never paid operating expenses, and it had very little of value to offer as security for an incumbrance of $1,000,000. No one would have taken the bonds, except as a venturesome speculation, or as part of a scheme which contemplated further steps before success should be attained. The purchase of $1,000,000 of such bonds at par, standing by itself, would be an act either reckless in the extreme, or suggesting combination for some purpose between the buyer and the seller. The Gas Company never paid any interest to the Delaware Company on the $1,000,000 paid as above stated. The defendant's explanation of the Gas Company's failure to issue its bonds is to be found in the transactions with the People's Gaslight & Coke Company, which will be immediately set forth. It should be added here, however, that some preliminary steps towards issuing the bonds, such as consultation with counsel, were taken, and I have no doubt that the bonds would have been actually issued if the People's Company had not come upon the scene at this juncture.

(9) On November 2, 1897, Messrs. Herbert P. Bissell, Wm. C. Cornwell, Jno. A. Kennedy, P. H. Griffin, Frank B. Beard, Fred C. M. Lautz, H. S. Denney, and T. Guilford Smith incorporated the People's Gaslight & Coke Company of Buffalo (hereinafter called the People's Company) with an authorized capital stock of $3,000,000, of which very little appears to have been paid in. These gentlemen, as an unincorporated syndicate, had for some weeks been engaged in negotiations with the defendant and his Construction Company, which culminated in an agreement, dated October 12, 1897, hereinafter to be set out in full.

(10) On December 3, 1897, the defendant caused the Construction Company to enter into four contracts with the Gas Company, with the People's Company, and with its incorporators as a syndicate (carrying out the antecedent agreement of October 12th) the effect of which was, inter alia, that the Construction Company should sell to the People's Company all the stock of the Gas Company for $100,000 in cash and $1,398,000 at par of the bonds and $218,000 at par of the stock of the People's Company. Of these bonds, the first four years' coupons upon $1,218,000 were to be detached and retained by the treasurer of the People's Company.

(11) On December 7, 1897, the defendant caused the directors of the Delaware Company to pass a resolution agreeing to accept, in substitution for the $1,000,000 5 per cent. bonds of the Gas Company, which had been paid for by the Delaware Company, but had never been issued, $1,200,000 in the 5 per cent. bonds of the People's Com-

pany at par, with the first four years' coupons removed; this being equivalent to $1,000,000 with interest in advance for four years.

(12) The Construction Company thereupon received an order drawn by the People's Company on the Colonial Trust Company of New York for the bonds that the People's Company owed to the Construction Company under the agreements of December 3, 1897, and assigned $1,212,000 of this order to the defendant; the balance, $186,000, having previously been issued.

(13) By these transactions the Construction Company had made a net profit of $920,000 in cash, and was to receive, also, $218,000 of stock in the People's Company and $86,000 of its bonds. It had received in cash $1,000,000 from the Delaware Company and $100,000 from the People's Company syndicate, and an order for $86,000 of the bonds of the People's Company, over and above the bonds that had been assigned to the Delaware Company; and it was also entitled to receive from the syndicate $218,000 of stock in the People's Company. For all purposes connected with the Gas Company it had spent not much more than $180,000.

(14) In the latter part of 1897, the minority interests in the Construction Company were bought out, either by the defendant or by the company itself, at a cost of $29,727.10 in cash, $85,000 of People's Company bonds, and $20,000 of People's Company stock. In September the Pettit, Stein, and Mintess shares were bought for $10,000. In December 50 of Beard's shares and the 150 shares belonging to Kirkover were acquired for $15,000 in cash, $85,000 of People's Company bonds, and $20,000 of People's Company stock. A few days later the remaining 100 shares belonging to Beard were acquired from his pledgees for $4,727.10.

The defendant has always been the chairman, and as the majority stockholder has always controlled the acts, of the Construction Company, although for several years a few other persons were real, and not merely nominal, owners of stock therein. All of this minority stock was acquired at or about the time when the stock and franchises of the Gas Company were sold to the People's Company, so that he was then, in effect, both the Gas Company and the Construction Company under these different names, being the absolute owners of their capital stocks. The small plant which the Construction Company built for the Gas Company was the only work of the kind that it ever did. Its office, and the offices of the Delaware Company and of the defendant, were occupied in common.

(15) In these transactions the defendant's individual net profit was about $890,000 in cash. The Construction Company's profit was $920,000, and, as the defendant had become the sole owner of the Construction Company at a cost of $29,727.10 in cash, all the assets of the company were really his, although they may have borne the corporate label.

(16) The money received by the Construction Company from the Delaware Company was used almost entirely for the purpose of dealing in securities for the defendant's individual benefit, although his individual name was not used. The first $250,000 was paid on September 13, 1897. On September 14th $100,000 was sent to Brown, Riley & Co.

On September 18th the second $250,000 was paid. On September 24th $230,000 was sent to Brown, Riley & Co. The last $500,000 went to these brokers direct. The first $330,000 was applied by Brown, Riley & Co. to the purchase in the name of the Construction Company of the Delaware Company's income bonds at prices averaging about 62 per cent. The defendant afterwards caused the Delaware Company to repurchase these bonds at 80 per cent. The last $500,000 was applied by Brown, Riley & Co. to a copper stock account, which was also carried in the name of the Construction Company, and upon this transaction a profit was realized.

(17) On January 17, 1898, a contract was entered into between the Gas Company and the People's Company, whereby it was provided that the Gas Company should build a plant for the People's Company for $842,000 of the bonds of the People's Company and $1,060,000 of its stock. On May 7, 1898, the Gas Company assigned the burdens and benefits of this contract to the Buffalo Contracting Company. On September 12, 1898, the Buffalo Contracting Company and the People's Company entered into a modified agreement, whereby it was provided that the People's Company should deliver to the Buffalo Contracting Company $645,000 of bonds and $1,816,200 of stock for the same construction, and this agreement was carried out.

(18) The bonds of the People's Company were intrinsically worth comparatively little. The total issue was $2,100,000, and the only money ever received by the company came from the sale of these bonds; the stock having been issued for nothing of value. Its plant cost about $500,000. Its gross earnings from April 30, 1898, to February 13, 1899, the only period during which it was operated, were $4,223.36. The only security for the bonds were the plant and franchises of the People's Company and of the Gas Company. These were the only assets that the People's Company ever had. Its bonds were almost without real value—although a speculative price was obtained for some of them—and no interest was ever paid on any of them. The plant, franchises, and property of the People's Company, including the property of the Gas Company, were afterwards acquired by the Buffalo City Gas Company—an older company, in possession of the field—in order to get rid of an annoying competitor. This disposition of the property of the Gas Company and of the People's Company was probably the ultimate object of the various promoters from the beginning, with such incidental profit as they might be able to pick up by the way.

The facts thus far stated are in the main either undisputed or indisputable, but there is a controversy over the important transactions outlined in paragraphs 10, 11, 12, 13, 14, 15, and 16, and it is therefore desirable to go into these matters somewhat more fully.

On October 12, 1897, the syndicate, that incorporated the People's Company shortly afterwards, made the following proposition to the Construction Company, which was accepted on the same day:

"October 12, 1897.

"Queen City Construction Company, Limited—Gentlemen:

"The undersigned syndicate, representing themselves and others, hereby make the following proposition for the purchase of all the stock, rights, franchises and property of the Queen City Gaslight Company:

"They offer to pay the sum of $100,000 in cash, and $80,000 in the bonds of the company, which said sum of $180,000 is the purchase price of the plant as fixed by you.

"They further offer to pay the sum of $1,000,000 in the bonds of the company for the legal rights and franchises belonging to the company. This offer is based on a proposition to issue two millions of bonds and two millions of capital stock.

"We are to increase the board of directors of the company and take such other action as we may be advised regarding the formation of the company, substituting ourselves or our representatives as a board of directors and managing the affairs of the company. One hundred thousand dollars of bonds are to be paid to us as a syndicate for the $100,000 of cash furnished as above set forth. The balance of the bonds are to be held in the treasury for the purpose of constructing and operating the plant and paying fixed charges as may be found necessary, or as hereinafter set forth.

"The syndicate is to own all of the stock of the company. The company is to forthwith proceed with the laying of pipes and preparations for the manufacture and sale of gas on the necessary scale.

"The Queen City Construction Company, if desired by the syndicate, is to construct the plant and works of the company and receive compensation in the bonds of the company at par, the stock to be also issued to the Construction Company in accordance with the requirements of the statute, and after its legal issue to be returned to the syndicate.

"Yours very truly,

Herbert P. Bissell,
"John A. Kennedy,
"P. H. Griffin,
"Wm. C. Cornwell.

"The above proposition is accepted.

"Queen City Construction Co., Limited,
"J. Edward Addicks, Chairman."

This scheme contemplated paying for the Gas Company's stock by the issue of its own bonds, and diluting the security plentifully by increasing the capital stock to $2,000,000, and putting out $2,000,000 of bonds; both the stock and the bonds having behind them no more than $180,000 of property, even if reckoned at the highest estimate fixed by the original promoters, namely, the defendant and the other interested parties. This plan was practically abandoned, however, and early in the following month the People's Company was incorporated as a more suitable instrument to carry out the scheme that had been agreed upon. To understand the real effect of the agreements that are about to be quoted, it is important to bear in mind that at this time, as is conceded by his counsel, the defendant had "acquired practically all of the stock of the Construction Company," so that he was not only his individual self, but was at the same time the Gas Company and the Construction Company as well. This being the situation, what happened was as follows: On December 3, 1897, four agreements were made, which will be set out in full, although only two are of chief importance. The first was between the Construction Company and the directors of the Gas Company (acting for that corporation), of the first part, and the People's Company, of the second part. It contained these provisions:

"Whereas, the said the Queen City Construction Company, Limited, one of the parties of the first part, is the owner of all of the capital stock of the Queen City Gaslight Company, a corporation duly organized and existing under the laws of the state of New York, and now engaged in manufacturing and supplying gas for lighting and heating purposes in the city of Buffalo aforesaid, and the said Newland, Kirkover and Beard are the persons to whom

said stock was issued and in whose names it stands upon the stock books of said Queen City Gaslight Company; and

"Whereas, the said party of the second part has been organized and incorporated under the laws of the state of New York for the purpose of manufacturing and supplying gas in said city of Buffalo, as provided by section 60 of the transportation corporations law; and

"Whereas, it is the desire and intention of the parties hereto that the said party of the second part shall acquire, own and control all of the capital stock of the Queen City Gaslight Company, together with all of its property, rights, privileges and franchises:

"Now, therefore, this agreement witnesseth, that the parties of the first part, for and in consideration of the sum of one dollar to them each in hand paid, the receipt whereof is hereby acknowledged, and for and in consideration of the payments, conditions, agreements and obligations hereafter to be paid and performed, as is hereinafter specifically stated and agreed, do by these presents hereby agree to and with the said party of the second part as follows:

"First. The said parties of the first part hereby agree that on or before the 13th day of December, 1897, they will deposit in escrow in the Niagara Bank, of the said city of Buffalo, all of the capital stock of the Queen City Gaslight Company, with a sufficient assignment and transfer of all of the certificates or shares thereof to the said party of the second part, provided the order mentioned in the paragraph 'second' below, for the delivery of one million one hundred and eighty thousand dollars of bonds to the said Queen City Construction Company, Limited, is also deposited at the same time or prior thereto.

"The said parties of the first part hereby further agree that they will also deposit in said bank an abstract of title, together with tax searches, showing that all of the property, rights, privileges and franchises and stock of the said Queen City Gaslight Company are free and clear from all liens and encumbrances, claims or demands whatsoever, which said stock certificates, abstracts of title and tax searches the said party of the second part, its attorneys or agents, shall, as soon as the same are deposited, have the right to examine and approve.

"Second. The said party of the second part hereby agrees that it will, on or before the 13th day of December, 1897, duly deposit in said Niagara Bank, of Buffalo, an order upon the trustees named in the mortgage of the party of the second part herein mentioned, duly accepted by said trustee, for the delivery of said Queen City Construction Company, Limited, as soon as the same shall be engraved, issued and certified by said trustee, of one million, one hundred and eighty thousand dollars of the first mortgage five per cent. thirty-year gold bonds of the party of the second part, secured by a mortgage covering all of its property, rights, privileges and franchises, and further secured by a pledge of all the stock of the Queen City Gaslight Company now or hereafter issued, as well as a first mortgage duly executed by the Queen City Gaslight Company, covering and including all of the property, rights, privileges and franchises of the Queen City Gaslight Company, together with a certificate representing one million one hundred and eighty thousand dollars ($1,180,000) of the capital stock of the said People's Gas Company, of Buffalo, or an order therefor, addressed to the treasurer thereof, and duly issued to the Queen City Construction Company, Limited, one of the parties of the first part, which said stock or order therefor and order for bonds, when so deposited, and mortgages securing said bonds, the said parties of the first part, their agent or attorney, shall first have the right to inspect, examine and approve, and when all of the said transfers, certificates and abstracts of title and orders and mortgages as aforesaid are so approved by the respective parties as aforesaid, the said capital stock of the said Queen City Gaslight Company, so deposited in escrow, shall thereupon forthwith be delivered to the trustee named in said mortgage, and when so delivered the said bonds and stock or the orders therefor, of the People's Gas Company, of Buffalo, shall thereupon be delivered to the said the Queen City Construction Company, Limited, one of the parties of the first part.

"It is hereby understood and agreed that the series of bonds, of which the bonds hereinabove described are to be part, shall be limited to a total issue of

ten millions of dollars ($10,000,000), in accordance with the terms and conditions of the said mortgage of the party of the second part to be given to secure the same.

Third. It is hereby further understood and agreed that the party of the second part shall also place and deposit with the said Niagara Bank, of Buffalo, an order for $218,000 of said bonds, without coupons for the first four years, in addition to the one million one hundred and eighty thousand dollars ($1,180,000) thereof hereinbefore mentioned, directing the said trustees to deliver the same to the Queen City Construction Company, Limited, which said order shall be delivered to the said Construction Company, upon its delivering to the said Niagara Bank, of Buffalo, for the People's Gas Company, the coupons for the payment of the first four years' interest on one million dollars ($1,000,000) of the bonds of the said People's Gas Company to be issued to the said Construction Company as herein provided. It being the desire and intention of the parties hereto to have the interest on said one million dollars ($1,000,000) of the bonds of the party of the second part which are to be issued and delivered to the Queen City Construction Company, Limited, provided for and paid in advance for the first four years of the period of said bonds, the Queen City Construction Company, Limited, hereby agrees to accept the said additional two hundred and eighteen thousand dollars ($218,000) of said bonds in full payment of said four years' interest on the said one million dollars ($1,000,000) thereof, and also of the interest on the said two hundred and eighteen thousand dollars ($218,000) bonds for a like period.

"It being the purpose of this agreement to provide that the entire capital stock of the said Queen City Gaslight Company shall be acquired and owned by the said party of the second part, subject to the lien of said mortgage as aforesaid, in payment of which said party of the second part shall issue to said the Queen City Construction Company, Limited, one of the parties of the first part, one million one hundred and eighty thousand dollars ($1,180,000) of its bonds, and an equal amount of its capital stock, as hereinabove expressly stated and set forth.

"And the party of the second part hereby agrees that it will in good faith, either in its own name or in that of the Queen City Gaslight Company of Buffalo, proceed with all due and reasonable expedition with the construction of and will construct a good and sufficient plant in the city of Buffalo for the purpose of manufacturing and supplying gas therein; and in the event that it does not purchase, control and operate one or more of the gas plants now doing business in said city in the meantime, it will expend at least the sum of eight hundred thousand dollars ($800,000) in the construction and equipment of a gas plant as aforesaid within the next three years.

"It is mutually understood and agreed that the conditions, limitations and agreements herein contained shall extend to and bind the successors and assigns of each and all of the parties hereto."

In brief, so far as is now material, this agreement provided that the Construction Company (for which should be substituted in thought its owner, the defendant) should transfer to the People's Company all of the Gas Company's stock, which belonged absolutely to the defendant through his ownership of the Construction Company, and that the People's Company, in return for such transfer, should issue to the Construction Company (that is, to the defendant) its bonds, or an accepted order therefor, amounting to $1,180,000, secured by first mortgages upon all the property of the People's Company and of the Gas Company, and also $1,180,000 of stock in the People's Company. But, as it was recognized that there was no money and little property behind these bonds, and therefore that it might be inconvenient to pay the interest until the public could be induced to take a satisfactory share in the enterprise, the payment of interest upon $1,000,000 of the bonds was deferred for four years, and in lieu of the coupons for that period the Construction Company (that is, the defendant) agreed to accept

additional bonds to the amount of $218,000, also without coupons for four years. The total sum to be received by the Construction Company (that is, by the defendant) under this agreement was, therefore, $1,398,000 in bonds of the People's Company without coupons for four years, $180,000 in bonds with coupons, and $1,180,000 of its stock. For this consideration the Construction Company (that is, the defendant) agreed to part with all of the Gas Company's capital stock.

On the same day a second agreement was made between the Construction Company and the directors of the Gas Company (acting for that corporation), of the first part, and Griffin, Cornwell, Kennedy, and Bissell, representing a syndicate composed of themselves and others, of the second part, which provided as follows:

"Whereas, the Queen City Construction Company, Limited, one of the parties of the first part, is the owner of all of the capital stock of the Queen City Gaslight Company, a corporation of the state of New York, now engaged in manufacturing and supplying gas for lighting and heating purposes in the city of Buffalo, which said stock stands in the name of said Newland, Kirkover and Beard on the stock books of said gaslight company, and

"Whereas, the parties of the second part, heretofore and on or about the 12th day of October, 1897, made and entered into an agreement with the said Queen City Construction Company, Limited, acting for itself and as agent for all of the parties interested in the capital stock, property and franchises of the said Queen City Gaslight Company, and

"Whereas, the said parties of the second part, together with certain other persons, have duly organized and incorporated under the laws of the state of New York a corporation known as People's Gaslight & Coke Company of Buffalo, for the purpose of manufacturing and supplying gas, as provided by section 60 of the transportation corporations law, and it is the desire and intention of the said parties of the second part that the said People's Gas Company of Buffalo shall acquire and own all of the capital stock, rights, properties, privileges and franchises of the said Queen City Gaslight Company, and

"Whereas, the said People's Gaslight Company of Buffalo has entered into a contract in writing with the parties of the first part, which said contract bears even date herewith, to acquire all of the capital stock of the said Queen City Gaslight Company, and providing for the payment and delivery by said People's Gas Company of Buffalo to said Queen City Construction Company, Limited, of one million one hundred and eighty thousand dollars ($1,180,000) of the five per cent. thirty-year first mortgage gold bonds of said People's Gas Company of Buffalo, and for the further payment and delivery to said the Queen City Construction Company, Limited, as a part of the purchase price of all of the stock of the Queen City Gaslight Company, as aforesaid, of one million one hundred and eighty thousand dollars ($1,180,000) of the capital stock of said People's Gas Company of Buffalo, and

"Whereas, it is the desire and intention of the parties hereto to perfect and carry out the terms and conditions of the said agreement in writing, bearing date the 12th day of October, 1897, and

"Whereas, in furtherance thereof it is the desire and intention of the parties of the second part to purchase from said Construction Company, Limited, the said amount of the capital stock of said People's Gas Company of Buffalo, to be issued and delivered to said Construction Company as aforesaid, viz., One million one hundred and eighty thousand dollars ($1,180,000) of said capital stock, as provided for by said agreement, and also to purchase one hundred thousand dollars ($100,000) of the said bonds so to be issued as aforesaid:

"Now, therefore, this agreement witnesseth:

"First. That for and in consideration of the premises and of the covenants and agreements herein expressed, and of the mutual benefits to be derived by the parties hereto, and of the sum of one dollar, paid to each of the said parties of the first part by the said parties of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part do by these presents

hereby agree to and with the said parties of the second part, their heirs, executors, administrators and assigns, as follows:

"The said parties of the second part hereby agree that they will pay unto the said Queen City Construction Company, Limited, the sum of one hundred thousand dollars ($100,000) in cash, for which they are to receive one hundred thousand dollars ($100,000) of the first mortgage gold bonds of said People's Gas Company of Buffalo, and one million one hundred and eighty thousand dollars ($1,180,000) of the stock of said People's Gas Company of Buffalo, the said sum to be paid when the said bonds and stock, or an order therefor, shall be delivered, which shall be as soon as the said stock and the said one million one hundred and eighty thousand dollars ($1,180,000) of bonds or orders therefor have been transferred to the said the Queen City Construction Company, Limited, by said People's Gas Company of Buffalo, pursuant to the agreement made between the said parties of the first part and said People's Gas Company of Buffalo, bearing even date herewith.

"Second. The parties of the second part, for themselves and for the said People's Gas Company of Buffalo, do hereby agree to and with the Queen City Construction Company, Limited, that they or the said People's Gas Company of Buffalo will hereafter issue and duly transfer or cause to be issued and duly transferred to the said Queen City Construction Company, Limited, shares or an amount of the capital stock of said People's Gas Company of Buffalo in addition to two hundred and ninety-eight thousand dollars of the bonds of said last named company, delivered to and retained by said Queen City Construction Company, Limited (being the two hundred and eighteen thousand dollars of bonds without coupons for four years, so delivered to said Construction Company, in full payment of interest on said two hundred and eighteen thousand dollars [$218,000] of bonds and on its one million dollars of said company's bonds for four years in advance, and the additional eighty thousand dollars of said bonds received and retained by the said Construction Company in excess of the said one million dollars of bonds), pursuant to the terms of this and of the other agreement herein referred to, bearing even date herewith, which said shares or amount of stock, so to be delivered to said Construction Company, shall equal the largest percentage or amount of said stock which shall be issued and delivered with any of said bonds hereafter sold by said People's Gas Company.

"It being mutually understood and agreed by and between the parties hereto that said stock so to be issued to said Queen City Construction Company, Limited, is in consideration of the acceptance by said Construction Company of the two hundred and eighteen thousand dollar bonds above mentioned, in payment of the interest as aforesaid in lieu of cash, and in consideration of all of the covenants and agreements hereinbefore contained.

"The said stock shall be delivered to said Construction Company as herein provided upon demand of said Construction Company at any time after any further sale by said People's Gas Company of Buffalo or its Construction Company of any of its bonds to investors.

"It is further mutually understood and agreed that said stock so to be issued to the Queen City Construction Company, Limited, shall be subject to any condition imposed or provision made with reference to the stock of said People's Gas Company providing for a voting trust with its usual conditions.

"It is hereby further agreed by the Queen City Construction Company, Limited, one of the parties of the first part hereto, that on or before the 13th day of December, 1897, it will cause to be deposited with the said Niagara Bank, of Buffalo, a certified copy of a resolution passed by all of the stockholders of the said Construction Company, Limited, consenting to and ratifying this agreement, accompanied by an affidavit of the secretary or treasurer of said Construction Company showing that all of the stockholders thereof were present and voted in favor of said resolution.

"It is further mutually agreed and understood that the conditions, limitations and agreements herein contained shall extend to and bind the successors and assigns of each of the parties hereto."

So far as we are now concerned, the substance of these provisions is this: The syndicate agreed to buy from the Construction Company

(that is, from the defendant) $100,000 of the bonds of the People's Company, with coupons, and the $1,180,000 of its stock, paying therefor $100,000 in cash, and agreeing to issue thereafter to the Construction Company (that is to the defendant) a bonus of a certain amount of stock upon either $218,000 or $298,000 of the bonds; the amount being somewhat uncertain, although $218,000 is probably the correct amount. The rate of the bonus was not fixed, but it was to be equal, at all events, to the largest bonus delivered to any future purchaser of the bonds. This, in connection with the first agreement, left the Construction Company (that is, the defendant) with $100,000 in cash, bonds of the People's Company to the amount of $1,218,000 without coupons, and $80,000 of bonds with coupons.

The third agreement, executed on the same day, was between the syndicate, of the first part, and the Construction Company, of the second part. It is of little importance in the pending controversy, but is nevertheless set out for the sake of completeness:

"Whereas, the said parties of the first part heretofore entered into an agreement with the party of the second part for the purchase of all the stock, franchises and property of the Queen City Gaslight Company of Buffalo, upon certain terms and conditions mentioned and set forth in an agreement in writing, dated October 12, 1897; and

"Whereas, it was agreed in and by said instrument that the amount expended up to the 1st day of October, 1897, by the said the Queen City Construction Company, for the construction and for furnishing materials for the plant of the Queen City Gaslight Company of Buffalo, was the sum of one hundred and eighty thousand ($180,000) dollars; and

"Whereas, it was further agreed that the parties of the first part would reimburse the said party of the second part for any amount expended for materials and construction in addition to the said sum of one hundred and eighty thousand dollars ($180,000); and

"Whereas, the said parties of the first part, together with others, have formed a corporation known as the People's Gaslight & Coke Company, of Buffalo, which said company has entered into a contract for the purchase of all of the property, stock, privileges and franchises of the said Queen City Gaslight Company:

"Now, therefore, for and in consideration of the premises and the payment by the said parties of the first part each of the sum of one dollar, the receipt whereof is hereby acknowledged, and in further consideration of the agreements herein expressed, the parties of the first part hereby agree that they will, either themselves or through the said People's Gaslight Company, reimburse the said party of the second part for any and all disbursements on account of the materials purchased and construction done for the Queen City Gaslight Company, which said materials have been furnished and construction done since the 1st day of October, 1897."

The fourth agreement was between the syndicate (eight persons being now named instead of four), of the first part, and the Construction Company and the defendant as an individual, of the second part. It is also of minor importance in this action, but is quoted because it was part of the transaction:

"Whereas, the said parties of the first part have heretofore formed a syndicate for the purchase of all of the stock, franchise and property of the Queen City Gaslight Company of Buffalo, and have organized a new company to which said stock, property and franchise have been transferred, said new company being known as the People's Gaslight & Coke Company of Buffalo; and

"Whereas, the said People's Gas Company of Buffalo has entered into an agreement bearing even date herewith, providing among other things for the

purchase by the said People's Gas Company of Buffalo of all the stock, property and franchises of the said Queen City Gaslight Company upon certain terms and conditions mentioned and set forth in said agreement, to which reference is hereby made, and which agreement also provides for the payment by the said People's Gas Company of Buffalo to the said the Queen City Construction Company, Limited, a corporation controlled by the said J. Edward Addicks, of one million one hundred and eighty thousand dollars of the first mortgage bonds of the said People's Gas Company of Buffalo, and one million one hundred and eighty thousand dollars of the stock of the said People's Gas Company of Buffalo; and

"Whereas, the said P. H. Griffin, W. C. Cornwell, John A. Kennedy and Herbert P. Bissell, acting for themselves and others, have entered into an agreement to repurchase from the said Queen City Construction Company, Limited, the said one million one hundred and eighty thousand dollars of the capital stock of the People's Gas Company and one hundred thousand dollars of the said first mortgage bonds, and to pay the sum of one hundred thousand dollars in cash for said stock and bonds, which said last-mentioned agreement also bears even date herewith, and to which reference is hereby made; and

"Whereas, the said the Queen City Construction Company, Limited, and the said J. Edward Addicks and others are desirous of protecting the amount of one million and eighty thousand dollars of said bonds which will remain in their hands against depreciation by reason of the failure of the said People's Gas Company to construct its plant or by reason of its entering into a consolidation or combination with other gas companies of Buffalo:

"Now, therefore, for and in consideration of the premises and of the sum of one dollar paid to, each of the parties of the first part by the party of the second part, and in further consideration of the mutual benefits, and the covenants and agreements expressed in the said contracts bearing even date herewith between the parties hereto, or some of them, and in the further consideration of the faithful performance by the said party of the second part of the covenants and agreements expressed and contained in said contracts, the parties of the first part do hereby agree as follows:

"The said parties of the first part hereby jointly and severally agree that in the event that any consolidation, union or other combination with, or sale, exchange or transfer of its stock, franchises or properties to or with any other gas companies in Buffalo or elsewhere shall be made by the said People's Gas Company of Buffalo or the said Queen City Gaslight Company of Buffalo, and in the event that such consolidation, union, combination, exchange, transfer or sale, if any, shall not be satisfactory to the Queen City Construction Company, Limited, or to said J. Edward Addicks, that then in either of said events the said parties of the first part will, on demand, purchase the said one million and eighty thousand dollars of bonds above mentioned from the said the Queen City Construction Company, Limited, or said J. Edward Addicks, and pay therefor the par value thereof with accrued interest in cash; and the Queen City Construction Company, Limited, and said J. Edward Addicks, parties of the second part, hereby agree that they or either of them will sell the said bonds to the said parties of the first part at the price aforesaid, in the event of such unsatisfactory consolidation, combination or sale as aforesaid.

"It being hereby understood and agreed that the said People's Gas Company of Buffalo will proceed with the construction in good faith of a good and sufficient plant in the city of Buffalo for the purpose of manufacturing and supplying gas, and in the event that there shall be no consolidation, combination or sale as aforesaid prior thereto, it is hereby further agreed that, when and as soon as the sum of eight hundred thousand dollars has been expended upon such plant in good faith, this agreement for the repurchase of said bonds shall be null and void, and the obligations hereby created shall be terminated.

"It is mutually understood and agreed that the conditions, limitations and agreements herein contained shall extend to and bind the successors and assigns of each and all the parties hereto."

These agreements were carried out, so far as the payments of money and transfers of securities are concerned, except that the evidence

leaves it doubtful whether the stock bonus on $218,000 of bonds, provided for in the second agreement, was ever issued. This point however, is not material, as the stock had no value.

The final result of these transactions was that the Delaware Company paid $1,000,000 in cash to the Construction Company (that is, to the defendant), and received therefor $1,212,000 in bonds of the People's Company, which were deposited in New York in the vaults of a trust company, in the names of the defendant and James G. Shaw, who was his brother-in-law, and was also the vice president and a director of the Delaware Company. These bonds had little intrinsic value. The issue was $2,100,000, and the plant and other property back of them was not worth one-third of this sum, even if appraised as worth all the money that had been put into the enterprise. Considering the property as income-producing and as security for an investment, it would not bear investigation for a moment. It was purely a speculative scheme, and, except in this aspect, its bonds were worthless. But it was a menace to the other artificial gas interests in Buffalo, and therefore had what one of the witnesses very aptly described as a "nuisance value," which afterwards turned out to be of some importance. The subject of value will be referred to again at the close of this opinion.

For the immediate purpose, it is enough to say that the Delaware Company had spent $1,000,000 in cash, which had gone into the treasury of the Construction Company (that is, into the pocket of the defendant, who had applied $830,000 of it to his own use), and had received in return a certain number of bonds of the People's Company, which I shall regard provisionally as worthless, leaving the question of their actual value to be considered hereafter. The defendant, in the guise of the two corporations that he owned absolutely, had profited largely by this transaction, and had applied a large part of the money to advance his individual purposes.

But the mere facts that he had been shrewd enough to carry through this somewhat involved transaction without putting much of his own funds at risk, and had emerged from the transaction with more than $800,000 of profit, are not sufficient to charge him with liability to the Delaware Company, or to its receiver, the complainant in the present bill. If the defendant had been a stranger to the Delaware Company, or if he had been merely a stockholder, without control or influence in its affairs, there would be no ground for the recovery that is now sought against him. Such recovery must rest upon proof that he occupied a position of confidence and responsibility in reference to the Delaware Company, and that he was faithless to his trust, in order that he might divert to his private gain a part of the corporate assets that were confided to his care.

And this brings me to consider the evidence concerning these additional questions, upon which I find the further facts to be as follows:

(19) During the period covered by the foregoing transactions the defendant was the absolute master of the Delaware Company. His power was unquestioned, not only over the selection and appointment of its directors, officers, and employés, but also over its financial and business management and the disposal of its assets.

(20) His control extended also to the stockholders' meetings. As already stated, the corporation was chartered with an authorized capital of $100,000, which was afterwards increased to $1,000,000,000, and of this vast total, shares of the aggregate par value of $250,000,000 were actually issued from time to time. Of the shares outstanding during the period involved in this controversy, the defendant at all times controlled a very large number, either by his personal influence and relations of one kind or another, or by virtue of proxies from other persons; and during all that period he controlled and voted, or caused to be voted, a large majority of the shares represented at each annual meeting of stockholders. He made it a practice to keep a collection of proxies, and before each annual meeting to get from the books of the company a revised list of stockholders. Where it appeared that stock had been transferred, he would write for a new proxy.

(21) The defendant had quorums fixed with reference to the number of his proxies in the following manner: Section 6 of the charter provided that a quorum at stockholders' meetings should consist of at least 50 per cent. of the capital stock. This was changed on March 1, 1895, when an amendment of the charter was passed at the defendant's instance, which provided that a quorum at such meetings should consist of so many stockholders as the by-laws might designate. Until October 23, 1900, article 2 of the by-laws provided that a quorum at annual meetings should consist of not less than a majority in interest of the stockholders. On that date he caused the directors to pass a resolution which purported to amend article 2 so as to provide that the quorum at stockholders' meetings should be determined by the board of directors before the meeting of the stockholders. In every year after 1895, however, the directors fixed the quorum on, or shortly before, the day set for the annual meeting, and the quorum thus fixed was in three of the years between 1895 and 1900, less than 50 per cent. of the stock outstanding; and, although the by-laws were not altered until October 23, 1900, the number of proxies which the defendant held immediately before the annual meeting in each year after 1895 determined the quorum which was fixed by the directors.

(22) He elected his own friends and associates as directors and officers, and they did whatever he asked them to do. They knew little or nothing about the manufacture and supply of gas, or about the Buffalo securities, but trusted everything implicitly to him. Many of them received large salaries, although the corporation had very little business to transact. The following details, which are taken in part from the complainant's brief, are abundantly supported by the evidence:

J. Frank Allee, a retail jeweler of Dover (afterwards a senator of the United States), was elected a director in 1895. He became a member of the board at the request of the defendant. When he was elected, he owned no stock; but 10 shares were put in his name to qualify him. He was a member of the executive committee, and became president in December, 1901. He was closely associated with the defendant in the factional politics of the state. So far as appears, he had had no experience in the gas business, or in the management of large affairs.

James G. Shaw, a cotton manufacturer of Newcastle, became a director in March, 1895, and continued in the board to the date of the

receivership. He was also a member of the executive committee. He was a brother-in-law of the defendant, became a director at his request, was nearly 70 years of age in 1897, and showed clearly by his testimony that he knew nothing about the gas business, and was not familiar with important affairs.

Newell Ball, of Bridgeville, a farmer, storekeeper, and director of a country bank, was elected to the board in October, 1895, at the suggestion of the defendant with whom he was on terms of social intimacy and of political alliance, and continued to be a director until the date of the receivership. He had no knowledge of the gas business, and very little, if any, experience in the affairs of large corporations, such as the Delaware Company.

Caleb R. Layton, a practicing physician of Georgetown, was a director from November, 1896, to November, 1902, except for a short interval before September 1897. He was asked to serve by the defendant, and consented as a friendly act to him, although he did not regard himself as well qualified for the position. He had no experience in managing gas companies, and the business of a large corporation was foreign to his training as a professional man. He was afterwards Secretary of State for Delaware.

Philo D. Beard, who was one of the promoters of the Gas Company, was elected a director in the fall of 1897, and died during the next summer.

J. H. Bateman served upon the board from November, 1897, to November, 1900. He was cashier of a bank in Dover, was closely associated with the defendant in politics, and managed the State Sentinel, a newspaper which the defendant published in the interest of his political faction.

George A. Kelly served as a director in 1895, and again from July, 1898, to November, 1902. W. H. Miller, John F. Donahoe, and C. F. Keller were connected with the company in official capacities; Miller as secretary or treasurer, Donahoe as secretary, and Keller as assistant secretary.

As already stated, the defendant, with the exception of the year from November, 1896, was president to December, 1901, when he was succeeded by Senator Allee. During the year from November, 1896, the president was John R. Bartlett of New York City, who gave the business of the company little, if any, attention. The defendant, who was then vice president, supervised and managed its affairs, just as he had done before. Although the Delaware Company was only a company holding certain securities nominally as investments, and was engaged in no active business, and although it paid no interest on its bonds or dividends on its stock after the spring of 1893, the directors and officers were paid large sums of money as salaries. From 1895 to November, 1897, each of the directors was paid $600 a year; and from November, 1897, to May 15, 1903, $2,500 a year. In 1896 the defendant received $10,000 salary as president; W. H. Miller received $5,000 as treasurer; C. F. Keller, $1,200 as assistant secretary; and John F. Donahoe, $2,400 as secretary, although he seems to have lived in Vermont and to have done little work. In February, 1897, the roll showed the following salaries: Bartlett, $10,000 as president; the defendant,

$10,000 as vice president; Miller, $5,000 as treasurer; Donahoe, $5,000 as secretary; and Keller, $1,200 as assistant secretary. In 1898 the defendant received $10,000 as president; Miller, $5,000; Donahoe $5,000; and Keller, $1,800. In the early part of 1898 the defendant's salary as president was advanced to $25,000 per year, and remained at that figure through 1898. George A. Kelly became clerk in 1898 at $3,600 per year. In 1899 the defendant received $25,000 as president; Miller, $5,000; Donahoe, $5,000; Keller, $1,800; Kelly, $3,600; and James G. Shaw, $3,000 as vice president. In 1900 and 1901 the salaries remained the same, except that in 1901 a new name appears—Kittinger, at $2,400. In 1902 Allee received $25,000 as president; James G. Shaw, $3,000 as vice president; Miller, $5,000; Donahoe, $5,000; and Keller $1,800. In 1903 Allee's salary as president was reduced to $5,000, while the salaries of Miller, Shaw, Donahoe, and Keller remained the same.

After the fall of 1896 the Delaware Company had no business for its officers and directors to transact, except the purchase of these Buffalo securities, and the purchase and sale of Amalgamated Copper and New Castle Gas stocks, and perhaps the holding of stocks in one or two other unimportant companies. That the officers and directors of the company were the merest automatons, acting solely as the defendant directed, and looking to him in the most complete confidence for orders, will appear conclusively by the following references to their testimony. I may add that the examiner's record upon this point should be read in its entirety, in order to appreciate adequately the complete surrender of the board to the defendant's will; but the references I am about to give will in some degree make the situation intelligible. To avoid prolixity, I shall merely give the substance of part of the testimony, instead of quoting the questions and answers in full.

Mr. Allee testified, inter alia, as follows: That, when the Construction Company applied in December, 1896, for a loan of $100,000, all the information he had about it came from the defendant. He did not know how far the defendant was interested in the company, nor what its assets were, except from general information derived from the defendant. That the loan at 4 per cent. without security was made "absolutely upon the advice of Mr. Addicks. We trusted him implicitly in these matters, and upon his advice it was done." That the board had no information about the loan, except what was given by the defendant, and "that the loan was made purely and solely because Mr. Addicks requested so." That in all matters relating to the purchase of the Gas Company's bonds "we were advised by Mr. Addicks and acted accordingly." That the board had no information concerning the Gas Company, except what was derived from the defendant and Mr. Beard, who was one of the original promoters. That he did not know, when he voted to buy $250,000 of the Gas Company's bonds, who the seller was, and that the executive committee had no advice "from any source other than Mr. Addicks as to the security back of the bonds." That he never visited Buffalo to investigate in regard to the bonds, and that "in all these matters he (Mr. Addicks) explained the thing to us, and we recognized him as the head of the company in

every way, and were guided by the information he gave us, and were satisfied with it, and so voted." That in reference to the purchase of the other $750,000 of the Gas Company's bonds "we acted in all of those matters in entirely the same way, on the advice of Mr. Addicks, the president of the company." That after the bonds were bought for $1,000,000 in cash none of the directors made any investigation about the Gas Company, not even when it appeared that no interest was being paid. That no investigation into the People's Company was made, "except what we received from Mr. Addicks," and that all that the board knew about this company also came from the defendant. That the substitution of the bonds of the People's Company for the bonds of the Gas Company was made because "Mr. Addicks, president of the company, advised it, and we acted accordingly." That the judgment of the board in this matter "was based upon the information given us by Mr. Addicks, and by the advice given by him that it was in the interest of our company it was done." That the defendant and Mr. Shaw were appointed trustees to hold the People's Company bonds, although the Delaware Company had a treasury of its own, "for the reason that was considered sufficient at the time, and given by Mr. Addicks and accepted by us, of course." That the defendant "always made a statement of the facts of the case, and we accepted them as so, and acted accordingly. * * * There was no one situated as Mr. Addicks was, as recognized by us as entirely as the head of the company, and we looked to him for the management of the company, and therefore, of course, there was no one else that could have advised us, that we would have considered in the matter, because there was no one else situated as he was." That no engineer was ever appointed to look into the condition of the Buffalo gas companies. That when the executive committee reported to the board that it had made investigations concerning any of the company's securities, this investigation "consisted (largely) in getting information and advice from Mr. Addicks."

From Mr. Ball's testimony it appears that from certain "glowing statements" made by the defendant and by Mr. Beard he formed what was evidently a very hazy idea about what the defendant was proposing to do. "The idea was formed in my mind that through those companies a controlling interest in the stocks of both of the companies could and would be obtained. That was the idea that was in my mind; just how I could not explain." He knew nothing about the Gas Company "except the information derived from the statements of Mr. Philo D. Beard and Mr. Addicks"; never investigated that company; did not know that the defendant or the Construction Company had any interest in the bonds; knew almost nothing about the People's Company; based his action in voting for resolutions concerning the purchase of the bonds upon "information obtained from Mr. Addicks"; and participated in the resolutions "at the request of Mr. Addicks, who requested me." Although he was a director to the date of the receivership, he never knew whether the Delaware Company had succeeded in obtaining "control of the Buffalo gas field," and took no independent means of acquainting himself with the facts, but stated "that what

[he] did in respect to all of those securities [he] did simply because [he was] requested to act by Mr. Addicks."

Mr. Shaw was even more dependent upon Mr. Addicks. He knew nothing about the Construction Company; was not even sure where its office was; did not know positively that the defendant was connected with it, although he had heard so "just in a general way, general talk." He made no inquiry about the company, or as to its business or its assets. As he frankly stated, "when I went into the board, I knew nothing about the gas business, and I told Mr. Addicks that, and I would have to rely upon him, and I relied upon Mr. Addicks in every particular, and anything he told me I believed him, and acted on anything he requested me to do." His testimony is full of illustrations of this confiding attitude. Being asked whether he knew how the bonds were secured he said: "No more than what Mr. Addicks told me. He told me that the security was a perfect security, and it was a good thing to be carried out, and we did it." Being asked, further, what information the board acted on when it agreed to the substitution of securities, he replied: "We got our information from Mr. Addicks. We were guided by him solely"—and added that he approved the exchange simply because it was recommended by the defendant, and that what he did at any time in respect to any of the company's securities "was done because Mr. Addicks, after talking the matter over, said it was the proper thing to do, and I knew no difference, so we did so."

These are by no means all the references that might be made, in order to support the proposition that the defendant was not only looked up to as the master of the corporate affairs, but was practically regarded as the corporation itself. They may suffice, however, to show what was undoubtedly the fact, that no one dreamed of opposing him, no one inquired independently about his schemes, or appeared even to desire information on the subject, and that he ruled in the counsels of the company as absolutely as if he had been without associates. The following brief extract from the testimony of W. H. Miller, the treasurer of the company from 1895 or 1896 to 1903, and for some time the treasurer of the Construction Company also, describes the situation exactly:

"Q. Are you able to state who was responsible for the organization of the company?
"A. J. Edward Addicks.
"Q. And who, if any one, controlled the company from that date on?
"A. J. Edward Addicks absolutely; no one else.
"Q. Was that true during the years subsequent to 1895 and down to 1903?
"A. Entirely so.
"Q. To what extent was that true at the time when he was not president of the company?
"A. It existed just the same; nothing done without his order."

A few more facts remain to be found before passing to the consideration of the legal questions that are involved.

(23) The defendant made it as difficult as possible for the holders of stock and bonds to find out what was being done with the funds of the Delaware Company. He directed the office employés never to give out any information as to the company's business under any cir-

cumstances. Until the receiver was appointed, although several attempts were made by the attorneys for holders of stock and bonds to gain access to the company's books, none was successful, owing to the defendant's opposition and positive instructions.

(24) Several changes were made in the time of holding the stockholders' meeting, and in the method of giving notice of these meetings. Section 6 of the charter provided that the directors should be elected annually at such place and time as the by-laws should designate; section 7 provided for 10 days' notice, by publication in two Wilmington newspapers; and article 25 of the by-laws required annual meetings of the stockholders to be held at the company's office in Wilmington on the first Tuesday in April at such hour as the directors should appoint, requiring, also, that a written or printed notice of such meeting should be mailed at least 10 days before the meeting to each stockholder of record at his address given on the books, and that notice of the time and place of meetings should be published in two Wilmington newspapers. On February 16, 1890, the directors amended article 25 of the by-laws, so as to provide that the annual meeting should be held on the third Wednesday of March in each year. On February 25, 1895, the directors again amended article 25 by changing the annual meeting to the first Monday of November. On March 1, 1895, the Legislature, at the instance of the defendant, amended section 6 of the charter so as to change the annual meeting to the third Tuesday after the first Monday in November, at such place and time as the by-laws should designate, and amended section 7 of the charter so as to provide that 10 days' notice of the time and place of the annual meeting should be given by publication in two newspapers published in the state of Delaware, instead of in the city of Wilmington. After the year 1895, notice of the stockholders' meetings was published in newspapers of small country towns, having limited circulation; and in consequence of this practice knowledge of these meetings from this source was likely to reach few, if any, of the stockholders. The defendant caused the annual meetings to be held at the unusual hours of 8:30 a. m. in 1900, and at 7:30 a. m. in 1901 and 1902, and caused the directors, before these meetings, to pass a resolution providing that the polls might be closed by a majority of the stockholders whenever a majority of the shares should have been voted for one ticket for directors. After 1892 no treasurer's report or financial statement was ever made at any stockholders' meeting. These changes in the charter and the by-laws were all made at the defendant's instance and by his procurement, and the result was greatly to hamper and impede any stockholder who might desire to obtain information concerning the company's affairs or to take part in the meetings.

The facts found in the foregoing paragraphs, beginning with No. 19, fully justify the following admissions of the defendant's counsel, which I quote from page 4 of his brief:

"While the broad and unqualified statements as to the control by the defendant of the property and directorate of the company are not proven by the evidence in the cause, it may be admitted that the guiding mind of the corporation was the defendant's; that the policies of the company were very largely his policies; that his opinions upon questions of company business were at all

times, from the organization of the company on, and regardless of the personnel of the board of directors, the most influential of anybody in the management of the company; that he was recognized by everybody connected with the company as being in closer touch with the greater questions of company policy and business than any other person; that his statements of fact were relied upon and constituted, from time to time, the basis of action by the company's board of directors. All these things naturally flow from the continuous interest which he took in the business of the company, from his greater knowledge of the business transactions of the company, from his official position as executive head thereof, and by the overwhelming vote of confidence in his management as indicated by the great number of proxies of company stockholders held by him."

To my mind these admissions do not adequately describe the situation. As it seems to me, the evidence proves overwhelmingly that the defendant was the absolute master in fact of the corporation, that his personality was dominant in all its affairs of every kind, that he dictated the personnel of its officers without contest or contradiction, and that the board of directors and the other officers were content merely to register his will. If he had owned the entire capital stock of the company—save the necessary qualifying shares—he could not have controlled it more completely. In short, the defendant and the Delaware Company were essentially identical, and the corporate machinery was merely used for the purpose of executing his plans under the guise of carrying out a formal corporate determination. The whole case is well summarized by the complainant's counsel, part of whose language I shall repeat at the risk of being tedious, in order to be sure that the situation has been made perfectly clear; for I agree with the argument that, as soon as the somewhat complicated facts are understood, the case is decided. I condense the summary into the following paragraphs:

(a) The circumstances surrounding and preceding the transactions of September and November, 1897, which resulted in obtaining $1,000,000 from the Delaware Company, ostensibly to buy the bonds of the Gas Company, clearly indicate that the defendant did not intend to make a legitimate investment for the Delaware Company, but that the object of the transaction was, by the adroit use of legal forms, to secure the Delaware Company's money for his individual purposes. It was this that came to pass, and it is fair to assume that the result was not due to chance, but to design. When the bonds of the Gas Company were bought in September and November, 1897, for $1,000,000 in cash, the only tangible asset owned by the Gas Company was a small gas plant, then nearing completion, which did not cost much, if any, more than $180,000. In form the transactions appear on the minute books of the Delaware Company as sales by the Gas Company of its own bonds to the Delaware Company, and prima facie, therefore, the proceeds of the bonds should have become part of the Gas Company's assets. But in point of fact the Gas Company never received any part of the proceeds of the checks and drafts of the Delaware Company, which were drawn to the order of the Gas Company's treasurer, and were immediately indorsed by him to the Construction Company, and collected by it for its own use. The money was thus, through the treasurer of the Gas Company as a conduit, simply transferred from the account of

the Delaware Company to the account of the Construction Company; and after the payments were made the Construction Company had received the purchase money for the bonds, and the Delaware Company, as the sole evidence of its payments, had nothing but an order on a trustee not yet appointed for bonds not yet issued or even provided for; and even when the bonds should be issued it had as security nothing except a plant worth no more than $180,000.

(b) The defendant asserts that the Construction Company received the money under a contract to erect a plant for the Gas Company. The contract was not produced, and no evidence of its existence is to be found on the minutes of the Construction Company; but, assuming that the contract existed, it is not to be presumed, without proof, that the Construction Company was entitled thereunder to receive either $1,000,000 in cash, or in the bonds of the Gas Company, for work upon which a disproportionately smaller sum had been expended. The effect of using the name of the Gas Company as the seller of the bonds was to conceal from the Delaware Company the fact that the money paid for the bonds would go to the use of the Construction Company, and of the defendant himself. The money obtained by these bond purchases was used by the defendant in speculative purchases of the income bonds of the Delaware Company and of the Butte & Boston copper stock. On September 13, 1897, the day when the first $250,000 was paid by the Delaware Company, the Construction Company opened an account with Brown, Riley & Co., a firm of brokers in Boston, and soon afterwards the speculative purchases began. The account of the Construction Company is credited, between September 15 and 24, 1897, with $330,000, which represents money paid to the brokers out of the $500,000 paid by the Delaware Company for the bonds of the Gas Company that were bought in that month. Part of the balance of this $500,000 was used by the Construction Company to repay the money that the Delaware Company had lent without security in 1896 for the purpose of building the small gas plant. During this month of September the brokers' account shows that income bonds of the Delaware Company were bought for the Construction Company at prices averaging 62; and toward the end of the same month they were sold to the Delaware Company at 80, a handsome profit thus being made by the Construction Company and by the defendant.

(c) Purchases of Butte & Boston copper stock were also begun in September, in the name of the Construction Company, and became active in the following November, as shown by the brokers' account. It was apparently for the purpose of aiding the defendant to deal in this stock that, on November 15, 1897, he caused the board of directors of the Delaware Company to authorize a further purchase of $500,000 of the Gas Company's bonds; for on that day this sum, represented by a draft on Brown, Riley & Co., who were brokers for the Delaware Company, as well as for the Construction Company and for the defendant, was transferred from the account of the Delaware Company to that of the Construction Company. Credit for this sum appears in the account of the Construction Company under date of November 16th.

(d) Thus the defendant had used $330,000 in September and $500,000 in November, both sums being money paid by the Delaware Company

for bonds to be issued by the Gas Company; but no part of this money had been applied to the use of the Gas Company or of the Construction Company, all of it having been employed in the effort to make individual profit for himself. By December 3d, however, the defendant came into possession of $1,218,000 bonds (or an order for bonds) of the People's Company, which had bought the stock of the Gas Company, and these bonds, or 1,212 of them (which were without coupons for four years and were intrinsically worthless as an investment), were afterwards delivered to the Delaware Company, in substitution for the bonds of the Gas Company, or of the order therefor. It cost the Construction Company little or nothing to acquire these bonds of the People's Company; and, after the defendant had caused the Delaware Company to agree to the substitution, he still had in his hands as clear profit, after deducting the cost of acquiring the minority interest in the stock of the Construction Company, the sum of about $890,000. The transactions through which this profit was made at the expense of the Delaware Company involved a clear disregard of the defendant's duty to that company, of which he was an officer and director, and, moreover, was in unquestioned control, and constituted a plain misappropriation of the company's funds to his individual use.

This condensed summary is, I think, amply justified by the findings of fact that precede it in this opinion, and, if the facts are true, it would be a waste of time to discuss elaborately the question whether the defendant is liable to account to the complainant in this suit. In my opinion, the unhesitating answer should be in the affirmative. His liability rests upon the fundamental principle that one who occupies a position of trust and confidence—such as the president, or a director, of a corporation—shall never be permitted to abuse his official position by dealing with the corporate property for his private gain. If he so deals, by whatever tortious devices, his acts are voidable if his trail can be followed, and he may be called upon to account for the profits that he has wrongfully made. If authority is needed for so plain a proposition, it may be found in Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509; Fox v. Mackreth, 1 Lead. Cas. Eq. (4th Am. Ed., Hare & Wallace's notes) 237 et seq.; McCants v. Bee, 16 Am. Dec. 616, note; Wilson v. Brookshire, 9 L. R. A. 792, note; Hindman v. O'Connor, 13 L. R. A. 490, note; 4 Thompson, Corp. §§ 4672, 4674. As was said in Wardell v. Railroad Co., at page 658 of 103 U. S. (26 L. Ed. 509):

"It is among the rudiments of the law that the same person cannot act for himself, and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' Marsh v. Whitmore, 21 Wall. 178, 183, 22 L. Ed. 482. The law, therefore, will always condemn the transactions of a party on his own behalf, when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule. They are not permitted to occupy a position which will conflict with the interest of par-

ties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits."

A similar position is stated in Rice's Appeal, 79 Pa., on page 264:

"While the right of a stockholder to contract with his corporation and become its creditor is conceded as a general proposition, the right of a person controlling a corporation to contract with it rests upon entirely different principles, if it exists at all. Where a person has the actual control of a corporation, whether such control arises from the ownership of a majority of the shares or from his position or influence, and enters into a contract with such corporation, he is to be held to the most rigid good faith. The onus is upon him to show the fairness of the transaction, if it is called in question. It is a principle too well settled to be now successfully controverted that the promoters, directors, or agents of a company shall not make a profit out of it in buying lands for it, or in dealing with it. This principle runs through all the fiduciary relations."

And in Finch Mfg. Co. v. Stirling Co., 187 Pa. 597, 41 Atl. 294—where, as stated in the syllabus, "the president of an insolvent corporation is present at a meeting of the directors of the company which votes to give a preference to another company, of which the president is also an officer and in which he is heavily interested, the mere fact that the president does not vote on the resolution does not rebut the presumption that the contract is void"—in delivering the opinion of the court, Mr. Justice Dean said, on page 600 of 187 Pa., and page 295 of 41 Atl.:

"Nor can we venture to say that under such circumstances, holding the responsible position of president of a corporation, he can relieve himself from the presumption of having secured the preference to the prejudice of the general creditors, by merely not voting. The transaction is consummated, not merely by his vote, but by the weight given to his advice or suggestion, and by his very prominence in the management. His opinion and request that the sale ought to be made is plainly apparent. The proposition to buy at the price named is made by the manufacturing company to the coal company, and accepted by the latter. Each director necessarily was aware, therefore, that their president thought the price fair, and that in his judgment the offer was one that should be accepted. In his presence they voted to accept. It is going too far, and might lead to great abuses, were we to hold that the mere declination to vote rebutted the presumption that the preference was fraudulent. Mere passiveness would not rebut the presumption; but he was more than passive. He made a proposition to buy, which was impliedly an invitation to the debtor to sell."

See, also, Russell v. Fuel Gas Co., 184 Pa. 102, 39 Atl. 21; Witmer's Appeal (Pa.) 15 Atl. 428; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667; Downs v. Rickards, 4 Del. Ch. 430; Brightly, Eq. Jur. (Pa.) §§ 97–101, and cases cited; Hill, Trustees (4th Am. Ed.) *535 et seq., and cases cited; and 1 Perry, Trusts (3d Ed.) §§ 207, 427.

As it seems to me, the defendant is in the position condemned by these authorities. He was an officer of the Delaware Company, and used his position as president and director to advance his own interests at the expense of the corporation. Of course, if he had put his hand into the treasury of the Delaware Company and had physically withdrawn for his own profit the money which the company has lost, no one would question his liability. Neither would it be questioned, if he had conspired with a majority of the board to do the acts and pass

the resolutions that have been done and passed, whereby the same result should be accomplished as by the coarser method of corporeal abstraction. And I see no reason why his liability should be doubted because the means actually adopted were different in kind, but were equally efficacious to transfer the property of the corporation to his personal use and profit. His control of the board was as complete as if they and he had been in collusion to accomplish a common object; and, with this uncontested power in his hands, he was the more bound to the utmost good faith and fair dealing. As has been shown, I think, he was absolutely unchecked by his fellow officers and directors. They looked to him, and to him alone, for information and advice. What he gave them was accepted without the slightest question or suspicion, and his wishes were carried into effect promptly and without change. No one can read the testimony without being convinced that real discussion in the board, or the exercise of individual judgment, was unknown. The directors and officers were either careless or ignorant to an almost incredible degree, and were apparently content to draw their satisfactory salaries and clothe his requests or suggestions in the formal garb of corporate action.

The defendant's counsel has made little effort to deny the relative position of the defendant and the board, and has made no effort to dispute the rule of law, if the facts are such as they have now been found to be. The only legal proposition for which counsel contends is—to use his own words—"that the primary decree of the court, if made against the defendant, must be simply for an accounting, and that the court is not at liberty, under the law or practice in equity, to at present find any sum which the defendant should be compelled to refund." I do not agree with this proposition. No doubt, if the liability to account should be wholly denied by a defendant, the issue thus raised must be first disposed of; and if an interlocutory decree is made that the defendant do account, the usual practice is to appoint a master. This, I think, may be said to be the invariable practice, if the dealings of the parties have been complicated, or if for any reason the convenience of the litigants or of the court would be promoted by such appointment. But there can be no dispute in the present case about the defendant's liability to account, if the facts are as they have now been found; and there is no complication in the dealings between the parties that calls for the aid of a master. A decree is about to be entered requiring the defendant to pay over a certain sum of money, and the single question remaining is: How much should he be decreed to pay? To answer this question, a reference to a master is not needed; but, even if it were desirable to have his assistance, it is purely a matter of discretion whether the appointment shall be made, or whether the simple account shall be stated by the chancellor himself. 1 Ency. Pl. & Prac. 103 note; 17 Ency. Pl. & Prac. 986, and cases cited; 2 Fed. Prac. (Garland & Ralston) § 263; 1 Foster, Fed. Prac. (3d Ed.) § 300. As was said by Chief Justice Marshall in Field v. Holland, 6 Cranch, 22, 3 L. Ed. 136:

"It was completely in the discretion of the court to ascertain this fact for themselves, if the testimony enabled them to ascertain it, or, if it did not,

to refer the question either to a jury or to auditors. There was consequently no error either in directing this issue or in discharging it."

And in Wheeler v. Billings, 72 Fed. 301, 18 C. C. A. 573, the Court of Appeals for the Eighth Circuit decided that:

"It is not necessary that an account decreed in a suit in equity should be stated by a master; but it is within the discretion of the court, if for any reason it deems it proper to do so, to state the account itself, after an examination of the testimony. * * *"

See, also, Head v. Head's Adm'r, 3 A. K. Marsh. (Ky.) 120; May v. May, 19 Fla. 388; 2 Beach, Eq. Plead. § 680.

Passing, then, to the last question, for how much should the decree be entered? I have come to the conclusion that, for the present at least, a final decree may be entered for the full amount claimed by the complainant, namely, $890,000, with interest from December 1, 1897. But I shall retain control of the decree for the purpose of diminishing the amount, if such action shall be found necessary. My reason is this: The Delaware Company exchanged the bonds of the People's Company for securities of the Buffalo City Gas Company—the corporation that took over the People's Company—or for other securities based upon the bonds. My examination of the testimony has not enabled me to ascertain the value of these securities (which it still owns), either at the time when the exchange was made, or their value at any subsequent date; and, if the defendant is entitled to have the value of these securities set off against the receiver's claim, I am not able at present to determine exactly how much deduction should be made. Moreover, the question whether the complainant is entitled to a decree for the entire profit made by the defendant, or whether the value of these securities should in equity be deducted therefrom, was not orally argued before me upon the final hearing, and is only slightly touched upon in the briefs. I am, therefore, unwilling to decide the point without giving the parties an opportunity to be heard, and I shall therefore ask counsel to assist me with an argument upon this question on Saturday, June 8, at 10 o'clock. If either party desires to take further testimony upon this point, they are at liberty to do so, and such testimony may be taken, upon five days' notice, either before the examiner, Henry B. Robb, or before any other person, either in Philadelphia or elsewhere, upon whom they may agree.

Meanwhile the final decree just indicated may be entered, without present abatement.

VENNER v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, S. D. New York. May 16, 1907.)

1. COURTS—EQUITABLE JURISDICTION OF FEDERAL COURTS—RULES OF SUPREME COURT.

While the Supreme Court may not by rule or otherwise limit the jurisdiction conferred on the United States Circuit Courts by statute, it may, and must when the occasion demands, determine what cases are within the equitable jurisdiction of such courts, and may prescribe by rule the cases or classes of cases in which they will grant equitable relief, and such

rules govern in all cases, whether commenced in such courts or removed into them from state courts.

2. SAME—ADOPTION OF PRACTICE OF STATE COURTS—EQUITY CAUSES—CORPORATIONS—SUITS BY STOCKHOLDER—RIGHT TO MAINTAIN IN FEDERAL COURT.

Under equity rule 94 (104 U. S. ix), a complainant, suing as a stockholder in a corporation on behalf of himself and other stockholders, cannot maintain a suit in equity in a Circuit Court of the United States against the corporation and others, founded on rights which may be properly asserted by the corporation, unless he was a shareholder at the time of the transaction of which he complains, or his shares have devolved on him since by operation of law; and such rule governs, although the cause was removed from a state court in which by reason of statute or decision such fact is not essential to the granting of equitable relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 902–907½.

Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

In Equity. Demurrer to amended bill of complaint on the ground that on the complainant's own showing he is not entitled, in equity, to the relief demanded, or to any relief, as to any of the matters alleged or contained in such bill of complaint.

Stephen M. Yeaman (Abram J. Rose and Alfred C. Pette, of counsel), for complainant.

Shearman & Sterling, for Great Northern Railway Company.

Simpson, Thacher & Bartlett (J. F. Workum and Millard C. Humstone, of counsel), for James J. Hill.

RAY, District Judge. The complainant, Clarence H. Venner, is a citizen and a resident of the state of New York; defendant, Great Northern Railway Company, is a corporation organized and existing under the laws of the state of Minnesota; and defendant James J. Hill is a citizen and resident of said state of Minnesota. The amount involved, exclusive of interest and costs, is upwards of $2,000. The bill of complaint alleges, in substance, that in or about November, 1900, the defendant James J. Hill, then being a director in and the president of the Great Northern Railway Company, and in acting as such, and in violation of his trust and duty as such, and to the great damage and injury of said railway company and its stockholders, did certain acts, fully stated, which, if done, created a cause of action in equity which said Great Northern Railway Company might have maintained against said Hill. The bill of complaint then alleges that about March 6, 1907, the complainant, a stockholder in said corporation, made a demand upon it, its directors and president, that this or a like action be instituted against said James J. Hill for the relief demanded in this action, and that they neglected and refused to institute such action. The bill of complaint also alleges that complainant now is, and that "on and before the date of the demand," the demand just stated, the complainant was, the owner of 300 shares of the preferred capital stock of said corporation of the par value of $100 per share and of the present market value of about $100,000. Complainant brings suit on behalf of himself and all others similarly situated, demanding that said Hill be required to account and pay over to the corporation for its benefit and the benefit, etc., of its creditors

and stockholders. The bill of complaint contains no allegation or statement that the complainant was a stockholder or shareholder in the Great Northern Railway Company at the time of the transactions complained of, or that his shares have devolved upon him since that time by operation of law. There are no allegations from which we may legally even infer that such are the facts. Hence the amended bill of complaint fails to comply with the ninety-fourth rule of equity practice (see 104 U. S. ix) promulgated January 23, 1882, and which provides:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

This action was commenced in the Supreme Court of the state of New York, and removed thence to the Circuit Court of the United States. A motion to remand was denied. A motion that complainant replead was granted, and complainant did replead, but has failed to strictly comply with the order in the respect named. However, a failure to comply with that order in such respect is not ground of demurrer. The question is: Does the amended bill of complaint state facts which in the Circuit Court of the United States entitle complainant to any relief in equity, or which entitle him to maintain an action in equity against these defendants? The complainant contends that in the Supreme Court of the state of New York, where this action was originally commenced, it is unnecessary to allege or prove, in order to maintain the action on this state of facts, that complainant owned his shares at the time of the transactions of which he complains, or that they thereafter devolved upon him by operation of law; in other words, to show that he was then interested in the corporation, or that the title to shares of one who then was interested therein has devolved upon him by operation of law. He insists that, as he had a cause of action in equity in the courts of the state of New York, when and where he brought his action, he has the same equitable cause of action in the Circuit Court of the United States, and that it may here be made out and sustained upon the same allegations and proof as are sufficient there. In short, he contends that equity rule 94, above quoted, has no application to a suit in equity removed to this court from a state court. The following cases are cited to sustain the contention: Earle v. Seattle R. Co. (C. C.) 56 Fed. 909; Evans v. Union Pac. R. R. Co. (C. C.) 58 Fed. 497; Maeder v. Buffalo Bill's Wild West Co. (C. C.) 132 Fed. 280; Frothingham v. Broadway, etc., R. R. Co., 9 Civ. Proc. R. (N. Y.) 304, 314; Hanna v. Lyon, 179 N. Y. 107, 71 N. E. 778.

It seems that in New York state its courts give equitable relief to a plaintiff, shareholder, who sues in behalf of himself and all others

similarly situated to enforce a cause of action like this, which the corporation itself might enforce for its own benefit, and consequently for the benefit of its shareholders, but will not, even if such plaintiff had no interest in the corporation or in the enforcement of the cause of action at the time the wrong complained of was committed and his present interest has not devolved upon him by operation of law since. Young v. Drake, 8 Hun (N. Y.) 61–64; Frothingham v. Broadway, etc., R. R. Co., 9 Civ. Proc. R. (N. Y.) 304, 314; O'Connor v. Virginia P. & P. Co., 46 Misc. Rep. 530, 535, 92 N. Y. Supp. 525; Fitchett v. Murphy, 46 App. Div. 180, 186, 61 N. Y. Supp. 182; Sayles v. Central National Bank of Rome, 18 Misc. Rep. 155, 158, 41 N. Y. Supp. 1063; Hanna v. Lyon, 179 N. Y. 107, 71 N. E. 778.

It must be regarded as settled law in the courts of the United States that a shareholder or stockholder in a corporation cannot maintain an action in equity of the description pointed out in equity rule 94, before quoted, unless he was a shareholder at the time of the transactions of which he complains, or his shares or share have since devolved upon him by operation of law. To give the courts of the United States equitable jurisdiction, the right to give equitable relief, this fact must be pleaded and proved. If the fact does not exist, then the courts of the United States have no equitable jurisdiction of the case; that is, they will not exercise their general equitable powers and jurisdiction. Unless that fact appears, it is not a case cognizable in equity in the courts of the United States, whatever may be the rules of equity or of equity jurisdiction in the several states, or in any one of them. Hawes v. Water Co., 104 U. S. 450, 461, 26 L. Ed. 827; Dimpfel et al. v. Ohio & Miss. R. R. Co., 110 U. S. 209, 210, 211, 3 Sup. Ct. 573, 28 L. Ed. 121; Corbus v. Gold Mining Co., 187 U. S. 455, 462, 23 Sup. Ct. 157, 47 L. Ed. 256; Quincy v. Steel, 120 U. S. 241, 245, 246, 7 Sup. Ct. 520, 30 L. Ed. 624; Davis & F. M. Co. v. Los Angeles, 189 U. S. 207, 220, 23 Sup. Ct. 498, 47 L. Ed. 778; Greenwood v. Freight Co., 105 U. S. 16, 26 L. Ed. 961; Detroit v. Dean, 106 U. S. 537, 542, 1 Sup. Ct. 560, 27 L. Ed. 300; Porter v. Sabin, 149 U. S. 478, 13 Sup. Ct. 1008, 37 L. Ed. 815.

There is another line of cases in the Supreme Court of the United States holding that, where service of process in an action brought in the court of a state against a corporation of another state is made upon an officer of such corporation temporarily in such state on his own private business, the corporation having no office or agent or property in the state where such service is made and doing no business there, the state court obtains no jurisdiction of such corporation, even though the statutes of the state and its highest court pronounce and hold such service good and sufficient, and in such cases, after removal to the federal courts, the actions must be dismissed. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; Wilson v. Seligman, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338; Lafayette I. Co. v. French, 18 How. 404, 15 L. Ed. 451; St. Clair v. Cox, 106 U. S. 350, 357, 359, 1 Sup. Ct. 354,

27 L. Ed. 222; Fitzgerald Co. v. Fitzgerald, 137 U. S. 98, 106, 11 Sup. Ct. 36, 34 L. Ed. 608; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; In re Hohorst, 150 U. S. 653, 663, 14 Sup. Ct. 221, 37 L. Ed. 1211. There are many other cases to the same effect.

In Goldey v. Morning News, supra, at page 523 of 156 U. S., at page 561 of 15 Sup. Ct. (39 L. Ed. 517), the opinion of the court says:

"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 Congress to remove a case from a court of the state into 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. 445, 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. 377. 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. * * * Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defense, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been originally commenced in said circuit court.'"

These cases go to the jurisdiction of the Circuit Court of the United States over the person of the defendant, and hold that such service as has been mentioned confers no such jurisdiction, even though the statutes and decisions of the highest courts of the state say it does. In New York, for instance, such service is held good. Hiller v. B. & M. R., 70 N. Y. 223; Pope v. Terre Haute Co., 87 N. Y. 137.

By Act March 3, 1875, c. 137, § 1, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], original jurisdiction was conferred on the Circuit Courts of the United States in controversies between citizens of different states when the matter in dispute exceeded $500, but limited the jurisdiction of such Circuit Court as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

Section 2 of the same act authorized the removal of causes between citizens of different states involving that amount from the state court to the Circuit Court, but did not impose the above restriction as to assignees and assignments.

It has been twice held by the Supreme Court of the United States that the limitation on the jurisdiction of the Circuit Court imposed by the first section has no application to suits commenced in the state courts and removed to the United States Circuit Court, and that such suits could be removed and maintained provided the laws of the state

from the courts of which the removal took place recognized and sustained the cause of action. Delaware County Commissioners v. Diebold, 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Claflin et al. v. Commonwealth Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76. See, also, language of Mr. Justice Clifford in City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809, and Bushnell v. Kennedy, 9 Wall. 387, 19 L. Ed. 736. These cases would seem to hold that, notwithstanding an express special limitation on the jurisdiction of the Circuit Court as to actions commenced therein, such limitation has no application to a suit commenced in a state court and removed to the Circuit Court; there being, of course, the necessary diversity of citizenship and amount in controversy to bring the case within the general jurisdiction of the Circuit Court. But this limitation on the right of a plaintiff to bring his suit in the Circuit Court is not necessarily a declaration that he has no cause of action, legal or equitable. In the first instance, it denies to that court the right to exercise jurisdiction of the case. It excepts out of the general jurisdiction conferred of a certain class of cases special cases otherwise within it. On the other hand, equity rule 94 and the cases cited seem to hold that a shareholder in a corporation has no cause of action in equity in a case like this, anywhere, unless he held his shares at the time of the transactions complained of, or they have devolved upon him by operation of law since. Jurisdiction of parties and of the subject-matter in controversy, and to determine whether a cause of action exists, is one thing, but equitable jurisdiction is quite another. Thus, the Circuit Court has jurisdiction of a controversy between parties residing in different states, if the amount involved, exclusive of interest and costs, exceeds $2,000. The jurisdiction to hear and determine this controversy is expressly conferred. So jurisdiction to hear and determine actions of ejectment may be expressly conferred on the Supreme Court of a state, and not on its county courts. In such case the county court has no jurisdiction of such a case. Equitable jurisdiction resides in the Circuit Court as a general proposition and a general power; but whether or not, in a given case, that court has "equitable jurisdiction," depends upon whether or not on general equitable principles, as established by the courts, the action in equity will lie. If not, there is no "equitable jurisdiction" of the particular case. Certain facts must exist, or there is no equitable jurisdiction of the particular case, while there is general equitable jurisdiction and power in the court. Anderson v. Carr, 65 Hun, 179, 19 N. Y. Supp. 992, 993; People v. McKane, 78 Hun, 154, 28 N. Y. Supp. 981, 985; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; 1 Pomeroy's Eq. Jurisprudence (3d Ed.) §§ 129, 130, 131. Says Pomeroy:

"It is important to obtain at the outset a clear and accurate notion of what is meant by the term 'equity jurisdiction.' It is used in contradistinction to 'jurisdiction' in general, and to 'common-law jurisdiction' in particular. In its most general sense the term 'jurisdiction,' when applied to a court, is the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision. If this power does not exist with reference to any particular case, its determination by the court is an absolute nullity; if it does exist, the determination, however erroneous in fact

or in law, is binding upon the parties until reversed or set aside in some proceeding authorized by the practice, and brought for that express purpose. * * * 'Equity jurisdiction,' therefore, in its ordinary acceptation, as distinguished on the one side from the general power to decide matters at all, and on the other from the jurisdiction 'at law' or 'common-law jurisdiction,' is the power to hear certain kinds and classes of civil causes according to the principles of the method and procedure adopted by the court of chancery, and to decide them in accordance with the doctrines and rules of equity jurisprudence, which decision may involve either the determination of the equitable rights, estates, and interests of the parties to such causes, or the granting of equitable remedies. In order that a cause may come within the scope of the equity jurisdiction, one of two alternatives is essential; either the primary right, estate, or interest to be maintained, or the violation of which furnishes the cause of action, must be equitable rather than legal; or the remedy granted must be in its nature purely equitable, or if it be a remedy which may also be given by a court of law, it must be one which, under the facts and circumstances of the case, can only be made complete and adequate through the equitable modes of procedure. At the same time, if a court clothed with the equity jurisdiction as thus described should hear and decide, according to equitable methods, a case which did not fall within the scope of the equity jurisprudence, because both the primary right invaded constituting the cause of action and the remedy granted were wholly legal, and belonging properly to the domain of the law courts, such judgment, however erroneous it might be and liable to reversal, would not necessarily be null and void. * * * It is plain, from the foregoing definitions, that the question whether a given case falls within the equity jurisdiction is entirely different and should be most carefully distinguished from the question whether such case is one in which the relief peculiar to that jurisdiction should be granted, or in which the equity powers of the court should be exercised in maintaining the primary right, estate, or interest of the plaintiff. The constant tendency to confound these two subjects, so essentially different, has been productive of much confusion in the discussion of equitable doctrines. Equity jurisdiction is distinct from equity jurisprudence. One example will suffice to illustrate this important proposition. A suit to enforce the specific performance of a contract, or to reform a written instrument on the ground of mistake, must always belong to the equity jurisdiction, and to it alone, since these remedies are wholly beyond the scope of common-law methods and courts; but whether the relief of a specific performance, or of a reformation, shall be granted in any given case, must be determined by an application of the doctrines of equity jurisprudence to the special facts and circumstances of that case."

And in People v. McKane, supra, the court held:

"'Jurisdiction,' in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action; it does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case before the court, and does not relate to the rights of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced nor the right of a plaintiff to avail himself of it if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else. Jurisdiction is entirely independent of the manner of its exercise, involving the power to decide either way upon the facts presented to the court. The term 'jurisdiction,' as generally used in equity jurisprudence, imports, not the power to hear and decide, but the cases and occasions when that power will be exercised, and is to be distinguished from the use of that term in its strict meaning."

If A. sues B. for assault and battery, and asks equitable relief that B. be restrained from committing further assaults, no cause of action in equity is stated, or there is no "equitable jurisdiction" of the case,

for the reason courts of equity do not grant such relief or any relief in such cases; but if A. sues B. for cutting down his orchard trees on his farm, and asks an injunction, the court of equity will grant the relief, if B. is doing the acts alleged, as here the case is within the equitable jurisdiction of the court. That is, in this class of cases, courts of equity, on well-established, equitable principles, grant such relief. In both cases the court has jurisdiction, but not equitable jurisdiction. In the first case it dismisses the cause for the reason the facts stated do not bring the case within the "equitable jurisdiction" of the court; that is, they do not make out a case where the court gives relief. In the class of cases of which this is one, the Supreme Court of the United States has held, in the cases cited, that equitable jurisdiction will not be exercised, equitable relief will not be given, unless the complainant avers and proves that he was a shareholder in the corporation at the time of the transactions complained of, or that his shares have devolved upon him since by operation of law. That court has plainly and repeatedly said that, if such fact does not appear, no cause of action within the equitable jurisdiction of the United States court is stated. This being so, it seems to me immaterial how the case comes into that court. Congress has provided that:

"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." Act March 1875, Rev. St. § 629, c. 137, cl. 1, as amended March 3, 1887, and corrected Aug. 13, 1888, 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508].

The jurisdiction conferred in equity exists independently of state laws, and is similar to the equity jurisdiction of England. Allen v. Blunt, 1 Blatchf. 480, Fed. Cas. No. 215. While the Supreme Court of the United States may and must, when occasion demands, decide what civil cases are "at law" and what are "in equity," and in what cases equitable relief will be given, what cases are within the equitable jurisdiction and power of the court, it may not by rule or otherwise limit the jurisdiction of the Circuit Courts of the United States conferred by the acts of Congress, and say that a party litigant residing in one state may not bring his equitable action, if he has one, against a resident of another state, in the proper Circuit Court, and have it there decided. It may, however, as stated, say what cases are within the equitable jurisdiction of the court; in what cases and upon what state of facts that court may grant equitable relief. This is what the Supreme Court has done in this class of cases, and, it seems to me clear, that court has decided, repeatedly, that a complainant suing as a shareholder or stockholder has no cause of action in equity, in behalf of himself and others similarly situated, against a corporation and others, founded on rights which may properly be asserted by the corporation itself, if it would, unless he was such shareholder or stockholder in the corporation at the time of the transactions of which he

complains, or such shares have devolved upon him since by operation of law. This was decided by the Supreme Court before it promulgated rule 94. The rule was to emphasize the decision. The courts of the United States administer equity in accordance with the principles of equity jurisprudence as laid down and declared by the Supreme Court of the United States, and not as laid down and declared by the courts of the several states, and if a citizen and a corporation of the state of Minnesota have committed some act or acts of which complaint is made (not against some statute of a state), and a citizen of some other state brings suit in equity asking equitable relief, and the case is one of which the acts of Congress referred to give the Circuit Court of the United States jurisdiction, it seems to me very clear that the rights of the parties must be determined according to the rules and principles of equity jurisprudence as determined and administered in the courts of the United States.

It is not a question of enforcing the provisions of some statute of a state conferring or defining some right, but one involving the application of the principles of the common law and of equity jurisprudence which are general throughout the United States, and in applying which the courts of the United States are not bound or governed by the decisions of the state courts, but by the decisions of the Supreme Court of the United States. See 2 Foster, Fed. Practice (3d Ed.) pp. 876, 877; 49 Fed. 4, per Wheeler, J. In Burgess v. Seligman, 107 U. S. 20–33, 2 Sup. Ct. 21, 27 L. Ed. 359, the court said:

"The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is; but, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence."

In Manhattan Life Ins. Co. v. Broughton, 109 U. S. at page 126, 3 Sup. Ct. at page 101 (27 L. Ed. 878), the court said:

"The question involved was not a question of local law, but of general jurisprudence, upon which Mrs. Ferguson, and Broughton, as her trustee, had a right to seek the independent judgment of a federal court. Railroad Co. v. Lockwood, 17 Wall. 357, 368, 21 L. Ed. 627; Myrick v. Michigan Central Railroad, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 21, 27 L. Ed. 359."

It seems to me clear that the question here is one of general equity jurisprudence, where the courts of the United States are to be governed by their own independent judgment, and where the Circuit Court should follow the decision of the Supreme Court of the United States as to what the law is.

In Myrick v. Michigan Central R. R. Co., 107 U. S. at page 109, 1 Sup. Ct. at page 425 (27 L. Ed. 325), the court said, in relation to a contract of carriage and in referring to the decisions of the Supreme Court of the state of Illinois:

"Assuming that such is the purport of the decisions, they are not binding upon us. What constitutes a contract of carriage is not a question of local law, upon which the decision of a state court must control. It is a matter of general law, upon which this court will exercise its own judgment. Chicago City v. Robbins, 2 Black, 418, 17 L. Ed. 298; Railroad Company v. National Bank, 102 U. S. 14, 26 L. Ed. 61; Hough v. Railway Company, 100 U. S. 213, 25 L. Ed. 612."

It seems to me it would be a strange medley in the law, as administered by the courts of the United States, to hold in this class of cases, in administering equity, where no local law, or state statute, or state Constitution is involved, that a citizen of New York has a cause of action in equity against a Minnesota corporation and a citizen of that state cognizable and enforceable by the Circuit Court of the United States sitting in New York, if he commences his action in the state court, and it is removed to the United States Circuit Court, but that another citizen of the state of New York, on the same facts and equities, has no cause of action in equity cognizable and enforceable by the United States Circuit Court sitting in New York if such action is brought in that court in the first instance. This would make his right of action and right to relief depend, not on the facts of the case, but on the court in which he commenced his action. I do not think that is the law. Where a line of uniform decisions has been established by the highest court of a state, so they have become a local rule of property, and parties are presumed to contract with reference thereto, the courts of the United States should, and except in special cases and for special reasons do, follow them. Neves v. Scott, 13 How. 268, 271, 14 L. Ed. 140; Gaines v. Fuentes, 92 U. S. 10–20, 23 L. Ed. 524; Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006. But that is not this case. In 2 Foster, Federal Prac. (3d Ed.) pp. 876–877, it is said:

"The Revised Statutes provide 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.' This rule applies to condemnation proceedings and to all civil proceedings in the federal courts, except equity and admiralty cases, although they are not strictly according to the common law."

In N. Y., N. H. & H. R. Co. v. Cockroft (C. C.) 49 Fed. 3–4, Judge Wheeler said:

"By section 721 of the Revised Statutes of the United States, the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This seems to govern all proceedings in court, except equity and admiralty cases, although they are not strictly according to the common law, and to be applicable here."

And I wish to emphasize two facts: First, I am not pointed to any decision of the Court of Appeals of the State of New York holding

a doctrine contrary to that laid down in Hawes v. Oakland, supra; and, second, in Hawes v. Oakland the Supreme Court first decided the case and enunciated the equitable doctrine and rules applicable to such a case, and then immediately adopted and promulgated the rule in equity quoted to emphasize that decision. See Corbus v. Gold Mining Co., 187 U. S. 462, 23 Sup. Ct. 157, 47 L. Ed. 256. I think the rules laid down in that case are not local in their application, but general; that they constitute a general rule of equitable jurisprudence and equitable jurisdiction throughout the entire United States, and govern all like cases tried in the Circuit Court of the United States, whether instituted there or removed thereto from a state court. In giving equitable relief in such cases, the holdings of the Circuit Courts of the United States should be uniform, and all shareholders in corporations should stand on an equality therein. Many state courts, as those of New York, hold that a plaintiff in a negligence action must allege and prove absence of contributory negligence. In the United States Circuit Court contributory negligence is an affirmative defense, and must be alleged and proved. This is the rule where the case is removed from the state court to the circuit court. R. R. Co. v. Gladmon, 15 Wall. 401, 21 L. Ed. 114; I. & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; N. Pac. R. Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296.

The demurrer must be sustained; but defendant may answer within 30 days after being served with a copy of the order to be entered pursuant hereto.

McCULLOUGH et al. v. SUTHERLAND et al.

(Circuit Court, N. D. West Virginia. April 16, 1907.)

1. SPECIFIC PERFORMANCE—PARTIES—CORPORATIONS.
   Where the owners of all the stock in a corporation agreed to convey the same to defendants and to execute a deed to the corporation's property, the corporation as such was not a necessary party plaintiff to a suit to enforce specific performance.

2. CORPORATIONS—TRANSFER OF STOCK—EFFECT.
   Where the owners of all the stock of a coal corporation agreed to transfer the same to defendants and to execute a deed of the corporation's real estate, the transfer of the stock, franchises, and rights of the company unincumbered operated as a transfer of the real estate as effectively as the execution and delivery of a deed.

3. FRAUDS, STATUTE OF—MEMORANDUM—SIGNATURE BY AGENT.
   Where a contract for the purchase of land is signed by the purchaser's duly authorized agent in his own name as agent, such contract constitutes a sufficient memorandum in writing to satisfy the statute of frauds.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 251–260.]

4. SAME—PART PERFORMANCE.
   Where defendants agreed, as part of the same transaction, to purchase a railroad and coal mining corporation, and they did in fact purchase and take over the railroad, such act constituted a sufficient part performance to satisfy the statute of frauds.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 287–292.]

5. SPECIFIC PERFORMANCE—SALE OF LAND—PAROL CONTRACT.
A court of equity, in order to defeat fraud, will compel specific performance of a parol contract for the sale of land, if established by clear and convincing proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 113–119.]

6. SAME—PARTIES—LIENORS.
Where, at the time of a contract for the sale of all of the stock, assets, etc., of a corporation, there existed to the knowledge of all the parties a mortgage on the corporation's property to a trustee to secure certain outstanding bonds, which the vendors agreed either to pay prior to conveyance or to suffer an abatement of the price equal to the amount due on the bonds on the day the conveyance was made, the trustee was not a necessary party to a suit to enforce specific performance.

7. SAME—ELECTION.
Where a contract for the sale of all a corporation's stock, franchises, and property provided that the vendors should satisfy certain outstanding bonds or suffer an abatement of the price equal to the amount due thereon at the time of the transfer, and the vendees thereafter repudiated their obligation to complete the contract, the vendors in a suit to enforce specific performance were entitled to elect whether they would pay the bonds or suffer an abatement of the price.

8. SAME—MUTUALITY OF REMEDY.
Where complainants, who owned all the stock in a coal-mining corporation, the property of which was subject to a mortgage to secure certain outstanding bonds, contracted to sell the same in connection with the railroad company to defendants for a specified price, there was no want of mutuality of remedy, precluding complainants from maintaining a suit for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 9–11.]

9. SAME—EVIDENCE.
Complainants, who were the owners of two corporations, one operating a railroad and the other certain coal fields, refused to sell the railroad to defendants without the coal fields, whereupon separate contracts were executed for the sale of both as a part of the same transaction; complainants being assured that both properties would go together. Defendants took over the railroad, but refused to complete the contract as to the coal fields for various technical reasons, which were subsequently obviated, when they refused absolutely to comply with such part of the contract. *Held*, that the contract was single and indivisible, and that complainants were entitled to enforce specific performance of the part relating to the coal fields.

[Ed. Note.—Persons entitled to enforce specific performance, see note to Lawyer v. Post, 47 C. C. A. 493.]

10. SAME—CONDITIONS—PERFORMANCE—TENDER.
In a suit to compel specific performance of a contract to purchase the stock, franchises, and property of a coal corporation, it was not a condition precedent to complainants' right to such relief that they should have tendered a deed to the property or other papers necessary to transfer the rights intended to be conveyed, defendants having expressed a purpose to repudiate the contract.

11. SAME—QUANTITY OF LAND—DEFICIENCY—EVIDENCE.
In a suit to enforce specific performance of a contract for the sale of a coal mining corporation's property represented to cover 4,073 acres of coal, evidence *held* insufficient to warrant a finding that there was a material deficiency in the coal land the corporation was empowered to convey.

In Equity.

Robert McCullough, William E. Gheen, Samuel Humes, J. W. Christman, H. A. Miller, and Thomas A. Davies, citizens of Pennsylvania, have filed their

original bill in this court against Howard Sutherland and Stephen B. Elkins, citizens of West Virginia, and the Pennsylvania Steam Coal & Coke Company, a West Virginia corporation, in which they allege themselves to have been, prior to the 28th day of March, 1903, the officers, directors, and sole owners of all the capital stock of two West Virginia corporations, the said Pennsylvania Steam Coal & Coke Company and the Cheat Valley Railroad Company; that the property of the coal company consisted principally of about 4,000 acres of coal lands situate in Preston county, W. Va., and the property of the railroad company consisted of a railroad with its franchises, rolling stock, rights of way, etc., designed to extend from Rowlesburg in said Preston county, along and adjacent to said coal field, to the Pennsylvania state line beyond Brandonsville, about seven miles of which, starting at Rowlesburg, was built; that the railroad was necessary to the operation of the coal field, and had been bought by the plaintiffs to make such operation and transportation of the coal to market possible; that on several occasions prior to March 28, 1903, the defendant Howard Sutherland had called on plaintiffs, seeking to purchase this railroad, but plaintiffs had refused to sell the road without selling at the same time the coal field, and finally these negotiations resulted in two contracts, both dated March 28, 1903, whereby, aided by a supplement added June 5, 1903, the plaintiffs agreed to sell to Sutherland all the capital stock, rights, franchises, and property of the coal company, and also all of the capital stock, rights, franchises, and property of the railroad company, for a consideration of $200,000 in cash upon delivery of the properties; that said Sutherland made payments of $5,000 on such purchase price; that on June 5, 1903, Sutherland pressed for immediate delivery of the railroad, as it was a going concern, and gave as a reason for not taking over the coal field at the same time that certain farmers (from whom the coal had been purchased) had bonds or claims against the property which constituted clouds upon its title which it was the duty of plaintiffs to remove, and that immediately after such claims were satisfied and such clouds removed the coal field would be taken over and paid for; that upon this representation the railroad was on that day transferred to and possession thereof given to said Sutherland and a further payment of $102,500 was made by him, leaving $95,000 still due plaintiffs upon the contracts; that, immediately after, plaintiffs paid off and discharged the claims of the farmers; that Sutherland then refused to comply and take over the coal property and pay the balance of the purchase price of the properties, setting up that Lakin and others had a suit pending for a money demand against the coal company; that plaintiffs offered to indemnify against this suit, but Sutherland refused to accept such indemnity, and they then proposed that he retain purchase money to the amount of the demand made in this suit until its determination, which he likewise refused to do; that in September, 1903, the Lakin suit was in court determined against the plaintiffs therein and in favor of the coal company, and thereupon Sutherland and Elkins (it having been alleged that Elkins was a silent partner with Sutherland in the contracts) both still refused to comply.

The allegations of said bill are further "that plaintiffs have tendered, and have at all times been ready, willing, anxious, and able, to tender to defendants a good and sufficient deed of general warranty, clear of all debts and incumbrances, as in, and by, their said written articles of agreement they had agreed to do, in and to all of the capital stock, rights, property, and franchises of the Pennsylvania Steam Coal & Coke Company and of the Cheat Valley Railroad Company, and now renew such tender and willingness, and now bring into court such deed of conveyance and every necessary muniment of title to the property of the Pennsylvania Coal & Coke Company and proffer delivery of the same to defendants."

The prayer of the bill is for specific performance and a decree for the $95,000 purchase money unpaid. To this bill the defendants filed a written motion to dismiss, and each a separate demurrer, Sutherland alleging some 10 grounds and Elkins 14 therefor, which motion to dismiss and said demurrer were overruled, and thereupon the defendants have filed their joint answer, to which plaintiffs have filed replication, in which answer they admit the execution of the contracts, that Sutherland in the transactions was acting for

Elkins, who furnished the money, and was beneficially interested in both contracts. They allege the properties to have been separate and distinct ones, held by separate and distinct corporations, and they deny that the two contracts were one and the same transaction, that the railroad was necessary to the coal field, but, on the contrary, allege that another railroad from Morgantown was being built nearer to these lands. Sutherland admits, substantially, in this answer, the negotiations had prior to March 28, 1903, the date of these contracts which he terms "options," and also admits, "that those with whom he discussed the question of said option sought to induce him to purchase the two properties in a single contract; but, realizing from the location of said lands that the coal claimed by the parties with whom he was negotiating would be of doubtful value, and being desirous of securing the railroad in the event the coal property should prove of slight value, he declined to unite the options for the two properties in the same contract"; but he declines either to admit or to deny "what may have been in the minds of complainants with whom he was negotiating for these properties as to whether they regarded the two contracts as one transaction, and dependent for their enforcement one upon the other," and denies that they communicated such idea, but that, on the other hand, they concealed it from him, if they did have it in mind. He does not, on the other hand, allege that he informed them as to what motives he had for requiring the contracts to be two, instead of one. He alleges he was to pay $100,000 for each of said properties and paid $2,500 down on each when contracts were signed. The defendants jointly deny the ability of plaintiffs to comply; deny that any tender has ever been made of a deed for the coal field of the capital stock, etc., of the coal company, or of the contracts, maps, surveys, notes of borings, cores, etc., or of the abstracts of title, books, and papers relating to the coal company. They deny that they have been called upon to elect whether they will take the land subject to the mortgage existing upon the lands or free from it, which right of election the contract gave them. They deny that the coal field embraces anything like 4,073 acres which the contract required it to contain, and on this account deny the plaintiffs' right to specific performance. Sutherland denies that on June 5, 1903, the plaintiffs were induced to transfer the railroad to him because "a delay in the transfer of the same would prejudice his interest," but avers that "he notified the said parties that, if they failed to settle as to the railroad property at that time, he would enforce his rights under the terms of said contract either in law or equity as might be deemed expedient." He admits that he refused at that time to take the coal property, but alleges it was because "the provisions of the contract as to its title, number of acres underlaid with coal, of merchantable quality, was not demonstrated or shown, and none of the conditions precedent provided for by said contract were then and there offered to be performed by complainants or any of them." On the other hand, he says all these conditions precedent were performed touching the railroad, and for this reason he then and there took it over, and both respondents admit that Elkins went into full possession of it. They also admit the payment of $2,500 at that time on the coal contract, and that they did not tender the residue. They then deny the jurisdiction of this court, for the reason that the coal company's interest is with complainants, and the diversity of citizenship is therefore destroyed. Samuel Humes having died pending suit, a bill of revivor has been filed and matured.

P. J. Crogan, for plaintiffs.
Reese Blizzard and F. P. Moats, for defendants.

DAYTON, District Judge (after stating the facts as above). I have carefully gone over again the technical defenses raised by the demurrer and the motion to dismiss for want of jurisdiction, and have discovered nothing to cause me to reach any other or different conclusion than the one arrived at upon former hearing thereof. In my judgment, under the facts alleged and now fully proved, these six nonresident plaintiffs owned all the stock of the Pennsylvania Steam Coal &

Coke Company, composed its board of directors and officers, and had full power, without the aid of this court of equity, to fully comply with all the essential and vital requirements of their contracts, to wit, to turn over to the defendants all the stock, rights, franchises, interests, and property of this company. They had but to control their own action to do this. While the contracts require the execution of a deed for the coal lands, and while the execution of such deed was hardly required in order to carry out the true intent and purposes sought to be accomplished, yet it is true, as shown by the evidence, that this action on behalf of the company has been done, as it had in the very nature of things to be done, by the authorization of these six stockholders and directors and of them only, for no other interest of any kind was in any way interested.

This coal corporation is therefore in my judgment a wholly unnecessary party, as such, and can well be dismissed from the proceeding. The grave doubt that existed in my mind upon former hearing as to how far defendant Elkins could be bound in these transactions has been wholly dissipated by the allegations of his answer conjoint with his codefendant Sutherland, in which he admits that the latter was acting in effect as his agent with full authority, that he has beneficial interests in the contracts, and has taken possession of the railroad property under one of them. Viewing these two contracts as substantially one, for reasons hereafter to be stated, and regarding the actual conveyance of the coal field by deed to be substantially immaterial to the true intents and purposes of the contracts (for the transfer of the stock, franchises, and rights of the company unincumbered accomplishes such transfer of its said realty just as effectively as it could be by deed), there are three reasons why I think the statute of frauds, requiring contracts for the sale of realty to be in writing, set up in his fifth ground of demurrer by Elkins, will not avail his release from liability. First. Because there is here a sufficient "memorandum or note in writing," clear and distinct contracts in fact touching such sale of real estate signed by Sutherland, his agent. "A person owning lands may authorize another to make a contract for the sale thereof; and, if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing signed by the person authorized to make it. The signing by the agent of his own name as agent is sufficient." Conaway v. Sweeney, 24 W. Va. 643. Kennedy v. Ehlen, 31 W. Va. 540, 8 S. E. 398, is exactly in point. In that case Ehlen was held bound for a sale of real estate made direct to Buchanan, although his name was not mentioned in the writing and his liability was not known, simply because he had an interest in the purchase and Buchanan was acting as his agent. These cases and others construe the West Virginia statute of frauds, and, under well-settled principles, must be followed by this court. Second. Because there has been part performance, as I have said, by reason of the taking over of the railroad by Elkins. A part performance makes the contract enforceable specifically in equity. Middleton v. Selby, 19 W. Va. 168; Kennedy v. Ehlen, 31 W. Va. 558, 8 S. E. 398; Lester v. Lester, 28 Grat. 737. Third. Because, notwithstanding the statute, courts of equity, in order to

defeat a fraud, will compel the specific execution of a parol contract for the sale of lands if the contract is established by clear and convincing proof. Boyd v. Cleghorn, 94 Va. 780, 27 S. E. 574.

Touching the other technical grounds assigned on demurrer, I desire next briefly to consider a little further the ninth one, assigned by Elkins, upon which much stress was laid. It seems that this coal company had executed a mortgage upon its property to the Colonial Trust Company, of Philadelphia, trustee, to secure $135,000 in bonds payable to bearer, $65,000 of which were outstanding. It is insisted that this trustee was a necessary party to this suit, and at first blush it might appear that this position was well taken. The answer, however, I conceive to be is that this mortgage was existent at the time these contracts sought to be specifically enforced were executed, and they were expressly made with the fact of its existence in view by the parties. The bonds under its terms were negotiable and ran 10 years, and in the contracts relating to the sale of the coal lands was this provision:

"Further, the said first parties shall either fully pay all the outstanding indebtedness of said company, including said bonds of $65,000.00 and interest on same to date of said final transfer, and procure the release of said deed of trust and the cancellation of said bonds, or such a reduction from said above named purchase price shall be made as will amply cover all such indebtedness, at the option of said second party. The second party reserving to himself, or his assigns, the option either to require the first parties to pay the said bonds and interest and to procure the release of the deed to cancel the bonds, or to buy the property subject to said bonds and interest and to deduct the amount thereof from said purchase price."

In view of this express stipulation in the contract, how does it become necessary for this trustee in the mortgage to be made a party to enforce specific performance? By the terms of the contract, these plaintiffs undertook, if required, to pay the bonds and secure release of the mortgage. On the other hand, the defendants had right to take the lands subject to the mortgage and pay the bonds when due, retaining the amount out of the purchase price. In neither event would or could the trustee in the mortgage have any interest or be affected by this controversy. The plaintiffs have alleged their ability and willingness to perform, at any and all times, these contractual exactions upon them, and now insist that the defendants having failed to elect which course they would require, but, on the contrary, having repudiated the contract entire, the election now rests with them, and I am inclined to regard this view sound under the authority of 3 Page on Contracts, § 1391.

I cannot understand what force there can be in the contention of defendants to the effect that, because the plaintiffs did not notify them to make this election (which in this answer they say they did not, but which the evidence clearly shows they did), therefore there exists no right in the plaintiffs to require them to perform the contract at all. The logic of this position would seem to be that because they were not notified to do what they had expressly reserved the right to do, and which it was their plain duty to do, they cannot be required to do anything. Equity and good conscience will hardly sustain such a position. When a man undertakes by contract to do a thing, he must do it without being told to do so. Finally, in the

fourteenth ground, it was insisted upon for demurrer that the defendants Elkins and Sutherland could not have enforced specific performance of this coal contract, and therefore want of mutuality is shown such as will bar enforcement of it against them. Why could they not, by the aid of a court of equity, have enforced this contract against these plaintiffs if the shoe was on the other foot? Could not such court have enjoined the disposition, by these six plaintiffs, of the whole capital stock of this company which was owned by them, and required its transfer to defendants, thereby substantially meeting every requirement of the contract save and except that of the payment of the company's debts? And could it not have convened the creditors and out of the purchase money paid these debts? Could it not have enjoined any disposition of the property by the company until such transfer of stock could be decreed, after which, as sole stockholders, the plaintiffs could have organized the company, managed it at will, and caused any deeds to be made by it they might desire? I think so, and therefore I regard this position untenable.

Coming now to the cause on its merits, it is not my purpose to discuss the facts further than to say that, in behalf of the plaintiffs, the evidence of four of their number, the son of one who acted in part of the transactions for his father, and of two attorneys of theirs in the negotiations, is taken, while Elkins does not testify at all, Sutherland but briefly and with but little conflict with plaintiffs' testimony, and the evidence of Paul, hereafter to be referred to, alone constitutes the evidence of the defense. I regard the evidence as fully maintaining the contentions of the plaintiffs. It establishes beyond question, I think, these facts that Elkins wanted, and wanted badly, the railroad, but did not want the coal field; that Sutherland was sent to purchase the railroad, but was flatly refused a sale of it alone by the plaintiffs, who would only sell it in connection with the coal field; that this negotiation was had just prior to March 28, 1903, with Gheen, Humes, and C. B. McCullough, son of plaintiff McCullough, and resulted in an agreed price of $200,000 for both properties; that Sutherland undertook to have the contract drawn at Williamsport, where he was going to spend the night with relatives, did have the two original ones drawn, returned, and, upon objection raised by Humes to there being two, he assured them "both properties would go together"; that by the contract he was given until April 18th following to examine the coal field and the title before closing, but, in fact, took until June 3d, when he returned in company with Attorney Faulkner, secured also the service of Munson, a local attorney, and met four of the plaintiffs with Reardon and McCormick, their attorneys; that he earnestly insisted upon taking over immediately the railroad, but not the coal property; that this was strenuously objected to, and to meet this objection he made most earnest protestations of good faith, revealed Elkins to be his principal, referred to his high position and character, and assured plaintiffs that, so soon as the "farmer bondholders" were satisfied, the coal property would be taken over, and then tendered and paid $2,500 additional of the purchase price; that under his assurances and those of Faulkner the supplemental contract was executed, and the rail-

road was turned over; that one of the plaintiffs and young McCullough went down next day to Kingwood and paid off the farmers, and on their way home notified Sutherland to come on and take over the property; that objection was then made by Sutherland to doing this because a suit was pending against the coal company by Lakin and others upon a money demand which might result in a lien against it; that plaintiffs offered to indemnify against this, but this was refused, and the matter remained so, until in September, when the local court decided this case in favor of the company; that Sutherland was notified and then objected that an appeal might be taken by Lakin et al., and then in November informed the plaintiffs that he had long since regarded the contract as at an end "because they were unable to comply with it"; that on June 25th he had been asked by letter to make his election as to whether he would take subject to the mortgage or not, but had never expressed his election; that Elkins was appealed to and ratified and approved the repudiation of the contract by his agent, alleging, as reasons, that the plaintiffs had never been in position to make title; that his engineers reported that the coal was not persistent; that it could not possibly be shown that there was coal under all the land; that one engineer reported that there was a disturbance in the coal field caused by the anticlinal, and, "added to all this, the price of coal lands has considerably decreased since Mr. Sutherland's contract was entered into."

It is to be remembered that the granting of the equitable remedy of specific performance "is, in the language ordinarily used, a matter of discretion, not of an arbitrary, capricious discretion, but of a sound, judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case. Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach." Pom. Eq. § 1404.

Without entering into an elaborate discussion of the law governing the administration of this equitable remedy, it may be well to say here that, as in all other equitable remedies, conditions existing in different states and localities have established different precedents. In our state, where many difficulties have existed touching land titles, our Supreme Court of Appeals has gone far to extend the application of this remedy. For instance, in Bennett v. Pierce, 50 W. Va. 604, 40 S. E. 395, it has been held:

"Though at the date of a conveyance of land, retaining a lien for purchase money, the title of the grantor is defective, yet, if at the time when he asks a decree to enforce that lien in a suit brought for the purpose the title has become good and valid, the original defect of title will not debar the grantor from such relief."

In Rader v. Neal, 13 W. Va. 373, it is held:

"Where a purchaser knows, when he makes his contract, that there is a defect in the title, and that it will take a considerable time to remove it, or acquires this knowledge after his purchase, and acquiesces in the delay, or pro-

ceeds, with knowledge of the defect, in the execution of the contract, he cannot afterwards complain"—citing Vail v. Nelson, 4 Rand. 478, 481; Goddin v. Vaughn's Ex'r, 14 Grat. 125.

And it has been held, further, that it is immaterial if plaintiff has title at all or whether title be outstanding in another, or whether it be defective or not at the time of bringing his suit, provided he can confer such title at any time before the decree granting him relief. Tavenner v. Barrett, 21 W. Va. 656; Core v. Wigner, 32 W. Va. 277, 9 S. E. 36. Touching the insistence of the defendants that no tender was made of the stock of the coal company, of the contracts held by it, the maps, surveys, abstracts of title, boring, etc., of the lands and of the deed specified in the contract whereby the right to demand specific performance became lost to the plaintiffs, it is sufficient to say that the courts of equity under modern administration, and especially so in this state, have swept away these technicalities as shown by such cases as Vaught v. Cain, 31 W. Va. 424, 7 S. E. 9; Koon v. Snodgrass, 18 W. Va. 320; Poling v. Parsons, 38 W. Va. 80, 18 S. E. 379; Thompson v. Lyon, 40 W. Va. 87, 20 S. E. 812; Creigh's Adm'r v. Boggs, 19 W. Va. 240; Blanton v. Kentucky, etc., Co. (C. C.) 120 Fed. 318; Pollock v. Brainard (C. C.) 26 Fed. 732; Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818. From these cases we find it is not a prerequisite to specific performance that tenders be made of deed, papers, property, or money where the opposite party has especially expressed a purpose not to comply with but to repudiate the contract.

This brings us to the last matter of defense set up and sought to be established by the evidence of Paul alone, to wit, the lack of the contract number of 4,073 acres of coal. If it was clearly shown that there was any considerable failure in this particular, this court would be very prompt in granting relief, either by an abatement of the purchase price, if that could under the terms of the contract properly be done, or, if not, by rescinding all the contracts and restoring the parties to their original condition. Believing, as I do, that the sale of the railroad and the coal property was substantially one and the same transaction, and that to allow the defendants to take the railroad and not the coal would be to allow them to perpetrate a palpable fraud upon the plaintiffs, if I had to construe this contract as allowing no abatement for lack of acres of coal, as insisted on by defendants, then I would feel constrained to allow plaintiffs to file an amended bill, praying rescission of all these contracts, and would decree accordingly. But, as I view this testimony, it is not necessary for me to construe this contract in this particular, for I do not regard the facts and evidence sufficient to sustain the contention that there is any deficiency. In the first place, the contract gave to Sutherland from its original date of March 28th until April 18th to examine into this very matter. He took until June 3d, and then raised no question as to this. He, in fact, made no objection on this ground until his answer in this cause. Paul, the witness, went on to some land indicated to him as this field by Flynn and Matheny. He did not know it was this land, and Flynn and Matheny are not called to state it was. He made no survey. He stepped off and estimated what he believed would amount to 215 acres of land that was

barren of the Upper Freeport vein. It is known from the geology of this section of West Virginia that these lower coal measures generally consist of the Masontown, Upper Freeport, Lower Freeport, and Kittaning veins, and that frequently two, or even more, of these veins are found in merchantable quantity under the same land. Paul made no test. He believed the Upper Freeport, and therefore necessarily the Masontown, veins to be absent on a part of the land which he stepped over and estimated to be 215 acres. He could not tell whether the Lower Freeport or Kittaning veins were under this 215 acres or not. He only believed not, but could not tell. This testimony seems to me to be wholly insufficient upon which to base this defense.

I am of opinion that the plaintiffs are entitled to the relief prayed for, and will so decree.

DENISON v. EMERY.

(Circuit Court, N. D. Ohio, E. D. April 24, 1907.)

No. 7,019.

1. INSOLVENCY — STOCKBROKERS — DISTRIBUTION OF PROCEEDS OF PLEDGED STOCKS.

Insolvents were engaged in business as stockbrokers, and were given an order by petitioner to purchase certain stocks. This order they executed through a correspondent firm, which purchased the stock, advanced the money to pay for the same, and charged the amount to the general account of the insolvents, holding the stock as security for such account according to the usual custom between brokers. On being presented with a bill by insolvents, petitioner paid the same, and the insolvents promised to have the shares transferred to his name and to deliver the same. They did not do so, however, nor remit the price to their correspondent, which on their failure sold the stock with other stocks bought for bankrupts on margin for customers to cover a balance due from them on their account. The proceeds of all of the stocks so sold exceeded the amount due, and the excess was paid over to the receiver in insolvency. *Held*, that petitioner's stock, having been separate from any other and paid for, as between him and the insolvents, or any of their creditors except the pledgee, was his property, and that he was entitled to the entire proceeds; none of it having been needed to pay the indebtedness to the pledgee.

[Rights and liabilities of pledgees of corporate stock, see note to Frater v. Old Nat. Bank of Providence, 42 C. C. A. 135.]

2. SAME.

Petitioner directed the insolvents, who were stockbrokers, to sell certain stock for him, and to purchase certain other stock. They sold and delivered the stock through a correspondent firm in Chicago, which credited the proceeds to their account, and they gave petitioner a corresponding credit on their books. They also purchased the desired stock from another broker, but it had not been paid for nor delivered at the time of their failure, and the sale was canceled by the seller. At the time of the failure, and from the time of the sale of the stock, the insolvents owed the Chicago correspondent firm a balance on account, for which the latter held as collateral stocks purchased and carried, and in which customers of the insolvents had an interest. On the failure such stocks were closed out by the pledgee realizing a surplus after paying the account which was turned over to the receiver in insolvency. *Held*, that petitioner had no interest in such fund, and was not entitled to share therein with customers whose stocks produced it, but was merely a general creditor.

In Equity. On exceptions to master's report on claims of Horace B. Corner and Frank S. Harmon.

M. B. & H. H. Johnson, for Corner.
Smith, Taft & Arter, for Harmon.
Kline, Tolles & Goff, H. J. Caldwell, and C. F. Taplin, for opposing claims of Corner and Harmon.

TAYLER, District Judge. This matter is on for hearing on exceptions to the report of the master as to the claims of Horace B. Corner and Frank S. Harmon, against the proceeds arising from the sale of certain stocks held by Finley, Barrel & Co., of Chicago, for the account of Denison, Prior & Co. The facts as found by the master are as follows:

On January 9, 1906, the date of the failure of Denison, Prior & Co., said firm was indebted to Finley, Barrel & Co. in the sum of $146,913.68; the latter firm carrying for Denison, Prior & Co.'s credit the following certificates of stock in pledge to secure such indebtedness: 2,599 shares of the common stock of the American Ship Building Company; 1,885 shares of the preferred stock of the United Boxboard & Paper Company; 70 shares of the common stock of the United Boxboard & Paper Company; 50 shares of the common stock of the Quaker Oats Company—which securities, with the exception of 75 shares of the Boxboard preferred stock, which were delivered free, were on January 10, 1906, sold out, producing the following amounts:

Ship common	$140,655 05
Box preferred	26,859 38
Box common	153 13
Quaker Oats common	7,146 87
Total	$174,814 43

That of said sum $1,698.06 was used to purchase 25 shares of Biscuit common stock, which Denison, Prior & Co. had sold short through Finley, Barrel & Co. That this left Denison, Prior & Co. on January 10, 1906, after the sale of all its securities, in Finley, Barrel & Co.'s hands, with a credit balance of $26,211.69. That on January 25, 1906, Finley, Barrel & Co. turned over to T. H. Bushnell, receiver herein, subject to the rights of the various claimants who had served notices on them, the said sum of $26,211.69, which sum is now in said Bushnell's hands to be distributed under the order of the court.

Under the rule found and announced by the referee, said sum, with interest thereon in the sum of $886.35, should be distributed as follows:

A. W. Ruple	$ 3,088 19
F. E. Taplin	4,749 57
S. H. Robbins	740 96
H. C. Meyers	1,394 36
N. M. Hoyt	406 83
M. P. Moore	1,418 25
L. M. Powers	1,460 46
George Reeves	706 24
E. L. Emmerson	713 73
J. B. Coffinberry	162 55
E. G. Krause	1,427 42
F. A. Arter	643 94
W. F. Sprague	2,628 07
A. H. Noah	1,549 91
J. P. Loomis	1,235 21
George D. Bates	160 48
C. H. Honodle	65 04
Charles Currie	63 35
I. N. Shively	82 96
Horace B. Corner	3,169 48
Total	$25,867 00

To this distribution all parties acquiesce, except Horace B. Corner, and Frank S. Harmon. Said Harmon was denied by the referee any participation whatever in said funds, and the said Corner was denied the preference which he claimed over the other owners of said securities, the reasons for said holdings being set forth at length in the opinion of said referee, which is hereto annexed, and marked "Exhibit A." The said Corner claims that he should be paid in full for his claim $7,146.87.

If the claim of Mr. Corner is allowed, and that of Mr. Harmon is denied, then distribution is to be made, as all parties agree, as follows, to wit: Pay to Mr. Corner the full amount of his claim, deduct the same from the total sum to be distributed, and divide the remainder among the claimants upon the same rule of distribution as above.

If Mr. Harmon's claim is allowed, then distribution is to be made upon the same rule of distribution as above, but including Mr. Harmon.

The facts upon which the rights of Mr. Corner are to be determined are as follows:

On the 24th day of November, 1905, Horace B. Corner placed an order with Denison, Prior & Co. for 50 shares of the common stock of the Quaker Oats Company. That pursuant to said order Denison, Prior & Co. did, on the same day, November 24, 1905, purchase through Finley, Barrel & Co., of Chicago, 50 shares of Quaker Oats stock for Mr. Corner; Finley, Barrel & Co. advancing, in accordance with the usual custom, the purchase price thereof, and charging the same to Denison, Prior & Co.'s general account, retaining the stock in pledge for the indebtedness then created on account of Denison, Prior & Co. with Finley, Barrel & Co. That on the 27th day of November, 1905, Denison, Prior & Co. presented to Mr. Corner a bill for the purchase price of said stock, including commissions, amounting to $6,631.25, and stated that said stock had been purchased for him in Chicago. Mr. Corner thereupon paid said bill, and instructed Denison, Prior & Co. to have the certificate for the said stock transferred for him, and this Denison, Prior & Co. agreed to do, and receipted said bill as follows: "Received payment, Nov. 27, 1905. Denison, Prior & Co., per W. W. Heron, Cashier. Stock deliverable when issued."

A few days thereafter, not having received the certificate, Mr. Corner asked Denison, Prior & Co. about the matter, and they informed him that the certificate had not been received, but that they would deliver it in a few days, as soon as it was received from the transfer office. Nothing more was done by Mr. Corner until the time of the suspension of the firm of Denison, Prior & Co., and the certificate was not delivered to him. Denison, Prior & Co. had never notified their correspondents, Finley, Barrel & Co., to transfer said stock to Mr. Corner.

The custom of brokers is that, when an order is filed for a cash purchase in the Cleveland office, it is wired to the correspondent (in this case Finley, Barrel & Co., of Chicago), who would make the purchase for the general account of the local broker (i. e., Denison, Prior & Co.) charging to the local broker the purchase price, and crediting them with the stock so purchased for their account, retaining the stock so purchased as security for the indebtedness created by the purchase of the stock. As requested by the customer, the stock may be either ordered for delivery in the certificates received by the correspondent, or in the name furnished by the customer. The certificates are then sent to the local broker, being charged to the local broker's account by the correspondent, and then delivered to the customer. The local broker must keep his account with the correspondent at or above a certain credit balance by sending stocks for sale or by cash remittances. Both the above methods have been followed by Denison, Prior & Co.

After the purchase of this stock for Mr. Corner, and after the payment by Mr. Corner to Denison, Prior & Co. for said stock, Denison, Prior & Co. continued buying and selling stocks through Finley, Barrel & Co. in the manner above stated. After the payment by Mr. Corner as above, Denison, Prior & Co. paid to Finley, Barrel & Co., or were credited upon deliveries of stocks to the amount of $13,071.95, and during the same period charges were made against Denison, Prior & Co. by Finley, Barrel & Co. to the amount of $29,300; such debits and credits being made partially on account of purchases and sales

for parties appearing in this matter, and partially for parties not appearing, and all of said debits and credits being made upon the general account.

The custom of brokers in dealing with correspondent brokers in the purchase of stock fully paid for by the local broker's customer, or of stock purchased to be carried on margin account for the customer, is the same. It appears that it is the general custom of brokers to pledge for their own account securities which were either purchased for a margin customer, or deposited by a margin customer to secure his account; and also to pledge with the correspondent broker securities purchased by a local broker for a customer through a correspondent broker until payment had been made to the local broker by the customer. It is not, however, customary to permit such securities to remain in pledge with the correspondent broker after such payment. They should be redeemed from such pledge by the local broker.

At the time of the failure of Denison, Prior & Co., and for some time prior thereto, said firm was short of margins with Finley, Barrel & Co., namely, the difference between the value of the securities carried for Denison, Prior & Co., and the debit balance of Denison, Prior & Co., was not equal to the customary margin for carrying the stocks then being carried.

The 50 shares of Quaker Oats stock which had been purchased for Mr. Corner through Finley, Barrel & Co. were on hand at Finley, Barrel & Co.'s continuously from the time of said purchase until the time of the sale, and were sold for $7,146.87. Mr. Corner did not consent to, and had no knowledge of, this stock being left in the possession of Finley, Barrel & Co.

It further appears that Mr. Corner was not at any time subsequent to the payment for this stock indebted to Denison, Prior & Co. in any sum whatsoever. The other securities held by Finley, Barrel & Co. were being carried by Denison, Prior & Co. for customers who had either pledged the same to Denison, Prior & Co. as collateral for the purchase of certain stocks on margins, or had purchased such securities on marginal contracts, and that all claimants interested in said securities, with the exception of Mr. Corner, were before the failure indebted to Denison, Prior & Co. to a greater or less extent, but that, after the failure and the closing of their accounts by the sale of their securities, all such other claimants were creditors of said firm.

As to the claim made by Frank S. Harmon, the referee finds that on January 4, 1906, Frank S. Harmon, intervener herein, ordered Denison, Prior & Co. to sell for him 20 shares of the preferred stock of the Quaker Oats Company, and at the same time ordered said firm to purchase for him 25 shares of the Guardian Savings & Trust Company stock. That on said date said firm executed both orders in the following manner: By selling the 20 shares of Quaker Oats preferred stock on the Chicago Stock Exchange for $103 per share, realizing a net amount, after deducting commissions, of $2,057.50; said sale being made through the Chicago brokerage house of Finley, Barrel & Co. That the purchase of the 25 shares of Guardian Savings & Trust Company stock was made at $302 per share, which, with the commission added, made a gross amount of $7,556.25; said purchase being made on the Cleveland Stock Exchange from the firm of Wright, McLeod & Baker, members of said exchange. That both of said transactions were reported in writing to said Harmon, and on January 5th said Harmon delivered to Denison, Prior & Co. a certificate for 20 shares of the preferred stock of the Quaker Oats Company, and at the same time paid Denison, Prior & Co. the sum of $98.75, which sum, together with the proceeds of the sale of the Quaker Oats stock, he directed to be applied on the purchase price of the Guardian Savings & Trust Company stock, thus leaving a balance due Denison, Prior & Co. of $5,400, and it was then agreed that Denison, Prior & Co. should deliver said shares of Guardian Savings & Trust Company stock to the Citizens' Savings & Trust Company, with which company Harmon had an arrangement whereby the bank would pay the balance of $5,400 to Denison, Prior & Co. on the delivery of said Guardian Savings & Trust Company stock.

Upon the sale of the Quaker Oats stock on January 4th, Finley Barrel & Co. credited Denison, Prior & Co.'s account with the selling price thereof, and charged their account with the stock so sold. That Denison, Prior & Co. transmitted the certificate of Quaker Oats preferred stock so delivered to it by Harmon to Finley, Barrel & Co. in Chicago, which firm, upon receipt of said

certificate on January 9th, credited Denison, Prior & Co.'s account with the stock so received, making a net credit on account of the transaction of $2,057.50.

On the 9th of January the books of Denison, Prior & Co. showed Harmon to be owing said firm the sum of $5,400, and that the firm were carrying for his account 25 shares of Guardian Savings & Trust Company stock; that Denison, Prior & Co. did not pay Wright, McLeod & Baker any part of the purchase price of the 25 shares of Guardian Savings & Trust Company stock, and at the suspension of Denison, Prior & Co. on January 10, 1906, said shares of stock were still in the possession of Wright, McLeod & Baker, and were held by said firm subject to the rules of the Cleveland Stock Exchange, which provide that, on suspension of a member of the exchange, the sale could be closed out and any deficiency resulting therefrom should be a lien on the seat of the firm so becoming insolvent; that, instead of closing out said sale, the same was canceled, and no loss resulted to Denison, Prior & Co., and no charge was made against the seat of said firm on the Cleveland Stock Exchange.

In closing out Mr. Harmon's account, Denison, Prior & Co.'s books credited him with the sum of $7,556.25, leaving Mr. Harmon with a net credit of $2,156.25.

* * * * * * * * * *

It further appears that the credit balance in the possession of Finley, Barrel & Co. was insufficient to pay to the customers of Denison, Prior & Co. the amount of their interest in the securities held by Finley, Barrel & Co. as collateral to their account with Denison, Prior & Co.; that is, Denison, Prior & Co. had pledged said securities with Finley, Barrel & Co. for a greater sum than the securities had been pledged by the customers with Denison, Prior & Co.

As to the claim of Horace B. Corner:

Reduced to its simplest form these are the facts in the Corner case: November 24, 1905, he gave an order to Denison, Prior & Co. to purchase for him 50 shares of Quaker Oats stock. This order was telegraphed to Finley, Barrel & Co. at Chicago, and on the same day the purchase was made by that firm. Certificates for the stock were taken by it in completion of the purchase, and the same were held, as by custom it had a right to do, as security on the general account of Denison, Prior & Co. Within a day or two a bill was rendered to Corner by Denison, Prior & Co. for $6,631.25, being the price of the stock and commissions, which was thereupon paid. At the time payment was made Denison, Prior & Co. were instructed by Corner to have the certificate for the stock transferred to him, and this they agreed to do. A few days later Corner again requested delivery of the certificate, and was informed that it had not been received, but that they would deliver it in a few days when received from the transfer office.

All this time the certificate or certificates for the 50 shares purchased for Corner and paid for by him remained in the hands of Finley, Barrel & Co., and continued to remain there until the failure of Denison, Prior & Co. When that occurred, there were other shares of stock in other companies in the possession of Finley, Barrel & Co. bought for account of Denison, Prior & Co., in which no person had a certain separable and distinguishable interest, but which belonged to several persons whose separate interests could not be determined. All the stocks were sold and the proceeds, after settling the indebtedness of Denison, Prior & Co. to Finley, Barrel & Co., are here for distribution. The Quaker Oats stock sold for $7,146.87, and the gross sur-

plus for distribution is $26,211.69. The master held that Corner had no prior claim to the Quaker Oats stock, but that he must be content to share ratably with the other persons interested in the surplus arising after the settlement of Finley, Barrel & Co.'s account.

Confusion is likely to arise if we do not bear in mind the fact that Finley, Barrel & Co. may have precisely the same rights in all of the Denison, Prior & Co. stocks in their hands, although Denison, Prior & Co. may, as between themselves and their customers, sustain a very different relation to the same stocks.

So far as the questions before us are concerned, the relative rights of the claimants to the surplus are to be determined by their relations to Denison, Prior & Co. Bearing this in mind, and bearing in mind the custom of brokerage transactions, we have here simply a question wherein, subject only to the rights of the pledgee, we follow the trust property, if we can; and if it may be identified and followed and reached, it must necessarily pass in some form or other into the hands of its owner. We do not resort to a plan of ratable distribution of the proceeds of the sale of the trust property, except where, as among the several owners of the trust property, we are unable to distinguish one part of the trust property from another as being the property of one of the beneficiaries.

If, as between a claimant and Denison, Prior & Co., the stock was wrongfully in the possession of Finley, Barrel & Co., then such a claimant is, in the event of a surplus, in a better position than those claimants, as between whom and Denison, Prior & Co., the stock was rightfully in the possession of Finley, Barrel & Co. This, it seems to me, is equity, and the law is not powerless to declare and enforce it.

The relation of Corner to the transaction itself and to Denison, Prior & Co. is radically to be distinguished from that which arose between margin traders and Denison, Prior & Co. Corner did not become a co-surety with other claimants or margin traders. The very ingenious and plausible illustration of Judge Caldwell, based upon the theory of co-suretyship, fails, for that reason, it seems to me, to be apposite.

As affecting the rights of Corner, the custom of brokerage transactions is unimportant, except as to the right of Finley, Barrel & Co. to hold the stock purchased as collateral to Denison, Prior & Co.'s account. Beyond that the right of the owner of the stock is determined by the general rules of law. These shares were Corner's. They ought to have been taken up by Denison, Prior & Co. Not having been so taken up, Corner's risk was that they might be needed to satisfy the general indebtedness of Denison, Prior & Co. to Finley, Barrel & Co., or that his stock might be indistinguishably mingled with other stocks belonging to persons similarly situated, and any delay on the part of Corner to effectually assert his claim of ownership could have no other effect adverse to him than to increase the risk of being unable to identify his property.

Suppose that Corner had served notice on Finley, Barrel & Co. that he was the owner of the 50 shares of Quaker Oats stock, and the proceeds of the sale of the Quaker Oats stock not being necessary to pay the indebtedness of Denison, Prior & Co. to Finley, Barrel & Co., what would have been the rights of Corner? They are defined

by the case of Le Marchant v. Moore, 150 N. Y. 209, 44 N. E. 770, and, as it seems to me, by the general principles of law and the demands of justice. Save only as subject to the rights of Finley, Barrel & Co., as pledgee, the title had passed to Corner. Only formal transfer was needed to complete the transaction. The trust was, with exact certainty, impressed upon the very shares of stock in the possession of Finley, Barrel & Co., and in order to justify the conclusion that these shares of stock or their proceeds belonged to Corner, we do not need to resort to the modern enlargement of the rule of following a trust fund, as declared in Knatchbull v. Hallett, 13 Ch. D. 696, and Bank v. Insurance Company, 104 U. S. 54, 26 L. Ed. 693.

As between him and the other claimants the points of distinction are: (1) Corner had bought and paid for certain shares of stock; the other claimants had not. (2) Corner's stock could be identified and separated from the mass; that of other claimants could not. (3) As between Corner and Denison, Prior & Co., the latter had no right to leave the stock in pledge; as between other claimants and Denison, Prior & Co., the latter had the right to leave the stock in pledge. The right of Corner is prior, both to his fellow claimants, and to general creditors; the right of his fellow claimants is prior to general creditors. Thus is equity done to all concerned.

It seems to me, therefore, clear that, subject to the rights of Finley, Barrel & Co., Corner was, at the time of the failure of Denison, Prior & Co., entitled to possession of the 50 shares of the Quaker Oats stock, which had been bought for him, and that he is now entitled to the proceeds of the sale of that stock.

As to the claim of Frank S. Harmon:

An analysis of the situation created by the Harmon transaction discloses the relation of creditor and debtor between him and Denison, Prior & Co. It is not a case of trusteeship and cestui que trust. There is no following of property. The fact that the fund in the hands of Finley, Barrel & Co. was increased by the amount of the Harmon claim is the same as if an ordinary transaction had occurred whereby money was paid to Denison, Prior & Co., for the purpose of making a purchase, and no purchase was made. The result therefore, is that Harmon is in the unfortunate position of a contributor to a fund which left him in the real position of a mere creditor, and the utmost claim to be made on his behalf would be that so much of this fund as he contributed should pass into the general estate.

I think the master was right in holding that Harmon has no claim of preference in the balance growing out of the settlement of account between Finley, Barrel & Co. and Denison, Prior & Co.

The exceptions to the finding of the referee as to the claim of Corner are therefore sustained. The exception to his finding as to Harmon is overruled.

McGUIRE v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, N. D. Iowa, C. D. May 11, 1907.)

No. 296.

1. REMOVAL OF CAUSES—MOTION TO REMAND—ALLEGED FRAUDULENT JOINDER OF DEFENDANTS.

On a motion to remand a cause removed by one of a number of defendants, the merits of the controversy can be considered only for the purpose of ascertaining the real nature of the alleged cause or causes of action against the several defendants, and whether or not there has been a fraudulent joinder of parties defendant for the purpose of defeating the jurisdiction of the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 227.

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

2. CARRIERS—LOSS OF GOODS—LIABILITY OF CONNECTING CARRIERS.

The fact that the destination of a shipment received by a railroad for transportation is beyond its own line, or that it was received from another carrier to be transported to a point on its own line, does not create any joint responsibility between the connecting carriers, where the shipment over each is under a separate contract which limits its liability for loss or injuries to such as may occur on its own line.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 817, 818.]

3. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—FRAUDULENT JOINDER OF DEFENDANTS.

In an action in a state court, a railroad company of the state, a local station agent on its line, and a railroad company of another state were joined as defendants. The petition alleged that through the joint negligence of defendants a shipper was furnished an unfit car at the local station in which to ship certain goods and to transport the shipper from such station to a point on the line of the second railroad company; that both companies carried the shipper and his property in such car to a point on the line of the second company, where they negligently set the car on fire, and thus caused the death of the shipper and the destruction of his property. On a motion to remand, after removal of the cause by the nonresident company on the ground of separable controversy and fraudulent joinder, treated also as a plea to the jurisdiction, it was shown that the agent who furnished the car was not the agent of, and had no connection with the removing, defendant; that the shipment was received by the local company under a written contract for its carriage only to a connection with the road of the second company, and limiting the liability of the carrier to loss or injury accruing on its own line; that the car was safely delivered to the second company, which received and forwarded it under a similar contract then made between such company and the shipper. The cause of the fire was neither alleged nor shown. *Held*, that the cause of action stated in the petition, construed in the light of such facts which were known to plaintiff, was not joint, and that the joinder of the defendants must be held to have been for the purpose of defeating the jurisdiction of the federal court.

[Ed. Note.—Separable controversy, see note to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

4. SAME.

The rule that where a removal is sought by one of two or more defendants upon the allegations of the plaintiff's pleading alone, the cause of action as therein stated is the test of removability, and if that is joint in character, and there is no showing of want of good faith on the part of the plaintiff in stating his cause of action, the question of proper joinder

is not to be tried in the removal proceedings, has no application where it is alleged and shown by the nonresident defendant that the plaintiff has purposely stated a fictitious cause of action against him and another jointly to prevent a removal, but in such cases the duty of protecting the right of removal to one having such right is strictly enjoined upon the Circuit Courts.

On Plea to the Jurisdiction and Motion to Remand to State Court.

This action was commenced in the district court of Iowa in and for Palo Alto county, by the plaintiff, a citizen of Iowa, as administratrix of the estate of P. F. McGuire, deceased, against the Minneapolis & St. Louis Railroad Company, hereinafter called the "Minneapolis Company," a corporation of Iowa, C. A. Ziehlke, a citizen of Iowa, and the Great Northern Railway Company, a corporation of Minnesota, to recover damages for the death of said deceased, and the destruction of certain of his personal property, which it is alleged were caused by the joint neglect of the several defendants.

The Great Northern Railway Company in due time removed the cause to this court, upon the alleged ground that there is a separable controversy between it and the plaintiff, to the determination of which the other defendants are not necessary or proper parties, but have been fraudulently joined by the plaintiff as defendants with the Great Northern Company for the sole purpose of preventing that company from removing the cause to this court. The plaintiff has filed a motion to remand, upon the grounds that there is no separable controversy between her and either defendant, that she has a cause of action against all of the defendants jointly, that the action is brought against all of them in good faith, and that this court is without jurisdiction of the suit. The motion to remand was ordered by the court to stand also as a plea to its jurisdiction, and that the evidence in support of the petition to remove and such plea be taken in the form of depositions. The evidence has been so taken, and the matter is now before the court upon the pleadings and such evidence.

The original petition, as amended in the state court, alleges, in substance: That the Minneapolis Company and the Great Northern Company are railroad corporations; that defendant Ziehlke is and was their agent at Ayrshire, in Palo Alto county, this state; that in March, 1906, the deceased, P. F. McGuire, applied to the defendant Ziehlke, as agent for said railroad companies, for a car in which to ship certain household goods, live stock, and hay and straw for such live stock, from Ayrshire, to McCanna, in the state of North Dakota, and in which car he was also to ride with such property. The charge is general against all of the defendants that they furnished an unfit car in which to make such shipment, and that both companies together carried the deceased and his property therein from Ayrshire to some point on the Great Northern line, where together they negligently set the car and shipment on fire, and thus caused the death of McGuire and the destruction of his property while being carried on that line.

From the testimony it appears that the Minneapolis Company operates a line of railroad through Ayrshire, a village of some 300 or 400 inhabitants, in Palo Alto county, this state, thence to Minneapolis, in the state of Minnesota, and defendant Ziehlke is and was in March, 1906, its agent at Ayrshire; that there is no other railroad at such village; that the Great Northern Company is and then was a Minnesota corporation, operating a line of railroad from Minneapolis, in that state, northwesterly into and through the state of North Dakota, and McCanna is a station on its line of road in that state; that it had no railroad in Palo Alto county, Iowa, and no office or agency at Ayrshire, or elsewhere in that county; that the deceased then lived at or near the village of Ayrshire, and was about to move his family, household goods, and other property to McCanna, N. D., and applied to defendant Ziehlke at Ayrshire for a car in which to ship said property to McCanna; that Ziehlke procured a proper car for such purpose, but, before the deceased was ready to load his property, let some other shipper have it, and furnished to McGuire another car of the Minneapolis Company, which it is claimed by plaintiff was old, out of repair, unfit, and unsafe in which to make such shipment, and Ziehlke told McGuire that he could take that car or none; that McGuire did load his property into such car, and started with it over the line of the Minneapolis Company for Mc-

Canna. Before starting, Ziehlke, as agent for the Minneapolis Company, gave to McGuire a written contract for the carriage of the property by the Minneapolis Company from Ayrshire to the end of its line, which contract is as follows:

"The Minneapolis & St. Louis Railroad Company.

"Live Stock Contract.

* * * * * * * * * *

"See current rules governing the passage of man in charge of live stock shipments. W. M. Hopkins, General Freight Agent.

* * * * * * * * * *

"Ayrshire, Iowa, Station, Mch. 21, 1906.

"The Minneapolis & St. Louis Railroad Company has this day received from P. F. McGuire, one car emigrant movables (more or less) to be transported over the lines of this company only, from Ayrshire Iowa Station, to point of delivery to the next connecting carrier if the destination of said shipment is not upon the railroad of this company, or if continuous carriage to destination is not for any reason made over this company railroad, and there delivered to the connecting carrier for transportation to or towards destination at the rate of tariff and switching charges, subject to the published rules, and regulations of said railroad company, and upon the following conditions:

* * * * * * * * * *

"The shipper agrees to load, unload, reload and feed said stock at his own expense and risk; to water and care for the same while it is in stock yards waiting shipment, and while on the cars, or at feeding, and transfer points, or where it may be unloaded for any purpose; to keep the cars securely locked and fastened; and to prevent its escape therefrom.

* * * * * * * * * *

"The railroad company shall not be liable for the loss, delay or injury of any property carried under this contract, nor for injuries sustained by any person in charge thereof, except upon its own railroad; its liability shall cease upon making delivery to its connecting carrier.

* * * * * * * * * *

"The above terms, conditions and limitations shall inure to the benefit of all carriers by whom the said property is transported.

"C. A. Ziehlke, Agent.
"P. F. McGuire, Shipper.

"Note.—This contract must be executed in duplicate, and signed both by shipper and agent. One copy must be forwarded to the auditor at Minneapolis, the other should be marked 'Duplicate' and delivered to the shipper.

"The words 'and there delivered to the connecting carrier for transportation to destination' should be ruled out, if the shipment is destined to a point upon the line of this company."

Indorsed on back of contract:

"The Minneapolis & St. Louis Railroad Company,

"Live Stock Contract.

"Nos. and Initials of Car M. & St. L. 5190.

"Parties actually in charge of, and accompanying within described stock are required to write their own names in ink here.

"We agree to the within named conditions. P. F. McGuire.

"Parties actually in charge have written their own names above.

"C. A. Ziehlke, Agent,
"Ayrshire Station."

The car, property, and the deceased were carried under this contract in safety by the Minneapolis Company alone to the Minnesota Transfer, which is its northern terminus and the place where it connects with the Great Northern Company. At that place the shipment was delayed a day for the purpose of making some repairs to the car. The Great Northern Company then gave to McGuire a written contract for the carriage of the car and property over its line of railroad to its destination at McCanna, which contract is substantially

the same as that of the Minneapolis Company, is signed by the agent of the Great Northern Company and by McGuire, and was good for his passage with his property from the Minnesota Transfer to McCanna, N. D. The car was put into a train of the Great Northern Company and started for its destination; McGuire, his son, and another person, riding in the car with the live stock and other property. About midnight after leaving Fargo, for McCanna, the younger McGuire awoke and discovered that the hay and straw in the car were on fire. He could not open the side doors of the car, because, as claimed by the plaintiff, of their defective and unsafe condition, and he got out of the car through one of its end doors, receiving some injuries in so doing; but his father and the other person and the live stock were burned to death, and the other property destroyed by fire. It is not alleged in the petition, nor does it clearly appear from the testimony, how the fire originated.

Ziehlke was not the agent of the Great Northern Company, but he gave McGuire the rate for the shipment over the line of the Minneapolis Company from Ayrshire to the Minnesota Transfer, and told him what the rate would be over the line of the Great Northern Company to McCanna: but each road fixed the rate for hauling the car and property over its own line. The freight was not paid to either company, but was to be collected at the destination of the shipment. Ziehlke sometimes sold tickets to passengers from Ayrshire to points on the line of the Great Northern Company, but he kept no such tickets for sale at Ayrshire, and when such tickets were required procured them for such purpose.

E. A. Morling and Kelly & Kelly, for plaintiff.

J. L. Kennedy, for the Great Northern Railway Company.

REED, District Judge (after stating the facts). The merits of the controversy may be considered only for the purpose of ascertaining the real nature of the alleged cause or causes of action of the plaintiff against the several defendants, and whether or not there has been a fraudulent joinder of parties defendant with the Great Northern Company for the purpose of defeating the jurisdiction of this court. Alabama Great Southern Railway Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441; Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. —.

The petition of plaintiff, as amended in the state court, is very general in its allegations. It is clearly vulnerable to a motion for more specific statement, and it is urged in behalf of the Great Northern Company that its allegations are thus indefinitely and generally made to conceal the real facts which caused the death of Mr. McGuire and the destruction of his property, and to make an apparent case upon paper against all of the defendants jointly, for the fraudulent purpose of preventing the Great Northern Company from removing the cause to this court.

The petition alleges, generally, and it is the contention of the plaintiff, that there was a joint undertaking of the two companies to furnish the deceased with a suitable car in which to ship his property and carry him from Ayrshire, in Palo Alto county, this state, to McCanna, N. D., and that both companies are liable for the failure to perform this undertaking; that defendant Ziehlke acted as agent of both companies in procuring a car for McGuire, and did procure for him a safe and fit car for such purpose, but wrongfully diverted it to another shipper and furnished a defective and unfit car of the Minneapolis Company in lieu thereof to McGuire, and for so doing he is also liable with the two companies for their alleged failure to carry deceased and

his property in safety to their destination; and that all of the defendants are therefore jointly and severally liable to the plaintiff. But the diversion of the first car to another shipper cannot be said to be the direct or immediate cause of the burning of the car that was furnished to McGuire, and no right of action for the burning of the car can rightly be predicated upon such diversion, conceding it to be wrongful, against any of the defendants. The petition does not state any facts, aside from its legal conclusions, from which it can be inferred that there was a joint undertaking of the two companies to furnish a car and carry deceased or his property therein to McCanna, and the testimony wholly fails to show any such undertaking. It is undisputed upon the testimony that the Great Northern Company had no line of railroad at Ayrshire, or at any other place in Palo Alto county, and no office or agency in that county; that Ziehlke was not its agent for any purpose in the matter of procuring this car, or in making this shipment; that its first knowledge of the shipment was when it was delivered to it at the Minnesota Transfer, to be carried over its own line to McCanna; that the Minneapolis Company alone, through Ziehlke, as its agent, furnished the car to McGuire; and that that company carried him and his property therein over its own line in safety to the Minnesota Transfer, where it was delivered to the Great Northern Company. The action of the Minneapolis Company in thus furnishing the car, and carrying the deceased and his property therein over its own line, was an undertaking upon its part distinct and separate from that of the Great Northern Company to carry them over its line. The two companies did not act together in any way, either as partners or as joint carriers; but each received and carried the shipment over its own line under its separate written contract with the deceased therefor, and neither company was the agent, or liable for the acts, of the other in so doing. True, the destination of the car was McCanna, N. D., a station upon the line of the Great Northern Company, and beyond that of the Minneapolis Company; but that of itself does not show a joint undertaking of the two companies to carry the shipment to that place. Myrick v. Michigan Central Ry. Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Pennsylvania Ry. Co. v. Jones, 155 U. S, 333, 15 Sup. Ct. 136, 39 L. Ed. 176; Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573; Root v. Great Western Ry. Co., 45 N. Y. 527; Ortt v. Railway Co., 36 Minn. 398, 31 N. W. 519.

In Myrick v. Michigan Central Railway Company, above, it is said:

"A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states. As was said in Railroad Company v. Manufacturing Company:

"'It is unfortunate for the interest of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' 16 Wall. 318, 324."

The separate contracts in writing of the two companies with the deceased, to carry him and his property over their respective lines only, are substantially the same, are each signed by the deceased, and were accepted by him for his own passage over each of the roads, and the plaintiff cannot, in the absence of fraud or mistake in procuring the contracts from the deceased, neither of which is alleged, be permitted to say that the deceased did not know their contents or understand their meaning. Insurance Company v. Railroad Co., 104 U. S. 146–155, 26 L. Ed. 679; Mulligan v. Illinois Central Ry. Co., 36 Iowa, 181, 14 Am. Rep. 514. The contracts, therefore, conclusively establish that the undertaking of each of the companies with the deceased to carry him and his property was several, and that the Minneapolis Company limited its liability for injuries in carrying them to such as might occur upon its own line. This it could lawfully do. Insurance Co. v. Railroad Co., 104 U. S. 146–154, 26 L. Ed. 679; Myrick v. Michigan Central Ry. Co., 107 U. S. 102–108, 1 Sup. Ct. 425, 27 L. Ed. 325; Southern Pacific Co. v. Interstate Commerce Com., 200 U. S. 536–554, 26 Sup. Ct. 330, 50 L. Ed. 585; Mulligan v. Illinois Central Ry. Co., 36 Iowa, 181, 14 Am. Rep. 514; Peterson v. Railway Co., 80 Iowa, 92, 45 N. W. 573; Ortt v. Railway Co., 36 Minn. 398, 31 N. W. 519.

There is an entire absence of any evidence that there was any undertaking, oral or written, by the Minneapolis Company, to carry the deceased beyond its own line, or that the Great Northern Company is in any way responsible for any act of Ziehlke, or the Minneapolis Company in furnishing the car to McGuire. These facts were fully known to plaintiff and her counsel before the suit was commenced, and the conclusion is unavoidable that the allegations of the joint undertaking of the two companies, and of their joint negligence in handling the car upon the line of the Great Northern Company, are wholly without support in the testimony, and that such allegations were made only for the purpose of preventing the Great Northern Company from exercising its right of removal of the cause from the state court.

It is true that the Supreme Court holds that when a plaintiff in good faith prosecutes his suit as upon a joint cause of action, and a removal is sought alone upon the allegations of the plaintiff's petition, the cause of action as therein stated is the test of removability, and if that is joint in character, and there is no showing of want of good faith on the part of the plaintiff in stating his cause of action, the question of proper joinder is not to be tried in the removal proceedings, and the case must be held to be that which the plaintiff states in setting forth his cause of action. But this rule has no application where it is alleged and shown by the nonresident defendant that the plaintiff has purposely stated a fictitious cause of action against him and another jointly, to prevent a removal of the cause to the federal court. In such cases the duty is strictly enjoined upon the Circuit Courts of protecting the

right of removal to one having such right, as well as to deny the removal when the right to do so does not exist. Alabama Great Southern Co. v. Thompson, above.

In Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. —, it is said:

"While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the federal courts should not sanction devices intended to prevent a removal to a federal court, where one has that right, and should be equally vigilant to protect the right to proceed in the federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."

To deny the jurisdiction of this court in this case would be to sanction a device that is thus condemned by the Supreme Court.

The question has been considered upon the cause of action as stated by the plaintiff in her petition: Whether or not a cause of action upon other grounds might have been stated in good faith against both companies jointly has not been, and need not be, considered.

The plaintiff relies upon chapter 89, Acts 31st Gen. Assem. Iowa, as authorizing this action, against both companies jointly for the recovery of the property destroyed. Without intimating that this act, if it had been in effect at the time of this shipment, would have been applicable thereto, it is sufficient to say that it did not go into effect until July 4th, following the shipment and the destruction of the property; and that chapter 74, Acts 30th Gen. Assem., which it repeals, and for which it is a substitute, has no application to the shipment in question. It need not be further considered.

The conclusion, therefore, is that the plea to the jurisdiction should be overruled, and the motion to remand denied, and it is so ordered.

VANCOUVER NAT. BANK v. LAW UNION & CROWN INS. CO.

(Circuit Court, D. Oregon. March 4, 1907.)

No. 3,040.

1. INSURANCE—INSURABLE INTEREST—GENERAL CREDITOR OF OWNER OF PROPERTY.

   A general creditor has no insurable interest in the property of his debtor.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 142.]

2. SAME—RIGHT OF ACTION ON POLICY.

   An insured may, at least with the consent of the insurer, have the loss, if any, made payable to a third person, who by such designation becomes his agent or representative, and may sue on the policy in case of loss in his own name; and it is immaterial that he is a creditor of the insured and by agreement between them entitled to the insurance, but his right of recovery is subject to all conditions imposed upon the insured.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1559.]

3. SAME—CONSTRUCTION OF POLICY—APPLICATION OF CONDITIONS TO MORTGAGEE.

   Under a provision of an insurance policy that "if, with the consent of the company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed

in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," the preceding conditions in the policy apply to the interest of a mortgagee or other person having an interest in the policy in all events, but as modified by whatever may be written upon the slip attached to the policy.

4. SAME—AVOIDANCE OF POLICY FOR BREACH OF CONDITION—TITLE OF INSURED. A policy of fire insurance containing a provision that it shall be void if the interest of the insured be other than unconditional and sole ownership is avoided by a contract by the insured for the sale of the property by which he transfers possession and agrees to convey the title, the effect of such contract being to vest the purchaser at once with the equitable title, and such rule applies whether the subject of insurance be realty or personalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 799.]

At Law.

On April 25, 1905, the defendant issued to George W. Cone, under the firm name of George W. Cone Lumber Company, its policy of insurance, to which a slip is attached showing the amount of insurance and the property covered, as follows:

$500 00 On one story rubberroid roof, frame building, occupied by the assured as a wet log sawmill, situate on the east bank of the Willamette river, at St. Johns, Multnomah county, Oregon.
$500 00 On engines, boilers, etc.
$500 00 On other fixed and movable machinery.
$500 00 On lumber in piles and about the premises.
$500 00 On frame dock, situate on the above-described premises.

Upon the same slip is the memorandum: "Loss, if any, payable to Vancouver National Bank, Vancouver, Washington."

The policy contains this clause at the foot of it:

"This policy is made and accepted subject to the following stipulations and conditions, printed on the back hereof, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

And on the back thereof are printed these provisions, among others:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership * * * or if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

The property was destroyed by fire September 1, 1905. Prior to that time, to wit, on April 22, 1905, George W. Cone, under the firm name of George W. Cone Lumber Company, entered into a contract with the Oregon Fir Lumber Company, whereby, for the consideration of $50,000, he sold and agreed to convey the property, both real and personal, to the latter company. After the fire an adjustment was had of the loss, and there was apportioned to the defendant company, as its proportional liability, among other companies cov-

ering upon the same property, the sum of $2,156.84. For a recovery of that amount, this action has been instituted.

The defendant has set up, by way of defense to the recovery, that the George W. Cone Lumber Company, in violation of the stipulations of the policy, on August 22, 1905, sold the property to the Oregon Fir Lumber Company, which said company assumed possession all without the consent or agreement of defendant; that thereafter the unconditional and sole ownership was not in the George W. Cone Lumber Company, and that by reason of such sale a change took place in the interest, title, and possession of the subject of the insurance, whereby the policy was rendered void as against the defendant company, and it was relieved of responsibility. The reply alleges that the defendant company had, long prior to the fire, full knowledge of such transfer under the contract alluded to, and, further, that the Oregon Fir Lumber Company never entered into possession, or carried out the covenants resting upon it, and thus never acquired any right, title, interest, or ownership in or to the property.

W. E. Yates and Platt & Platt, for plaintiff.
Snow & McCamant, for defendant.

WOLVERTON, District Judge (after stating the facts). It is first contended that the plaintiff cannot recover, for the reason that it is without an insurable interest in the property covered by the policy of insurance. Under the testimony, and by the explicit admission of the parties, the plaintiff had not at the date of the policy, nor has it now, any other interest in the subject of the insurance except as a general creditor. It had not then, nor has it now, any mortgage or judgment, but holds the promissory notes of the George W. Cone Lumber Company for moneys loaned or advanced, so that it stands absolutely as a general creditor, and in no other position. Such a creditor is without an insurable interest. As expressed by the court in Foster v. Van Reed, 5 Hun (N. Y.) 321, 325:

"It certainly would not be claimed that a mere simple contract creditor could obtain a valid insurance of his debt from a fire insurance company. The creditor must have an interest in the real estate to authorize him to insure."

Under certain peculiar conditions simple contract creditors have been held to have an insurable interest, as where the debtor is insolvent, or has since deceased, and the estate constitutes a fund, as it were, for the discharge of his obligations, or the property has been purchased upon the credit or responsibility of the person claiming the interest. Herkimer v. Rice, 27 N. Y. 163; Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Roos & Co. v. Merchants' Mutual Ins. Co. of New Orleans, 27 La. Ann. 409. But no such conditions attend the claim or demand of plaintiff.

The real question, however, is not whether the plaintiff has an insurable interest, but whether it is entitled to sue upon the demand for loss under the policy. It will be noted from the memorandum upon the slip that the loss, if any, was made payable to the bank unconditionally, not, as is usually the case, "as its interest may appear." This is, in effect, an appointment of the bank as the party to receive payment in case of loss. The parties to the policy have regularly so stipulated with reference to the loss, and the bank has assented thereto; and why may it not sue to enforce the obligation? The legal consequences of such a stipulation and agreement are well stated by

Mr. Justice Miller in the case of Bates v. Equitable Insurance Company, 10 Wall. (U. S.) 33, 19 L. Ed. 882. He says:

"Now, it is a well known and frequent thing in insurance business for a person to insure his life, or his property, and either in the policy itself, or by indorsement at the time it is made, or by subsequent indorsement, to which the consent of the company is generally required, to direct the loss to be paid to some third party. And this is done in language similar to, if not identical with, that used in this case. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person. This transaction is a very common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, his skill and success in trade, but who requires indemnity against such accidents as loss by fire, or the perils of navigation. The property of the debtor at risk being thus insured for the benefit of the creditor gives him this indemnity."

So that the relation stands here simply that the Cone Lumber Company insured its property for the benefit of its creditor, namely, the Vancouver National Bank; and there exists no good or sufficient reason why this may not be done. Guiterman v. German-Amer. Ins. Co., 111 Mich. 626, 70 N. W. 135; Ermentrout v. American Fire Ins. Co., 60 Minn. 418, 62 N. W. 543. I am of the opinion, therefore, that the action was rightly brought in the name of the Vancouver National Bank, and that it could sue whether it had an insurable interest in the property of the insured or not. It is sufficient that the bank was appointed as the party to receive the loss, if any should occur. Such being the agreement of all the parties concerned, it occupies the relation of a trustee, and may recover in its own name.

The next contention is on the part of counsel for plaintiff, which is that, under the provisions of the paragraph running, "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee," etc., it was not designed that a breach by the assured of any of the preceding conditions contained upon the back thereof should void the policy, because, it is argued, all the conditions, if any, affecting the bank were, by intendment, to be contained upon the slip attached thereto, whereby the loss is made payable to the bank. There are several cases in the state courts so holding, the first, and leading one, of which is Oakland Home Ins. Co. v. Bank of Commerce, 47 Neb. 717, 66 N. W. 646, 36 L. R. A. 673, 58 Am. St. Rep. 663. The case is determined entirely upon the interpretation of a paragraph identical with the above. The learned commissioner who announced the opinion of the court renders the stipulation as follows:

"'The conditions hereinbefore contained shall apply,' not absolutely, but in a qualified way, 'in the manner expressed in such provisions and conditions * * * as shall be written upon, attached, or appended hereto'; that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee, there must be written upon, attached, or appended to the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable."

He then further reasons that no conditions were written upon or attached or appended to the policy, and hence that the general provisions should not apply. The clearest statement of the position is contained in a later case. Christenson v. Fidelity Ins. Co., 117 Iowa, 77, 90 N. W. 495, 94 Am. St. Rep. 286. The court, after quoting a part of the clause, says:

"This means that, in order that they become applicable to the interest of the mortgagee, the manner thereof must be indicated by an indorsement or some writing attached to the policy. Nothing of the kind was indorsed on or appended thereto, and for this reason the conditions do not apply."

Other cases to the same purpose are Senor & Muntz v. Fire Insurance Co., 181 Mo. 104, 79 S. W. 687; East v. New Orleans Insurance Association, 76 Miss. 697, 23 South. 358; Queen Ins. Co. v. Dearborn Sav., Loan & Building Ass'n, 175 Ill. 115, 51 N. E. 717; Northern Assurance Co. v. Chicago Mut. B. & L. Ass'n, 98 Ill. App. 152; Boyd v. Thuringia Ins. Co., 65 Pac. 785, 25 Wash. 447, 55 L. R. A. 165. Opposed to this view is a case in the United States Court of Appeals for the Eighth Circuit, before Caldwell, Sanborn, and Thayer, Circuit Judges. The opinion is by Mr. Justice Sanborn. After stating the contention of counsel for the defendant in error, which is the same as that made by counsel for plaintiff here, he says:

"But the clause which these parties selected and attached to the policy had a known, definite, and adjudicated meaning. It had a settled legal effect when they chose and appended it to the contract. The meaning and effect that the indemnity thereby secured to the mortgagees was subject to the risk of every act and neglect of the mortgagor which would avoid the original policy in his hands. No form of words could have been devised or adopted, relating to the insurance of these mortgagees, which would so clearly and conclusively have expressed the intention of the parties to this contract to subject the indemnity secured by the mortgagees to the risk of the acts and omissions of the mortgagor as the clause which they selected and attached to the policy, because a long line of adjudications, covering more than 40 years, had established the fact that this was its true meaning and effect."

After citing authorities, he continues:

"The true construction of the clause 'Loss, if any, payable to ———, mortgagee, as his interest may appear,' or of words of similar import, when attached to policies of fire insurance, is, and has been for more than 40 years, that the mortgagee is thereby made the simple appointee of the mortgagor, and that his indemnity is at the risk of the acts and omissions of the latter which would avoid, terminate, or affect the mortgagor's insurance under the original policy." Delaware Ins. Co. of Philadelphia v. Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

A later case by the same court, composed of Circuit Judges Sanborn, Van Devanter, and Hook, has this to say on the subject:

"But the question under consideration is not solved by merely ascertaining the meaning of the words 'as their interest may appear.' They do not stand alone, and are not controlling. By the plain terms of the indorsement the consent to pay the loss to Dodge and Stevenson was made 'subject to all the conditions' of the policy. This qualifying clause means that the consent was given upon the express condition that the conditions of the policy were not thereby abrogated or waived, but that they should have effect and be respected in like manner as if the indorsement had not been made. It means that a loss to be payable to Dodge and Stevenson under the indorsement, must be one which, under the conditions of the policy, would be payable to the insured, and that whatever, under those conditions, would defeat the insured's right to payment in the absence of the indorsement, will equally defeat it in the presence of the indorsement." Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497, 504, 71 C. C. A. 21.

Franklin Ins. Co. v. Wolff, 54 N. E. 772, 23 Ind. App. 549, decided by the Court of Appeals of Indiana, is to the same purpose.

These latter authorities appear to me as announcing the better doctrine. The paragraph in question reads:

"If * * * an interest * * * shall exist in favor of a mortgagee, * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

"Conditions hereinbefore contained" unquestionably refers to preceding conditions set out in the policy of insurance, or contained on the back thereof. Now, it is stipulated that they shall apply where there is an interest in favor of a mortgagee, which has been assented to or recognized by the company. If nothing further had been said, no question or confusion could arise. But it is significant, as a premise, that the agreement is that they shall apply. Now we inquire how, or in what manner, shall they apply, for in all events they are to have application, unless it be further stipulated, by reasonable intendment, that they shall not apply notwithstanding the agreement that they shall. They "shall apply in the manner expressed in such provisions and conditions * * * as shall be written upon, attached, or appended hereto"; that is, written upon, attached, or appended to the policy. Here is a plain recognition that they shall apply in some manner, and the manner pointed out is, as is expressed in the provisions and conditions, written upon, attached, etc. The slip appended in the present case contains an additional paragraph, as follows: "Permission granted to make additions, alterations and repairs"—and a warranty by the insured that, when the sawmill is idle, competent watchmen shall be employed, and that, if it remains idle for a period of more than 30 days without the written consent of the company, the policy shall become void. These are concluded by a stipulation that:

"This slip is attached to and made part of policy No. 1328999 issued to the George W. Cone Lumber Company by the Law, Union & Crown Insurance Company."

The permission to make additions, etc., is an enlargement, in a manner, of the assured's rights, and the warranty may be considered a restriction thereof. These are provisions and conditions appended to the policy, but they do not appear to relate to the interest in favor of the bank any further than they modify the general provisions contained elsewhere in the policy; so that there are no provisions or conditions expressing the manner of application of the conditions contained in the policy, or on the back thereof, preceding the clause under discussion. Does this mean that the preceding conditions shall not apply at all, or, in other words, was it necessary, to give them application, that they should have been repeated or set out again upon the slip, or an appropriate affirmative provision written thereon, saying in effect that such preceding conditions shall apply when it had been as plainly stipulated as could be that they should apply? Any other answer but one, namely, that they were intended to apply in connection with such provisions and conditions as should be written upon the slip, and as modified thereby, would lead to a palpable absurdity, and hence it may be reasonably concluded that the conditions were intended to apply in all events, but as modified by whatever might be written upon the

slip attached to the policy. If the "hereinbefore" conditions were not intended to have application, how easy it would have been to have said so bluntly and pointedly—that such conditions shall not apply except so far as they are reiterated upon the slip. The so-called union policies, which have received a settled construction, do this. Syndicate Ins. Co. v. Bohn et al., 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; Hastings et al. v. Westchester Fire Ins. Co., 73 N. Y. 141; Magoun v. Fireman's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5. The policy not having expressed it in that way, it is incumbent upon the court to seek for another meaning. The slip is made part of the policy, and, being so made part, all the conditions on the policy, contained both upon the back and upon the face of it, together with those contained upon the slip, should be construed together as one entire instrument, and all given effect, if possible; and, when so construed, the plain intendment becomes manifest that it was not designed that there should be one agreement with the insured and another with the mortgagee, or other person having an interest in the property. I am aware of the rule that, if contracts of the kind manifested by policies of insurance contain ambiguous or incongruous conditions, the construction most favorable to the insured should be adopted. I am sure the paragraph in question is ambiguous enough, and why it should be retained and acted upon by men of clear business judgment is a mystery; but the rule does not go to the extent of according to the court a free hand to write into the contract a condition that was plainly never intended by the parties to be there, and such, it seems to me, would be the result of counsel's contention, were it adopted. As a further reason for the construction I have given the policy, it is stipulated at the foot thereof that "this policy is made and accepted subject to the following stipulations and conditions, printed on the back hereof, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto", so that the plain intendment from the whole contract is that all these conditions, including those contained upon the slip, should be construed together, and harmonized, if possible, and this I have endeavored to do. But, if I am wrong about this, and if the cases last cited are unsound upon principle, I am nevertheless firmly of the opinion that the cases in the state courts cited and relied upon by counsel for plaintiff are without application here, because in the present matter there is no interest existing in the creditor—that is, the Vancouver National Bank—with the consent of the insurance company. In other words, the insurance company has not agreed or stipulated that the bank has any interest, insurable or otherwise, in the property covered by the policy. Loss, if any, is made payable flatly to the bank, and not in so far as its interest may appear. So that in any event the conditions and provisions of insurance relating to such interest cannot apply here, because no such interest exists by agreement of the parties. The bank is simply the appointee of the insured, to receive whatever loss he may sustain by reason of fire from the insurance company, under the conditions of the policy by which insurance was guarantied.

The next question involved is whether the contract of sale entered into between George W. Cone Lumber Company and the Oregon Fir Lumber Company rendered the policy void, so that recovery cannot be

had in this action. The contract was made and entered into between George W. Cone, of the first part, and the Oregon Fir Lumber Company, of the second part, and it stipulates that the first party "has and does hereby sell and deliver to said second party all the property hereinafter described upon the following conditions, to wit: The second party is to pay said first party the sum of fifty thousand dollars ($50,000) for said property, twenty-five thousand dollars ($25,000) of which is to be paid for the real estate and twenty-five thousand dollars ($25,000) for all the other property. Said second party is to pay said first party the sum of ten thousand dollars ($10,000) upon the signing and delivery of this contract and the possession of said property, the receipt of which is hereby acknowledged by said first party. The balance is to be paid as hereinafter set forth. Said first party is to transfer and convey said real estate by a good and sufficient warranty deed and all the other property by a good and sufficient bill of sale."

Then, after describing the property in detail, the contract proceeds:

"The first party is to furnish said second party a complete abstract of title to said property showing a perfect title in said first party, which title is to be passed upon and approved by the attorney of said second party. He is also to perfect and complete his title to said property and clear up all taxes and incumbrances against the same except a certain mortgage to E. Quackenbush, on which there is a balance of some fifty-eight hundred dollars ($5,800), and a mortgage held by Georgiana Jackson for one thousand dollars ($1,000). Said first party is to have not to exceed sixty days to complete said abstract and perfect said title and prepare and furnish said warranty deed and bill of sale. When said first party perfects his title and makes and delivers a good and sufficient warranty deed of said real estate and a bill of sale conveying and transferring all of said property to said second party free from all incumbrances except the two mortgages above described, then said second party is to immediately pay said first party the balance of said purchase price of forty thousand dollars ($40,000), after deducting the amount of the mortgages above described therefrom. The said second party is to have full possession and control of said property from this date and is to conduct and carry on said business."

It is contended on the one part that, by virtue of this contract or agreement, a change was effected in the interest and title of the subject of the insurance, and that thereafter the unconditional and sole ownership was not in the George W. Cone Lumber Company, and thus that there was a violation of the stipulations of the policy, rendering it void. This position is challenged as unsound upon the other part. It is a settled rule of law that, under a contract which portends a present sale of realty, an equitable conversion takes place, and that the property will henceforth be treated in legal consequence as if the legal title had actually passed; the most important incident attending such a contract, which may be mentioned, being that the property will descend to the heirs of the vendee, while the purchase money will go to the personal representatives of the vendor. This proceeds under the maxim that "equity regards that as done which ought to have been done." As is said by Mr. Pomeroy in his work on Equity Jurisprudence (section 368):

"The vendee is looked upon and treated as the owner of the land. An equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years. Although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all

the beneficial interest has passed, having a lien on the land even if in possession of the vendee, as security for any unpaid portion of the purchase money."

So it is said in Richter v. Selin, 8 Serg. & R. (Pa.) 425, 440:

"When a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered, in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises to every intent and purpose in equity."

So, also, it is said, in McKechnie v. Sterling, 48 Barb. (N. Y.) 330, 334, where a contract very similar to the one involved here was under discussion:

"The agreement between the parties was therefore a contract for the sale of an interest in land. The defendant was authorized to take immediate possession. The payment of the consideration was to be made upon demand, as no time was fixed for its payment. Strictly, perhaps, the plaintiffs could not have required payment till they tendered an assignment of the lease, and gave the defendant possession. The contract, however, was absolute, and vested in the defendant the equitable interest in the land the moment it was executed and delivered."

And, quoting from Sugden on Vendors, p. 254, the opinion continues:

"That a vendee, being the equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim."

This much as to the general equitable doctrine.

Coming to the very point in controversy, we quote from Snyder v. Murdock, 51 Mo. 175, 177, as follows:

"After an executory contract for the conveyance of real estate has been entered into by the execution of a bond for title and notes for the purchase money, the property is at the risk of the purchaser. If it burns up, it is his loss. If it increases in value, it is his gain. This is the settled equity doctrine, and is based upon the principle that in equity what is agreed to be done must be considered as done."

So in Dunn v. Yakish, 61 Pac. 926, 10 Okl. 388, a case almost identical in its facts with the one at bar, the court says:

"Does the fact of the insertion into a contract like the present, for the sale of real estate, of an agreement to deliver possession at a future day, make any difference in the application of the rule? It is true it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to; but they explicitly say it is the passing of the title in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits."

These authorities indicate very conclusively that, when the sale takes place under an agreement of the kind considered, the equitable title passes at once from the vendor to the vendee, which is such a transfer of interest or title as will void the policy under the paragraph relied upon. Indeed, it is explicitly so held in Gibb v. Philadelphia Fire Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405.

The question may be considered from another standpoint. It is held in Loventhal v. Home Insurance Co., 112 Ala. 108, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17, that:

"A vendee of land in actual possession, exercising acts of ownership under a valid executory contract of purchase, and holding the bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner in fee simple of said land, within the meaning of a policy of insurance which is conditioned that the 'entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple,' and as to an insured holding such interest a policy with this condition is not void, but can be enforced at the suit of the insured."

To the same purpose is the holding of the court in Baker v. State Ins. Co., 31 Or. 41, 45, 48 Pac. 699, 65 Am. St. Rep. 807. See, also, Pennsylvania Fire Ins. Co. v. Hughes, 108 Fed. 497, 47 C. C. A. 459.

Now, if it be true that such contract will constitute the vendee the unconditional and sole owner, it must follow unalterably as a corollary that such ownership cannot remain in the vendor, and that the contract itself operates to cause a change to take place in interest, title, and, if possession is delivered, in possession also. There is a line of authorities which, on cursory examination, seem to controvert the position that the loss in case of such a contract as is here entered into, occurring by reason of the destruction of buildings by fire prior to the time when it is contemplated that the deed shall be delivered, shall fall upon the vendee. The leading case on that view of the question is Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, wherein the court says:

"When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money."

The principle seems to have been adopted in Powell v. Dayton, Sheridan & Grande Ronde R. R. Co., 12 Or. 488, 8 Pac. 544. The true doctrine of that case, and of others upon which it proceeds, is elucidated in the case of The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747. The court there, in quoting from Taylor v. Caldwell, 3 Best & Smith, 826, says:

" 'In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.' "

And, further, in commenting upon the case of Appleby v. Myers, L. R. 2 C. P. 651, the court continues:

"There the plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises, with all the machinery and materials thereon, were destroyed by an accidental fire. It was held that both parties were excused from the further performance of the contract, and that the

plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not."

Then is cited the Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, as authority to that purpose.

So it would appear that, where the parties had in view the continued existence of buildings attached to realty until a conveyance of the legal title is had, then the rule in Wells v. Calnan, 107 Mass. 514, 9 Am. Rep. 65, is applicable. This is elucidated by a further reference to that case, and to a later one from the same court, namely, Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779. In the former the court, by way of distinguishing some authorities referred to, further remarks:

"But in the case at bar the defendant has only agreed to pay the purchase money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land."

And in the latter case, after referring to the contract, the court says:

"In such a state of things no condition can be implied that the performance of the contract is dependent upon the continued existence of the buildings. The reasoning of the cases in which it has been held that both parties were excused from performance by the destruction before a breach of that which constituted an important part of the contract, but concerning whose destruction there was no provision in the contract, does not apply."

However, on the other hand, where the parties are dealing with the property in general, and their contract is for the sale thereof, which is then in existence and capable of delivery or conveyance, the contract works eo instante an equitable conversion, and the parties must be considered as having changed position in reference thereto, and the loss falls accordingly, if there should be any occurring before conveyance.

In discussing the clause of the policy under consideration, the court, in the case of Skinner & Sons' Co. v. Houghton, 92 Md. 68, 93, 48 Atl. 85, 90, 84 Am. St. Rep. 485, says:

"Can it be doubted that there was a change in the interest in this property? As long as the insured has made no change in his estate in the property, a company may be perfectly satisfied to continue the insurance, but, if he makes such a change as to divest himself of all interest in the property, excepting a vendor's lien for the purchase money, and has a responsible party bound for the payment of that, he does not have the same motive for the protection of the property that he had before. In short, the insurer's risk is or may be increased by the change of the interest of the insured."

And so the court concludes that under a policy containing a clause identical with the one here under consideration, having in view a contract of the same nature, it wrought a change of interest in the insured as to the property that would render the policy void.

I have considered the rule thus far as it relates to the realty only, for the sake of perspicuity, and it is only necessary now to add that the same rule will apply, with equal, if not stronger, force, to the personalty. 2 Kent's Commentaries, 492; Commercial Bank v. Davidson, 18 Or. 57, 22 Pac. 517; Morrow v. Delaney, 41 Wis. 149.

Now, it will be seen that the contract is complete for the sale and

transfer of the property in question. It contemplates, of course, a future conveyance by deed and by bill of sale; but the covenants and agreements are mutual, and the contract itself stands upon such covenants and agreements, without any attempt or design, apparently, to make them conditions precedent; that is to say, the George W. Cone Company agrees to furnish the abstract as indicated on or before 60 days, and, when completed, it further agrees to make and execute the deed and bill of sale and to deliver the same, and the Oregon Fir Lumber Company agrees to pay the balance of the purchase price. The conveyance is not made to hinge at all upon the performance of any conditions precedent, but the covenants are mutual and concurrent, and the intendment is that the parties shall perform their covenants as agreed. Thus it is apparent that the intendment was that the contract should operate as a present sale, although executory, and that, in legal effect, when signed and delivered, it carried the equitable title, and henceforth there was an equitable conversion of the property. Under the testimony it is not altogether apparent that the Oregon Fir Lumber Company went into possession, but it did what was equivalent thereto. It authorized George W. Cone to run the business in the interests of the Oregon Fir Lumber Company, and, according to the testimony of Cone himself, the profits thereafter were to accrue to the Oregon Fir Lumber Company, and not to Cone. Mr. Blagen, who was as much concerned in the Oregon Fir Lumber Company as any one, says:

"In other words, he [Cone] was running it for the account of the Oregon Fir Lumber Company until such time as the deal was consummated."

So that there can be no question, under the contract and under the evidence, that the sale was absolute and not conditional, that it took effect at once to transfer the equitable title, and that the loss by the fire fell upon the Oregon Fir Lumber Company, and not upon George W. Cone, and, as the contract had the effect to violate the condition of the policy, it relieved the insurance company of all liability thereunder.

There is some discussion as to whether Dooly, the agent of the company, and through him the company, should be charged with knowledge of the transfer, and with a ratification thereof. But it is hardly possible that this can follow from the facts shown. Mr. Dooly testifies that he was discharged as agent of the company on August, 22, 1905, while in San Francisco, and, while he said on his examination in chief that he must have seen the account of the sale in the Oregonian prior to his discharge, yet, as it appears the sale took place on August 22, 1905, it is very evident that, being in San Francisco, he did not come into knowledge of the fact of sale until after his discharge, and hence it would seem that the company could not be affected by his knowledge thereof. At any rate, the proof does not show the fact as alleged.

These considerations lead to findings for the defendant in the action, and the complaint will therefore be dismissed.

BRECHT v. LAW UNION & CROWN INS. CO.

(Circuit Court, D. Oregon. March 4, 1907.)

No. 3,039.

INSURANCE—AVOIDANCE OF POLICY FOR BREACH OF CONDITION—TITLE OF INSURED.

The owner of a sawmill property, including the mill, machinery, and logs and lumber, the personalty being subject to a chattel mortgage, entered into a contract with the chattel mortgagee by which he purported to convey and transfer to said mortgagee all of the property, both personal and real, with authority to take possession and to operate the mill and to sell any and all of the property, the owner agreeing to execute conveyances of the same as required by him. In consideration of such contract the grantee agreed to pay certain indebtedness of the owner, including his own, and to apply to that purpose all sums received from the operation of the mill or sales of the property, after deducting expenses, the surplus, if any, to be paid over to the grantor. *Held*, that such contract was not a mortgage, but a trust agreement or deed, which vested the absolute title to the property in the grantee, and that it avoided a policy of insurance previously issued to the grantor on the property containing a provision that it should be void if his interest in the property should be or become other than unconditional and sole ownership.

At Law.

On October 5, 1904, defendant issued to A. S. Douglass, R. P. D. Douglass, and A. B. Douglass, partners doing business under the firm name of St. Johns Lumber Company, its policy of insurance, whereby it insured the firm against loss or damage by fire, as per printed slip attached to the policy, as follows:

$1,500 On frame wet log saw mill building and additions, adjoining and communicating, situate on the east bank of the Willamette river, St. Johns, Multnomah county, Oregon.
$1,500 On engines, boilers, and connections.
$1,500 On fixed and movable machinery. * * *
$500 On lumber; all while contained in and piled upon the within described premises.
Other concurrent insurance permitted.
Loss, if any, hereunder is hereby made payable to Daniel Brecht.
This slip is attached to and made a part of Policy No. 1328859 of the Law Union & Crown Insurance Company, issued to St. Johns Lumber Co.

On May 19, 1905, the defendant issued to the St. Johns Lumber Company another policy of insurance, whereby it insured the latter company against loss or damage by fire, as per printed slip attached thereto, as follows:

$750 00 On frame wet log saw mill building and additions adjoining and communicating, situate on the east bank of the Willamette river, St. Johns, Multnomah county, Oregon.
$750 00 On engines, boilers, and connections.
$1,000 00 On fixed and movable machinery. * * *
Loss, if any, payable to Daniel Brecht.
Other concurrent insurance permitted.
This slip is attached to and made part of policy No. 1329006 issued to St. Johns Lumber Company by the Law Union & Crown Insurance Company.

Another slip attached to the same policy contains the following stipulation: "It is warranted by the insured that whenever any of the following named parts of the plant described in this policy, to-wit: Saw Mill is idle or not in operation, from any cause whatever, competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately about said part of the plant. If any of the above named parts

is idle or not in operation for a period of more than thirty (30) days without the written consent of this Company this policy shall be void."

The two policies are otherwise identical, as respects their provisions and conditions, and each contains the following stipulation at the foot thereof: "This policy is made and accepted subject to the following stipulations and conditions, printed on the back hereof, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." And upon the back thereof the following, among others:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise."

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto."

At the time of the issuance of the policy the plaintiff was a creditor of the St. Johns Lumber Company, being secured by chattel mortgages upon the personalty covered by the insurance. On August 25, 1905, the copartners above named, doing business as the St. Johns Lumber Company, as parties of the first part, entered into a contract with Daniel Brecht, the plaintiff, as party of the second part, in language following: "In consideration of the foregoing the party of the second part does hereby assume and agree to pay all outstanding indebtedness owing by the said parties of the first part, incurred in connection with the said milling business; the said outstanding indebtedness, with the exception of certain sums due for labor, and including the amounts due by the parties of the first part to the party of the second part, is shown by the items hereto attached and marked 'Exhibit A' and hereby expressly made a part hereof, and aggregating in amount the sum of sixteen thousand three hundred and thirty dollars and thirty-six cents ($16,330.36); and in addition thereto the party of the second part assumes and agrees to pay the obligations of the said first parties for labor performed in connection with their said milling business now unpaid and amounting approximately to the sum of three hundred and seven dollars ($307). It is hereby expressly understood and agreed that the second party does not assume or agree to pay any sums in addition to those represented on said 'Exhibit A' and the said sum due for labor aggregating approximately the sum of $307.00. Immediately upon the execution of these presents the party of the second part shall be given and take possession of said mill and all thereof and everything connected therewith, and said accounts receivable, lumber, and stock on hand, and all other items connected with said milling business or used or intended to be used therein, and shall, at his own election, operate said mill in such manner as he may see fit; nothing herein contained, however, shall be construed so as to compel the second party to operate said mill; but the second party may operate the same for such length of time and in such way as he may

see fit; and the second party may, at any time he may see fit, and for such prices as he may be able to obtain, dispose of any and all of said property. All debts contracted by the second party in the operation of said mill or in any wise connected therewith shall be deducted from the receipts of operation or from the money received from the collection of said accounts or the sale of said property. The said second party may, at any time he sees fit, and for such prices as he may see fit, dispose of any and all of said property in bulk or otherwise. The said party of the second part shall keep true and correct account of all expenditures made by him in connection with the operation, management and sale of said property, and of all sums received by him in any way connected therewith, and apply the same: 1st. To the expenses of operating said mill and other expenses incurred by him, howsoever. 2nd. To the payment of all of the said debts now due by said first parties and herein mentioned, including the claims and demands of the second party against the first parties, and after the full payment of all said obligations and debts, any surplus remaining shall be at once paid over to the parties of the first part. The parties of the first part shall, upon the demand of the second party, execute and deliver to the second party, or to whomsoever the second party may designate, such bills of sale, assignment or conveyances as the second party may deem proper to fully vest in the second party or such person as may be designated by him, the entire legal and equitable title to all of the property now owned by said parties of the first part."

The property was destroyed by fire September 1, 1905, and plaintiff sues, by two counts, to recover upon each of the policies of insurance. As one of the defenses to each of the causes of action it is alleged that plaintiff went into immediate possession of the property under the contract above set out, and that, by reason of said contract and the action of the parties concerned in pursuance thereof, the policies were rendered void, and that defendant was thereby relieved of liability thereunder.

William T. Muir, for plaintiff.
Snow & McCamant, for defendant.

WOLVERTON, District Judge (after stating the facts). The questions presented in this case of which I deem it important to take note are the same as those presented in the case of Vancouver National Bank v. Law Union & Crown Insurance Company (just decided) 153 Fed. 440, save one, which I will now determine. That question is whether, by virtue of the contract of August 25, 1905, between the St. Johns Lumber Company and the plaintiff, a change was effected in the interest, title, or possession of the property, the subject of the insurance, such as renders the policies of insurance upon which the action is based void under the stipulations and conditions therein contained. In the view I take of the question, its solution depends upon the proper interpretation of the contract. It is contended, on the one hand, that the instrument was intended by the parties as an unconditional conveyance of the property from the vendor to the vendee, in trust for the purposes therein stated, or, if not so determined, then that it operates as an assignment of the property irrevocably for the benefit of the creditors of the St. Johns Lumber Company; while, upon the other hand, it is strongly insisted that the writing portends a chattel mortgage only, and that its true purpose was merely to secure the payment of the debts of the St. Johns Lumber Company.

The instrument should be construed by its four corners, so as to give all parts of it operation, if possible, and this in connection with the attending circumstances and conditions as shown by the testimony

introduced at the hearing. If it was the purpose to convey the property to Brecht as a security for the payment of his demands, along with the demands of other creditors of the St. Johns Lumber Company, then it should be deemed and considered a mortgage; and, by whatever name it may be called, equity looks beyond that, and determines the true intent and purpose of the parties, as gathered from the instrument itself and the attending conditions under which it was executed. If, however, it was the purpose to vest the ultimate legal title in Brecht, in trust though it may be, to be disposed of as his judgment might suggest, for the purpose of procuring funds whereby to meet the obligations outstanding against the St. Johns Lumber Company, and that it was merely intended that the vendor should be entitled to the surplus only of what might be left after disposing of the property and applying the proceeds to the debts, then the instrument should be considered as a deed of trust simply, and not as a mortgage. Mr. Justice Bean has noted the distinction between a mortgage and a deed of trust, in the case of Ladd v. Johnson, 32 Or. 195, 200, 40 Pac. 756. He says:

"A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or performance; * * * while a deed of trust of the character under consideration here is an absolute and indefeasible conveyance of the whole of the grantor's title, for the purpose expressed. The former, whatever the form of the instrument, or whatever name may be given it by the parties, creates a mere lien, while the latter conveys title."

On the other phase of the question, as to whether this contract should be considered an assignment for the benefit of the creditors, the distinction is clearly made by Caldwell, Circuit Judge, in the case of Bartlett v. Teah (C. C.) 1 Fed. 768. He says:

"A mortgage does not invest the mortgagee with an absolute and indefeasible title. The equitable title, called the 'equity of redemption,' remains in the mortgagor. The mortgage is a security for the debt, and creates a lien upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. * * * An assignment for the benefit of creditors is well defined to be 'a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor.' Burrill on Assignment, § 2. The terms of the instrument in this case bring it exactly within this definition, and stamp it as an assignment for the benefit of creditors, and not a mortgage, or deed of trust in the nature of a mortgage. Unlike a mortgage or deed of trust, it was not given by way of security. There is no defeasance clause giving the grantor the right of redemption. It does not create a lien on the property, but conveys it absolutely for the purpose of raising a fund to pay debts; and, if valid, it passed the absolute title, legal and equitable, to the grantors in the deed, subject to the trust, and placed the same beyond the reach of the debtor, as well as her creditors, until the purposes of the trust were satisfied. When the debts were paid, the debtor had a right to the surplus, but until that was done she had no legal or equitable interest in the property, or its proceeds, that could be sold or incumbered or seized on attachment or execution by her creditors."

This case has the sanction of Shiras, District Judge, in a much later case, reported as Appolos et al. v. Brady et al., 49 Fed. 401, 1 C. C. A. 299. Special reference is there made to the Arkansas authorities, which hold very clearly to the same principle. Richmond v. Mississippi Mills, 52 Ark. 30, 11 S. W. 960, 4 L. R. A. 413; Robson v. Tomlinson, 54 Ark. 229, 15 S. W. 456. See, also, Holliday v. Benoist, 37 Mo. 501. The like distinction as between a mortgage and an assignment for the benefit of creditors is stated in Bank v. Crittenden, 66 Iowa, 240, 241, 23 N. W. 646, 648, as follows:

"If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it, if it is intended as an absolute conveyance of all of his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them, in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property, and but a portion of his debts are secured by it."

See, also, Sabichi et al. v. Chase, 41 Pac. 29, 108 Cal. 81.

The same doctrine has been announced in the Oregon Supreme Court in the case of Monteith v. Hogg, 17 Or. 270, 20 Pac. 327. Mr. Justice Lord, in speaking for the court, says:

"An assignment whereby the debtor conveys all his property for the benefit of his creditors amounts to a complete cession or surrender of his property to his creditors. It operates to vest in the assignee the legal title to the property, but the beneficial interest is in the creditors, the cestuis que trust. He is seized not for himself, but for the creditors, and as a consequence the moment he is seized the beneficial, substantial interest passes out of him into them. Necessarily the converse of this proposition must be true as to the assignor's interest in the property assigned. After the assignment he is devested of the legal title to the property assigned, and the only possible interest he can have is wholly uncertain and contingent, and according to the nature of the transaction only results after the payment of the debts, and is confined to such residuum as may remain of the unappropriated property or its proceeds. In a word, until the purposes of the trust are satisfied, the assignor has no legal or equitable rights in the assigned property."

Now, we will turn to the instrument itself, and determine its character. By the first provision, after reciting the consideration, the contract purports to grant, bargain, sell, convey, assign, and set over unto the plaintiff all of the property (describing it in detail), together with all moneys, claims, demands, lumber on hand and in stock and logs intended to be cut into lumber. Then, following the habendum clause, it is stipulated that, in consideration of the foregoing, the plaintiff assumes and agrees to pay all outstanding indebtedness owing by the lumber company incurred in connection with the milling business, and also all of certain labor claims amounting to the sum of $307, as exhibited by a schedule attached. By the third paragraph it is stipulated that the plaintiff shall be given possession of the mill, and everything connected therewith, and of all the property mentioned and described in the contract, and that he shall have the right, at his election, to operate the mill in such manner as he may deem proper, and shall sell any of the property at any time, as he may see fit, for such prices

as he may be able to obtain for the same; that an account of all the debts contracted in connection with the operation of the mill subsequent to the transfer shall be kept, and the amount thereof deducted from the money received from the collection of the accounts or the sale of the property. It is further provided that, after the sale of such property, the plaintiff shall pay, first, the operating expenses of the mill; and, second, all the debts and demands due from the lumber company to said plaintiff, and, after the full payment thereof, the surplus, if any remain, shall be paid over to the company. Then follows the provision that the lumber company shall, on demand, at any time, execute and deliver to the plaintiff, or whomsoever he may designate, such bills of sale, assignments, or conveyances as the plaintiff may deem proper to fully vest in him, or in such other persons as he may designate, the entire legal and equitable title to all the property owned by the lumber company. There is nothing upon the face of this instrument, or in the plain reading thereof, to indicate in any way that it was designed or intended as a mortgage. It purports to convey an absolute title, without reservation or right of redemption. The power of sale in the vendee is absolute, and not conditional in any way upon the vendor's failure in payment of the indebtedness specified. While the application of the proceeds is fixed by the conditions of the trust, no declaration is to be found that the sale should be void upon the payment of such demands; nor is there anywhere to be found in the writing any condition suggestive of a mortgage agreement, or of a deed of trust in the nature of a mortgage. Aliunde the written agreement, one of the partners of the firm of the St. Johns Lumber Company testifies that all claims and demands against the firm were intended to be included in the schedule attached, but that a few were omitted through oversight; and, when asked what was the purpose of executing the instrument to Brecht, he replied:

"It was for the protection of Mr. Brecht and myself and the creditors. We got considerably involved, as the lists show there, and was behind in our payments. We hadn't collected up our bills as we should, and first thing we knew we were cramped. And there was one of the creditors was about to commence an action against us, and I was afraid it would sacrifice the property. So Mr. Brecht and I talked it over, and he agreed, if I would secure him in some way, that he would stand between me and those creditors, and pay them off as we could work it out of the business. And the result was we got up this agreement. And this creditor, the one that was liable to give us the trouble, he paid him off the first one, some $2,300 or $2,400."

Prior to the time of entering into this agreement Brecht held two chattel mortgages against the property for the security of his demands, amounting to more than $7,500. This constitutes all the testimony that has any bearing upon the purpose for which the contract was executed. The only statement of the witness explanatory of the purpose is that Brecht agreed that, if he (the witness) would secure him in some way, he would stand between witness and those creditors, pay them off as they should work it out of the business. The result was the agreement, and to that we are referred to determine how Brecht was to be secured. The matter aliunde does not therefore materially help us. There was no understanding tantamount to a defeasance, and no agreement changing the relations of the parties except as expressed in the con-

tract itself. The last paragraph was designed apparently as a provision for further assurance as to title. In view of the conditions, therefore of the contract, construed in the light of the testimony, so far as it sheds any light, and in further consideration that the contract in the form in which we find it supersedes two chattel mortgages, which were concededly such, it seems to me that there can be but one conclusion, namely, that it was intended solely as a trust agreement or deed to enable Brecht to dispose of the property, and vested the title absolute in him. Whether it be called a trust agreement or trust deed, or a deed of assignment for the benefit of creditors, is of no practical importance, as in either event it carried the title, and does not constitute a mortgage or mere lien for the security of Brecht.

It is insisted by the plaintiff that, if there was left in the vendor an insurable interest in the property, then it could not be considered that there was a change of interest, title, or possession within the purview of the policies. But I cannot agree to this proposition. It is very clear that a bond for a deed, under the authorities, will transfer the equitable title, and yet there remains in the vendor, perhaps, an insurable interest, or an interest which the insurance companies might legally insure. Yet, as has been seen in the Vancouver Bank Case (just decided) 153 Fed. 440, where the equitable title has been transferred, that in itself works a change of interest such as will void the policy under the clause invoked here; but, under the present contract, I am of the opinion that no insurable interest remained in the St. Johns Lumber Company. Lazarus v. Commonwealth Ins. Co., 22 Mass. 76.

Another view is here suggested, in addition to the arguments made in the Vancouver National Bank Case, that it was permissible for the plaintiff to show that it was the intention of the parties to make the loss payable to Brecht "as his interest may appear," and not to him absolutely. I am of the opinion that this would result in a change in the written contract itself, and is therefore not competent under the rules of evidence. As the contract reads, the loss is made payable to Brecht without else; and, under the stipulation, as has been seen in the former case, Brecht was appointed, with the consent of the company, to receive the amount of the loss, and is in reality made a trustee for that purpose, and thus he is authorized to sue in his own name and recover the whole of the loss. No condition being imposed upon him to show that he has any interest whatever in the subject of insurance, it is only necessary for him to establish the condition that the loss was made payable to him. Whereas, if the loss was made payable to him "as his interest may appear," he would have to show such interest as he had, and could not recover otherwise. So I say that any testimony which would have a tendency to show an intention of the parties contrary to what is written would be inadmissible, as it would vary the terms of the contract.

The other two questions insisted upon here, namely, that plaintiff is without an insurable interest, and that the slips attached to the policies contain all the conditions affecting the insured, are settled in the Vancouver National Bank Case.

These considerations lead to a rendition of judgment for the defendant, and the complaint will therefore be dismissed.

Ex parte HULL.

(Circuit Court, E. D. Alabama, N. D. May 9, 1907.)

1. COMMERCE—INTERSTATE COMMERCE—INVALID RESTRICTION—LICENSE.

A state statute imposing a license on persons soliciting orders for pictures, picture frames, etc., who were not merchants or dealers having a permanent place of business within the state, etc., constituted an invalid restriction on interstate commerce in so far as it affected an agent of a foreign art company who delivered pictures, frames, etc., and collected the money due on orders previously taken by another agent of the corporation and sent to another state where the corporation resided to be filled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 111.

State laws interfering with interstate commerce, see note to 24 C. C. A. 21.]

2. SAME—DISCRIMINATION.

A state statute imposing a license tax on persons soliciting orders for the enlargement of photographs or for picture frames, etc., within the state, but declaring that the act shall not apply to merchants or dealers having a permanent place of business within the state, and who kept picture frames as a part of their stock in trade, was invalid as an unjust discrimination in restraint of interstate commerce in favor of merchants residing within the state and having a permanent place of business therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 111.]

Application for Writ of Habeas Corpus.

Knox, Acker & Merrill, for petitioner.
Borden Burr, for the state of Alabama.

HUNDLEY, District Judge. This is an application for writ of habeas corpus filed by J. D. Hull, seeking his discharge from a conviction before A. E. Carruth, county judge of the county of Cleburne, Ala., in which he was fined the sum of $75 for failure to take out license under a statute of the state of Alabama. The matter is submitted to the court upon an agreed state of facts, which are stated as follows:

"That the said J. D. Hull was arrested, tried, and convicted on the 8th day of May, 1907, for engaging in or carrying on the business of selling or disposing of pictures and picture frames without having taken out a license to engage in said business; copy of said affidavit, warrant of arrest, and judgment being hereto attached and made a part of this agreement. That the facts upon which the state relied for conviction before the said A. E. Carruth, county judge, are as follows: That the said J. D. Hull was employed by the Chicago Crayon Company, a foreign corporation, incorporated under the laws of Illinois, and as agent of said company he went to Heflin, in Cleburne county, Ala., for the purpose of delivering pictures and picture frames, for which contracts of sale had previously been made by other employés of the Chicago Crayon Company, who had preceded the said Hull in Cleburne county, Ala.; that while the said J. D. Hull was engaged in delivering pictures and picture frames, which had been shipped to Heflin, Ala., addressed to the Chicago Crayon Company, to the different purchasers in Cleburne county, Ala., he was arrested upon such charge. It is further agreed that the said Chicago Crayon Company has its offices, and only place of business, in Chicago, Ill., that all orders for portraits are taken, and are to be delivered, in accordance with its regular customer's contract."

This contract was set out in extenso in the agreed statement of facts, and in substance shows that the crayon pictures sold by the Chicago Crayon Company were to be delivered to the purchasers by an agent of

that company, designated as a "delivery man," who would collect the charges for same. It was further agreed in the statement of facts as follows:

"That all orders are taken, executed, shipped, and delivered in the name of the company, and remain the property of the company until delivered and collected for. It is also agreed that petitioner had not taken out a license to dispose of or sell pictures and picture frames."

The statutes under which this defendant was tried and convicted are as follows:

"That each person, firm or corporation, either in person or through agents, who solicits orders for the enlargement of photographs of any character or for picture frames, whether they made charge for such frames or not, or any person, firm or corporation, either in person or through agents, who sells or disposes of picture frames, shall pay a license tax of $25.00 in each county in which they may do business; but this act shall not apply to merchants or dealers having a permanent place of business in this state, and keeping picture frames as a part or all of their stock in trade."

"Any person who after the 15th day of January in any year engages in or carries on any business for which a license is required, without having taken out such license, must, on conviction, be fined three times the amount of the state license."

The question as to whether the defendant was guilty of the charge of soliciting orders for the enlargement of photographs or picture frames or disposing of picture frames is not a matter of which this court has jurisdiction, since the state court has determined that question, and I accept the conclusion of that court upon this matter as a question of construction belonging entirely within its exclusive jurisdiction. The sole question which is presented to me for determination is whether the statute as construed by the county judge of Cleburne county and applied to the case at issue is invalid as an attempt to interfere with and regulate commerce. The decisions of the Supreme Court of the United States upon this question are numerous, and I shall not attempt to enumerate them here. That a state has no right to levy a tax on interstate commerce in any form has been most positively decided (Lyng v. Michigan, 135 U. S. 165, 10 Sup. Ct. 725, 34 L. Ed. 150; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; Robbins v. Shelby County Taxing District, 120 U. S. 490, 7 Sup. Ct. 592, 30 L. Ed. 694), and many decisions referred to in those cases. In addition to these cases and many others of like import, the Supreme Court of the United States has in a very recent case decided in favor of the petitioner's contention upon the construction of an ordinance of the city of Greensboro, N. C., in almost the identical terms brought in question here. In that case (E. M. Caldwell v. State of North Carolina and City of Greensboro, 187 U. S. 622–633, 23 Sup. Ct. 229, 47 L. Ed. 336), the plaintiff in error was convicted of a violation of a city ordinance requiring persons engaged in selling or delivering picture frames, pictures, photographs, etc., to pay a license tax to the city of Greensboro. The Supreme Court of the United States in that well-considered opinion, Mr. Justice Shiras delivering the opinion of the court, says:

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at

Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate. Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution."

It will be noted by reference to the Alabama statute, which is under consideration here, that, in addition to requiring a license tax from persons or corporations engaged in business therein designated, there is also this provision:

"But this act shall not apply to merchants or dealers having a permanent place of business in this State, and keep picture frames as a part or all of their stock in trade."

It will be noted here that there is a direct discrimination in favor of merchants residing within the state and having a permanent place of business as against merchants residing without the state. The question as to whether such legislation could be enforced by states against the citizens of other states was exhaustively treated in the case of Robbins v. Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694. In that case Mr. Justice Bradley stated the following principles as already established by the Supreme Court of the United States:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that, where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health and comfort of persons and the protection of property, and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States, and imposes taxes upon all property within the state, mingled with and forming part of the great mass of property therein, but that, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce, nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein, and no discrimination can be made, by such regulations, adversely to the persons or property of other states, and no regulations can be made directly affecting interstate commerce."

That case too involved the construction of a statute almost identical with that portion of the statute here at issue in relation to exempting merchants or dealers having permanent places of business in this state. Upon these established principles as laid down by the Supreme Court of the United States, I am compelled to hold that said statute as construed by the county judge of Cleburne county, Alabama, and applied to this petitioner, is invalid. The case of Asher v. Texas, 9 Sup. Ct. 1, 128 U. S. 129, 32 L. Ed. 368, was a case where the state statute required from "every commercial traveller, drummer, salesman or solicitor of trade by sample or otherwise an annual occupation tax"; and such legislation was declared inoperative so far as it affected one soliciting orders for business in any other state. To the same effect, also, is the decision in the case of Stoutenburg v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637.

It cannot be seriously doubted, in view of the numerous decisions of the Supreme Court of the United States upon the question, that efforts to control commerce of this kind in the interest of any states where purchasers reside have been frequently made in the form of statutes and city ordinances, but that such efforts have heretofore been rendered fruitless by the supervising action of the federal courts.

Upon principle and authority, therefore, I am of the opinion that upon the agreed statement of facts in this cause that the judgment of conviction of the county judge of Cleburne county on the 8th day of May, 1907, as applied to this petitioner, was void, and the prayer of the petitioner is granted, and he is discharged from custody. So ordered.

PARR et al. v. UNITED STATES et al.

(Circuit Court, D. Oregon. May 6, 1907.)

No. 2,844.

1. JUDGMENT—ESTOPPEL—JURISDICTION.

Where a state court had no jurisdiction to determine heirship for the purpose of fixing the right of descent to an allotment on the Umatilla reservation, while the land was held in trust by the United States for the heirs of the allottee, the state court's judgment in such proceeding did not operate as an estoppel in a subsequent proceeding by the allottee's surviving husband for curtesy.

[Ed. Note.—Conclusiveness as between federal and state courts, see note to Kansas City, Ft. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468.]

2. INDIANS—INDIAN LANDS—ALLOTMENT—CURTESY.

Indian Treaty June 9, 1855, 12 Stat. 945, constituted a cession of the Umatilla Indian reservation to the United States, and authorized the President to provide a permanent home for such Indians in his discretion. Act March 3, 1885, c. 319, 23 Stat. 340, provided for the allotment of lands in such reservation to Indians in severalty according to the size of the families, etc. The act provided for the issuance of patents for the allotments, but that the legal title should be held in trust by the United States for the allottee and his heirs for 25 years in fee, provided that the law of alienation and descent in force in the state of Oregon should apply after the issuance of patents. B. & C. Comp. Or. § 5544, provides that, when a man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for life as tenant by the curtesy, etc. *Held* that, where land was allotted

to an Indian woman within such reservation, her surviving husband was entitled to curtesy therein, though the legal title still remained in the United States under such trust.

On Motion to Strike Further and Separate Answers.

See 132 Fed. 1004.

On about April 12, 1893, there was allotted to Maggie Damain, a mixed-blood Indian woman, who was at the time the wife of John Damain, the northeast quarter of section 26, township 3 north, range 34 east of the Willamette Meridian, situated within the Umatilla Indian reservation. Subsequently the Damains adopted Ellen Rainville, an Indian child, through proceedings duly had and instituted in the county court for Umatilla county, state of Oregon, who later married Fred Parr. About June 27, 1894, Maggie Damain died intestate, leaving as her heirs at law her son, Isaac Gober; a daughter, Rosa Gober (sometimes called Rosa Farrow, now Rosa Parr); and her adopted daughter, Ellen Parr. Isaac Gober died, leaving as his heirs at law Rosa Gober and Ellen Parr. Since the death of Maggie Damain, John Damain, her husband, has been collecting the rents, issues, and profits of the land allotted to his wife, to the exclusion of her daughters. It is complained by Ellen Parr, who with her husband brings this suit, that she and Rosa Parr are the only heirs at law of Maggie Damain, and that they are entitled to the rents, issues, and profits of the allotment, to the exclusion of John Damain, the widower.

Damain has answered the bill of complaint, and claims that, under the act providing for the allotment of Indian lands upon the Umatilla reservation, he is entitled to curtesy or a life estate in the lands of his wife, and that, by reason of such right, he has been collecting the rents and profits of the allotment in question; but that he has been providing, also, for Ellen and Rosa Parr out of such rents. By a first further and separate answer he sets out the facts necessary to show that he was the husband of Maggie Damain, and that, by reason of such fact, he is entitled to the rents. By a second further and separate answer, he sets up a decree, given and rendered in the circuit court of the state of Oregon for the county of Umatilla, in a case wherein Rosa Farrow and John Damain were plaintiffs, and Isaac Gober and Ellen Damain were defendants, wherein it was decreed that Damain was entitled to a life estate by curtesy in the premises, and therefore entitled to collect the rents and profits, which decree is pleaded, as an estoppel to the present suit. And he prays, therefore, that he be declared to be entitled to hold said land for and during his natural life, and to the rents, issues, and profits arising therefrom, and for other relief.

The plaintiffs moved to strike out these two further and separate answers, not separately, but as a whole, and the motion is now submitted for determination.

R. J. Slater, J. H. Raley, and Charles H. Carter, for plaintiffs.

W. C. Bristol, U. S. Atty.

Hailey & Lowell, for defendant Rosa Parr.

H. J. Bean and James A. Fee, for defendants John Damain and George E. Peringer.

WOLVERTON, District Judge (after stating the facts). The first question I will consider is whether the decree given and rendered in the state court operates as an estoppel to the present suit. Since this case was argued, the cause of William McKay (substituted for Mary Kalyton) et al., Plaintiffs in Error v. Agnes Kalyton, by Louise Kalyton, her Guardian ad litem, 27 Sup. Ct. 346, 51 L. Ed. —, has been decided by the Supreme Court of the United States, and it was there considered that the state court is without jurisdiction to determine the heirship, under Act March 3, 1885, c. 319, 23 Stat. 340, under

which the allotments were made to the Indians upon the Umatilla reservation. The court held that, prior to the act of Congress of 1894, all controversies necessarily involving the determination of the title, and, incidentally, of the right of possession, of Indian allotments, while they were held in trust by the United States, were not primarily cognizable by any court, either state or federal, and that the result of the act of Congress which delegated to the courts of the United States the power to determine such questions cannot be construed as having conferred upon the state courts the authority to pass upon federal questions over which, prior to the act of 1894, no court had any authority. Hence it was determined, as previously indicated, that the state court had no authority in that case to adjudicate touching the heirship as it respects Indian allottees. That case is preclusive, therefore, of any further controversy on the question in this case, and it is plain that the plea cannot operate as an estoppel to the present suit.

The next and only other question for determination is whether the husband of a deceased Indian woman, she being an allottee of land upon the Umatilla Indian reservation, has a right of curtesy in and to his wife's allotment. This depends upon the allotment act of March 3, 1885, providing for allotments to Indians upon such reservation, and the laws of the state of Oregon governing curtesy and descent of real property. By the act of 1885, the President of the United States is authorized to cause lands to be allotted to the confederated bands of Cayuse, Walla Walla, and Umatilla Indians residing upon the Umatilla reservation, in the state of Oregon, as follows, of agricultural lands:

"To each head of a family, one hundred and sixty acres; to each single person over the age of eighteen years, eighty acres; to each orphan child being under eighteen years of age, eighty acres; and to each child under eighteen years of age not otherwise provided for, forty acres.

"Allotments to heads of families and to children under eighteen years of age belonging to families shall be made upon the selections made by the head of the family."

The act further provides for the appointment of a commission to set aside certain portions of the reservation for the purpose of allotments to the Indians residing upon such reservation, and then as follows:

"As soon as such surveys are approved the selections and allotments shall be made. The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as hereinotherwise provided."

By section 5 of the act it is further provided:

"That before this act shall be executed in any part, the consent of said Indians shall be obtained to the disposition of their lands as provided herein, which consent shall be expressed in writing and signed by a majority of the male adults upon said reservation, and by a majority of their chiefs in

council assembled for that purpose, and shall be filed with the Secretary of the Interior."

By the laws of the state of Oregon (section 5544, B. & C. Comp.) it is provided that:

"When any man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by the curtesy, although such husband and wife may not have had issue born alive."

By section 5577 that:

"When any person shall die seised of any real property, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same such real property shall descend subject to his debts, as follows; (1) In equal shares to his or her children, and to the issue of any deceased child by right of representation," etc.

And by section 5589 that:

"Nothing contained in this and the preceding chapter shall affect or impair the estate of a husband as tenant by the curtesy nor that of a widow as tenant in dower."

After the Indians had signified their consent that the lands of the reservation should be allotted as contemplated by the act, commissioners were appointed by the President, and allotments were made, resulting in the setting aside of the tract herein involved to the Indian woman Maggie Damain.

In order to a clear understanding of the major premise from which must be deduced a solution of the question in hand, it will be necessary to go back to the original treaty between the government and the Indians now established upon this reservation, and to trace a little the manner in which the government has dealt with them in respect of the lands of which they have claimed possession and title. The treaty to which I refer was entered into on June 9, 1855 (12 Stat. 945), and afterwards ratified by the Senate and proclaimed by the President. By its first article the Indians ceded to the United States all their right, title, and claim to all and every part of the country included within certain boundaries there specified (which comprises a large amount of territory), with a provision, however:

"That so much of the country described above as is contained in the following boundaries shall be set apart as a residence for said Indians, which tract for the purposes contemplated shall be held and regarded as an Indian reservation; * * * all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use."

By article 6 it is stipulated as follows:

"The President may, from time to time at his discretion, cause the whole or such portion as he may think proper, of the tract that may now or hereafter be set apart as a permanent home for those Indians, to be surveyed into lots and assigned to such Indians of the confederated bands as may wish to enjoy the privilege, and locate thereon permanently, to a single person over twenty-one years of age, forty acres, to a family of two persons, sixty acres; to a family of three and not exceeding five, eighty acres; to a family of six persons and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres to each additional three members; and the President may provide for such rules and regulations as will

secure to the family in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon; and he may at any time, at his discretion, after such person or family has made location on the land assigned as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which condition shall continue in force until a state Constitution, embracing such land within its limits, shall have been formed and the Legislature of the state shall remove the restriction: Provided, however, that no state Legislature shall remove the restriction herein provided for without the consent of Congress: And provided, also, that if any person or family, shall at any time, neglect or refuse to occupy or till a portion of the land assigned and on which they have located, or shall roam from place to place, indicating a desire to abandon his home, the President may if the patent shall have been issued, cancel the assignment, and may also withold from such person or family their portion of the annuities or other money due them, until they shall have returned to such permanent home, and resumed the pursuits of industry, and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of Indians residing on said reservation."

The previous policy of the government was to treat the Indians as in a state of tutelage; the government assuming and continuing its guardianship in a manner over both their persons and property, and in particular over such rights of property as they may have had or possessed in the lands of their primitive habitations. Generally, the government has so far recognized the Indians' right of occupancy in such lands as that it will not dispossess them without their consent, although it has been conclusively settled that the fee is in the government. This title to the fee came from the right of discovery and the succession to that right, which confers the authority to extinguish the Indian title of occupancy. Says Chief Justice Marshall, in Johnson v. McIntosh, 8 Wheat. 543, 603, 5 L. Ed. 681:

"It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."

So, in United States v. Cook, 19 Wall. 591, 593, 22 L. Ed. 210, the court, speaking through Mr. Chief Justice Waite, says:

"The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy."

Yet later, in Beecher v. Wetherby, 95 U. S. 517, 525, 24 L. Ed. 440, the court says:

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

And, again, in Spalding v. Chandler, 160 U. S. 394, 402, 16 Sup. Ct. 360, 364, 40 L. Ed. 469:

"It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was

from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated."

Now, while it is true that the government can dispose of the fee, in absolute derogation of the possessory rights of the Indians, yet unless the government assumes, itself, to extinguish the Indian title, its grantee takes subject and subordinate to their possessory right. Upon the other hand, the Indian title cannot be conveyed by the Indians to any one but the United States without the consent of the latter. Lone Wolf v. Hitchcock, 187 U. S. 553, 23 Sup. Ct. 216, 47 L. Ed. 299; United States v. Alaska Packers' Association (C. C.) 79 Fed. 152. So that, in consideration of the long-settled policy of the general government, the Indians possess such a right of occupancy in and to the lands set apart to them by treaty out of their larger dominions as no one except the government itself can disturb; and the government has always, unless in exceptional cases, respected that right, and treated it as one of property.

The government having the fee of the lands upon the Umatilla reservation, and the Indians the right of exclusive occupancy and possession, the Congress has provided for allotments of such lands in severalty, but not until the consent of the Indians thereto shall have been given; nor by the act has Congress departed essentially from the stipulations of the treaty in that behalf. Looking back to the treaty, therefore, the intendment with both the government and the Indians was that the latter at some time, when developments had demonstrated their capacity to manage successfully their property affairs, should come into the ultimate title to those lands, or a portion thereof, in severalty, and be able to hold and enjoy them as citizens of the United States and of the states hold and enjoy real property; there being a joint ownership by occupancy on the part of the Indians. The fee being in the government, the allotments were had with a view to clothing the Indians with the fee in particular tracts in severalty. There was no donation or grant in the sense of disposing of the public domain to settlers thereon, but a fulfillment of treaty stipulations; the consideration for the allotments having long since been fully performed on the part of the Indians, and they having yet only to demonstrate their capacity to manage the property to entitle them to the fee absolute. To "allot" is:

"To divide or distribute, as by lot. To distribute or parcel out in parts or portions; or to distribute to each individual concerned; hence, to grant, as a portion; to give, assign, or appoint in general." Webster's Unabridged Dictionary.

So the purpose and process here was to distribute to each person concerned, in full accord with treaty regulations, that which was understood and conceded to rightfully belong to the Indians themselves, although the fee was held for them by the United States in the capacity of guardian of their property and estate; the allotment being intend-

ed as in the nature of a partition among joint owners of realty, whereby there should be set apart to each owner a single portion in severalty as and for his joint interest or property in the whole. The United States in making the allotments was dealing with the fee, and yet conceding that the Indians were entitled to it, and providing that in due time they should have it. "Allot" is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right. The Honorable William H. Taft, Solicitor General, advising as to the allotment of lands to individual Indians, asked: "What is the Indian right of occupancy?" To which he answered:

"It is the right to enjoy the land forever, with the right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit."

And then, after stating the government's relation to the Indians as guardian, he makes this further observation:

"Allotments in severalty of Indian land are therefore naturally evolved from the Indian right of occupancy." 20 Opinions Attorney General, 42, 48.

Now, understanding the nature and the purpose of the allotment, we may determine as to the inheritancy. "The law governing the descent of lands and the distribution of the personal property of an intestate, wherein the tribal organization is still recognized by the government, is the law of the tribe." 22 Cyc. 119; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. This pertains to tribal Indians. To supplant this condition, while the government was pursuing its course of inducing the Indians to abandon their primitive habits and customs, it was deemed appropriate to enact that the laws of descent obtaining in the state of Oregon should apply to the allotments of land in severalty, and hence the act of 1885. The Supreme Court has spoken, in United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, in part interpretation of section 5 of the act of 1887, containing provisions of similar import with those of the act of 1885 now under consideration. Referring to the term "patents," as first used in the section, the court says it was merely designed to denote "a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he [the Indian] would be entitled to a regular patent conveying the fee." This patent, so called, it is provided by the act shall be of legal effect and declare that:

"The United States does and will hold the land thus allotted * * * for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state of Oregon, and that at the expiration of said period the United States will convey the same by patent to the said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Another patent is therefore to follow which shall invest the Indian with title absolute, divested of all trust relationship with the government, and in final discharge of the government's guardianship as it pertains to the allotment. What, then, is made descendable or inheritable? Is it the fee, or is it merely the right of occupancy, or has the government carved out of this Indian title a trust estate for them,

whereby the Indian is accorded an equity only for the time being, and is that the estate which the law declares to be inheritable?

Counsel for defendants insist that it is this latter equitable estate that is within the intendment of Congress; but with this contention I am unable to agree. As I have shown, Congress was dealing with the fee of those Indian lands with a purpose of investing that title ultimately in the Indians in severalty for their sole and exclusive ownership and management, as a citizen of the United States might own and manage property for his exclusive benefit. The scheme was by allotment among the Indians of that to which they were entitled by treaty and by the long-continued policy of the general government. Hence the government adopted a procedure for setting aside or distributing to each Indian concerned that to which he was entitled. To accomplish that purpose in manner deemed by Congress to be to the best interests of the Indians, it was considered wise to withhold the ultimate title from them for awhile, but the scheme was for the allotment ultimately of that title; and so it was the fee with which Congress was dealing, and it was the fee concerning which the allotments were to be and were made. Such being the case, it is the fee that Congress has made inheritable according to the laws of the state of Oregon. The estate is therefore one of inheritance, and the right of curtesy attaches. The clause, providing "that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided," is best construed as a general provision to apply both to the preliminary and final patents, and the exception mentioned has relation to the withholding of the title in fee during the probationary period. Of course, no alienation can take place in the meantime if the government is to convey the fee free of all charge or incumbrance whatsoever.

It will be noted that this act of 1885 does not provide for citizenship of the allottees. That was left for the act of 1887; so that the law of inheritance applying to citizens generally would not govern the Indian respecting the inheritance of realty, unless specially provided, and such was, perhaps, the intendment of Congress by inserting the clause. This gives meaning and significance to all the language employed, and renders none of it superfluous. The general statute of 1887 provides specifically that any conveyance of the allotted land prior to the final patent shall be null and void, and that the law of descent and partition (not alienation) in force in the states or territories in which the lands lie shall apply after patents therefor, etc., which was there intended probably to limit the operation of descent and partition to the time intervening prior to the issuance of the final patent conveying the fee, for by this act the Indian was made a citizen by reason of the fact of allotment (In matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848), and no provision was necessary to make the law of alienation and descent apply to him after he had been invested with the fee. Nor am I, after a careful review of the entire subject, now of the opinion, as indicated by the case of Kalyton v. Kalyton, 45 Or. 116, 129, 74 Pac. 491, 78 Pac. 332, that the heirs of Indian allottees "take as donees of the United States and not by inheritance." My reasons are apparent from previous discussions here-

in. The leading case for the doctrine supposed to apply in the case of Kalyton v. Kalyton is Hall v. Russell, 101 U. S. 503, 25 L. Ed. 829, and is predicated of the donation act; but there the court says it was not the land that it was contemplated should descend to the heirs, but the "settler's rights only." And, again, the court says specifically: "We attach no importance to the word 'descend' as used in this section." By the death of the entryman he could not comply with the conditions as to residence and cultivation so as to entitle him to his patent; so the law provided that upon the death of such entryman his rights should descend to his heirs at law, including his widow, and that proof of compliance with the statutory conditions on their part would entitle them to patent; and so the court held that they took as donees of the government, as they very well might. This case was followed, and the doctrine thereof applied, in Quinn v. Ladd, 37 Or. 261, 59 Pac. 457. So it was said of the homestead act, in Bernier v. Bernier, 147 U. S. 242, 246, 13 Sup. Ct. 244, 245, 37 L. Ed. 152, that the object of the sections of the statute involved was "to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." And such is the case under the timber culture act. See, Kelsay v. Eaton, 45 Or. 70, 76 Pac. 770, 106 Am. St. Rep. 662, and Cooper v. Wilder, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163.

But not so with the present act. The purpose there was to give scope and effect to the laws of descent in Oregon, which were made applicable to the allotment. I have not overlooked the case of Patawa v. United States (C. C.) 132 Fed. 893. While the distinguished jurist in that case used language which would imply that dower would not attach as it relates to the allotment, and this because it was contended for the demurrer that the right of the widow to dower involved the construction of the laws of the state, and was the exercise of a jurisdiction probate in its character, yet he says distinctly:

"The right of dower in this case depends upon the allotting act. The right exists if it can be implied from the act that the allottee's interest is with respect to dower subject to the rule that obtains in the case of estates of inheritance in general. And so the right to dower involves the construction of a federal statute. There is no question involving a construction of the laws of Oregon in the case."

And thus was the question left for determination by a construction of the allotting statute, without attempting to render the interpretation. The case is therefore not controlling.

The interpretation I have given to the act, construed in connection with the treaty, seems more in consonance with the intendment of Congress and the expectations and anticipations of the Indians. It secures, as was stipulated in the treaty of 1855, to the family, in case of the death of the head thereof, the possession and enjoyment of the permanent home and the improvements thereon. Otherwise, it might happen that the wife of a deceased allottee, or the husband of such an allottee, would be left without any estate whatsoever in any of the Indian lands upon the reservation. The allotments are made to the heads of families, being Indians or of mixed Indian blood and of the

confederated tribes settled upon the Umatilla reservation. Ordinarily, the husband is the head of the family, and the allotment is to him; none is to the wife, though the children are entitled to their allotments. So that at the death of the husband the wife is left without the benefit of any allotment, unless she is to have her dower, which will secure to her the measurable possession and enjoyment of the permanent home. Otherwise, she is left homeless and remediless, dependent wholly upon the charity of relatives and friends, with the government discharged of its guardianship. True, it may and does happen that Indian women marry white men, or Indians not of the confederated tribes, and the allotment is then to the wife as the head of the family. Hy-yu-tse-mil-kin v. Smith, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039. In such cases, under the rule here adopted, the husband becomes entitled to the curtesy. But these are exceptions, for the general rule is that intermarriage is with members of the confederated tribes, and it was the latter condition that was in view in casting the treaty and in the adoption of the legislation relative to the allotment of these Indian lands upon the Umatilla reservation to the members of the confederated tribes in severalty.

Since, therefore, the motion to strike out includes relevant and material matter with other that is impertinent, it must be overruled, and such will be the order of the court.

WHEELER v. PETITE et al.

(Circuit Court, D. Oregon. May 6, 1907.)

No. 3,057.

INDIANS—ALLOTMENTS—DOWER.

The widow of an Indian to whom an allotment of lands in severalty had been made from the Grande Ronde Indian reservation, as authorized by the treaty of January 22, 1855, and Act Cong. 1887, c. 119, 24 Stat. 388, is entitled to dower in such lands.

On Demurrer to Complaint.

The complainant, who is an Indian woman, brings this suit to determine her right to dower in certain lands situate upon the Grand Ronde Indian reservation, in the state and district of Oregon, formerly allotted to Henry Winslow, a full-blood Indian. From the allegations of the bill of complaint, it appears that the complainant intermarried with Henry Winslow in the year 1881. Subsequently, under and by virtue of the provisions of the act of Congress entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," approved February 8, 1887 (24 Stat. 388, c. 119), there were allotted to Winslow the lands alluded to. Two daughters were born to Henry Winslow and the complainant, the issue of their said marriage, who are now living, and known as Tillie Quenel, née Winslow, and Rosa Winslow. Some time during the year 1890, Winslow, without being separated or divorced from the complainant, married the defendant Annie Petite, and the issue of this marriage is one son, namely, Augustus Winslow. Winslow died in the year 1896, leaving the defendant Annie Petite and their son Augustus Winslow in possession of the allotment. Annie Petite acquired her present name, subsequently to the decease of Winslow, by intermarriage with one Petite, with whom she is now living. The complainant claims a right of dower in the said premises, as the lawful widow of Henry Winslow, and the right to pos-

sess the same jointly with the children of Winslow, namely, Tillie Quenel, née Winslow, Rosa Winslow, and Augustus Winslow, and prays that her rights in the premises be so determined and adjudicated. The defendant Annie Petite challenges the sufficiency of the complaint by demurrer, and the question presented is whether the complainant is entitled to the right of dower in and to the allotted lands.

James Cole, Asst. U. S. Atty., for plaintiff.
Martin L. Pipes and J. S. McCain, for defendant Annie Petite.

WOLVERTON, District Judge (after stating the facts). On January 22, 1855, the Calapooia, Yamhill, Clackamas, and other tribes and bands of the Indians entered into a treaty with the United States, whereby they ceded all their title to lands comprising the entire Willamette Valley to the government, with a provision that they "be permitted to remain within the limits of the country ceded, and on such temporary reserves as may be made for them by the superintendent of Indian affairs, until a suitable district of country shall be designated for their permanent home, and proper improvements made thereon." The Indians stipulated to vacate the country ceded when directed by the superintendent of Indian affairs, "and remove to the district which shall be designated for their permanent occupancy." By the fourth article it was agreed that the President might, from time to time at his discretion, cause the whole or such portion as he might think proper, of the tract that should be set apart as a permanent home of the Indians, to be surveyed into lots, and assign them to such Indians of the confederated bands as might wish to enjoy the privilege and locate thereon permanently: To a single person, over 21 years of age, 20 acres; to a family of two persons, 40 acres; to a family of three persons, and not exceeding five, 50 acres; to a family of six persons, and not exceeding ten, 80 acres; and to each family over ten in number, 20 acres for each additional three members. The President was also authorized to make rules and regulations such as would secure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. Other provisions are inserted, with a view to induce the Indians to remain permanently upon the land thus allotted to them, and it was designed that they should finally be entitled to the lands absolutely, without right or title in the government. The act of 1887 (24 Stat. 388, c. 119) provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: Provided, that in case there is not sufficient land in any of said

reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act."

Section 2 provides:

"That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children."

And section 5:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided."

It does not appear in what manner the Grande Ronde reservation was set apart to these confederated bands of Indians, but I presume that it was done through an executive order. At least, that the reservation has been regularly established is unquestioned. The general act for the allotments of lands upon Indian reservations, we may assume, was intended to carry out in the main the purposes of the treaty stipulations and agreements with the Indians—this treaty with the confederated bands of Indians of the Willamette Valley being one among many others—and one of those main purposes was to furnish a permanent home, ultimately, for the families of such Indians. The act of 1887 is in consonance with this idea. Indeed, the allotments were by that act to be made to the heads of families, and, where so made, of course, there was no allotment to the spouse. In order, therefore, to carry out the idea of affording a permanent home for the Indian family, there was a purpose, manifestly, to secure the widow in the home of a deceased head of a family by some permanent right. Dower is suited to this purpose. Many of the states and territories, perhaps most of them, at the time of the adoption of the act of 1887, had, and have now, statutory regulations respecting dower, so that it may be reasonably inferred that, by the provision of the act that the allotted lands shall descend according to the laws of the state or territory in which they shall be situated, it was the purpose of Congress that the widow should have her dower in such allotments, and thereby be measurably secured in the permanent family home. The relation between this statute and the Indian treaties preceding it is not so manifest as that which plainly exists between the treaty with the confederated tribes of Indians settled upon the Umatilla reservation

and the act of 1885, providing specially for allotments of lands pertaining to that reservation; but the act of 1887 is a reflection, with some modifications to suit general conditions, and with a view to constituting citizens out of Indian allottees, of the act of 1885, and was intended, no doubt, to conserve the same general purpose. Hence it is more readily inferable that it was the design of Congress by the act of 1887 as well to secure the widow in a measure in the enjoyment of a permanent home by according to her dower or other such right in the lands of the husband as the local laws and statutes might have provided.

As to the nature of the allotment and of the estate allotted, I have fully determined that in the case of Parr v. United States et al. (just decided) 153 Fed. 462, and it is unnecessary that I repeat the considerations here. What I have premised in this case, read in connection with the considerations in that, affords a full solution of the present controversy.

I am of the opinion, therefore, that the complainant is entitled to a dower right in the allotment of her deceased husband, Henry Winslow, and the demurrer to the bill of complaint will be overruled.

BEAM v. UNITED STATES et al.

(Circuit Court, D. Oregon. May 6, 1907.)

No. 3,076.

1. INDIANS—HEIRS.
   Where a child was born out of wedlock to an Indian woman, to whom Indian reservation lands were allotted, and such child survived her, he was her heir at law.

2. SAME—CURTESY—INDIAN LANDS—HUSBAND OF ALLOTTEE.
   Where an Indian woman of mixed blood, to whom Indian reservation lands had been allotted, died, leaving a son born out of wedlock, as her heir at law, and a husband, surviving her, the husband was entitled to an estate by the curtesy in the allotment, and to the rents, issues, and profits thereof.

A. D. Stillman, for plaintiff.
James Cole, Asst. U. S. Atty.
Olmsted & Strayer, for defendant James Holcomb.

WOLVERTON, District Judge. The plaintiff brings this suit to have determined his right to the possession, and to the rents, issues, and profits, of a certain tract of land allotted to Clara Gale upon the Umatilla Indian reservation, under and by virtue of the act of March 3, 1885 (23 Stat. 340), providing for the allotment of lands to the Indians residing upon such reservation. The cause has been put at issue under the pleadings, and, the testimony having been taken, is now submitted upon the merits for final determination. The contested fact in the case is whether Lester Beam, the plaintiff, is the child of Clara Gale, who later, on September 21, 1890, intermarried with James Holcomb, the defendant.

Without attempting to discuss the testimony, it is sufficient to say that, after a careful reading of the same, there is but one conclusion to arrive at, which is that Lester Beam is the son of Clara Gale, born about March 14, 1889, out of wedlock. He was soon adopted by Eliza Beam, who appears as his nearest friend in this controversy, and has been reared by her. Clara Gale was an Indian woman of mixed blood, and the allotment was made to her while single. After her marriage to Holcomb, there was born to them a female child. The mother died January 26, 1894, surviving the child but a few days. Since the death of the wife, Holcomb has been receiving the rents and profits from her allotment.

The question of fact as to whether Beam is the child of Clara Gale having been determined, it follows that he is her heir at law. The further question is then submitted whether the defendant Holcomb is entitled to an estate by the curtesy in the allotment, or to the rents, issues, and profits, by reason of such an estate. The controversy has been determined in the case of Parr v. United States (just decided) 153 Fed. 462. That case is therefore decisive of this one.

I might say, further, that if, in this case, no child had been born to Clara Gale, either prior or subsequent to her marriage with Holcomb, Holcomb would have been the sole heir, under the laws of the state of Oregon (section 5577, B. & C. Comp.), would have inherited the allotment of his wife, and would have been entitled to the final patent at the end of the period prescribed by the first patent, during which the government holds the land in trust. So that here would have been a person of white blood only inheriting allotted lands upon this Indian reservation, and it does not, therefore, seem strange that he should be entitled to a right by the curtesy; his wife having died leaving an heir, as well as himself, surviving her.

The decree will therefore be in accordance with the opinion here rendered.

THE RIVER BELLE.

(District Court, S. D. New York. January 23, 1893.)

SALVAGE—PROTECTING VESSEL FROM FIRE.

A steamer, requested by the man in charge of a vessel lying inside the breakwater in Erie Basin at night to lie by and protect such vessel from fire, while buildings on shore close by were burning, awarded $75 as salvage for the service rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 55–77.

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Sullivan & Cromwell and Mr. Hill, for libelant.

Alexander & Ash, for claimants.

BROWN, District Judge. About midnight on May, 1892, some one-story buildings on the easterly side of Columbia street, not far from the breakwater at Erie Basin, caught fire. The steamboat McLaughlin soon after went to the neighborhood of the fire, and her witnesses claim that

her services were requested by the man in charge of the River Belle, lying inside the breakwater, to lie by her and keep her wet down, to preserve her from the fire; that the McLaughlin did so, playing upon the boat, and putting out small patches of fire that had caught from sparks, for which service a salvage compensation is claimed.

There is the utmost contradiction upon many points in the testimony. I am satisfied that there is much exaggeration and inaccuracy on both sides. I do not believe that the story of the libelant is a pure fabrication. I credit the statement that the McLaughlin, when seen approaching, was hailed by the man in charge of the River Belle, probably from her main deck, and not from the breakwater, to lie by; and that in consequence of that request the McLaughlin turned from the object she at that moment had in view, and came near to the River Belle on the opposite side of the breakwater. I do not credit the assertion that the McLaughlin was requested to play her hose upon the River Belle, or that playing upon her was then necessary. I find that a service was rendered upon request, but of a very low grade of merit, and that $75 will be a fair compensation therefor, which I allow, without costs; of this sum, one half to go to the owners of the McLaughlin, and the other half to the officers and crew on board, in proportion to their wages.

A decree may be entered accordingly.

THE PRISCILLA. THE PURITAN. THE CITY OF LOWELL.

(District Court, S. D. New York. April 12, 1907.)

SALVAGE—FIRE—COMPENSATION FOR SERVICE.

Four steamships of the same owner, and largely of wooden construction, were lying for the winter at piers near each other, when one took fire in the night and burned. Another, the Lowell, worth $300,000, which was lying in the same slip, with only 50 feet between them, was in imminent peril, and would probably have been destroyed if she had remained. A small tug offered its services, but they were refused, although probably adequate, and the Lowell took a line from libelant's larger tug, and was towed to a place of safety; the service requiring half an hour. The tug then went to the assistance of two smaller tugs, and together they took out the third vessel, the Puritan, worth $800,000, which was lying on the opposite side of the pier from the burning ship and was in a position of danger, as the pier was on fire, and would probably have been injured, but not destroyed. This service took about three-quarters of an hour, and at the request of those in charge of the fourth vessel the tug then stood by during the remainder of the night, but her service was not required. The tug was valued at $60,000. Neither she nor her crew were at any time in danger. *Held*, that she was entitled to a salvage award of $9,000 in case of the Lowell, and $5,000 in case of the Puritan, and also to $250 for standing by the fourth vessel at the request of her owners; three-fourths of such award to go to the owner, and one-fourth to the crew.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 55–77.

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suits for salvage.

On the night of March 26, 27, 1906, several of the fleet of the "Fall River Line" were lying in winter quarters in the harbor of Newport, R. I. The three steamboats here proceeded against, as also the steamboat Plymouth (of

the same line, and in winter quarters at the same place), were without motive power of their own, but had on board crews of from 14 to 20 men, and were maintaining steam in the donkey or auxiliary boilers sufficient to keep the fire-fighting apparatus in commission and to furnish enough power to warp the vessels about the wharves at which they lay. The fire equipment of these boats was extraordinarily ample, but their construction such as to render them peculiarly liable to fire damage. The vessels named are freight and passenger steamers, with very large upper works constructed mainly of wood.

On the night in question, a southerly wind of 15-20 miles per hour was blowing, and the Fall River vessels named above were lying at three parallel wharves projecting into Newport Harbor, whereof the Long Wharf was the most southerly, the General Storage Pier the central one, and Briggs' Wharf the most northerly. On the north side of the Long Wharf lay the City of Lowell, on the south side of the General Storage Pier was the Plymouth, on the north side of the General Storage Pier was the Puritan, and on the north side of Briggs' Wharf lay the Priscilla. The Plymouth and Lowell so filled up the slip between the Long Wharf and the Storage Pier that there was but 50 feet between them amidships; while the slip on the north side of the Storage Pier was so narrow, and the Puritan so large, that there was but about 50 feet between her northerly side amidships and the south side of Briggs' Wharf. The Central Storage Pier is 275 feet wide, and Briggs' Wharf something less than 100. A summary statement of the relative positions of the vessels is that the City of Lowell was about 50 feet to windward of the Plymouth, and the Puritan and Priscilla about 275 feet and 525 feet, respectively, to leeward.

On the night in question, libelant's sea-going tug C. W. Morse, with her tow of coal barges, was lying in Newport Harbor, weather bound. The Morse is a powerful vessel of nearly 1,100 i. h. p. and, having just come in from sea, had at the time of the occurrences to be stated full steam up and her entire crew on board. She was ready for instant service. There seem to have been in the harbor that night but two other tugs; the Solicitor, a comparatively small vessel (i. h. p. 175), and the United States tug Chickasaw, lying at the Torpedo Station at Goat Island, and of somewhat less power than the Solicitor.

At the time of the breaking out of the fire which gives rise to this action, the Solicitor was entirely ready for service, and the Chickasaw was almost immediately manned by a volunteer crew from the Torpedo Station and repaired to the scene of disaster.

Shortly after 1 a. m. of March 27th fire was discovered on board the Plymouth, and at 1:25 a. m. it was known to be sufficiently serious to have a general alarm sounded, which summoned to the water front the entire fire department of the city of Newport, consisting of five steamers, eight hose carriages, and one chemical engine. The crews on the vessels in winter quarters promptly prepared their fire-fighting apparatus, and seem to have kept their own vessels well covered with water, while the efforts of the land fire department were principally directed to staying the destruction of property on the wharves. Almost immediately after the sounding of the fire alarm, the Plymouth was found to be beyond saving. The fire spread to leeward from her to the General Storage Pier, and, despite every effort, worked entirely across that pier, and destroyed the buildings upon it for a distance varying from 400 to 150 feet shoreward from the water end. Sparks and cinders were carried by the wind across the 150-foot slip to Briggs' Wharf, but the firemen succeeded in preventing anything from being consumed upon that wharf, except certain old fish nets. The Plymouth was abandoned to her fate at or shortly after 1:30 a. m. of March 27th, and thereafter the fire burned fiercely upon the Storage Pier for approximately two hours before it could be said to be wholly under control.

Shortly after the discovery of the fire, and before any tug came to her assistance, the Puritan cast off her mooring lines, and was carried by the southerly wind against the southerly side of Briggs' Wharf, thus removing her from the actual place of fire for an additional distance of about 50 feet. She then endeavored to warp herself out into the stream.

While the Puritan was doing this, the City of Lowell was also endeavoring by her own lines to get outside the pier head. Although to windward, she was

so near the Plymouth that she repeatedly caught on fire in her upper works. She had succeeded in hauling her stern quite beyond the water end of the Long Wharf, when the Solicitor came to her assistance, and shortly thereafter the C. W. Morse arrived on the scene. The Lowell was in charge of an employé of the claimants, who did not permit the Solicitor to haul the Lowell out, not thinking that the hawser of the Solicitor, which was first made fast to the Lowell, had a good lead. The Morse first took a line from the Lowell, which broke. She then passed her own nine-inch hawser, those in charge of the Lowell cast off or cut their lines, and she was taken away from the dangerous proximity of the Plymouth in a few minutes and anchored at a safe distance.

I think that the Solicitor's power was sufficient to handle the Lowell, which was much the smallest of the four Fall River vessels enumerated; but in my opinion the Morse did the actual service of rescuing the Lowell from a situation which might soon have involved her in the fate of the Plymouth. The entire service to the City of Lowell occupied about half an hour.

The Morse next proceeded to the assistance of the Puritan, which was then lying with her northerly side against the southerly side of Briggs' Wharf and her stern projecting slightly beyond the water end of that wharf. When the Morse arrived near the Puritan, the Solicitor and the Chickasaw were pulling on one line connecting the Puritan with themselves, and hauling in a southwesterly direction.

The only substantial conflict of testimony occurs at this point. It is maintained by the claimants that the united efforts of the Chickasaw and Solicitor had got the Puritan moving, and that she would have successfully cleared the piers and been carried by force of the wind alone beyond all danger, had the Morse not appeared. The libelant asserts that the overhang of the Puritan had in some way become foul of the piling on the southerly side of Briggs' Wharf, so that she had ceased to move, and would have there remained fast, had it not been for the power of the Morse, which applied her bow to the northerly quarter of the Puritan and shoved her to windward and clear of Briggs' Wharf, thus making possible the subsequent maneuver of getting her to a safe anchorage in the stream.

The testimony is not clear as to what it was that stopped the way of the Puritan while in charge of the Chickasaw and Solicitor only; but I find it fairly established by a preponderance of evidence that her way had stopped, or at least been materially checked, before the Morse arrived. At the time of such arrival the fire was still extending across the Storage Pier, and I find it to be true that when the Morse took hold of the Puritan she was in a position where she probably would have lain until the fire was under control, after extending to a point not more than 50 feet from the Puritan's southerly side. I find, however, also that when the fire did extend to this extreme northerly point, it was much diminished in intensity, and, while I believe the Puritan would have been injured, she probably would not have been destroyed, had she remained where she was when the Morse came alongside. She was very far from being in such danger as was the Lowell, but she was in a position from which every consideration of prudence and good management demanded her instant removal, and to such removal I believe the Morse principally contributed. Considering the size and freeboard of the Puritan, I do not think that the Chickasaw and Solicitor together were able to handle her in the high wind then prevailing.

The entire service to the Puritan occupied probably about three-quarters of an hour, and the Morse then returned to the end of Briggs' Wharf prepared to render aid to the Priscilla. By this time the fire was obviously much subdued, and all danger of fire on Briggs' Wharf was past.

While going out with the Puritan, the Morse had been requested by the principal officers of the claimants then present to return and take out the Priscilla, but when she did return the Priscilla was so clearly in no immediate danger that the request was changed to a suggestion that she stand by. This the Morse did, remaining at the end of Briggs' Wharf during the balance of the night, and keeping a small line connecting herself with the Priscilla in order that a hawser might be taken aboard the latter vessel if necessity demanded. Before morning it was obvious that the services of salving tugs were no longer

required. At no time during the night was either the Puritan or the Priscilla on fire.

The tide at the time of these occurrences was near low water, and the Morse with her deep draught was steered with some difficulty, and at one time for a minute, possibly, was actually aground; but I do not think that her efficiency was seriously diminished. Her great power enabled her to free herself from the mud when occasion demanded. The salving tugs were not in any danger themselves. The Morse certainly did not put a stream upon the fire at any time, although her hose was ready. None of her crew left her to perform any service on the vessels assisted. The entire time elapsing from the moment the Morse left her anchorage to go to the fire until she tied up near the Priscilla's stern was approximately two hours, and of that time she was actively engaged in serving either the Lowell or the Puritan, probably, an hour and a quarter.

By stipulation it is agreed that the value of the Morse is $60,000, of the Lowell $300,000, of the Puritan $800,000, and of the Priscilla $1,000,000.

Amos Van Etten (J. Parker Kirlin, of counsel), for libelant.
Harrington Putnam, for claimant.

HOUGH, District Judge (after stating the facts). The City of Lowell was, in my opinion, rescued from imminent peril, certain serious damage, and probable destruction.

The Puritan was removed from certain danger, probable serious damage, and in the exercise of sound judgment.

The Priscilla was, at the time when the Morse was ready to serve her, in no danger at all, and was not thereafter in danger.

"In harbor cases, where tugs are abundant and on the ground in time to give needed aid, large awards are not only unnecessary, but contrary to principle." The O. C. Hanchett, 76 Fed. 1003, 22 C. C. A. 678. This applies to the case of the City of Lowell, for, although the Solicitor did not render the effective service which removed the Lowell from danger, she was in attendance and sufficient for the purpose, had the greater power of the Morse not rendered her services superfluous.

In the case of the Puritan, I regard the Solicitor and the Chickasaw as but the helpers, efficient, but in themselves insufficient, of the Morse; but the danger to the Puritan was very much less than that from which the Lowell was rescued.

Of the classic attributes of salvage as laid down in The Clifton, 3 Hagg. Adm. 120, there are to be considered in the cases of the Puritan and Lowell only the peril of the rescued property, the time occupied, and the value salved. For there were no elements of danger to salvors, or risk of salvors' life or property, or remarkable labor or skill on the part of the salvors displayed or required on the night in question. The value was very great, the time very short, and the degree of peril high in the case of the Lowell, moderate in the case of the Puritan.

It heightens the degree of peril that the salved vessels were so largely of wood, and deprives many cases involving fires in or near steel or iron vessels (of deep sea construction) of value as standards of comparison, e. g.: The Indiana (D. C.) 22 Fed. 925; The Kaiser Wilhelm der Grosse (D. C.) 106 Fed. 963. Of salvage instances known to me, the case most appropriate to that of the Lowell is the Kaaterskill (D. C.) 48 Fed. 701, though considering the circumstances, as found by

the court, the reward given seems small. Cf. The Barge No. 127 (D. C.) 113 Fed. 529. I think a fair award to the libelant for services to the Lowell is $9,000.

While the value of the Puritan was very much greater than that of the Lowell, the danger to which she was exposed was so much less that I regard $5,000 as full compensation.

Strictly speaking, I do not think that any salvage service was rendered to the Priscilla at all, but rewards in the nature of salvage have frequently been allowed in this court for "standing by on request." The River Belle (D. C., S. D. N. Y.) 153 Fed. 475; Index-Dig. of Brown, D. J., tit. "Salvage." And other instances are known to every practitioner at this bar. Whether a service of this nature confers a maritime lien is an academic question, owing to the trifling amounts involved. The Morse was, I believe, requested by duly authorized representatives of the claimant to be ready to assist the Priscilla, and she was ready to assist the Priscilla for eight or nine hours. For this service, and without expressing any opinion on the form of the action, the libelant is awarded $250.

The amounts herein awarded may be allotted in the proportion of three-fourths to the owner of the Morse and one-fourth to the master and crew in proportion to their wage. From the wage list submitted, however, I am of opinion that there is an undue discrepancy between the wages of the master of the Morse and those of her mate (Lennan). He steered the Morse during her service, and that, I think, was a delicate piece of work. Let him receive not only his wage share, but one-half as much more; the extra half to come out of the owner's proportion. Costs are allowed in each case.

UNITED STATES v. GEORGE BORGFELDT & CO.

(Circuit Court, D. Maryland. **April 22, 1907.**)

No. 34 (1,547).

CUSTOMS DUTIES—CLASSIFICATION—WOOLEN POWDER PUFFS—BRUSHES.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 410, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1673], the provision for "brushes" does not include so-called powder puffs, which are composed of flat circular pieces of woolen cloth with a fuzzy surface and are useful in applying toilet powder, and which, though resembling brushes in use, do not resemble them in construction.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

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

Appeal of the United States from the decision of the Board of United States General Appraisers, overruling the decision of the collector of customs at Baltimore with respect to the assessment of duty on an importation of powder puffs.

John C. Rose, U. S. Atty.

Robert G. Keegan, for importers.

MORRIS, District Judge. The merchandise consists of certain articles invoiced as powder puffs. They are simply flat circular pieces of white woolen fabric about one-half an inch thick and about three inches in diameter, useful for applying toilet powder to the face and neck. The duty was assessed by the collector at Baltimore upon the articles as a manufacture of wool, at the rate of 44 cents per pound and 55 per cent. ad valorem, under paragraph 366 of Act July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1666]. The importer contends that the articles were brushes and under schedule N, paragraph 410, of the Act of July 24, 1897 (30 Stat. 190 [U. S. Comp. St. 1901, p. 1673]), liable only to 40 per cent. ad valorem.

Paragraph 410 reads:

"410 Brushes, brooms and feather dusters of all kinds and hair pencils in quills or otherwise 40% ad valorem."

It probably would not have occurred to any one to contend that these flat circular pieces of woolen fabric, precisely alike on both sides, are brushes, except that in previous cases certain powder puffs were held to be properly classified as brushes, and, as these imported articles are used as powder puffs, it is contended that they also should be so classified. The powder puffs originally held to be brushes had handles, and were made by sewing a bunch of swan's down to a circular piece of silk or cotton cloth, and affixing to that a small handle. That article had a handle, had a body to support the brush part, and had the swan's down to answer the place of the bristles or hair or fibers of other kinds commonly used in brushes, and they were used to apply powder to the face or to rub it off. It is obvious that these powder puffs were like "brushes" in construction and use. The articles now in question have none of these points of similitude to brushes, except their use. They are called powder puffs, and are useful in applying toilet powder to the skin; but so would be a towel, a handkerchief, a napkin, or a wash cloth, or any piece of woolen or cotton fabric, or a wad of cotton or wool. It seems to be a full description of the article now in question to say that it is a piece of woolen fabric which can be conveniently used for applying a toilet powder, and that is all the similitude it has to "brushes." The authority for the assimilation of powder puffs to "brushes" appears first in the letter of Assistant Secretary of the Treasury, French, to the collector at New York, dated November 28, 1876 (Synopsis of Decisions, Treasury Department 1876, T. D. 3,028, p. 362). In that case the imported articles were composed of swan's down, cotton, and metal, and were used for applying toilet powder to the face. The contention of the importer was that they were liable only to a duty of 35 per centum ad valorem, as manufactures of cotton and metal, while the contention of the collector was that they were dutiable at 40 per cent., under the provision placing that duty on "brushes of all kinds." The Assistant Secretary, while sustaining the ruling of the collector, wrote:

"In case, however, of an importation of so-called puffs composed in part of materials other than those above mentioned bearing a higher rate of duty, it

would be proper, in order to give due effect to the law, to base the assimilation upon the materials of which the article is composed, rather than upon the use to which it is applied. You are therefore instructed upon any such importations to consider whether, and to what extent, this principle should govern the classification thereof, and if necessary apply to the department for specific instructions in the premises."

Another case that came up for a ruling was in 1877 (T. D. 3,114, p. 50). This was an appeal by the importer from an assessed duty of 60 per cent. ad valorem on certain powder puffs, instead of 40 per cent. The same Assistant Secretary wrote:

"It appears from the special report of the appraiser that the powder puffs in question are similar to those which were the subject of the department's decision of November 28, 1876 (T. D. 3,028), with the exception that they possess as a component material a small piece of scrap silk, which, however, does not give character to the goods, nor is it of sufficiently important a value to be considered in classifying them for duty. In view of these facts, the department decides that the appeal is well taken, and that the powder puffs are dutiable at the rate of 40 per cent. ad valorem, as brushes, under the decision above referred to."

Subsequently the same ruling was applied to an instrument made of brass wire used for cleaning gun barrels, which was held dutiable as a brush, and not as a manufacture of metal, and in other cases to feather dusters, a hair swab for applying remedies to the throat, bundles of fiber bound together by thin wooden strips, gloves made of hair used for rubbing the skin, an instrument for dampening the leaves of letter copy books, composed of a handle and pieces of rubber, instead of hair; all these have been held to be dutiable as "brushes." In many of these cases there has been expressed doubt. In 1892, with regard to powder puffs manufactured of down, the Board of General Appraisers said:

"The Board feels constrained to sustain the protest by reason of the long established practice of the Treasury Department with regard to the classification of powder puffs."

And they further said, speaking of powder puffs composed of down and other materials:

"We do not feel justified in reversing the long-established practice of the department with regard to these goods, although we doubt the correctness of these decisions, and might have reached a different conclusion if we were unembarrassed by them."

The powder puffs, which were composed of a little bit of down sewed to a cotton cloth, made into a puff shape by being stuffed with a little excelsior and covered with a small bit of satin, were quite a manufactured article; each component part separately having hardly an appreciable value, and the whole as put together being pretty and of value for the purpose for which it was manufactured. The articles now under consideration are simplicity itself, being nothing more than two discs of a woolen fabric having one fuzzy and one plain surface, and sewed together with the plain surfaces back to back so as to present the fuzzy surfaces on both the outsides of the discs. Of this article the appraisers at the port of entry certified that, although invoiced as powder puffs, the article was in no sense a brush, but, being composed of wool, was dutiable under paragraph 366, and

the collector certified that they were an entirely different article from that held in T. D. 3,028 to be brushes. The Board of General Appraisers, in conformity to a previous decision, held that these articles, being powder puffs, were dutiable as brushes.

I am fully impressed with the justice and propriety in customs cases of adhering to an established practice of classification upon which importers have relied; but this case appears to be one in which a classification based, in the first instance, upon similarity of use has been step by step extended, until it is held to include the present importation, which, although in construction and material altogether different from the powder puffs which were held to be brushes, is held to be a brush, although it does not resemble either a powder puff or a brush, solely because it is useful for applying a toilet powder and is invoiced as a powder puff by an importer of brushes. It seems to be too wide a departure from the meaning of the words "brushes of all kinds" to hold that Congress contemplated that these discs of woolen fabric might be classified as brushes.

I think the decision of the Board of General Appraisers should be reversed, and the decision of the collector at Baltimore should be sustained.

UNITED STATES v. O. G. HEMPSTEAD & SON.

(Circuit Court, E. D. Pennsylvania. March 14, 1907.)

No. 42 (1,729).

1. CUSTOMS DUTIES—CLASSIFICATION—MAGNESITE BRICK—FIRE BRICK.

The phrase "fire brick," in Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1632], is a well-known commercial designation, which means brick made from fire clay, and therefore does not include magnesite brick.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

2. EVIDENCE—OFFICIAL REPORTS—ADMISSIBILITY.

An official report by a government chemist, which was made at the request of the Board of General Appraisers, and related to merchandise involved in a case pending before the board, *held* incompetent because ex parte, not under oath and not subject to cross-examination.

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

For decision below, see G. A. 6,067 (T. D. 26,475), relating to merchandise imported at the port of Philadelphia.

A part of the record returned by the board to the Circuit Court consisted of an official chemist's report, made in the laboratory connected with the office of the United States Appraiser at the port of New York, which was prepared in accordance with a request made by the Board of General Appraisers to said appraiser.

J. Whitaker Thompson, U. S. Atty., and Walter C. Douglas, Jr., Asst. U. S. Atty.

J. Stuart Tompkins, for importers.

J. B. McPHERSON, District Judge. The article in controversy is plain magnesite brick weighing less than 10 pounds each, and the question for decision is, under what clause of the tariff act of 1897 the duty should be imposed. Act July 24, 1897, c. 11, § 1, Schedule B, par. 87, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1632]. The collector classified the importation under clause 3, as "brick, other than fire brick, not glazed, enameled, painted, vitrified, ornamented or decorated in any manner," and assessed the duty at 25 per cent. ad valorem. The importer protested, testimony was taken by the Board of General Appraisers, and the decision of the board sustained the protest, and imposed a duty of $1.25 per ton, under the first clause of paragraph 87, which imposes a duty of that amount upon "fire brick weighing not more than 10 pounds each, not glazed, enameled, ornamented or decorated in any manner." The opinion of the board is G. A. 6,067, and is reported in Treasury Decisions, 26,475. From this ruling the collector appealed; and, further testimony having been taken under the order of the Circuit Court, this, with the testimony that was before the board, has been duly considered.

It will be observed that the decision of the board was apparently much influenced by a communication from R. W. Moore, a chemist in New York, which was evidently regarded by the board as competent evidence, although it was purely an ex parte statement, not under oath, and not subject to cross-examination by the government. It need scarcely be said that Mr. Moore's letter was incompetent, and should not have been considered. I have laid it aside entirely, and base my conclusion solely upon the testimony that was taken in the regular way before the board and under the order of the Circuit Court. This testimony I shall not discuss in detail. It is enough, I think, to say that, as the decision of the case evidently turns upon a question of fact, the government's witnesses have satisfied me beyond doubt that "fire brick" is a phrase with a well-known commercial designation in the trade, that it means brick made from fire clay, and that magnesite brick are not commercially understood as being included within its scope. On the contrary, when magnesite brick are wanted, they are always ordered eo nomine, and never as "fire brick." The testimony establishes these facts clearly, and the result is that the commercial meaning of the word, according to well established rules, must prevail. Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482. In that case the Supreme Court of the United States said, upon page 371 of 152 U. S., page 589 of 14 Sup. Ct. (38 L. Ed. 482):

"In Cadwalader v. Zeh, 151 U. S. 171, 176, 14 Sup. Ct. 288, 38 L. Ed. 115, it was said that 'it has long been a settled rule of interpretation of the statutes imposing duties on imports that if words used therein to designate particular kinds or classes of goods have a well-known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved that the common meaning of the words is to be adopted.' But it is also true that, as observed by Mr. Chief Justice Waite in Swan v. Arthur, 103 U. S. 597, 598, 26 L. Ed. 525: 'While tariff acts are generally to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown.'

"The inquiry was whether, in a commercial sense, the articles were so known, trafficked in, and used, under the denomination of toys, that Congress, in the use of the particular word, should be presumed to have had that designation in mind as covering such articles.

"Necessarily the commercial designation is the result of established usage in commerce and trade, and such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal."

The decision of the Board of General Appraisers is reversed, and the classification of the collector is affirmed.

In re BAUMBLATT.

(District Court, E. D. Pennsylvania. May 6, 1907.)

No. 2,621.

BANKRUPTCY—DISTRIBUTION OF ESTATE.

The owner of a saloon transferred the same, together with the good will and all property used in connection with the business, to trustees for the benefit of his creditors. The trustees transferred the stock and leased the fixtures, etc., to the bankrupt in consideration of his agreement to assume and pay the debts of the former owner. The payments were to be made to the trustees in installments, and on their completion the bankrupt was to own the property. The liquor license was transferred to him, and on his subsequent bankruptcy was sold as a part of his assets. *Held*, that the creditors of the former owner had provable claims against the bankrupt's estate, and were entitled to share ratably with subsequent creditors therein, including the fund produced by the sale of the license; such subsequent creditors having no right of priority therein.

[Ed. Note.—Franchises and licenses as assets in bankruptcy, see note to Fisher v. Cushman, 43 C. C. A. 389.]

In Bankruptcy. Reargument on certificate from referee concerning claim of Baker, Giltinan & Patterson.

Meredith Hanna and Charles B. Joy, for claimants.
J. Louis Breitinger, for trustee.

J. B. McPHERSON, District Judge. The facts out of which this controversy arises will appear in the following certificate of the referee (Richard S. Hunter, Esq.):

"Frederick G. Keer had a license to sell liquor on the premises 14, 16, and 18 South Fifteenth street, and conducted the business of a saloon keeper there for a certain length of time, at the expiration of which he was indebted to various persons to the aggregate amount of about $73,000. He then, by agreement of March 22, 1906, assigned to the trustees for the benefit of creditors all his good will, stock, fixtures, furniture, book accounts, and all other personal property and assets connected with the premises or his business, in consideration of the assumption by Emil Baumblatt of all the indebtedness due by Keer. By a contemporaneous agreement between the trustees and Emil Baumblatt, after reciting this assignment and agreement of the lessor of the premises to assign to the trustees the lease thereof, the trustees left to Emil Baumblatt the good will, fixtures, furniture, etc., connected with the premises or the business, and assigned to him all the groceries, meat, and liquors on the premises, in consideration of the covenant by Baumblatt that he should pay $5,000 forthwith to the trustees, the rentals thereafter falling due of the real estate, the keeping of the leased premises and personal property insured against fire, and the payment of certain sums each month to the trustees. Then, after certain other covenants, it was provided that, if all payments mentioned in

the agreement should be made, the good will, fixtures, furniture, etc., should be assigned to Baumblatt.

"This agreement was signed by all the creditors of Keer, including the claimant.

"Under this agreement Baumblatt entered into possession of the premises and a transfer of the liquor license from Keer to Baumblatt was approved by the court.

"Subsequently, on September 21, 1906, more than four months after the date of this agreement, Baumblatt was adjudicated a bankrupt. The scheduled indebtedness consists of $62,000 of debts mentioned in the foregoing agreement and of about $1,200 of indebtedness incurred by Baumblatt in his administration of the business. Among these latter debts is that of the claimant, which is for $236.67 for wines and liquors supplied from April 30 to June 6, 1906. The liquor license, which was the only asset belonging to Baumblatt and not covered by the agreement of March 22, 1906, was offered at public sale, and the highest bid obtained was $1,250. This sale was deemed grossly inadequate by the creditors and the referee refused to confirm the same. At a subsequent meeting held in the referee's office, the offer for the license was raised under competitive bidding to $2,100, and it was then announced as a result of an agreement between the trustee in bankruptcy and the trustees for the benefit of creditors, that the property as a whole would be sold, including fixtures, good will, restaurant, and license, and under this agreement the bidding rose to $4,600, at which the entire property, including the license, was sold to William F. Jocher. It was agreed between the trustee in bankruptcy and the trustees for the benefit of creditors that $2,600 of this purchase price should belong to the estate of Emil Baumblatt and that the balance of $2,000, less $100 for their proportion of the expenses of the sale, should belong to the trustees for creditors.

"On the 8th of November, 1906, a meeting was held at the referee's office for the declaration of a dividend, and the claimant contended that the indebtedness of Baumblatt to them, being for merchandise furnished to him during his conduct of the business, should be paid in full. Their argument in support of this contention rested substantially on two grounds—failure of consideration under the agreement of March 22, 1906, and the supposed injustice of allowing the creditors of Keer recourse to two funds where Baumblatt's individual creditors had but one.

"The failure of consideration does not appear to the referee to be an element in the case. It is true that Baumblatt did not and could not discharge his obligation under that agreement, but the essential part of that agreement, as far as these creditors are concerned, was that Baumblatt should have a going business, which, if successful, would enable him to discharge in whole or in part, the indebtedness of Keer. He did discharge a portion of this indebtedness, bringing the figures down from $73,000 to $62,000, but was unable to do more. The claimant signed the agreement, and was well aware that Baumblatt was in a position of a man without resource, except the confidence of the public and a prospect of a successful conduct of the business. There is here no such failure of consideration as can be invoked in equity.

"Nor is there here any case for marshaling of assets. The bankruptcy law plainly enacts that all creditors, except those having a priority under the terms of the act, shall receive an equal dividend. The claimant supplied the bankrupt with wines and liquors, knowing well his financial condition and having signed the agreement by which he assumed the indebtedness of Keer. The only element, therefore, which in the opinion of the referee could give them a standing in court, to wit, the existence of a secret trust, is entirely wanting.

"The referee awards to the claimant a dividend at the rate declared at the meeting of creditors."

When the case was originally argued, the evidence taken before the referee did not accompany his certificate, and was not fully brought to the attention of the court. Nothing appeared in the papers that were then laid before me to justify his conclusion that the bankrupt had assumed to pay the creditors of Keer. So far as I knew at that time,

there was no other evidence of the agreements between the parties than these papers, and my opinion was based upon their contents alone. Upon the reargument, however, all of the evidence was produced, and from this it is now clear that the bankrupt for a good consideration did assume to pay the debts of Keer. The assumption probably did not amount to a novation, but it went far enough to give Keer's creditors an additional security for their debts, namely, the bankrupt's valid promise to pay them. This being so, these creditors have a provable claim against the fund produced by the sale of the bankrupt's assets, and I am unable to see what difference it makes that part of the fund arises from the sale of the bankrupt's license. This is a salable privilege, constantly treated in this district as the transferable property of a bankrupt and an asset of his estate; and the mere fact that it has a personal quality does not give to creditors of the class to which Baker, Giltinan & Patterson belong a superior right to share in its proceeds. If the bankrupt's license had sold for enough money to pay in full the creditors who were primarily Keer's, but whose debts Baumblatt had promised to pay, and also to pay the creditors who were Baumblatt's alone, there could, I think, be no doubt that both classes would be entitled to payment out of the fund; and, in my opinion, the fact that the license sold for a smaller sum does not change the rights of either class of creditors, but simply diminishes the dividend which they are to receive.

The order entered by this court on March 30, 1907, is therefore rescinded, and the decision of the referee is now affirmed.

MOXIE NERVE FOOD CO. OF NEW ENGLAND v. MODOX CO. et al.

(Circuit Court, D. Rhode Island. May 15, 1907.)

No. 2,709.

TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—RIGHT TO RELIEF IN EQUITY.

The fact that the manufacturer of an article, sold as both a medicine and a beverage, built up its business in part on misrepresentations made upon its labels and wrappers and in its advertisements respecting the medicinal properties of the article will not debar it from relief in equity against unlawful imitation of its trade-name and unfair competition, where it has permanently discontinued such misrepresentations, and makes only such representations as are considered warranted by a substantial amount of medical opinion.

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

Misleading or false labels, see note to Raymond v. Royal Baking Powder Co., 29 C. C. A. 250.]

In Equity. On motion for preliminary injunction.

See 152 Fed. 493.

Oliver Mitchell and Robert Cushman, for complainant

Geo. H. Huddy, Jr., for defendants.

BROWN, District Judge. After the filing, on February 20, 1907, of the opinion of this court upon final hearing of the previous suit

between these parties, the complainant on March 22, 1907, filed a new bill seeking protection against infringement of the complainant's trade-mark and trade-name, and against unfair competition in trade. This bill presents a case substantially distinct from that in which an injunction was formerly denied.

The bill alleges that upon the filing of the opinion of this court in the case of Moxie v. Holland (on December 12, 1905) 141 Fed. 202, the complainant discontinued the labels formerly in use, and which were dealt with in the previous litigation between the present parties. The complainant has also properly alleged that its article "Moxie" is "a compound which is a beverage and a nerve food; that is, a compound for the nervous system and a restorative agent of value in restoring lost nervous energy, and also of value as a stomachic," etc. The allegations of the bill correspond with the allegations made to the public upon the labels.

The present bill, therefore, is not open to the objection made to the former bill, that the true nature of the business for which protection was sought was not set forth in the bill. The bill is sworn to, and the complainant stands on its rights as proprietor of a preparation which it asserts to be both a beverage and a nerve food.

Upon the present petition for a preliminary injunction the defendants again raise the defense of unclean hands. This rests substantially upon the use by the complainant of the term "nerve food." Affidavits are presented to the effect that the expression "nerve food," as applied to a compound of the character disclosed by analyses, is in the opinion of the affiants "a misrepresentation of such compound, not only being scientifically a meaningless phrase, but as importing colloquially the possession of nerve nourishing or stimulating properties which according to said analyses it cannot possess."

The complainant's affidavits in reply are to the effect that the term "nerve food" has a distinct and well-understood meaning, and is used by physicians and pharmacists. Extracts from medical literature are quoted in support of this. Francis E. Thompson, president of the Moxie Nerve Food Company and custodian of the secret formula by which Moxie is made, makes affidavit that he has submitted the actual formula of Moxie to seven physicians for their opinions as to the truthfulness of the statements on the Moxie labels. He also says that the analyses appended to the defendants' affidavits are erroneous in stating as present ingredients which are not used, and in omitting ingredients which are used. These physicians testify that upon an examination of the formula they find the preparation properly described as a nerve food, and as warranting the statements made concerning it upon the labels. There are also affidavits of physicians who have not examined the formula, but who state that in experience with Moxie they have found it to be substantially as represented upon the labels.

In the opinion in the former case between these parties it was observed:

"This court should not sit as a court of medical inquiry to settle differences of medical opinion."

Weighing the affidavits filed on both sides, it must be said that the complainant has shown that its statements are indorsed by a considerable number of regular practitioners, and therefore that there is a reasonable basis for the complainant's belief in the representations which it now makes to the public.

In the former opinion the court said:

"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."

Upon the question of unlawful imitation and unfair competition, I am of the same opinion upon the present record. The defense of unclean hands, to avail, must be based upon conditions existing at the time when the party applies for equitable relief. A period of more than 15 months has elapsed since the discontinuance by the complainant of the use of the labels which were found to contain misrepresentations; and it also appears that after the adoption of the new labels the business of the company very largely increased. It is evident that much the larger part of the complainant's business is based upon the merits of Moxie as a beverage; and, while it is doubtless true that the present business was built in part upon misrepresentation, this is not, in my opinion, a sufficient reason for denying relief to a complainant who has removed the objectionable representations from its labels, wrappers, and other advertisements, and who has endeavored to conduct its business making only such representations as are considered warranted by a substantial amount of medical opinion.

A preliminary injunction will be granted.

UNITED STATES v. THOMAS LEEMING & CO.

THOMAS LEEMING & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 21, 1907.)

Nos. 4,226, 4,228.

1. CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS—CORRECTION OF DECISION.

Two months after a reappraisement decision had been made by a Board of General Appraisers, the board amended it in order to correct an error. *Held*, that the correction was illegal.

2. SAME—REAPPRAISEMENT—PRESUMPTION AS TO INCLUSION OF COVERINGS.

A reappraisement return by a Board of General Appraisers as to the value of imported chocolate failed to state whether the value of the coverings was included in the value stated in the return. *Held* that, under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], providing that the dutiable value of importations should include the cost of all "coverings of any kind," it should be presumed that such value was included, notwithstanding that Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 281, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], provides that the dutiable value of chocolate shall not include the value of plain wooden coverings.

3. SAME—UNDERVALUATION—ADDITIONAL DUTY—GOODS IN EXCESS.

An importation subject to the additional duty for undervaluation provided by Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat.

134 [U. S. Comp. St. 1901, p. 1892], as amended by section 32 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 211), was found to consist of a greater quantity than was specified in the invoice. *Held*, that the additional duty should not be limited to the quantity so specified, but should be imposed also on the excess.

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

These are cross-appeals from a decision reported as G. A. 6,315 (T. D. 27,216), in which the Board of General Appraisers affirmed in part and reversed in part the assessment of duty by the collector of customs at the port of New York.

Everit Brown, for importers.

J. Osgood Nichols, Asst. U. S. Atty.

HOUGH, District Judge. Certain chocolate having been appraised by a single General Appraiser on appeal from the collector, his appraisement sheet contained as a part of his report of proceedings the following words:

"These values as reappraised represent the foreign market value of the goods * * * excluding the value or weight of all the plain wooden coverings."

Thereupon an appeal was taken to the Board of General Appraisers, and three members of that board, having examined into the matter, made return dated April 12, 1905, stating:

"We have examined the * * * merchandise * * * and do hereby certify that in our opinion the market value or wholesale price of the said goods * * * was and we do thereby appraise the same as follows:" [Then stating the description of the merchandise and the price thereof.]

The board of General Appraisers did not add to or incorporate in their return the words used by the single general appraiser as above noted.

In June, 1905, a deputy collector addressed a communication to the Board of Appraisers, stating that a difference of opinion had arisen in the collector's office as to whether the decision of the board did or did not cover the "plain wooden coverings" specifically excepted in the report of the single appraiser. The board thereupon, and on June 6, 1905, added to their reappraisement sheet a statement that "the value and weight of outer wooden coverings" were not included in the values stated in the return of April 12th.

It is admitted that in making the addendum of June to the appraisement sheet of April 12th the Board of Appraisers exceeded their authority, and that such interpretation of their decision is not to be considered in the assessment of duties thereunder (U. S. v. Morewood [C. C.] 94 Fed. 639); but it is contended by the government that owing to the nature of the goods imported—i. e., chocolates—which are dutiable under paragraph 281 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652]), the same result is arrived at as would be reached were the addendum of June given full force and effect, because the paragraph relating to chocolate provides that "the weight and value of all cov-

erings other than plain wooden shall be included in the dutiable weight and value." To this contention I cannot agree. It is not the business of the appraisers to assess the duty, but merely to ascertain values.

The return of the Board of Appraisers, dated April 12th, purports to be made in strict compliance with section 19 of the act of June 10, 1890 (26 Stat. 139, c. 407 [U. S. Comp. St. 1901, p. 1924]), as amended, and to state "the actual market value or wholesale price" (of the goods in question) which must by statute include "the value of all cartons * * * and coverings of any kind." The importers had therefore an absolute right to rely upon the statutory correctness of the return or reappraisement sheet of April 12th, and to base their business transactions upon the faith thereof. They were entitled to believe that the values fixed by the Board of Appraisers did include the value of "coverings of any kind." They might rely upon the deductions appropriate under paragraph 281 being made by the collector. This record makes it quite clear that the omission from the return of the Board of Appraisers of the statement (above quoted) embodied in the proceedings of the single appraiser was a mistake; but that fact should not lead to the allowance of a custom calculated to impair security in business dealings with the government and to lessen reliance upon the finality of a duly signed appraisement.

The appeal of the importers is sustained.

The appeal of the United States herein arises from the fact that in one of the importations covered by this proceeding it appeared that the value of the goods as declared in the entry was less than the appraised value thereof, and likewise that the quantity of the goods so increased in value by appraisement was greater than that specified in the invoice. It follows that the importer is subject to the additional or increased duties provided for by section 7 of act of June 10, 1890 (26 Stat. 134, c. 407), as amended by section 32 of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 211 [U. S. Comp. St. 1901, p. 1892]). The collector assessed such additional duties upon the excess in quantity over and above that stated in the invoice, a proceeding contrary to the ruling of the Board of General Appraisers in Re Herazy, G. A. 5,804 (T. D. 25,645), and his proceedings have accordingly been overruled by the Board of General Appraisers, from which an appeal has been taken. I am unable to assent to the correctness of the decision quoted. It rests upon the proposition that under section 7, supra, additional duties can be collected only upon the appraised value in excess of "the value declared in the entry," and that, inasmuch as any excess of quantity discovered in the goods referred to in the entry was never entered, therefore, under the language of the statute, but a single duty is chargeable against the excess of weight.

It is obvious that such a construction of the statute opens the door to profitable fraud. A merchant who both undervalues his goods and understates the quantity thereof may easily so grossly understate the quantity that he is but little injured by paying additional duties only upon the quantum of his entry, and he can run this risk in the hope that both undervaluation and understatement of quantity will escape

detection, to his great and obvious profit. Nor does such construction of the statute appear to me necessary or proper. The act provides that "the additional duties" shall apply to the "articles in each invoice," and for each entry an invoice is necessary. The intent of each and every custom house entry is to pass into the country goods of a certain quantity and a certain value, and both the quantity and value should be and usually are discoverable from the documents collectively known as the "entry." The act of entering goods of a stated quantity constitutes a promise on the part of an importer to pay lawful duty upon all those goods, be the quantity more or less, and it appears to me entirely plain that, if undervaluation exists, additional duties necessarily attach to all the goods on which a single duty would have been payable had no such undervaluation been discovered.

The appeal of the United States is sustained.

In re FINKLEA.

(District Court, E. D. South Carolina. May 15, 1907.)

BANKRUPTCY—HOMESTEAD EXEMPTION—HEAD OF FAMILY.

Where a bankrupt and his wife had separated by mutual consent a short time before the bankruptcy, and she had received approximately half of his property, and had removed with an adopted child to another town, where she remained, leaving him with no property, except a small stock of merchandise, he ceased on such separation to be the head of a family, within the meaning of the homestead provision of the Constitution of South Carolina, and is not entitled thereunder to the allowance of a homestead exemption out of the remaining property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 668–670; vol. 25, Homestead, §§ 22–25.]

In Bankruptcy. On report of referee.

W. F. Clayton, for creditors.

W. H. Wells and J. W. Ragsdale, for bankrupt.

BRAWLEY, District Judge. This case is before me on petition for review of the judgment of the referee, allowing homestead exemption in merchandise to the bankrupt. It appears that Charles L. Finklea was a merchant in a small way of business at Florence; that in the autumn of 1906 he separated from his wife, giving her a part of his goods, which, according to the statement of his attorneys upon this hearing, amounted to $600 or $700, about one-half of the value of his stock of merchandise, and some furniture; that she removed from Florence to Columbia, carrying with her an adopted child; that on October 6, 1906, the bankrupt published in the newspaper at Florence the following:

"Notice.

"My wife, Mrs. C. L. Finklea, and I, having mutually agreed to conduct our affairs, both business and home affairs, separately, this is to give notice to the public that I will only be responsible for debts of my own making.

"[Signed] C. L. Finklea."

In December following it was discovered that the bankrupt was packing his goods for shipment to North Carolina. Attachment proceedings were begun, and the shipment was stopped, and shortly thereafter the petition in bankruptcy was filed. The stock of merchandise on hand was appraised at $684.85. The indebtedness amounts to $897.86. The bankrupt claimed the homestead exemption and merchandise to the value of $500 has been set aside to him. The referee has, in a report characterized by his usual care and conscientiousness, held that he was entitled to his homestead under the Constitution of South Carolina, which allows personal property to the value of $500 as a homestead to the head of a family. Since the separation from his wife, the bankrupt claims to have sent her $2 by letter. The attorney for the creditors claims that this was a trick on the part of the bankrupt in order to lay the foundation for a claim of homestead, and that the $2 was returned; but the testimony tending to establish that contention was ruled out. Since the separation, the bankrupt has continued to remain in Florence, boarding at different places.

The only question arising upon this review is whether Finklea is the head of a family, within the meaning of the Constitution. A family has been defined to be "a collective body of persons who live in one house and under one head or manager." The beneficent provision of the homestead exemption is for the benefit of the family—that is, a collection of persons living together under one head—and the exemption is to the head for the sake of the family. In Fant v. Gist, 36 S. C. 576, 15 S. E. 721, where the family consisted of a wife and an orphan boy and a little girl, the wife's niece, after the death of the wife and the little boy, the man continued to support the niece, who when not at school spent part of her time with him, and it was held that the man was the head of the family, within the meaning of the term used in the exemption laws; but in that case the husband, after the wife's death, had continued to occupy the homestead, and inasmuch as the wife's niece had been a part of his family, and there was a moral obligation on him to support her, the homestead was allowed. But it does not seem to me that this case is authority to support the referee's conclusion here, where there is no family living with the husband, and no homestead, no roof under which the family can gather, and no family to enjoy the benevolent provisions of the law, and no presumption that the family would enjoy any of the benefits of this homestead. The bankrupt has already taken from the creditors part of the stock of merchandise of which he was in possession, about one-half, according to the statement of counsel, and has given it to his wife for her separate support, and now he asks that about all that is left shall be turned over to him. While there is no testimony to prove that this stock of merchandise has not been paid for, there is a strong presumption that such is the case. At all events, the creditors will get nothing if this exemption is allowed.

I have great respect for the referee's opinion, and my first impulse was to affirm his judgment. A case from Arkansas has been cited which seems to sustain it. There the wife had abandoned the husband, and it was held that this did not forfeit her right to the homestead upon his death, and it was contended that, although the wife

was living apart, she might have returned to her duty at any time, and that, so long as the relation of husband and wife existed by law, his legal status was unchanged; he was still the head of the family. In Cooper v. Cooper, 24 Ohio St. 488, it is held:

"Where a debtor moves for the custody of a fund in the hands of the court in lieu of the homestead, the right to the fund must be determined upon the state of facts existing at the time when it is finally disposed of by the court; and, if the debtor has then ceased to be the head of the family, within the meaning of the homestead exemption, he is not entitled to any exemption."

The circumstances of this case are such that I am of opinion that the court should not be astute to discover grounds upon which the exemption should be allowed. There is no family or collection of persons living together in one home or under one head. The wife has voluntarily gone off to another town, carrying with her the adopted child, and there is no home to which she may return. Some provision has been made for her support, and the assets to which creditors might look for payment of their claims has been thus depleted. A mere legal liability for the support of a wife who has thus voluntarily abandoned her husband, which may or may not be enforced, does not restore the family status, and, as the primary object of the constitutional provision allowing a homestead is the protection of the family, when the family relation ceases to exist, the reason for the privilege is gone. The fund claimed is in the hands of the court for distribution among those justly entitled thereto. It must consider the status as it is to-day, and it seems clear that there is no family now existing which will be benefited by the exemption, and therefore no head of the family entitled to claim it, and if allowed the money will go to the sole benefit of Finklea as an individual. It does not seem to me that his claim to it is superior to that of the creditors.

It is therefore ordered and adjudged that the order of the referee, directing that merchandise of the value of $500 belonging to the estate of the bankrupt be set aside to Finklea as a homestead exemption, be, and the same hereby is, overruled.

UNITED STATES v. YUEN YEE SUM.

(District Court, D. Oregon. April 8, 1907.)

No. 4,791.

ALIENS—CHINESE EXCLUSION ACT—TIME FOR APPEAL FROM JUDGMENT OF DEPORTATION.

Under section 13 of the Chinese exclusion act (Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), which provides that any Chinese person convicted under the act of being unlawfully in the United States "may within ten days from such conviction appeal to the judge of the district court for the district," unless an appeal is taken within the time so limited, the court acquires no jurisdiction to hear and determine the cause.

On Motion to Dismiss Appeal.

James Cole, Asst. U. S. Atty.

James Gleason, for defendant.

WOLVERTON, District Judge. The defendant, being a Chinaman, is charged, by proper complaint addressed to the United States commissioner, J. A. Sladen, with being a laborer and not belonging to any of the excepted classes of Chinese persons provided by law, and therefore unlawfully within the United States. The cause coming on to be heard before the commissioner, the defendant offered no evidence to sustain his right to remain here, and a judgment of deportation was entered on November 25, 1904. An appeal was taken to the District Court, by notice filed and served on January 11, 1905. The cause having been certified here, the government moves to dismiss, for the reason that the appeal was not taken within 10 days, the time prescribed by section 13, Act Sept. 13, 1888, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317].. Unless the appeal is taken within the time fixed by law, this court can acquire no jurisdiction to hear and determine the cause. The statute was designed as a summary proceeding to insure a speedy hearing, so that matters might be terminated shortly, and the defendant deported if unlawfully within the United States, or discharged if rightfully here. It is very evident, from a survey of the dates, that the appeal was not taken within the time allotted. Therefore the cause should be dismissed. See Chow Loy v. United States, 112 Fed. 354, 50 C. C. A. 279.

In re LEWIS, ECK & CO.

(District Court, E. D. Pennsylvania. April 9, 1907.)

No. 2,426.

BANKRUPTCY—RECONSIDERATION OF CLAIM—PLEADING.

Proceedings to expunge a claim against an estate in bankruptcy after it has been allowed should properly be based on petition and answer, and where a petition has been filed by a trustee and a time fixed for answering the same, but the claimant neither files an answer nor asks for an extension of time, he will not be allowed to file an answer after the trustee has finished taking testimony under his petition.

In Bankruptcy. On certificate from referee.

Howard M. Long, for trustee.

Philip J. Dougherty, for claimant.

J. B. McPHERSON, District Judge. The claim of J. B. Ellison's Sons was duly proved against the bankrupt estate, but several months later the trustee presented a petition to expunge, under clause "k" of section 57 (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). The claimants were allowed 15 days within which to file an answer, and, after this time had expired without the presentation of any defense or objection, the referee proceeded to take testimony in support of the petition. The claimants' counsel attended these hearings and cross-examined the witnesses, but no application was made to remedy the failure to file an answer until after the trustee had taken all his testimony. At that time, a month after the return day, the claimants offered to take testimony on their own be-

half, and asked leave to file an answer to the petition. The referee ruled:

"That proceedings to expunge claims should be properly founded on petition and answer; that where a petition has been filed and an answer has not been filed within the time limited by the rules of court, and an order entered as was made in this case, the proceedings should go on upon the petition to which no answer has been filed. In the opinion of the referee the respondents cannot take testimony without having obtained leave to file an answer, which the referee does not feel authorized to allow."

To this ruling the claimants excepted, and asked that the question be certified.

It will be observed that the precise question before the court is whether the referee was right in deciding that upon the facts stated he had no authority to allow the claimants to file an answer at the time when they asked leave so to do. In my opinion, this decision of the referee was correct. The claimants had ample opportunity to make defence to the petition; for, if the 15 days originally allowed for this purpose had for any reason been insufficient, further time would no doubt have been granted upon cause shown either to the referee or to the court. It was only necessary that a prompt application should be made, but it was too late to ask for leave after the trustee's case had been put in, and the claimants were thus fully advised of the evidence which they were obliged to meet. To grant leave now—no unusual excuse being offered—would give them an undue advantage, which the court, no more than the referee, is disposed to allow them.

It may be as well to add, in order to avoid misunderstanding, that I intimate no opinion on the merits of the trustee's petition to expunge. The referee has not decided the question presented thereby, and the court is merely passing now on the point of practice raised by the present certificate.

The ruling of the referee is affirmed.

RICE v. NORFOLK & W. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. May 10, 1907.)

No. 1,634.

RAILROADS—REORGANIZATION—PURCHASING COMPANY—LIABILITY.

Rev. St. Ohio 1892, § 3300, authorizes any railroad company to purchase any part or all of a railroad constructed or in course of construction by another company, if the lines are continuous or connecting and not competing, and declares that after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion, and operation of such railroad, and shall be subject to all the "duties, obligations and restrictions" of the former company. *Held*, that a claim for breach of a contract to transport plaintiff's stone for a specified rate existing against a railroad company, whose line was purchased by defendant, was not an "obligation" which defendant was bound to perform under such section; defendant never having agreed to assume such liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 399, 400.]

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

A. T. Holcomb and Albert D. Alcorn, for plaintiff in error.
Oscar W. Newman, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. The validity of the claim sued on in this case depends upon the construction of section 3300 of the Revised Statutes of Ohio of 1892, regulating the purchase by a railroad company of a line of road of another company, continuous or connected, but not competing.

The suit was brought by the plaintiff in error, Samuel L. Rice, against the Norfolk & Western Railway Company, on a contract made by Rice with the Cincinnati, Portsmouth & Virginia Railroad Company, the predecessor of the Norfolk & Western Railway Company, by which Rice agreed to purchase and operate a stone crusher on the line of the road near Newport, Ohio, and the railroad company agreed to carry the crushed stone to points in Cincinnati, Ohio, at rates fixed by the contract. This contract was entered into on October 22, 1898. It is alleged in the petition that Rice expended $9,390.83 in the purchase and establishment of the stone crushing plant; that for a short time the Cincinnati, Portsmouth & Virginia Railroad Company complied with the contract, but on or about April 1, 1900, without any cause, and against the protest of Rice, refused to further transport the crushed stone at the rates fixed in the contract, and demanded rates in excess thereof, which Rice was compelled to pay under protest, the overcharges amounting altogether to about $1,110.17.

After this, on October 12, 1901, the defendant, the Norfolk & Western Railway Company, purchased the railroad property and franchises of the Cincinnati, Portsmouth & Virginia Railroad Company, including the line of road from Sciotoville to Cincinnati, Ohio, through the

counties of Scioto, Adams, Brown, Clermont, and Hamilton, on which was located the stone crushing plant of Rice already mentioned.

The suit was instituted August 4, 1903, by Rice, against the Norfolk & Western Railway Company, to recover the damages, claimed to be $10,000, caused by the breach of this stone crushing contract by the Cincinnati, Portsmouth & Virginia Railroad Company, and the overcharges, amounting to $1,110.17, alleged to have been collected under it by the latter company.

The purchase of this railroad was made under authority of section 3300 of the Revised Statutes of Ohio of 1892, which provides:

"Any company may * * * purchase any part or all of a railroad constructed, or in course of construction, or by another company, if the lines of road of such company are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase, the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, * * * including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company," etc.

In the deed of conveyance of this railroad, there was included in the description of the property conveyed "all cash on hand, contracts, book accounts, bills receivable and assets of every kind," etc.

The plaintiff Rice takes the position that among the "contracts" mentioned and intended to be embraced in the deed of conveyance of the railroad property, along with "cash on hand," "book accounts," "bills receivable," and "other assets," was included his contract with the Cincinnati, Portsmouth & Virginia Railroad Company, and that section 3300 at the same time it vested in the Norfolk & Western Railway Company all the rights and powers in respect to the location, construction, completion, and operation of the railroad, and its branches, owned by the selling company, also subjected the purchasing company to all the "duties, obligations and restrictions" imposed by this stone crushing contract upon the selling company.

To determine this requires a construction of section 3300, and especially the words just quoted.

The original of section 3300 was enacted May 1, 1852, as section 24 of the act to provide for the creation and regulation of incorporated companies in the state of Ohio. It provided that any railroad company might aid another in the construction of its road for the purpose of forming a connection of the two roads, or might lease or purchase the road of another company, if the lines of road should be continuous or connecting, upon such terms and conditions as might be agreed upon between said companies, but no aid should be furnished or purchase perfected until the question should be submitted to and approved by the stockholders of the companies.

As thus enacted, the section came before the Supreme Court of Ohio in Campbell v. Marietta & Cincinnati R. R. Company, 23 Ohio St. 168, 188, in which the authority exercised in the purchase and operation by the Marietta & Cincinnati Railroad Company, of its branch line from Hampden to Portsmouth, Ohio, was in dispute. The court, speaking by Judge McIlvaine, said:

"This act is entirely silent as to the terms upon which the purchase road may be maintained and operated by the purchasing company. Indeed, it does not, in terms, authorize the purchasing company to maintain and operate the purchased road at all; but such authority must be implied from the grant of power to purchase, for the reason that the Legislature certainly did not intend that the purchased road should cease to be operated as a public highway. And inasmuch as no new mode of use or power of control was expressly provided, and as the power of the purchasing company to demand and receive tolls, as conferred by its own charter, is limited to roads constructed under the charter, it must be inferred that the Legislature intended the purchasing company to succeed to the powers and privileges of the vending company, and to none other."

The limitations which followed the powers of the purchasing company thus restricted are expressed in the second paragraph of the syllabus:

"(2) Where the railroad of one company is purchased by another railroad company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor." 23 Ohio St. p. 168.

Section 24 of the act of May 1, 1852 (50 Ohio Laws, p. 281), as thus construed, was amended by the act of April 15, 1873 (70 Ohio Laws, p. 129), by the addition of certain sections defining the rights of dissenting stockholders, and passed into the Revised Statutes as section 3300, where it was amended March 14, 1882 (79 Ohio Laws, p. 35), so as to assume its following form, which has remained unchanged:

"Sec. 3300. Any company may aid another in the construction of its road, by means of subscription to the capital stock of such company, or otherwise, for the purpose of forming a connection of the roads of the companies, when the road of the company so aided does not and will not, when constructed, form a competing line; any company may lease or purchase any part or all of a railroad constructed, or in course of construction, by another company, if the lines of road of such companies are continuous or connected and not competing, upon such terms as may be agreed upon between the companies; and after such purchase the purchasing company shall be vested of all the rights and powers in respect to the location, construction, completion and operation of such railroad, and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor, and shall be subject to all the duties, obligations and restrictions of said company; and any two or more companies whose lines are connected and not competing, may enter into any arrangement for their common benefit consistent with and calculated to promote the objects for which they were created."

It is the contention of counsel for the defendant in error that the provision that the purchasing company "shall be subject to all the duties, obligations and restrictions of said company," referring to the selling company, is merely an expression in statutory form of the rule announced in the case of Campbell v. Marietta & Cincinnati Railroad Company, 23 Ohio St. 168, and relates only to the duties, obligations, and restrictions of a public nature, imposed by law, and does not embrace obligations created by contract like that entered into between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company, which could have no binding force upon the purchasing company, un-

less a special provision was made for their continuance in the contract for the purchase of the road. This was the view taken by the court below.

It would seem to be supported by the decision in Railroad Co. v. Hinsdale, 45 Ohio St. 556, 557, 572, 15 N. E. 665, in which it was held that neither section 3300 nor section 3409, of the Revised Statutes of Ohio of 1892 conferred authority to sell and transfer a stock subscription made by the company whose road was purchased.

An examination of the Revised Statutes of Ohio of 1892 discloses provisions relating to the sale of railroad properties which may throw light upon the meaning of the provision under consideration.

The general rule is that the owner of property, whether an individual or a corporation, has a right to sell and dispose of it in good faith and for a valuable consideration.

"It is true that, ordinarily, a creditor has no right that will interfere with that of his debtor to sell and dispose of his property for a valuable consideration, unless he has taken the precaution to acquire some lien upon it, by mortgage or otherwise, as a security in his own behalf. As a rule, the right of an unsecured creditor is confined to the personal obligation and the undisposed of property of his debtor; still it is not strictly accurate to say that such creditor has no claim upon the property of his debtor, for in one sense, all the property owned by a debtor, unless exempt by statute from sale on execution, is subject to the claims of his creditors, and he cannot dispose of it unless for a valuable consideration, so as to defeat this right." Compton v. Railroad Co., 45 Ohio St. 592, 614, 16 N. E. 110, 18 N. E. 380.

The above extract from the opinion of Judge Minshall, is preliminary to the holding that under the act of April 10, 1856 (1 Swan & C. Rev. St. p. 327, now section 3384 et seq., of the Revised Statutes of Ohio), the effect of the Ohio act for the consolidation of railroads was to merge the old corporations into the new one, which took their place, succeeded to their property, and assumed their liabilities. Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Railway Co. v. Georgia, 98 U. S. 359, 25 L. Ed. 185; Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. Ed. 235; Compton v. Railway Co., 45 Ohio St. 592, 613, 16 N. E. 110, 18 N. E. 380.

The interpretation thus placed upon these Ohio statutes was the result of the express language used. The original language, preserved in section 3384, provided that upon the consolidation:

"All rights of creditors, and all liens upon the property of either of said corporations (meaning the constituent companies), shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same; and all debts, liabilities and duties of either of said companies, shall thenceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it." Compton v. Railway Co., 45 Ohio St. 613, 16 N. E. 110, 18 N. E. 380; Rev. St. Ohio 1892, § 3384.

This express provision was held not to be applicable in the case of Railroad Co. v. Hinsdale, 45 Ohio St. 556, 15 N. E. 665, and for lack of it neither section 3300 nor section 3409 of the Revised Statutes of 1892 was deemed to confer authority to sell and transfer the stock subscriptions of a selling company to a purchasing one.

Again, section 3396, which relates to the reorganization of railroad companies, after defining the powers of the new company, and providing that all the franchises and property of the reorganized company shall be held and disposed of for the use and benefit of the creditors and stockholders of such company, contains the following language:

"And shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for."

Again, section 3426, which relates to the purchase of railroads at judicial sale, after providing for the incorporation of the purchasers and the transfer to them of the railroad and property purchased at the sale, contains the following language:

"And in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights, and subject to all the privileges and restrictions imposed upon railroad companies by the general laws of this state."

This language, it seems, is a substantial equivalent for that contained in section 3300; the "duties, obligations and restrictions of said company" being those "imposed upon railroad companies by the general laws of this state."

The cases of New Bedford R. R. Co. v. Old Colony R. R. Co., 120 Mass. 397, Berry v. K. C. Ft. S. & M. R. R. Co., 52 Kan. 759, 34 Pac. 805, 39 Am. St. Rep. 371, Montgomery & West Point R. R. Co. v. Boring, 51 Ga. 582, and Warren v. Mobile & Montgomery R. R. Co., 49 Ala. 582, all turn upon statutes whose language differs materially from that of the Ohio law.

In the Massachusetts case, by a special act one railroad was authorized to "purchase the rights, franchises and property" of another, and the latter, upon such purchase, was given power to convey "its franchises and property, and all the rights, easements, privileges and powers" granted to it, to the purchasing company, which upon such conveyance, was "to have, and enjoy all the rights, powers, privileges, easements, franchises and property," of the selling company, "and be subject to all the duties, liabilities, obligations and restrictions to which said last-named corporation may be subject." The Supreme Court of Massachusetts held that this language was broad enough to place the purchasing in all respects in the position of the selling corporation, upon the making of the conveyance. "It is equivalent to an amalgamation of the two; all the franchises, privileges, and powers are transferred without reservation; not merely the franchise to own and manage a railroad, but the franchise of being a body politic, with rights of succession, of acquiring, holding, and conveying property, and of suing and being sued by its corporate name. It puts out of the reach of creditors all property liable to attachment to satisfy claims, either in contract or tort. It practically terminates the corporate existence of the selling corporation," etc. 120 Mass. 400.

This is not true of section 3300 of the Ohio law. It does not provide for the sale of a railroad company, with all its franchises and property, but for the lease or sale of the whole or any part of a railroad constructed or in course of construction. The only franchises vested in the purchasing company are "the rights and powers in re-

spect to the location, construction, completion and operation of such railroad." It is perfectly obvious that the lease or sale of a part of a railroad under this provision would not necessarily terminate the existence of the selling company. It might, or it might not. The reasoning of the Massachusetts case does not apply here.

The statutes on which the other cases turn present even more marked differences.

In conclusion, we may observe that the stone crushing contract between Rice and the Cincinnati, Portsmouth & Virginia Railroad Company terminated before the purchase of the railroad of the latter company by the Norfolk & Western Railway Company. The amended petition claims damages for its breach. This is not a claim that the contract is or was binding originally upon the purchasing company. The claim is limited to the liability on the part of the latter for the damages caused by the selling company through a breach of its own contract with Rice. But it is to be observed that there is no averment and no claim that the purchasing company agreed to assume any such liability on the part of the selling company. Nor is there any attempt to charge the purchasing company with fraud in the disposition of the assets it obtained through the purchase. That remedy, the pursuit of the assets of the selling company, would only naturally follow an attempt to collect the claim against the selling company itself.

The judgment is affirmed.

NOTE.—The following is the opinion of Cochran, District Judge, on demurrer to amended petition:

COCHRAN, District Judge. This cause is submitted on demurrer to the amended petition. The liability of the defendant for the claims set forth in said pleading against the Cincinnati, Portsmouth & Virginia Railroad Company is based upon section 3300 of the Revised Statutes of Ohio and upon the meaning to be given to the word "obligations" contained therein. There is no such liability, unless said word is construed to embrace contract obligations. I do not think it can be so construed. It has reference solely to obligations imposed by law other than through contracts. Its meaning is affected to a certain extent by its companion words "duties" and "restrictions." It is not urged that they have reference to duties or restrictions arising out of contract. The statute not only renders the purchasing company subject to certain things, it also passes certain things to it, "the rights and powers in respect to the location, construction, completion and operation of such railroad and of branches thereto of the company from which it purchased said railroad, including the power to acquire and appropriate property therefor." The rights and powers which the statute thus passes are not rights and powers arising out of contracts, but such as are conferred by law otherwise than through contracts. As to whether the purchasing company is to be subject to other things, or other things are to pass to it upon the transfer, that is left to be determined by the contract between the two companies. The section provides that the transfer is to be "upon such terms as may be agreed upon between the companies."

This view of this statute is confirmed by a consideration of other statutes. Section 3426b relating to the purchase of railroads at judicial sale and the incorporation of the purchasers, provides that, "in the operation and maintenance of such railroad, the said corporation shall be entitled to all the rights and be subject to all the obligations and restrictions imposed upon the railroad companies by the general laws of this state."

Here it is plain that it is not rights and obligations arising out of contracts that is had in view, but such as are imposed by the general laws of the state. The absence here of the explanatory clause "imposed upon railroad companies

by the general laws of this state" does not differentiate that statute from this.

Again, section 3384, relating to consolidation of railroad companies, provides that "all debts, liabilities and duties of either of said companies shall thenceforth attach to the new company and be enforced against it to the extent as if such debts, liabilities and duties had been contracted by it"; and section 3396, relating to the reorganization of railroad companies, after defining the powers of the new company, provides that it "shall be in no wise chargeable in respect to any debt, liability or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for."

These statutes show that when the Legislature had in view contract obligations it used apt words to describe them so as to leave no doubt as to its having them in mind.

The case of New Bedford Ry. Co. v. Old Colony Ry., 120 Mass. 397, can have no application here, because the statute there is different and was without other statutes having a bearing on its construction.

I do not mean to be understood as holding that, in case of a purchase by one railroad company of the property of another railroad company, under section 3300, a contract obligation of the seller may not pass to or against the purchaser in the absence of a provision in the contract between the two companies. It may pass if it possesses the characteristics of a covenant which runs with the land. But the contract obligations sought to be enforced herein against defendant are not of that character, nor is it claimed that they are.

There is room to hold that the amended petition is bad, even if the word "obligations" in section 3300 be construed to exclude contract obligations. The sale and purchase which it authorizes is conditional, to wit, "if the lines of road of such companies are continuous or connecting and not competing." It is nowhere alleged in plaintiff's pleadings that such condition existed in this case.

The demurrer is sustained.

ATCHISON, T. & S. F. RY. CO. et al. v. HURLEY et al.

(Circuit Court of Appeals, Eighth Circuit. March 20, 1907.)

No. 2,424.

1. BANKRUPTCY—NATURE OF PROCEEDINGS—PROTECTION OF EQUITABLE RIGHTS.
   The administration and distribution of the property of bankrupts is a proceeding in equity, and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable or both.
2. SAME.
   A trustee in bankruptcy stands in the shoes of the bankrupt, and whatever rights a third party had against the property of the bankrupt before adjudication that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy.
3. FRAUDS, STATUTE OF—OPERATION OF STATUTE—CONTRACT AS GROUND FOR EQUITABLE RELIEF.
   Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance on his promise, has expended money and changed his situation.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 343.]
4. BANKRUPTCY—ASSUMPTION OF CONTRACT BY TRUSTEE.
   While trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable, they are required to elect whether to assume an existing executory contract and to continue its performance and ultimately dispose of it for the benefit of the estate, or to renounce it, and leave the injured party to such legal remedies for the breach as the case affords. If they elect to assume a contract, they

take it cum onere, as the bankrupt held it, subject to all of its provisions and conditions, and any valid modification of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, will be binding upon them.

5. SAME—ENFORCEMENT OF EQUITABLE LIEN.

The owners of coal lands entered into a contract by which they leased the same, and by which the lessee engaged to supply to a railroad company all of the coal required on certain lines of its road at stated prices, the company on its part agreeing to pay for the coal delivered during each calendar month on the 15th of the following month. The railroad company was given power to terminate the lease on a failure of the lessee to comply with such contract, and the lease was made assignable only with its consent. The lease was assigned to a coal company which fulfilled the contract for a number of years. Becoming short of money, the railroad company advanced it money to meet its pay rolls under an oral agreement that the advances should be repaid by the subsequent delivery of coal under the contract. While still owing such advances, the coal company was adjudicated a bankrupt, and its receivers and subsequently its trustees continued to deliver coal under the contract, but refused to allow the advances. *Held*, that the oral agreement was in effect a waiver by the railroad company of its right to withhold payment until after delivery, and the advances constituted a payment in advance for coal to be delivered under the contract and a pledge of the coal when mined, which was valid as against the bankrupt and its trustees, who had assumed and continued performance of the contract.

Hook, Circuit Judge, dissenting.

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

Robert Dunlap (Wm. R. Smith and Gardiner Lathrop, on the brief), for appellants.

John S. Dean, for appellees.

Before SANBORN, HOOK and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an appeal from an order of a court of bankruptcy in the district of Kansas denying to the Atchison, Topeka & Santa Fé Railway Company a claim for a preference against the assets of Mt. Carmel Coal Company, bankrupt, or the alternative relief prayed for.

In 1896 the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, as parties of the first part, Charles J. Devlin, as party of the second part, and the railway company, as party of the third part, entered into an agreement whereby the parties of the first part leased, for certain rents and royalties reserved, to Devlin for a term of three years certain coal lands situate in the state of Kansas with the right to mine coal therefrom, and the party of the second part agreed to sell and deliver to the railway company and the latter to buy from him daily all the coal required by it in the operation of certain of its lines of railroad in the state of Kansas, at the prices stated in the lease, the same to be paid for by the railway company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the railway company to terminate the lease for failure by Devlin to perform any of

his undertakings, and the right to assign the lease was made subject to the consent of the railway company. Subsequently Devlin duly assigned to the Mt. Carmel Coal Company all his rights under the lease. By two successive agreements between the latter company and the other parties to the lease the same was extended with slight modification, unimportant now to mention, subject to all its original terms and conditions, until June, 1906. All the parties continued in the performance of their respective obligations until July, 1905, when the Mt. Carmel company was adjudicated a bankrupt. Receivers were duly appointed and authorized to conduct the business of the bankrupt in the usual course, until trustees should be chosen. The receivers and subsequently appointed trustees successively continued to operate the mines under orders of the court, and, in the language of the court below, "performed fully the terms of the contract as it is written with the coal company and the railway company." While the receivers were in charge the railway company and the two coal companies, the original lessors, filed their joint intervening petition, setting forth their relations with the bankrupt under the contract of 1896 as extended, their rights thereunder as already stated, and, in substance, that by an agreement had between them and the bankrupt the contract had been modified to the extent that the railway company had agreed that, without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the bankrupt and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes for coal thereafter to be delivered under and pursuant to the terms of the contract; that pursuant to that agreement and for the purposes stated it had advanced $57,304.16 to the bankrupt with the understanding that it should be repaid by the delivery of coal under the contract, during the months of July and August, 1905; that the intervening bankruptcy proceedings of July 7th and the appointment of the receivers by the court alone prevented the bankrupt from carrying out its obligation and delivering the requisite coal to it.

The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them, or that the receivers be directed to deliver to the railway company the amount of coal so paid for in advance by it. The intervening petition was referred to a referee who heard the proof and reported unfavorably to granting any relief, and his report was afterwards confirmed by the district judge and the petition dismissed. The facts are not materially controverted.

The referee found and reported the amount claimed by the railway company, $57,304.16, had been advanced in the way shown by the proof, to enable the bankrupt to meet its pay rolls. He concluded as follows:

"I am unable to find any testimony indicating an intention to modify the written lease. There certainly was no express oral agreement to that effect. It is true the advances were to be paid, by money due the coal company for coal furnished the Santa Fé Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fé Company for money advanced."

The court in reviewing the action of the referee said:

"True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August as claimed, but at the time of the failure of the bankrupt the coal remained in the ground unmined."

From these facts the referee concluded that the verbal agreement was a separate independent parol contract, and had nothing to do with the original contract as evidenced by the lease, and the court in affirming the referee's conclusion observed as follows:

"I am of opinion that the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions by reason of which the bankrupt became indebted to the railway company for so much money and that such transactions are wholly independent of and separate and apart from the original contract between the parties. * * * The contracts under which the money was advanced created no lien upon any property for its repayment. * * *"

The supplemental agreement whereby provision was made for advance payments for coal to be thereafter delivered under the lease may or may not be properly called a modification of the original agreement. That is immaterial. What we are concerned about is not its name, but its meaning; that is, what was the intent and purpose of the parties in making it. In arriving at such intent and purpose we should consider the situation of the parties and the facts and circumstances surrounding them in the light of which, and to effect which, the supplemental agreement was made. The clear intent and purpose of the main contract, so far as the railway company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years—a provision so important to the railway company itself and to the traveling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the coal company's rights under the lease if it failed to observe its contract obligations. It appears that the coal company, while the contract was still in force and being executed, became embarrassed and unable to meet its pay rolls. As a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for 15 days after coal was delivered to it and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following at the price fixed by the original contract. This arrangement made when the coal company was in embarrassed circumstances, and obviously inspired by the necessity of meeting the pay rolls and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree

with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

The contract after the new arrangement remained as before. The coal company still had a right to mine coal on the same terms and conditions as before, and was bound to supply the daily needs of the railway company as before. The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement, interpreted in the light of the conditions surrounding the parties and as necessarily intended by them, was to set apart a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed. We cannot conceive it possible that the railway company, with all the machinery for self-protection and security afforded by the original contract, would, when the coal company became embarrassed financially, surrender that protection and security and voluntarily loan to the insolvent money to produce its coal without any security whatsoever. Accordingly we cannot agree with the learned trial court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the coal company. On the contrary, we think, as already stated, that the parties intended to appropriate and secure to the railway company sufficient coal when mined to repay the advances made by it.

In the case of Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, the facts were that the Keystone Bank solicited and received from the Fourth Street Bank $25,000 of gold certificates, agreeing to give its check against its reserve in the Tradesmen's National Bank therefor. Instead of doing so, it gave in the execution of the transaction a check against its general account in the last-mentioned bank. The draft was duly presented for payment, and payment was refused. It was held in the case which was brought to subject moneys in the hands of the receiver of the Keystone Bank to an equitable charge or lien in favor of the Fourth Street Bank that, inasmuch as it was the intention and agreement of the parties that the check drawn generally should be paid out of a particular fund, such check, as between the parties, should be treated as an equitable assignment of that fund to the extent necessary to pay the check. In its opinion the Supreme Court made the following observations:

"When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions—banks of deposit. They were located in the same city. * * * It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. * * * The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without reference to an assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge, or lien on the property upon the faith of which they both dealt. * * * It is, of course, true that the method adopted to evidence the appropriation [by the Keystone. Bank] was a check drawn generally upon the Tradesmen's Bank, but, as already stated, the authorities are clear that, when it is established that it was the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund."

To the same effect are the following cases: Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669; Duplan Silk Co. v. Spencer, 53 C. C. A. 321, 115 Fed. 689; Erie R. C. v. Dial, 72 C. C. A. 183, 140 Fed. 689; In re Cramond (D. C.) 145 Fed. 976; Reeves v. Kimball, 40 N. Y. 299.

The foregoing are sufficient to show how far the courts have gone in declaring transactions, not made strictly in the conventional language of a mortgage or pledge, to be equitable charges in the nature of such mortgage or pledge, when it is necessary to do so in order to execute the intent and purpose of the parties.

It follows that, if bankruptcy had not supervened, the railway company could have enforced its claim for advantages against the coal when mined by the coal company. Does the bankruptcy of the latter company deprive the former of the same remedy against the trustees? The administration and distribution of the property of bankrupts is a proceeding in equity (In re Rochford, 59 C. C. A. 388, 124 Fed. 182), and should be conducted on broad equitable lines, with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both. In re Chase, 59 C. C. A. 629, 124 Fed. 753. The last cited case well expresses the broad and liberal spirit which pervades the bankruptcy act. It is there said by Circuit Judge Putnam, in delivering the unanimous opinion of the Circuit Court of Appeals of the First Circuit, as follows:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

See to the same effect the following cases: Hutchinson v. Le Roy, 51 C. C. A. 159, 113 Fed. 202, 205; Hutchinson v. Otis, 53 C. C. A. 419, 115 Fed. 937, 940; Batchelder & Lincoln Co. v. Whitmore, 122 Fed. 355, 58 C. C. A. 517.

The trustees stand in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy. Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

In Thompson v. Fairbanks, the Supreme Court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

In the light of these authorities we have no hesitation in holding that the equitable charge created by the parties before the bankruptcy of the coal company should be enforced against the estate in the hands of its trustees.

Counsel for the trustees contend that no lien, equitable or otherwise, was created by the subsequent agreement, because it was not in writing and signed by the parties to be charged as required by section 3173, Gen. St. Kan. 1901, commonly known as the "statute of frauds." We find it unnecessary to consider the interesting question debated at the bar whether the oral agreement was such a substantive modification of the original one as distinguished from a change in detail of performance, as required it to be in writing to conform to the statute in question. It sufficiently appears that the railway company fully performed its part of the agreement. It advanced the money as agreed, but the coal company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance upon his promise, has expended money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed. Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554; Brown on Stat. of Frauds, §§ 457–460; Glass v. Hulbert, 102 Mass. 24, 36, 3 Am. Rep. 418; Suggett's Adm'r v. Carson's Adm'r, 26 Mo. 221; Winters v. Cherry, 78 Mo. 344, 349.

Another and conclusive answer to the trustees' contention in this case is found in their conduct on assuming the duties of their trust. They found an assignable executory contract in force between the bankrupt and the railway company—one that might be advantageous or disadvantageous to the estate. It was evidenced by writing, but the parties had changed its mode of performance as already

pointed out, so that as between them it consisted of the original instrument and the agreed modification.

It is well settled that trustees in bankruptcy are not found to accept property or take over contracts which are onerous and unprofitable, and which would burden, rather than benefit, the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance, and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. American File Co. v. Garrett, 110 U. S. 288, 295, 4 Sup. Ct. 90, 28 L. Ed. 149; Sparhawk v. Yerkes, 142 U. S. 1, 13, 12 Sup. Ct. 104, 35 L. Ed. 915; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Dushane v. Beall, 161 U. S. 515, 16 Sup. Ct. 637, 40 L. Ed. 791; Watson v. Merrill, 69 C. C. A. 185, 136 Fed. 359, 363; In re Chambers, Calder & Co. (D. C.) 98 Fed. 865; Mercantile Trust Co. v. Farmers' Loan & Trust Co., 26 C. C. A. 383, 81 Fed. 254; Central Trust Co. v. Continental Trust Co., 30 C. C. A. 235, 86 Fed. 517.

If they elect to assume such a contract, they are required to take it cum onere, as the bankrupt enjoyed it, subject to all its provisions and conditions, "in the same plight and condition that the bankrupt held it." York Mfg. Co. v. Cassell, supra, and cases supra.

Any valid modifications of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. They take it subject to all equities between the original parties. Reeves v. Kimball, supra; Wood v. Donovan, 132 Mass. 84; Homer v. Shaw, 177 Mass. 1, 58 N. E. 160; Mangles v. Dixon, 3 House of Lords Cases, 703. The duty rests upon the trustees to make inquiry and ascertain the true nature, character, and conditions of the contract before exercising their election. When the election is made to assume it where no fraud has been practiced upon them, they stand in exactly the same situation as the bankrupt himself stood prior to the adjudication. Cases, supra.

After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract, and entered upon its execution. They mined coal, delivered it to the railway company, and, in the language of the trial court, "performed fully all the terms of the contract as it was written," but failed to conform to the condition created by the oral agreement to deliver coal to the railway company in payment of the advances made by it to keep the mine going.

From the foregoing the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the railway company sufficient coal to cover its advances. Not having done so and the lease having expired so that it cannot now be done, the assets of the estate, consisting in part of money

received for coal delivered to the railway company, should be subjected to the payment of such advances as a preferential claim.

The decree is accordingly reversed, and the cause remanded, with instructions to proceed according to this opinion.

HOOK, Circuit Judge, dissents

CHICAGO & N. W. RY. CO. v. O'BRIEN.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1907.)

No. 2,446.

1. RAILROADS—INJURIES TO LICENSEE—SPEED—NEGLIGENCE.

In general, in the absence of a regulating statute or ordinance, a carrier may run its trains at such a rate of speed as it deems convenient for the conduct of its business, without being guilty of negligence per se in case a derailment occurs resulting in injuries to licensees on the train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 879.

Rights of licensee on train, see note to Chamberlain v. Pierson, 31 C. C. A. 164.]

2. SAME—QUESTION FOR JURY.

Where defendant railroad company operated a fast mail train down a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve at the foot of the grade, at the rate of from 70 to 75 miles per hour, without slackening speed, and the train was derailed at the curve, resulting in the death of plaintiff's intestate, an express messenger working on the train, whether defendant was guilty of negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 918.]

3. WRIT OF ERROR—EXCESSIVENESS OF DAMAGES—REVIEW.

The Circuit Court of Appeals has no jurisdiction to review an objection that the damages awarded in an action for wrongful death are excessive, though it is convinced that the trial court improperly exercised its discretion in refusing to grant defendant relief on such ground on the motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3873.]

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

Error to review a judgment obtained by Mary O'Brien, as administratrix of the estate of J. J. O'Brien, deceased, against the Chicago & Northwestern Railway Company.

D. E. Lyon (Lyon & Lyon, on the brief), for plaintiff in error.

R. M. Wright (Wright & Nugent and Healy & Healy, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. This is the second appearance of this case in this court. When it was first here, a judgment in favor of the plaintiff was reversed because the trial court refused to instruct the jury that negligence could not be inferred from the fact of accident in

an action for the death of one who was not a passenger, but whose relation to the defendant was analogous to that of an employé and governed by the same principles. Also it was doubted that there was sufficient evidence that the derailment of the train which resulted in the death of the deceased was due to the negligence of the defendant. The general features of the case fully appear in the report of our previous opinion. Railway Co. v. O'Brien, 67 C. C. A. 421, 132 Fed. 593.

At the second trial additional evidence of a dangerous rate of speed, in connection with the particular structure of the track at and in the vicinity of the place of wreck, was introduced, and the plaintiff again secured a verdict and judgment. The exceptions preserved at the trial and such of the assignments of error as were framed and set forth in the brief of counsel in the manner required by the rules of this court present but one question that requires our consideration: Did the trial court err in refusing the defendant's request for a directed verdict in its favor? In other words, was there sufficient evidence of the negligence of the defendant to require the submission of the case to the jury?

The train upon which the plaintiff's intestate was engaged as an express messenger and the wreck of which resulted in his death was a fast mail train running between Chicago and Omaha. Its schedule called for a speed of 45 miles per hour, though it does not follow that that speed was to be maintained over every portion of the track. The train was derailed a short distance west of Boone, Iowa, at the foot of a descending grade of 60 feet to the mile, and at the sharpest point of a 6 degree curve. There were but three curves as sharp on defendant's system in Iowa comprising more than 1,000 miles of railroad track, and it was the sharpest curve between Boone and the Missouri river. All other charges of negligence failing for lack of proof, the only claim left the plaintiff was that the accident was caused by a negligent rate of speed at which the train was being run by the engineer, considering the grade and the sharp curve at the bottom. Upon this question there was the following testimony for the plaintiff supplementing a description of the track and grade:

Lindell was a railway mail clerk upon the wrecked train. He had made the particular run about 60 times. For some minutes before the accident he was looking out of the side door of his car and observing the telegraph poles and other fixed objects along the right of way. After qualifying himself to testify upon the subject of speed, he said that the train was running from 70 to 75 miles per hour.

Sigafoos was an express messenger working in the express car under the directions of the deceased. He said that the train was going so fast over the curves near the point of derailment and the car was swaying so violently that nearly all of the piles of express packages were thrown down.

Dye showed his familiarity with railroad operations by testifying that he had been a railway telegrapher for about eight years. He saw the accident from a point about half a mile distant, and said that the engine was working steam in going down the hill, a thing which he had never observed before upon any of the 15 to 30 other occasions

when he saw the train at that place. The noise of escaping steam and the unusual speed attracted his attention.

Hoyt, a railway mail clerk of seven years' experience, had served upon this fast mail train for a year, and in going eastward and westward had passed over the track where the derailment occurred about every three days. On the occasion in question, and shortly before the accident, the letters were thrown from their pigeon holes at the side of the car by the violent lurching of the train. This was an unusual occurrence. He did not recall that it had ever happened before. The pigeon holes from which the letters were thrown were about seven inches in depth, with a downward slant of about an inch. He had difficulty in keeping his feet, and the clerks were tossed from side to side of the car. The train seemed to be going at a greater rate of speed than usual. He also said that he did not notice that the air brakes were applied, although if they had been the effect would have been noticeable.

Fox, a locomotive engineer with over 30 years' experience, said that a speed of 60 miles per hour down such a grade and upon such a curve would be unsafe, and the danger would be enhanced with the increase of the speed; also that the application of the brakes steadies a train when taking a curve at speed.

Dowd, a locomotive engineer, said that the purpose of applying brakes on a sharp curve is to steady the train. The testimony of Nettle and Johnson was to the same effect.

Bowles, an eyewitness who testified at the first trial, again said that the train was running with unusual speed, nearly twice as fast as on former occasions, and that, while previously this train slowed up at the descent, it did not do so at this time.

The rapid movement of trains in the carriage of freight and passengers and the mails, resulting from the insistent demands of the public and the necessities of commerce, has become a feature of our modern life, and the enterprise of the times finds expression in the train schedules of the carriers. A complete observance of these schedules, which would imply perfection in mechanism and human skill, is impossible in the practical operation of a railroad. Moreover, conditions constantly arise which as often require that some trains be rushed forward at increased speed as that others be held back in order that the business of transportation may not be unduly impeded and the engagements of the carrier may be measurably fulfilled. All of this signifies risk to life and limb of those who serve upon the train; but, if the company has been duly diligent in respect of operation, appliances, and ways, the risk is one that is assumed, and there is no recourse for a resulting injury. And so the general rule is that, in the absence of a regulating statute or ordinance, a railroad company is at liberty to run its trains at such speed as it deems convenient for the conduct of its business, and a high rate of speed is not, per se, negligence. But this rule has its limitations. For instance, there may be at particular points upon its railroad such defects in the track or such conditions of structure, though not defective, as to make the rate of speed at which a train is moving an element to be considered in determining the question of negligence. Railroad v. Bishard (C. C.

A.) 147 Fed. 496, was a case of that character. A train moving at high speed was wrecked by being shunted to a siding constructed and designed for trains moving slowly or under control. See, also, Meloy v. Railway, 77 Iowa, 743, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325. There is an analogy in passenger cases, though the rules governing liability are different. Railway v. Lewis, 145 Ill. 67, 33 N. E. 960. In Railway Co. v. Clowes, 93 Va. 189, 24 S. E. 833, the court, after observing that as matter of law mere rate of speed, though unusual, is not negligence, said:

"Without doubt a rate of speed may be dangerous, taken in connection with other circumstances; as, for instance, the condition of the track, which would be entirely safe under other circumstances. The degree of curvature may be such as to render more than a given rate of speed dangerous, and a dangerous rate of speed is negligence."

The evidence in this case on behalf of the plaintiff, the substance of which has been given, is harmonious and of a substantial character, and in our opinion it is sufficient, being believed by the jury as against the countervailing evidence, to support the conclusion that the train was being negligently operated by the engineer in view of the unusual and excessive speed, the descending grade, and the sharp curve at the bottom. A statute of Iowa permits a recovery, although the deceased and the engineer were fellow servants.

Complaint is made of the amount of damages awarded. The attention of the trial court was directed to this matter by a motion for a new trial, which was overruled. We agree with counsel that the award is excessive, and that the defendant has been thereby deprived of its property to that extent; but it has been conclusively settled that the sole remedy for such a grievance is by appeal to the judgment and discretion of the trial court. Its refusal to act is final.

The judgment is affirmed.

FADLEY v. BALTIMORE & O. R. CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 11.

1. WRIT OF ERROR—REVIEWABLE ORDER—JUDGMENT OF NONSUIT.

A judgment of compulsory nonsuit, entered by a federal court in Pennsylvania in conformity to the state practice, is a final judgment, and reviewable on writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 471.

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

2. CARRIERS—INJURY TO PASSENGER—GETTING OFF TRAIN—CONTRIBUTORY NEGLIGENCE.

Plaintiff's husband was struck and killed by a passing train at a station on defendant's railroad. In an action to recover damages for the death, the only testimony was that introduced by plaintiff, which was uncontradicted, and showed that the road was a double-track road, trains running west on the north track and east on the other, there being a space of 12 feet between the two; that there were platforms for passengers on

the north side of the north track and on the south side of the south track, but no platform between; that decedent alighted from a west-bound train on the south side of the same in the daytime, and started across the south track, when he was struck by an east-bound train thereon. The only witness to the accident was another passenger, an employé of defendant, who alighted on the same side in advance of decedent and crossed the south track ahead of the train. He testified that such train was in plain view and whistled, and also that he called and motioned to decedent to stay back, but that decedent started to run, and had reached the south rail when he was struck. There was no evidence of any invitation by defendant to passengers to alight on that side of trains, or that it had knowledge of any custom to do so; nor did decedent, who was a stranger to the place, have knowledge of any such custom, if it existed. *Held*, that the court properly directed a compulsory nonsuit on the ground of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1385–1397.]

3. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where a witness of an accident by which a person was run over and killed by a railroad train, on his direct examination by the plaintiff in an action to recover damages for the death, testified generally to the situation and conditions surrounding the accident, and to certain acts of the decedent, the defendant was entitled on cross-examination to inquire in detail as to all the acts and conduct of decedent immediately preceding the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 931–948.]

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

Charles Koonce, Jr., for plaintiff in error.

John S. Wendt, for defendant in error.

Before GRAY, Circuit Judge, and LANNING, District Judge.

GRAY, Circuit Judge. The writ of error in this case is to the judgment of the Circuit Court for the Western District of Pennsylvania, in a suit brought under the provisions of the statute of that state, by the plaintiff in error, as widow of Robert Fadley, deceased, and a citizen of said state, against the Baltimore & Ohio Railroad Company, a citizen of the state of Maryland. The plaintiff sues in behalf of herself and her children, to recover damages from the said defendant for negligently causing the death of the said Robert Fadley.

The statement of claim charges that, on the 13th day of August, 1905, the decedent was a passenger on one of the defendant's trains, hereinafter referred to as train No. 201, and that, just after alighting therefrom at a station known as Gratztown, in the state of Pennsylvania, and while crossing a parallel track of the defendant's road, owing to the negligence of the said defendant, he was killed by a train, hereinafter referred to as train No. 6, running thereon in an opposite direction.

At the said station at Gratztown, the defendant's road, which is a double track road, runs in an easterly and westerly direction. The northerly track is used by the west-bound trains and the southerly track by east-bound trains. Trains running on these tracks thus pass, as is usual, to the right of each other. On the morning of the accident,

the train No. 201, in which the decedent was a passenger, was proceeding westwardly, and therefore on the northern track. The decedent occupied a seat on the left hand side of the smoking car, next to the baggage car, which intervened between the smoking car and the locomotive. Two seats behind him sat Blackburn, a telegraph operator of the defendant company, who was called as a witness in the case. As the train was approaching Gratztown, decedent was notified of that fact by the conductor, as he held a ticket for that station. As the train slowed up at or near the station, Blackburn went out upon the forward platform of the smoking car and, standing upon the lower step upon the left hand side thereof and looking westwardly, stepped from the car while it was still in motion. At the same time, he heard the whistle of the approaching express train No. 6 on the southern track. He then started across the space between the two tracks in a somewhat diagonal direction, towards the platform on the southerly side of the east-bound track. He then became aware that the decedent was about to alight from the same side of the forward platform of the smoking car, and says he shouted to him to look out for No. 6, and that he threw up his hands as he did so. The decedent, however, alighted before the train had quite stopped, and Blackburn again shouted to him to stay back. He says:

"I hollered to him to stay back; it wasn't far from him and I knew I could only get across myself, and I knew if he did come across he wouldn't make it across, and I hollered for him to stay back, and I hollered again after I was on the platform; I hollered to him twice at least."

The witness explained that, as he first got off and before the train stopped, in order to go to the telegraph office at the westward end of the east-bound or southern platform, he went in a direction westwardly and diagonally across the intervening space and tracks; that as the train had moved further on before decedent alighted, and as decedent started diagonally in a southeasterly direction, their paths crossed each other, and on this account the witness, Blackburn, says he was close to the decedent when he shouted to him. Decedent, however, according to the witness, as soon as he alighted, started to run across the intervening space towards and across the east-bound track, and had almost cleared the southerly rail when he was struck by train No. 6, running at a high rate of speed, and instantly killed. Blackburn says that when he, Blackburn, started to go across, No. 6 was in full view, about the distance of two telegraph poles away.

Blackburn, the sole witness of the accident, was called by the plaintiff, and the facts which we have summarized were established by his testimony. Other undisputed facts are that, the distance between the west-bound and east-bound tracks was twelve feet; that there was a platform on the northerly side of the west-bound track, 150 feet long, and opposite to it on the south side of the east-bound track was another platform, both for the use of passengers. It was about the same length, but extended about 20 feet further west than the west-bound platform. These platforms were on the outside of both main tracks and were so placed that passengers on the west-bound trains would alight on the north side of the tracks, and those on the east-bound trains

would alight on the platform on the south side of the tracks. These platforms were about eight feet wide. From about the middle of the west-bound platform, there was a planked cross-way to the east-bound or southerly platform, which witness says was used for trucks, in wheeling baggage from one side to the other. It also appeared that the car in which decedent was a passenger was alongside of the northerly platform at the time the decedent alighted, and that this platform was in full view of any one upon the forward platform of the car; that no other passengers than the decedent and the witness, Blackburn, alighted on the south or left hand side of the train. Along the southerly platform, there was a freight house and an old box car, used as a telegraph office, and on the northerly side, on ground some eight feet above the platform and somewhat to the east, was a station house and ticket office. It also appears, from the testimony of Blackburn, that when decedent alighted, he alighted with his face partly turned toward the east and away from the oncoming train, and ran in a southeasterly direction and not towards the buildings on the south side of the platform. Three or four witnesses were introduced by the plaintiff, who testified that they had occasionally seen passengers on the west-bound trains alight from the south side of the train. There was no evidence, however, of invitation, express or implied, on the part of the road or its officers to passengers, that they should do so, nor was there any evidence of knowledge on the part of the road or its officers of such a custom, if custom it was, or that it so frequently happened that its officers and agents should have been aware thereof. It was also in evidence that the decedent was a stranger and not familiar with the situation at Gratztown or its surroundings. He, therefore, could not have any knowledge as to passengers more or less frequently alighting upon the south side.

There was no conflicting testimony as to any material fact, all the testimony being that of witnesses produced by the plaintiff. At the conclusion of this testimony, upon motion of the defendant, a compulsory non-suit was granted by the court, presumably upon the ground urged by the defendant, that the evidence adduced by plaintiff showed that the decedent was guilty of negligence which contributed to the accident resulting in his death. Afterwards, a motion was made by plaintiff to take off the compulsory non-suit, and the same, coming on for hearing, was argued by counsel and overruled by the court.

There are several assignments of error, the most important of which concern the action of the court in sustaining the motion of the defendant to grant a compulsory non-suit and in overruling plaintiff's motion to take off the same.

The question, whether a judgment of compulsory non-suit is such a final judgment as may be reviewed on a writ of error, has been settled in the affirmative by the Supreme Court of the United States, in Central Trans. Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. The question was presented in a case from the United States Circuit Court for the Eastern District of Pennsylvania, and it was held that the Circuit Court should follow the state practice in ordering or refusing to order non-suits, and it was declared that:

"The judgment of non-suit being a final judgment, disposing of the particular case and rendered upon the ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error."

The same rule was followed in Coughran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117, 41 L. Ed. 442.

A motion for compulsory non-suit always challenges the most careful examination and scrutiny by the court of the evidence adduced by the plaintiff, and the testimony and all inferences therefrom must be taken most strongly in favor of the plaintiff. With this caution in mind, we are of opinion that the court below did not err in granting the compulsory non-suit. The defendant company had provided the usual platforms on the north and south sides of the west-bound and east-bound tracks respectively. We must assume, for there is no evidence to the contrary, that they were properly constructed and adequate for the accommodation of passengers alighting from the trains stopping alongside of them. Their position was such on the outer and right hand side of the respective tracks, that passengers alighting upon them were in no danger from passing trains. They were on the sides upon which such platforms are customarily placed on double track roads, and obviously convenient and safe for passengers using them. Their position was an invitation, as well as a notice, to passengers to use them and alight on the right hand side of the train. There was nothing on the left hand side to indicate that passengers were to alight on that side, much less anything that could be construed as an implied invitation to so do. The decedent was a man of mature years, and there is nothing to show that he was not capable of intelligently observing his surroundings at the time in question. It was broad daylight when he alighted, and there was a clear view of the east-bound track for at least nearly half a mile in the direction from which No. 6 train was coming. Moreover, by the testimony in chief of plaintiff's own witness, the whistle of that train was sounded more than once before he started across the east-bound track. By the testimony of the same witness, he was warned of the approach of the train more than once, by the waving of the witness's hands and his shouting to look out for the train. Notwithstanding this, decedent started and ran diagonally across the intervening twelve-foot space and the east-bound tracks, upon the southern rail of which he was struck by the oncoming train. His course, as pointed out in the testimony, was such that it must have crossed that of the witness, Blackburn, and thus have brought the two so close together as to have made it improbable that the warning should not have been seen or heard. In the space of twelve feet between the two tracks, decedent could have safely and conveniently stood, while No. 6 passed by.

From these facts established by the undisputed testimony on the part of the plaintiff, no other inference seems reasonable than that decedent, with full knowledge of the approaching train, thought he had time, by running, to clear the east-bound track in front of train No. 6. With full knowledge of the situation, or opportunity thereof, of which he should have availed himself, he thus left a place of safety, where he had alighted, and attempted to pass in front of the swift-

ly moving east-bound train. In this, we see no ground upon which reasonable men could differ, as to the character of defendant's conduct. If this be so, the suggested negligence on the part of the company, in allowing a train at high speed to pass a station while another train is discharging its passengers, cannot affect the conclusion arrived at. No matter how negligent the defendant may have been, the negligence of the plaintiff was a contributing cause, without which the accident could not have happened.

The other assignments of error relate to the testimony elicited on cross-examination from plaintiff's witness, Blackburn. We have carefully considered those parts of the cross-examination duly objected to by plaintiff's counsel, and the exceptions taken to the action of the court in overruling the same. We do not find, however, that this testimony was permitted in contravention of the well-settled rules governing cross-examination. The witness, Blackburn, was called by the plaintiff at the opening of her case, and was the principal witness in her behalf. He testified to being a passenger on train No. 201; to the decedent sitting in front of him; what side of the car they sat upon; as to what the conductor said to decedent; as to how and when the witness alighted from the train; how and when and under what circumstances the decedent followed him and also alighted; as to how fast the train was moving; whether it had stopped when witness and decedent left it; as to the situation and dimensions of the platforms, the station buildings on either side of the road and the general physical environment of the place of the accident; as to the approach of train No. 6; as to its schedule time and as to its being late; also as to the schedule time of train No. 201 and as to its being late; as to what warning was given by No. 6 as it approached the station; and as to when he heard the whistle, whether before or after he alighted. It seems to us very clear that this testimony in chief opened up a very wide range for cross-examination. The further testimony of the witness was in continuation and elaboration of that already given. Having testified to part of the conduct of the decedent, in alighting from the train, defendant's counsel was properly allowed to explore the witness's knowledge as to all that decedent did immediately following his actions already testified to. Having testified to his having gotten out upon the wrong side of the train, and that another train was approaching upon the opposite track, of which warning was given by a whistle, it was certainly relevant to that testimony to inquire what was done by the decedent at that crisis. Everything, therefore, done by the decedent, after alighting from the train, seems to us to have been pertinent to the examination in chief.

The assignments of error in this regard are without merit, and for the reasons already given the judgment of the court below is affirmed.

UNITED STATES v. TOWN OF NAHANT. In re UNITED STATES. Ex parte TOWN OF NAHANT.

(Circuit Court of Appeals, First Circuit. February 1, 1907.)

No. 674.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS BY UNITED STATES—JUST COMPENSATION.

Where the United States in its sovereign capacity exercises its arbitrary power to condemn private property for necessary public use, the just compensation which it is required by the Constitution to make to the owner should be determined on equitable principles, and should be such as to put the owner in as good condition pecuniarily as he would have been if the property had not been taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 325–402.

Nature and extent of power of United States to condemn property for public use, see note to Shipman v. Ohio Coal Exchange, 70 C. C. A. 653.]

2. SAME—PROPERTY OF MUNICIPAL CORPORATION—RIGHT TO COMPENSATION.

Where a town having statutory power to condemn land or right of way for sewer purposes actually acquired and took possession of land for such purpose, and constructed at large expense and had maintained for a number of years a sewer over the same without objection from the landowner, it has such an interest in the land and structure as entitles it to be justly compensated therefor when the same are taken by the United States for a paramount public use, without regard to the strict regularity of the proceedings by which it acquired the right. Such right of compensation also extends to structures placed by the town in public streets or roads, such as water or sewer pipes where such streets are taken, but not to the easements in the streets themselves, nor to material thinly spread upon the ground for road purposes of such character that it loses its identity and tangibility as property when so used.

3. SAME—RULE OF COMPENSATION.

In determining the just compensation to which a town was entitled on the taking of a part of its water and sewer systems by the United States, in proceedings to condemn land for government purposes, where the parts taken were essential to enable the systems to perform their functions, it was not error to permit the town to show the fair cost of restoring the water and sewer systems to their original efficiency of circulation, or to make such cost the measure of compensation.

4. SAME—INTEREST.

An award of compensation to a town under such circumstances should not include interest from the time of the institution of the proceedings where up to the time of the trial there has been no actual taking and the use by the town of its complete water and sewer systems has not been interfered with, but the award is based on the estimated cost in the future of completing the systems in view of their contemplated impairment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 397–399½.]

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

For former opinion, see 136 Fed. 273.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty., for plaintiff in error.

Harrison M. Davis (James R. Dunbar, on the brief), for defendant in error.

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

ALDRICH, District Judge. We look upon a case like this, where the government in its sovereignty exercises its right to take private or municipal property for its necessary public purposes, as somewhat exceptional in respect to rules of damage or compensation. The right to take is a strictly arbitrary right, a right without any qualification, and one which at once cuts through all individual and inferior government conditions. The federal government arbitrarily, and as a supreme entity, takes, without question, for its own necessary defenses and other public uses, whatever it lays its hand upon. While this is so, and while it necessarily must be so, the other phase of the proceeding, and this is what makes the situation exceptional, contemplates "just compensation." "Just compensation" is the compensation vouchsafed to private interests by the federal Constitution. This phase of the case is not upon arbitrary lines. The government in a situation like this in effect says the right to take is necessarily arbitrary and must stand unchallenged; but having thus, under the strong arm of sovereignty, cut through private and municipal rights, the rigor of the arm shall be relaxed, and the government itself will see that just compensation is awarded accordingly. The paramount law intends that the owner shall be put in as good condition pecuniarily by a just compensation as he would have been if the property had not been taken. Lewis on Eminent Domain, § 464. In our view it is almost, if not quite, an element of the government's case to see to it that just compensation is ascertained and accorded. The question of just compensation contemplated by the Constitution is more an equitable question than a strictly legal or technical one. The policy of the government is to absorb all interests, so that it shall remain undisturbed in the exercise of its dominion over the property, and to this end its purpose is to render constitutional compensation under legal principles, softened somewhat by broad considerations of justice.

This proceeding in its inception comprehensively directed itself against lands and rights therein and against buildings. The act conferring authority upon the Secretary of War to institute condemnation proceedings did not necessarily limit the interests to be condemned to the phraseology of that particular act, but would probably be construed as conferring authority upon the Secretary of War to institute proceedings broad enough to invoke all existing condemnation power of the government in respect to property necessary for fortifications and coast defences, but, whether this is so or not, the act of August, 1890, directs itself against "any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defences." Following out this idea, the petition for condemnation asked for an impartial appraisement of "lands and ways and interests therein, and any building standing on said land."

It is claimed by the government that the proceedings with reference to the town's waterworks and sewage system were not shown to be legal. Now, what was the town's status in this respect?

Sections 1 and 2 of chapter 50 of the Public Statutes of Massachu-

setts (1882), in force in 1894, authorized the selectmen of a town to lay out, make, and maintain, drains and sewers through the lands of any persons or corporations, subject to the provision that, when land was taken for that purpose, the proceedings in towns should be "the same as in the laying out of townways." The proceedings with reference to townways were provided for in sections 65 and sequence of chapter 49. There was an essential difference between proceedings for laying out sewers and laying out townways in this respect: While the selectmen might lay out sewers and take lands for that purpose, the proceedings with reference to townways were under the control of the town, and were required to be finally acted on at a town meeting properly called therefor. Section 71 of chapter 49 provided that a townway could not be established until its location was reported to the town, and accepted and allowed at a public meeting of its inhabitants; and it also directed that the "laying out" should be "filed in the office of the town clerk seven days at least before such meeting." Notwithstanding the general directions that proceedings in laying out sewers were to be the same as in the laying out of townways, the direction for filing the report of the latter proceeding in the office of the town clerk seven days before the meeting of the inhabitants was not appropriate to the laying out of sewers, because the statute as to the latter did not contemplate any such meeting. The record in this case, however, does not state whether a plan was filed with the town clerk. The record likewise fails to give the details of the proceedings in reference to the sewer in question. The substance of what is shown is that in March, 1894, the selectmen, in a warrant for a town meeting, brought before the inhabitants of Nahant the question of an appropriation for building sewers, that the plan of their proposed location was presented at that meeting, that there was an appropriation of $3,000 for such purpose, and that the sewers were constructed in accordance with that plan. This in a sense implies prior action by the selectmen according to the statute. It also appears from the record that the plan was never recorded in the registry of deeds; but the law providing for such a record was not passed until March 3, 1898. Acts 1898, p. 88, c. 134. Consequently this is irrelevant.

The answer of the town with reference to the statutory proceedings in laying out the sewers is not specific. It merely states that what was done in that respect was "in the exercise of its lawful rights and duties." Of course, that general allegation would include a legal taking under sections 1 and 2 of chapter 50 of Public Statutes (1882), to which we have referred, as well as any other lawful method of proceeding which might be suggested. In view of what appears in the record, and of the acquiescence in the proceedings of the town in regard to these sewers by everybody concerned until the United States undertook to dispute them, a period of more than eight years, and in view of the lack of any specific objections to the legality of the proceedings of the selectmen, except the statement that there was no record under the act of 1898, which, as we have shown, was not required, we think we may assume that the selectmen of the town of Nahant proceeded by condemnation to secure rights for the sewers in question in accordance with the Public Statutes of 1882.

Apparently the only failure on the part of the selectmen was in not proceeding for an assessment of damages in accordance with section 3 of chapter 50; but this was not necessary as against the owners in 1894 of the lands here involved, and their successors in title. This was settled in Roberts v. Northern Pacific Railroad Company, 158 U. S. 1, 10, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; and there are other decisions in that line which recognize the idea that, after an acquiescence on the part of landowners such as we have here, no proceedings can be taken by them except to obtain an assessment of damages. Indeed, the decisions seem to go further, and not to leave it open to the United States to dispute the right of the town to its sewers, even if the proceedings of the selectmen in laying them out were informal. According to Roberts v. Northern Pacific Railroad Company (at page 10 of 158 U. S., 15 Sup. Ct. 756, 39 L. Ed. 873), it was probably sufficient if the town, or its authorized officers, under a power of eminent domain, entered into actual possession of lands necessary for its corporate purposes, either with or without the consent of the owners. As the selectmen had authority under the statutes to take the lands in question for sewers, and in fact did take possession in accordance with a plan which sufficiently shows what was taken, and as the owners acquiesced in what was done, the rights of the town were complete as against the owners and their successors in title so far as involved in the proceeding before us.

Moreover, and upon a broader ground, under the conditions existing here, we do not think it necessarily follows that an interest in land must have ripened into a strictly common-law easement in order to entitle a party to just compensation. We think the Constitution contemplates just compensation for such interest as a party has and such as is taken. Of course, it must be an interest or a right recognized as of some value under legal or equitable principles.

In this case the town, in its municipal capacity, at least entered upon land under a parol license from an individual owner for which it paid $100, and upon land under a parol license from the treasurer of the land company, and constructed public sewer works at large expense, a situation in which the land company and the individual owner acquiesced for years. The town likewise in its municipal capacity constructed public waterworks in which the pipes were laid in its streets or highways.

Under such circumstances, and without regard to the question of the authority of the treasurer of the land company or to the strict regularity of the municipal proceedings in respect to its works, we think the right of the town in the nature of an easement amounted to an interest for which it is entitled to be justly compensated under the fair meaning of the Constitution. And this we think is so both as to lands condemned and as to such as were secured by purchase which the government holds subject to the interests of the municipality. See Randolph on Eminent Domain, §§ 387, 390; Roberts v. Northern Pacific Railroad, 158 U. S. 10, 11, 15 Sup. Ct. 756, 39 L. Ed. 873; Northern Pacific Railroad v. Smith, 171 U. S. 260, 270, 18 Sup. Ct. 794, 43 L. Ed. 157; Walton v. Green Bay, etc., R. Co., 70 Wis. 414, 418, 36 N. W. 10; McAulay v. Western Vt. R. R. Co., 33 Vt. 311,

78 Am. Dec. 627; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 215, 8 N. E. 460, 59 Am. Rep. 341; Davis v. Titusville & O. C. R. Co., 114 Pa. 308, 314, 6 Atl. 736; Brimmer v. Boston, 102 Mass. 19.

As to the road material, we think its nature is such that it cannot become the basis for recovery, either as land, structure, or personal property. This is understood to be a thin layer of macadam road material. If the material consisted of paving stones, or wood blocks of structural formation, which in the ordinary course of road repairing or road building might be taken up and placed elsewhere for beneficial purposes, it quite likely might be otherwise. But when material of the character in question is thinly spread upon the ground for highway purposes it loses its identity and tangibility as property, and in view of the purpose for which it is used would be accepted as something permanently dedicated to that particular public use. We find no authority, nor do we see any reason, for treating road material of the character in question either as a structure or as an interest in land for which recovery or compensation can be had.

Now as to the rule which the trial court adopted for the purpose of submitting the question of just compensation to the jury.

Some phases of the questions arising upon this writ of error were necessarily discussed by this court in its opinion when the case was first before us. Town of Nahant v. United States, 136 Fed. Rep. 283, 70 C. C. A. 641, 69 L. R. A. 723. The primary question, of course, is just compensation, and this means the full equivalent for the property taken. Monongahela Nav. Co. v. United States, 148 U. S. 312, 326, 13 Sup. Ct. 622, 37 L. Ed. 463. The difficulties of getting at just compensation are not so great where an entire property is taken as where a part only is taken. Where a part only is taken, resort must be had oftentimes not only to the value of what is taken, but to the situation in which the part not taken is left. Under such circumstances the books apparently recognize several expedients as reasonable, by way of evidence, for getting at what will make the owner whole. The reasonableness of the application of a particular rule of evidence quite likely depends on the particular circumstances in a given case. In the case at bar the property taken was part of a system of public municipal works which must be restored and maintained in the interests of local health and public good. The expedient adopted by the trial court was one which seems to have been recognized in United States v. Gettysburg Electric Railway Co., 160 U. S. 668, 685, 16 Sup. Ct. 427, 40 L. Ed. 576, where it is said in effect that, if the part taken is essential to enable the railroad corporation to perform its functions, or if the value of the amount remaining is impaired, such facts might enter into the question of the amount of compensation awarded. See, also, Town of Nahant v. United States, 136 Fed. 273, 284, 70 C. C. A. 641, 69 L. R. A. 723. In this case the part of the system taken was essential to enable it to perform its functions, and the rule of evidence adopted for the purpose of ascertaining just compensation permitted the town to show the fair cost of restoring the water and sewerage system to the original efficiency of circulation. We think this was a reasonable and just expedient under the circumstances. Where part is taken just compensation includes damages to the re-

mainder (Lewis on Eminent Domain, § 464, and authorities, note 86), and the evidence under the rule adopted was one way of showing the damages which the town sustained by reason of what was taken.

Now as to interest. Without regard to the question whether the time of taking relates to the date of the inception of the condemnation proceeding, or to the date of the decree, the time is often fixed by a rule of fiction having reference to a constructive rather than to an actual taking, and we do not think the question of interest is necessarily controlled by a fictional rule. In this case it is admitted that at the time of the trial there had been no actual interruption of the town's possession, and that the town had continued in its enjoyment of the right as fully as it would have done if the government proceedings had not been instituted. The just compensation has not therefore been withheld, and its ascertainment in fact in this particular case is made to turn on what it would cost to construct other works, and it is not suggested that any expenditure in fact has been made in that direction.

The equitable rule sustained by authorities (Lewis on Eminent Domain, § 499, note 44), which under certain circumstances permits an adjustment between the value of the use of the property and interest, is said to be one derived from the constitutional provision requiring just compensation. Looking at the enjoyment of use here as based upon fact rather than fiction, if the town were allowed interest from the date of the filing of the petition, it would be allowed more than just compensation, because it would have enjoyed both the benefit of possession and of interest. As the rule of evidence adopted for ascertaining just compensation permitted the town to show the estimated cost of necessary future expenditures, it would be giving the town more than just compensation to add interest to the estimated future expenditures.

In this case there were special verdicts based upon the different claims of the town, all of which included interest, and the amount of interest appears upon the face of each special verdict. There was also a general verdict which included all the special verdicts.

This case is remanded to the District Court, with directions to open the decree entered on July 27, 1906, so far as it relates to compensation to the town of Nahant, and to enter a decree for the amounts awarded by the jury on account of the water supply system $3,850, and on account of the sewer system $9,300, making a total of $13,150, without interest, and for the costs in the District Court, and for nothing more.

MANSON et al. v. WILLIAMS.

(Circuit Court of Appeals, First Circuit. May 16, 1907.)

No. 688.

1. BANKRUPTCY—ORDER OF ADJUDICATION—CONCLUSIVENESS OF FINDINGS.

Where a petition in involuntary bankruptcy alleged that the two defendants owned a stock of goods as partners, and that therefore a partnership existed which it was prayed might be adjudged a bankrupt, and such adjudication was made, it was a conclusive determination of the owner-

ship of the stock of goods as between the parties to the proceeding, but could not bind the trustees in bankruptcy of one of the alleged partners, who had taken possession of and sold the goods as assets of his individual estate, and who were not permitted to become parties to the partnership proceeding.

2. SAME—PARTNERSHIP—EVIDENCE TO ESTABLISH.

The owner of the stock of goods in a store turned the same over to his brother, who personally conducted the business thereafter under a company name, which was publicly used in all transactions relative to the business. It was originally the intention to form a corporation to own the business, the most of the stock to be issued in the first instance to the brother who owned the goods, but such intention was never carried out. *Held*, that there was a partnership in fact between the brothers in the business, which might be adjudged a bankrupt, and which was the owner of the property and assets of the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 51; vol. 38, Partnership, §§ 1–38.]

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

For opinion below, see 148 Fed. 305.

John W. Manson (Harry R. Coolidge, on the brief), for appellants.
John S. Williams (Albert S. Woodman, on the brief), for appellee.

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

PUTNAM, Circuit Judge. The controversy in this case arose as follows: On the 14th day of July, 1904, Henry Hudson filed a voluntary petition in bankruptcy, on which he was adjudicated a bankrupt, and John W. Manson, Albert W. Chapin, and Freeman D. Dearth were duly appointed and qualified as trustees of his estate on the 23d day of August. Subsequently, on October 22d of the same year, a petition was filed by creditors against Henry Hudson and James Hudson, alleging that they were copartners doing business under the style of the Hudson Clothing Company, and praying that they be adjudged bankrupts as such copartners. Henry Hudson and James Hudson were brothers. On the 9th day of the succeeding November a denial of bankruptcy was filed by the trustees of the estate of Henry Hudson. On November 21st Henry and James each filed their answers denying the allegations of the petition. On November 22d a further answer of the trustees was filed. On the 24th day of the succeeding January an order was made as follows, "Case to stand for hearing on question of adjudication on petition and answers of James and Henry Hudson"; and a hearing was had on June 13, 1905, by the District Court, as the result of which James and Henry were adjudged bankrupts, as copartners under the style of the Hudson Clothing Company. Subsequently a petition for a rehearing was filed and denied.

No doubt on the creditors' petition the real controversy considered and passed on was whether there was any such copartnership as the petition alleged. There was nothing, however, to qualify the order of January 24th that the case was to stand for hearing on the creditors' petition and the answers of James Hudson and Henry Hudson; and it is thus apparent from the record in the District Court that the

trustees of the estate of Henry Hudson were not regarded as being in court with reference thereto.

At the time Henry Hudson filed his petition in bankruptcy, a stock of general merchandise, such as is customary in country stores, was in the control of himself or his brother James, or of both of them. This stock was taken possession of by the trustees in bankruptcy of Henry Hudson, and sold by them, and the present controversy arises out of a claim of John S. Williams, who was appointed trustee of the alleged bankrupt copartnership, to the proceeds of the sale on the ground that the merchandise belonged to the Hudson Clothing Company. The case was heard by the learned judge of the District Court, where the bankruptcy proceedings were pending, and decided by him in favor of Williams as trustee, whereupon the trustees of the estate of Henry Hudson appealed to us.

One feature of this case which we cannot pass by is that the questions of the existence of a copartnership and of the title to the stock of goods are identical; that is to say, if the stock of goods was the individual property of Henry Hudson, there was no copartnership, and, if there was no copartnership, the stock was his individual property. Therefore the substance of a like issue to that before us was adjudicated on the creditors' petition to have Henry Hudson and James Hudson adjudged bankrupts as copartners. The question at once arises whether the issue is not already concluded. It might have been if the trustees of Henry Hudson's individual estate had been allowed to intervene and become parties to the hearings on the creditors' petition. Of course, so far as ordinary bankruptcy proceedings are concerned, the adjudication of the District Court on that petition determined the status of the Hudson Clothing Company; but, as the trustees who have appealed to us had not been included as parties thereto, as we have explained, the fact of the status of the Hudson Clothing Company for ordinary purposes cannot affect the alleged rights of the appellants, or bar these proceedings.

We agree with the conclusion of the learned judge of the District Court, and approve his observations so far as he has expressed himself, with reference to the issues before us. 148 Fed. 305. Probably, with regard to the adjudication on the creditors' petition, he had orally explained himself fully, so that on the issue now before us he did not deem it necessary to express himself except in a general way; and, as the questions involved are to a certain extent novel, we conclude that our opinion in reference thereto had better explain itself.

We will observe, however, that the learned judge of the District Court found that there was a copartnership in fact between the two brothers under the style of the Hudson Clothing Company. He did not rest his conclusion in any way on any hypothesis of a copartnership by estoppel in the strict sense of the expression. This is important, because we regard the law as settled that, in bankruptcy proceedings involving a copartnership, the copartnership is, ordinarily, to be regarded as a true entity, precisely as the individual partners are. Various incidental reasons are given for this, the principal one of which is that otherwise there would be two classes of creditors whose equities otherwise are equal, one of which classes would share

in the proceeds of certain property on the ground that two or more persons were estopped as to them from denying a copartnership, while other creditors who had contributed to the same enterprise would be left to what might remain of the property involved in the enterprise after the first class were paid, or to one or more individual estates. The fundamental reason, however, is that all through the various statutes of bankruptcy, whether in the United States or in England, which deal with copartnerships, the individuality and the entity of the copartnership are recognized to the same extent as the individuality and the entity of the several persons involved therein. The entire rule on this topic, so far as we have occasion to refer to it, is well deduced from Ex parte Sheen, 6 Ch. D. (1877), 235, to which case we will return again.

In view of these suggestions, however, we will say that there is in the record a large amount of correspondence, some of which may tend to show a copartnership by estoppel in favor of numerous creditors, and some of which might raise an indication that there was in fact no partnership. All of it, however, can be passed by as having no clear tendency in any direction so far as the issue before us is concerned, without any further comment in reference thereto. We regard the case as easily disposed of on the theory of a real copartnership on the facts stated by Mr. Henry Hudson, as follows:

"For some time prior to April, 1902, I have been equitable mortgagee, or in fact owning the stock of goods in the store conducted by J. A. Rand, in Guilford Village, Me. Mr. George F. Newbegin, who then lived in Guilford, had an equitable interest in the goods. In the latter part of April, 1902, I deemed it for my interest to take said goods. I communicated with Mr. George F. Newbegin, and Mr. Newbegin and J. A. Rand took the account of stock as a basis of settlement between Rand and Newbegin. After this account of stock was taken, Mr. Newbegin turned over to me the stock of goods as my own. I had these goods and desired to sell the goods. Immediately after this transaction was closed with Mr. Newbegin, I had two telegrams to go to Bangor, where my brother, James Hudson, was conducting a grocery business. After I got to Bangor, I deemed it for his interest that he should close out his grocery business at Bangor, and for him I did close out the business. I told him that I had a stock of goods at Guilford, and that he could go to Guilford and go into business there in the same store where the business had been carried on by J. A. Rand, and with this stock of goods he came to Guilford and went into the store. He had the original account of stock which had been taken of the goods and examined it. I said to him that I would form a corporation; that it would take three of us; that myself and he, with a third party, would make up the corporation, and he could have all of the goods; and that it should be his business, but the stock, when issued, I should hold, and, as he could pay me, he was to pay me for the stock of the corporation, and it was to be turned over to me after the corporation was formed. I would transfer to the corporation the goods, so that the corporation could hold the goods. It was talked between him and myself that my aunt, Martha Martin, should be the third party to make up the corporation; that he could hold some of the stock, and Mrs. Martin should have enough so as to make her eligible as a party to the corporation. I think it was about the 6th of June that he went into the store to do business. Some time in the month of June I did draw up an agreement under the statute to form a corporation, and also wrote a certificate as required by law. Nothing further was done with these two documents by me. They remained in my office. I never showed them to my brother, James Hudson, or to Mrs. Martha Martin. I did not complete the organization at that time on account of the condition of my brother. I thought from week to week that circumstances might change, and then I would complete the organization. So that

this was allowed to go from time to time until August, 1903, when my brother was away from the store for about six weeks, and returned the latter part of September or first of October, and after that pressing business matters of my own caused me to neglect to do anything further in regard to completing the organization of the corporation. My brother never saw the documents that I had drawn up. I never transferred to any one the title of these goods which I had from Mr. Newbegin. My brother was in the store and conducted the business entirely. He did not consult with me at all in regard to the management of the business. Whatever goods I took from the store I purchased and bought, principally at prices at the time which he gave me, and practically paid for everything that I took from the store, and so far as I can recollect I never had any goods charged that I took from the store. I made purchases there the same as I purchased goods at other stores. I never had anything from the store but what was paid for.

"There never was any talk between us about forming a partnership or that I should ever receive any profit from the business. I was to hold the stock of the corporation, when formed, only as security, and to be turned over to him as his property as he paid for it. I did what I did for the express purpose of having him go into business at Guilford to carry the business on as practically for himself. The idea of a corporation was that he could hold it and manage it best as his own, and I still be in a measure protected by holding the stock. I cannot state the time when I first knew of the name of the Hudson Clothing Company. It must have been some time in the summer. I was not consulted in so far as the name was concerned. My first knowledge in regard to the name was obtained, not from my brother, but, I think, from seeing the advertisement which he put into the newspaper or on the boards he put out upon the highway or upon the corner of the store. We never had any talk whatever in regard to the use of the name, or in regard to the conducting on of the business. I advanced or let him have money from time to time to pay, as he said, bills that he had contracted. I also paid notes that he had given; these notes having been brought to me and indorsed by me for him. The amount which I paid on account of debts which he had contracted after he went into the store aggregate about $5,000. These sums of money which I let him have I charged upon my books under the name of Hudson Clothing Company, except in some few instances. These instances I am not now able to state the dates or exact amounts. Not having seen my books for some time to make examination, I used the name of the Hudson Clothing Company simply as an identification to keep the account by itself. I did indorse for him, from time to time, notes given to persons, firms, or corporations from whom he had purchased goods."

Affairs continued in the manner thus described until Henry Hudson filed his petition in bankruptcy; that is, until July, 1904, being more than two years, except that the name Hudson Clothing Company was publicly exhibited by a sign on the store where the business was transacted; that the bills received and rendered carried that title; and that, beginning with September, 1902, the account with the First National Bank of Guilford, at which the deposits of the business were made, which until that time had been kept in the name of James Hudson, was changed to Hudson Clothing Company, and checks were subsequently drawn as the checks of the Hudson Clothing Company. There was thus a general holding out to the public to that extent. Although for the purpose of maintaining merely an estoppel in the strict sense of the word, this cannot be availed of, as we have shown, it is available on the question of the existence of a copartnership in fact, because, as this all occurred in the small town in which Henry Hudson lived, and as he admitted that he knew the name Hudson Clothing Company had been used, the learned judge of the District Court had a right to find as a fact that he knew, or ought to have known, the extent to which that had gone. Bearing in mind the

fact that all agreements as to which no particular form is demanded may either be proven as made expressly or proven as made by implication, the fact of this public use of the name, apparently that of a copartnership, must be given its due effect.

At this point we return to Ex parte Sheen, 6 Ch. D. (1877) 235. It is true that it was held by the Court of Appeals that the mere fact that one who has held himself out to a small number of creditors as a copartner with a trader is not barred from proving against the trader, whatever may be his liabilities to the few persons with reference to whom he may be estopped; but Lord Justice James, in his opinion, at page 237, observes that there was no actual copartnership in the case, and "no ostensible partnership, no holding out to the world, that is, to creditors generally, that there was a partnership, * * * so as to make a joint estate." This fairly implies that a holding out such as we have here may, at least to some extent, support a finding that there was a copartnership by implied agreement, or that the parties had drifted into the relationship of copartners in fact. This subject is treated sufficiently in Williams on Bankruptcy Practice (8th Ed.) 166, 167, where there is a discussion of reputed ownership, which, of course, does not exist in the United States to any definite extent, and also of an ostensible copartnership of the kind referred to by Lord Justice James, with some examination of the authorities on both these topics, which it is not necessary for us to follow out.

It is plain that the original arrangement between the two brothers did not contemplate a copartnership, but simply an intrusting by Henry to James of property belonging to Henry, to enable James to work it up for his own benefit. True it is that, in regard to the proposed corporation, the trustees of the estate of Henry Hudson cite Fay v. Noble, 7 Cush. (Mass.) 188, Bank v. Almy, 117 Mass. 476, and Ward v. Brigham, 127 Mass. 24, to the point that parties who join in the contemplated organization of a corporation do not thereby become copartners. Two of these cases relate to the general proposition that members of a de facto corporation which is defectively organized are not copartners, and the other to peculiar circumstances with regard to the relations among themselves of partners contemplating a corporation; the peculiar circumstances establishing no general principle. None are at all in point here. The intention to form a corporation slumbered so thoroughly, and so long, that it is of no effect.

Probably the best definition of partnership is that found in the partnership act of 1890 (St. 53 & 54 Vict. c. 39), which reads as follows: "Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit." It is necessary to note the significance of the words "carrying on a business," which implies a relation entirely different from the enforced relation of tenants in common, as the owners of a ship or of a house, who must either let the property lie idle or keep it in some way occupied or used, deriving a return from such occupation or use. Various illustrations of the force of this distinction will be found in Pollock's notes to the act referred to, entitled "A Digest

of the Law of Partnership," (5th Ed.) 2, 3. Mr. Justice Gray, in Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 36 L. Ed. 835, gives a definition almost precisely like that which we have cited from the partnership act, as follows:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

The difficulty with definitions, like some of those brought forward by the trustees of the Henry Hudson estate, is that they put the agreement to share profits to the forefront. The right to share profits is, of course, an element in a true copartnership; but, when it is said that a copartnership involves an agreement to share profits, it goes beyond the legislative definition, and that of Mr. Justice Gray which we have quoted, and unnecessarily beyond them. The right to share profits, of course, exists; but the right may arise without anything in the nature of an express agreement, indeed, without anything in the nature of an implied one. The right to share profits is an indication of the existence of a copartnership, but it may result from an agreement to that effect, or it may flow out of the relationship which exists between the parties. It is true that the present case is embarrassed by the fact that, in the absence of any agreement as to the profits, in connection with the further fact that Henry Hudson contributed only assets, while James Hudson contributed only personal services, it may be difficult to determine how profits would have been shared, and therefore it is plausible to suggest that there could have been no profits, and consequently no partnership. Nevertheless, both of these details are met by Paul v. Cullum, 132 U. S. 539, 550, 10 Sup. Ct. 151, 33 L. Ed. 430, where it was observed that, in the absence of any evidence showing a different intention, partners would be held to share equally both profits and losses.

The result is that, whatever may have been the intention when Henry Hudson put the property into the hands of James Hudson to be managed by him, those gentlemen and the circumstances of the business drifted entirely away from it, and the relations between them must be determined by what afterwards ensued. Those relations embraced all the elements necessarily included in the definitions given by the partnership act and by Mr. Justice Gray; and it is impossible to characterize the substantial result except as has been done by the learned judge of the District Court.

The question of interest passed on by the learned judge of the District Court was fully explained by us in Hutchinson v. Otis, 115 Fed. 937, 53 C. C. A. 419, in an opinion passed down on May 22, 1902, which is the same case reported as Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179. His decision in regard thereto conformed to the rule stated by us, and was undoubtedly correct.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal against the appellants as trustees.

CITY OF GRAND FORKS v. ALLMAN.

(Circuit Court of Appeals, Eighth Circuit. April 22, 1907.)

No. 2,465.

1. MUNICIPAL CORPORATIONS—ACTIONS AGAINST FOR PERSONAL INJURY—CONDITIONS PRECEDENT.

Under Rev. Code N. D. 1899, § 2172, which requires as a condition precedent to the maintaining of an action against a city for a personal injury that a verified claim setting forth the time, place, cause, and extent of the injury shall be presented to the mayor and common council for audit and allowance within sixty days after the happening of the injury, a claim is duly presented where it is presented to and filed by the city auditor within the specified time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1704.]

2. SAME—OBSTRUCTION IN STREETS—DUTY TO REMOVE.

It is the duty of a city whenever a dangerous obstruction appears in its streets, even though it was unauthorized, to use reasonable diligence to remove it, and what constitutes such diligence depends on the facts in each case, and especially upon the fact whether the existence and dangerous character of the obstruction was known, or in the exercise of reasonable supervision and diligence could have been known by the city in time to have caused its removal before it produced the injury complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1612–1615.]

3. SAME—ACTION FOR PERSONAL INJURY—QUESTION OF NEGLIGENCE.

In an action against a city to recover for a personal injury, it was shown that, when walking at night on one of the most frequently used streets of the city, plaintiff fell over a loose plank and was injured, that some time before a water pipe had been temporarily laid in the street upon the pavement and covered to prevent freezing, and that the plank in question had been placed on the covering to keep it in place. Although it was not so placed by authority of the city, it had been there for a week or more prior to the injury. *Held*, that under such evidence the question of the city's negligence was properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1745–1752.]

4. TRIAL—VERDICT—CONSISTENCY WITH SPECIAL FINDINGS.

A general verdict for the plaintiff in an action against a city to recover for an injury received by plaintiff by falling over an obstruction in a street, returned under instructions which authorized such verdict if the jury should find that the obstruction had been there for such length of time that the city in the exercise of reasonable care should have known of it, is not inconsistent with the answer to a special interrogatory stating that the jury were unable to find the length of time the obstruction had been there, where the evidence tended to show that it had been there for a number of days, but left the exact length of time uncertain.

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

Scott Rex, for plaintiff in error.

C. J. Murphy and Fred S. Duggan, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Allman, the plaintiff below, brought this suit against the city of Grand Forks to recover damages for injuries sustained by him by falling over an obstruction in one of the public

streets of the city. He recovered a judgment in the Circuit Court, and the city on this writ of error challenges it in argument and brief for three reasons: (1) Because there was no preliminary presentation of the claim for damages given to the city as required by section 2172 of the Revised Code of North Dakota of 1899; (2) because there was no substantial proof of negligence on the part of the city; (3) because the verdict was in disharmony with the special findings made by the jury.

Was there a proper preliminary presentation of the claim?

Section 2172 of the Code requires as a condition precedent to maintaining a suit of this kind against the city that the claim "shall within sixty days after the happening of such injury or damage, be presented to the mayor and common council of such city by a writing signed by the claimant and properly verified, describing the time, place, cause and extent of the damage or injury." On February 6, 1905, within 60 days after the injury, which occurred on December 17, 1904, plaintiff presented to the city auditor a claim for damages corresponding to the requirements of section 2172, supra, and the same was filed by the auditor. A regular meeting of the council was to be held that evening, but for want of a quorum it was not held until February 16th, when the auditor advised the council of the filing of the claim and was instructed to return it to plaintiff with the information that, when presented according to the requirement of the statutes, it would be considered.

A brief reference to the statutes and decisions of North Dakota will serve to show that the filing of the claim with the auditor was a presentation of it to the mayor and council within the meaning of the law. The mayor and common council of each city is constituted a board of audit of such city. Section 2171, Rev. Code 1899. The city council consists of the mayor and aldermen. Section 2172, Rev. Code, 1899. Only one writing signed by the plaintiff and properly verified is contemplated by section 2172, supra. When so executed and verified, it is to be presented to the mayor and council "for audit and allowance." Section 2174. Giving due consideration to these provisions of the statutes considered collectively, we cannot agree with counsel for the city that the claim should have been presented to the mayor separately from the council. The claim manifestly should be so presented to the body authorized to audit it as to secure the attention of that body, and, when that is done, it would seem that the requirement of the statutes has been complied with. It was therefore properly presented to the mayor and common council sitting together as a board of audit. The mayor constituting one member of the council and one member of the board of audit was, to all intents and purposes, presented with the claim when it was presented to the council.

There obviously must be some way of presenting a claim which the city cannot, by its own action, thwart or prevent. If it could only be presented to the council when in session, that body, as illustrated in this case, might fail to meet during the period within which the claim was required to be presented, and thus by its own wrong work a defeat of a meritorious claim. It was sought to be presented

on February 6th, when a regular meeting of the council should have been held, but which, without any fault of the complainant, was postponed until after the statutory time for presenting the claim had elapsed. The city auditor is by law required to keep his office at the place of meeting of the council or elsewhere as directed by the council; to keep a record of the proceedings of the council; to be the custodian of the corporate seal and of all papers and records of the council; and to audit and adjust all claims and demands against the city before they shall be allowed by the council. Sections 2168, 2170, Rev. Code, 1899. It appears from these provisions and from the obvious necessity of providing an effective way of presenting a claim to the final auditing board that the auditor is clearly intended to be the medium of approach to the council, and that, when a claim is presented to and filed with him for audit and adjustment, it is presented to the council; and this, we understand, has been so held in the recent case of Pyke v. City of Jamestown, decided by the Supreme Court of North Dakota, February 15, 1906, and reported in 107 N. W. 359, wherein, after referring to the legislation just pointed out, it is said:

"The auditor is the proper official channel through which all claims for damages reach the city council and is the official representative of the city council for receiving all claims and demands against the city, including claims for personal injuries."

In the last-mentioned case a large number of authorities are cited, and the conclusion there reached forcibly commends itself to our approval.

Was there sufficient evidence of negligence to justify the jury's finding to that effect?

The streets of a city are made and maintained at public expense for the use of its citizens and others who may lawfully pass over them, and a duty is cast upon a city to exercise all reasonable supervision, care, and precaution to maintain them in a reasonably safe condition so as to avoid, as far as possible, injury to the traveling public. This general rule necessarily implies a minor one that the city must, whenever even an unauthorized, dangerous obstruction appears on its streets, use reasonable diligence to remove it. This duty is imposed upon defendant city by statute (section 2148, Rev. Code 1899, subd. 10), as well as on general principles of law. Barnes v. District of Columbia, 91 U. S. 540, 23 L. Ed. 440; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472. What is such diligence depends upon the facts of each case, and particularly upon the fact whether the existence and dangerous character of an obstruction has been known, or in the exercise of reasonable supervision and diligence could have been known, by the city long enough to enable it to remove it or cause it to be removed before an accident happens.

The foregoing propositions of law are not disputed by either side, and were in substance and effect given by the learned trial judge to the jury in this case. What are the facts? Plaintiff on the evening of December 17, 1905, when dark, was walking with two friends from East Grand Forks to Grand Forks. He had just crossed the bridge connecting the two places, and was walking from the west

end of the bridge sidewalk across a corner of the public street to the main sidewalk, which did not align with the bridge sidewalk. Pedestrians customarily walked there in traveling between the two places. As plaintiff was making this crossing he fell over a loose plank which had been placed over an iron water pipe lying temporarily for a short distance on the surface of the paved street while the regular water pipe was undergoing repair. On November 24th, three weeks before the accident, the iron pipe was laid across the street and two planks, one on either side of it, were spiked down to the street to hold the pipe steady and to permit traffic over it without injuring it. Some time thereafter manure was placed over the pipe to keep it from freezing, and it was claimed by the plaintiff that the loose plank was placed there to hold the manure down. This was vigorously denied by the city. In the argument before us it seems to have been assumed as a fact that the city did not originally authorize the placing of the loose plank over the pipe line, and counsel for plaintiff concede for argument's sake that on the evidence adduced the assumption was warranted. Notwithstanding that concession, it is an indisputable fact that the plank was there on the evening in question, that it was a dangerous obstruction to the street, and that plaintiff fell over it and was injured.

The plank was there at the time of and immediately before the accident serving a purpose which reasonably implied some permanency. The city introduced several witnesses who, after showing that it was more or less probable that they would have noticed the plank if it had been there any length of time, testified that they had not seen it before the accident. Other witnesses called by plaintiff testified to the contrary. The sheriff of the county testified that he had noticed it lying there three or four days before the accident; that when he saw it it was lying somewhat crosswise of the pipe, but that he straightened it out so as to cover the pipe, remarking at the time that "somebody is going to fall down here and get hurt." Another witness testified that it had been there a week or 10 days before the accident.

Without further specification, it is sufficient to say that there was evidence from which the jury might have found that the loose plank in question had been there for at least a week before the injury.

If, now, the city in the exercise of reasonable care ought to have known of the obstruction within that time, its duty was to remove it or take the consequences. We think there was ample evidence to warrant the finding which the jury made on that issue in favor of the plaintiff. The city had many duties, which appropriately required daily supervision and inspection of its most frequented streets, imposed upon it by law. Section 2148, Rev. Code 1899. Among them was to light and clean streets and prevent and remove obstructions therefrom. The obstruction in question was on a street very frequently traveled, forming a connecting link between two important localities. It had been there several days and its dangerous condition had been the subject of comment by one of the most important officers of the county. It is difficult in cases of this kind to lay down definite rules for the determination of the issue of reasonable care. What

would import knowledge of an obstruction in one locality would necessarily be different from what would do it in another. The obligation of care and inspection is more imperative where the street is much used than where it is little used, and reasonable care might be different for each place. Considerations like these make the issue in question peculiarly appropriate for a jury. For some illustrative cases where the existence of an obstruction for a short period of time has been held sufficient to charge defendant with constructive knowledge of it reference may be made to Carrington v. City of St. Louis, 89 Mo. 208, 1 S. W. 240, 58 Am. Rep. 108; Straub v. City of St. Louis, 175 Mo. 413, 75 S. W. 100; Mayor v. Johnson, 84 Ga. 279, 10 S. E. 719; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414. In the last-mentioned case it is said:

"Whether the corporation had notice or was negligently ignorant is a question of fact for the jury. Notice will be inferred if the defect in the street or sidewalk has existed for a considerable length of time or from the fact that the defect had existed so long as to render it notorious."

See, also, to the same effect, Thompson on Negligence, 761.

Was the general verdict inconsistent with the special findings?

The Code of North Dakota empowers the courts of that state to require the jury to make special findings of fact, and provides that, if they are inconsistent with the general verdict as found, a judgment as required by the special verdict shall be entered. The court below pursued that practice and submitted to the jury the following questions, to which answers were made as stated after each question:

"(1) How many planks were used in the structure in question when it was put down on November 24, 1904? Ans. Two.

"(2) Were such planks spiked down to the pavement? Ans. Yes.

"(3) Was the plank which tripped the plaintiff one that was laid November 24, 1904, or one that was subsequently laid? Ans. Subsequently laid.

"(4) If you find in answer to question 3 that the plank which tripped plaintiff was placed subsequent to November 24, 1904, for what time previous to the accident had it been continuously at the point of the accident? Ans. We don't know."

The contention is that the finding that the jury did not know how long the plank which tripped plaintiff had been located there is inconsistent with the general finding under the court's charge to the effect that it had been there continuously for such a time that the city in the exercise of reasonable care should have discovered it. We fail to discover any inconsistency in this. The jury under the evidence gave a very proper answer to the last question propounded to them. The proof rendered an accurate answer difficult. The witnesses placed the time variously from four to ten days. It does not follow that the jury could not properly find that the plank had been there long enough to charge the city with knowledge of its existence merely because it was unable to definitely and accurately tell the number of days it had been there.

There is an assignment of error predicated on the court's refusal to instruct a verdict for defendant based on the grounds that there was no proof of defendant's negligence, but was proof of plaintiff's contributory negligence. Proof tending to show defendant's negligence has already been considered, and it is sufficient to say that in

our opinion the issue of contributory negligence was properly left to the jury, and its finding thereon is conclusive. The case was tried below with great fairness and impartiality, which specially characterized the charge to the jury, and we find no reason to attribute the result to either prejudice or sympathy, as suggested by defendant's counsel.

The judgment should be affirmed.

FILES v. RANKIN.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1907.)

No. 2,441.

1. SALES—RIGHT OF RESCISSION—FRAUDULENT CONCEALMENT OF FACTS BY PURCHASER.

While a purchaser, who stands on an equal footing with the seller as to access to means of obtaining knowledge of the value of the thing sold, is not bound to disclose any knowledge he may have on the subject, if in addition to keeping silent as to such knowledge he makes any statement which tends affirmatively to the suppression of the truth, or is calculated to deceive the seller, or to distract his attention from the real facts, his concealment becomes fraudulent, and will afford ground for a rescission of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 89, 92, 100.]

2. SAME.

Defendant purchased from the receiver of a national bank for $25 a judgment held by the bank against a deceased debtor amounting to over $9,000. At the time of the sale, the bank held, as collateral to the judgment, an assignment of a claim in favor of the debtor against an insolvent firm whose assets were being administered by the court, which was of considerable value, and on which a dividend had been declared and was then payable, amounting to nearly $900. Defendant knew of this collateral, but the receiver did not, having succeeded prior receivers who had lost the evidence of the transfer, and there being nothing on the receivers' books to put him on inquiry. Nor did the record in the insolvency case show that the bank was the owner of the claim. The receiver lived at a distance, and the negotiations for the purchase were conducted by correspondence, in which defendant made no mention of the collateral, but stated his understanding that the debtor had died insolvent after going through bankruptcy, and suggested that the claim would soon be barred by limitation, and that if handled at once a small sum might be realized, but even that was very doubtful. *Held*, that such statements and suggestions amounted to an active and fraudulent concealment of the facts, and entitled the receiver to a rescission of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 89, 91, 92, 100.]

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

Since this case was here on the former appeal (Files v. Brown, 59 C. C. A. 403, 124 Fed. 133, to which reference is made for a general statement of the facts), the receiver has amended his petition and placed his right of recovery upon different grounds than before. This cause of action then was and now is an equitable one to set aside an administrative order made in the court below in the matter of the receivership of the First National Bank of Little Rock then pending in the court, authorizing the receiver of that bank to sell a cer-

tain judgment for $9,230.09 in its favor against one Kelso to defendant Files for $25 and to rescind the sale made by the receiver pursuant to the terms of that order. Thereafter, and before defendant had taken any steps to realize on the judgment, the receiver filed his motion in the nature of a bill in equity to set aside the sale on the grounds of inadequacy of consideration and failure by Files to impart to the receiver knowledge which he possessed of the existence and value of certain collaterals held by the bank as security for the payment of the judgment. We held on the former appeal that neither inadequacy of consideration alone nor silence by the vendee as to his knowledge of the character or value of the thing sold warranted rescission of the contract, and to those propositions we still adhere; but we ordered the case remanded, with instructions to allow the receiver to amend his petition and to set up other facts, if such there were, which might entitle him to the equitable relief sought. Later an amended petition was filed in which it was charged that the bank held as collateral security for the payment of its judgment against Kelso three notes executed by Thomas H. Allen & Co. of Memphis, and payable to Kelso, aggregating about $9,000; that the maker of the last-mentioned notes had failed in business, and its estate was being administered in the court below for the benefit of its creditors; that before the sale of the Kelso judgment to defendant an order of distribution of 11 per cent. on all allowed claims against the estate of Allen & Co., among which was one in favor of the First National Bank on its notes held as collateral for the payment of the Kelso judgment, had been passed and by reason thereof a dividend of $989.70 was then due and payable to the receiver of the bank, and other money and property were then in the hands of the receiver of the estate of Allen & Co. sufficient to pay in all about $3,600 on the collateral so held by the bank; that while negotiations were pending for the sale of the judgment to defendant neither the receiver nor the Comptroller of the Currency, under whom he was acting, had any knowledge that the Kelso judgment was secured by the collateral mentioned, but that defendant was fully cognizant thereof, and instead of observing silence with respect thereto, as originally charged, he, with the purpose of securing the judgment for a nominal sum made statements and representations concerning the character and value of the judgment to the receiver which were false, fraudulent, misleading, and deceptive, and which did mislead and deceive him into selling the judgment for the inadequate sum of $25. Defendant in his answer to the petition, after denying that he made any false and fraudulent statements, alleged as follows:

"The defendant further says that at the time he purchased the judgment in controversy he believed that said judgment was secured by a collateral claim against the estate of Thomas H. Allen & Co., but he did not know it, and his information was meager and unsatisfactory. He had also been informed that there were assets in the hands of the receiver of said estate for the creditors thereof, but he has never examined the records to see what dividend, if any, had been declared."

The proof fully establishes the allegation last quoted, and in our opinion goes further and discloses that defendant not only believed that the judgment was secured by collateral, but that he knew it at the time he made the purchase in question. It establishes that some time before the sale of the judgment to defendant his attorney had seen and conversed with the receiver of Allen & Co. concerning the claim of the bank against the estate of Allen & Co., and that about the time of the purchase defendant and his attorney called on him and notified him that the bank had recovered a judgment against Kelso which had been purchased by defendant, and, as the claim of the bank against the estate was held by it as collateral security for the payment of that judgment, that he (defendant), as owner thereof, was the owner of the claim against the estate.

The evidence in the case, with the admissions found in defendant's answer, taken in connection with the fact that Files did not testify in his own behalf, satisfy us that he knew in the fall of 1902, while negotiating for the purchase of the judgment, that it was secured by the collateral in question, and that such collateral was of considerable value.

At a public sale of assets of the bank held in 1899, the judgment was offered for sale, but no bid was made for it, and it remained undisposed of.

Cockrill, the original receiver, resigned soon thereafter. Mr. Auten succeeded him and served for a short time, after which E. F. Brown succeeded him. Some time before Cockrill resigned, but how long the record does not disclose, the certificates of allowance in favor of Kelso which had been assigned to the bank were lost or misplaced, and as a result they were not turned over to his successors in the receivership; neither was there any memorandum or item in the books of the receivership showing the fact that the bank, held by assignment or otherwise, Kelso's certificates of allowance against the estate of Allen & Co.; so that neither Auten nor Brown had any actual knowledge of that fact. The records in the case of Houchens v. Thomas H. Allen & Co., in which the affairs of the latter company were being administered, would have disclosed that Kelso had three allowances against the estate, and that certificates of such allowances had been made to him, but they would not have disclosed that Kelso had assigned them to the First National Bank. It was in 1902, a year after Brown became receiver, that negotiations were entered upon by defendant for the purchase of the Kelso judgment. Brown resided in Chicago, the Comptroller of the Currency was in Washington, and negotiations for the purchase were conducted by correspondence. Defendant opened the correspondence by inquiring of the Comptroller if the judgment was for sale. He was referred to Brown, the receiver, to whom he on August 27, 1902, wrote, suggesting that possibly he, by reason of being the owner of some of Kelso's notes, might have some interest in the judgment, and saying:

"If I could control the whole judgment I think there is a bare possibility of securing a small amount in the way of dividends. As it is I am likely to get nothing. I am willing to pay a nominal sum for the bank's interest, which is, say, two-thirds, or thereabouts."

It is not now pretended that defendant had any interest in the judgment sold. Neither is it contended that his representations to Brown were intentional misrepresentations about that matter. After some correspondence defendant offered $25 for the judgment. That offer was rejected, and the Comptroller on September 15, 1902, directed receiver Brown to dispose of the judgment at public auction at the termination of his receivership. Nothing more was done in the matter until October 6th, when defendant reopened negotiations by writing the following letter to receiver Brown:

"Dear Sir: Your letter to H. F. Auten, Esq., inclosing a letter from the Comptroller of the Currency, of date September 15, 1902, in regard to the offer of $25.00 by me for a judgment in favor of the First National Bank against J. G. Kelso, deceased, in the United States court at Texarkana, has been shown to me by Mr. Auten. I note that the Comptroller declines the offer, and directs you to sell the judgment at public auction at the time you terminate your receivership. Mr. Auten advises me that it will be impossible to close the litigation under two years, perhaps longer, and as this claim will be barred by the statute of limitation within a short time, and thus whatever value it might have, if any, be lost, permit me to suggest that a sale now, at public auction, or otherwise would give the purchaser the benefit of whatever value it might have. At a sale two or more years from now it would probably go off like it did at the former sale—'No bidders,' hence no sale. My understanding is that Mr. Kelso went through bankruptcy and died insolvent. Hence you will see that if any value attaches now it would be lost by a delay of two or three years. If it could be handled at once, a small sum might be realized, but even that is very doubtful, and unless sold at once, or in the very near future, it will be valueless. I own about one-third of the judgment, bought it with other assets at receiver's sale, December 11, 1899, and if I didn't own that interest I wouldn't care to bother with the matter. Kindly submit the matter to the Comptroller as to an early sale, and advise me of his conclusion in the premises. Very truly yours, [Signed] A. W. Files."

The letter was forwarded to the Comptroller, who authorized the receiver to use his discretion. That officer finally relying upon the representations and statements found in the letters of August 27th and October 6th, and with no personal knowledge of the value of the judgment, concluded a sale to defendant for $25, and secured an order of the court permitting him to assign the judgment for that consideration. A decree rescinding the sale was rendered by the Circuit Court, and it is from such decree that this appeal is prosecuted.

W. S. McKain, for appellant.
Moore, Smith & Moore, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

It is first contended by defendant that he and receiver Brown stood on an equal footing; that Brown knew, or by the exercise of ordinary care could have known, as much about the value of the judgment as he knew; and that in such circumstances the receiver had no right to rely upon any fraudulent representation or concealment which he (defendant) might have practiced. On the facts so assumed the proposition of law contended for cannot be disputed. It is well settled that where the means of knowledge are at hand and equally available to both parties, and where a party, instead of resorting to them, sees fit to confide in the statements of one whose interest it is to mislead him, the law will afford him no redress against his own imprudent confidence. Cooley on Torts, *p. 487; Slaughter's Adm'r v. Gerson, 13 Wall. 379, 20 L. Ed. 627; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Yeates v. Pryor, 11 Ark. 58; Hill v. Bush, 19 Ark. 528. But in the light of the pleadings and proof we are unable to view the facts as claimed. Defendant knew that the allowed claims of Kelso against the Allen estate stood pledged as collateral for the payment of the Kelso judgment, and he knew that they were of considerable value. Of those facts Brown knew nothing. Neither did his immediate predecessor have any knowledge. What Cockrill, the first receiver, knew concerning them, is not disclosed; but it is a fact that, when he offered the assets of the bank at public auction in 1899, no one considered the judgment of any value. It was offered for sale, but no bid was received for it. If he then or subsequently had the assignments of Kelso's allowances against the Allen estate in his possession, they doubtless were considered of no value. They certainly disappeared, and neither they nor any memorandum of them were ever transmitted to his successors to evidence any claim of right on the part of the bank against the Allen estate. The testimony of both Brown and his predecessor, Auten, to the effect that they had no knowledge of the existence of any such claim, stands uncontradicted. But it is said that Brown could have acquired accurate information by investigating the means at hand and available to him for that purpose. It is claimed that, if he had investigated the records of Houchens v. Allen & Co., and made inquiries of the receiver in charge of the estate of that company, he could and would have ascertained the truth. We are unable to perceive, in the absence of anything in his own records, or in his own possession to suggest investigating the Houchens Case, what should have moved him to make an investigation of that any more than any other case; but suppose reasonable diligence would have put him upon some inquiry in that case, and suppose he would have discovered that certain allowances had been made in favor of Kelso, we do not perceive how that fact would have given

him any knowledge or suggestion that Kelso had assigned the claim to the bank as security for the payment of his judgment. From all the evidence we are unable to find that any such opportunities for information were open to Brown as would have put a reasonably prudent person upon inquiry concerning the facts which gave the Kelso judgment exceptional value.

This brings us to a consideration of the contents of the two letters of August 27th and October 6th, written to the receiver Brown by defendant and of their legal effect upon the transaction in question.

Defendant, with the knowledge possessed by him of the value of the judgment, was dealing with a person residing at a distance. He desired to buy the judgment. However full his information might be, he was under no obligation in law to impart that knowledge to the owner of the judgment. Files v. Brown, 124 Fed. 133, 59 C. C. A. 403. Standing in no fiduciary relation to him, and owing him no duty to make disclosure of his information, he might have observed strict silence on the subject and have reaped the full advantage which his diligence in securing information gave him; but any activity on his part, which directly or indirectly tended to put the vendor off his guard or mislead him to his injury, would afford ground for the rescission of the sale.

In Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214, Chief Justice Marshall stated the case and delivered the opinion of the court, as follows:

"The question in this case is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The court is of opinion, that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within the proper limits, where the means of intelligence are equally accessible to both parties. But at the same time, each party must take care not to say or do anything tending to impose upon the other."

Lord Eldon, in Turner v. Harvey, Jacob's Reports, 178, after declaring the purchaser's right in general to keep silence, said as follows:

"Very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

Pomeroy, in his work on Equity Jurisprudence (volume 2, § 901), after laying down the rule that in cases unaffected by fiduciary relations silence by one of the contracting parties having a peculiar knowledge of the subject may be observed with impunity, makes the following statement:

"If, in addition to the party's silence, there is any statement, even any word or act on his part, which tends affirmatively to suppression of the truth, to a covering up or disguising the truth or to a withdrawal or distraction of the party's attention or observation from the real facts, then the line is overstepped, and the concealment becomes fraudulent."

Story, in his work on Sales ([4th Ed.] §§ 175, 177), observes as follows:

"If a vendee have private information with regard to any extrinsic fact or event, which materially affects the value of the subject-matter of sale, he would

not be legally bound to divulge it, unless a special trust were either expressly or impliedly reposed in him. * * * Such cases are, however, closely scrutinized, and it behooves a person taking such an advantage to be careful lest he say anything which is calculated in the slightest degree to mislead, for the smallest fraud is sufficient to poison a contract. * * * If there be any studied efforts [on the part of either party to a contract of sale] to prevent the other from coming to any knowledge relating to the sale and, especially if there be any false suggestion or representation, however slight, the transaction will be fraudulent and void."

Applying the foregoing well-established principles to the facts of this case, we cannot escape the conviction that defendant did not observe that indifferent attitude toward the transaction which was required of him. There seems to have been a covert attempt on his part to attract the receiver's attention to all the facts which minimized the value of the judgment and to turn his attention from those which magnified that value.

Defendant had some time in September, 1902, offered $25 for the judgment at private sale. The Comptroller declined to sanction the sale for that sum, and so advised the receiver, and directed him to dispose of the judgment at public auction at the termination of his receivership. It is in the light of all these facts that the letter of October 6th should be considered. Defendant wanted to buy the judgment, had made an offer for it which had been rejected, and negotiations had apparently closed. Upon the determination of the Comptroller to sell it at public auction, defendant volunteered his good services. In the letter of October 6th he gratuituosly suggests that the sale of the judgment at public auction at the time of the termination of the receivership would postpone it so long that the statute of limitations might bar recovery upon it. He incidently alludes to Kelso's death, insolvency, and bankruptcy, and says:

"Permit me to suggest that a sale now at public auction or otherwise would give the purchaser the benefit of whatever value it might have. * * * If any value attaches now it would be lost by delay of two or three years. * * * If it could be handled at once, a small sum might be realized; but even that is very doubtful. Kindly submit the matter to the comptroller," etc.

That letter, by its suggestive references to the death, insolvency, and bankruptcy of Kelso, to the worthlessness of the judgment and to the need of hasty action to realize even a small sum and prevent the bar of the statute of limitations, went far beyond that silence which the law under the circumstances permitted defendant to indulge. He had knowledge of the value of the judgment which he artfully concealed. His suggestions were well calculated to divert the mind of the vendor from inquiring concerning the value of the judgment, to forestall the public auction and secure acceptance of his once rejected offer. The receiver acted upon them, accepted the original offer, and closed the sale.

Counsel for appellant invokes the principle that mere expressions of opinion as distinguished from statements of fact are not actionable. That proposition may be conceded, but from what has already been said there is more in this case than that. There was such an artful concealment of facts by the purchaser as was calculated to and did mislead the seller, throw him off his guard, and prevent his

making an independent investigation as to the value of the subject of sale. Under the authorities cited, this, without more, is enough to warrant a rescission of the sale.

The case was tried below in harmony with the principles now announced, and the decree as rendered is affirmed.

NEW YORK, N. H. & H. R. CO. v. DE NOYELLES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 706.

1. COLLISION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.
   In an action for injuries to plaintiff by a collision between defendant tug and one of several floats attached to a dock, whether plaintiff was negligent *held* for the jury.
2. SAME—NEGLIGENCE.
   Defendant tug while going up a river to defendant's coal dock, which was located just below the dock to which plaintiff's boat was moored, collided with the outer of several floats attached to such dock, and the shock being communicated to each plaintiff was caught and injured as he was standing on a stringer in front of the bulkhead of the dock. The maneuver executed by the tug at the time of the collision was the usual one apart from the degree of violence of the contact, and it also appeared that the master of the tug, by reason of intervening cars on one of the floats, and plaintiff's stooping posture, could not have seen him, and did not know of his dangerous position. *Held*, that the master of the transfer was not negligent in adopting the maneuver executed at the time of the collision, nor in failing to discover plaintiff's presence either just prior to the collision or as the tug was approaching the dock at a time when plaintiff was in a place of safety.
3. SAME—NEGLIGENCE—QUESTION FOR JURY.
   In an action for injuries to plaintiff in a collision between defendant's tug and a series of floats attached to a dock, whether the master was negligent in causing his tug to come in violent contact with one of the floats without knowing that persons were not working in or around them, *held* for the jury.

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

Writ of error by defendant below to review judgment of the United States Circuit Court for the Northern District of New York, entered upon a verdict in favor of plaintiff below, for $20,134.26 for personal injuries. The undisputed facts material to the issues presented herein are as follows: The defendant is the owner of a dock known as the "fish dock," on the east side of the Harlem river, above the Willis Avenue Bridge. The river at this point is about 400 feet wide. At said dock there is a bulkhead with piles for mooring vessels. Outside of the bulkhead there are spring fender piles bowed and keyed into stringers stretched along the outer edge of the bulkhead. There are three rows of these stringers eight or ten inches wide, and so located the one above the other that a person may step down on them from the bulkhead. The plaintiff was captain of a barge, and on the night before the accident had brought her to said bulkhead at the fish dock and had discharged his cargo. During the night a scow loaded with ashes, a car float loaded with cars, one of defendant's tugs, and another float loaded with cars, all belonging to defendant, had come up alongside of plaintiff's barge in the order stated, and lay there lashed together and to each other in the usual way. In the morning, while the plaintiff was waiting for a tug boat to take him away, he discovered that the breast line on the starboard bow of his barge had slipped down on the

spile, and the knot was jammed in between the spile and the barge so that he could not haul it out. He called on his deck hand to assist him and to pry out the barge from the spile, and stepped down on the lower one of the three stringers, and while standing, either with one foot on the rail of the boat and one on the stringer, or with both feet on the stringer, and stooping over to reach for and pull up the line, he was thrown down between the bulkhead and the barge by the shock of the barge striking the bulkhead, and caught on a stub on the dock, and while in this position was again struck and crushed and seriously injured. The conditions leading up to and causing this damage were as follows: Just prior to the accident, the defendant's tug, Transfer No. 4, 92 feet long, was coming up the river, bound for the defendant's coal and water dock located just below the fish dock. The tide was setting up the river. The boats at the fish dock projected out over 100 feet, and on the opposite side of the river lay a schooner and hoister projecting out about 35 feet. In order to round to against the tide, so as to enter the coal and water dock, the master of the Transfer No. 4 stopped his boat after he cleared the Willis Avenue Bridge, ported her helm, then backed and filled so as to let her stern swing up with the tide, went ahead so as to bring her bow against the side of the outside float, and then, while her stern was swinging up river with the tide, he worked along the edge of the float toward the coal and water dock. The impact caused by the striking of this Transfer No. 4 against said float, and communicated through the intervening boats to plaintiff's boat and the dock, caused the plaintiff to fall and receive the injuries complained of.

H. G. Ward and William Greenough, for plaintiff in error.

R. J. Donavan and Herbert D. Cohen, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The single assignment of error challenges the action of the trial judge in refusing to direct a verdict for the defendant on the ground either that the defendant was not in fault, or, even if in fault, that plaintiff's fault contributed to cause the injury.

The contention of contributory negligence need not be discussed. The plaintiff, it is true, when he saw the approaching boat 100 feet away, was in a place of safety, and he put himself in a perilous position where apparently he would be likely to be injured by a very slight jar or disturbance of the water. But this question was one peculiarly for the jury, the burden of proof was upon the defendant, the facts were fairly submitted to them in a charge to which no exception was taken, and their verdict is conclusive upon this point.

A more serious question is presented upon the contention that no negligence has been shown on the part of the defendant. The maneuver executed by the master of Transfer No. 4 appears to have been a usual one in such conditions when it is necessary, and, barring the question of the violence of the jar in contacting with the float, seems to have been properly performed. There is considerable testimony to the effect that that was the only practicable way in which to reach the coal dock with this boat in a flood tide and with the accumulation of boats at this point.

Furthermore, we find no negligence in the fact that the master of the transfer did not see the plaintiff at the time of the collision. The evidence shows that he was in a position where he could not be seen from the transfer. The plaintiff himself testifies as follows:

"I could not look over the cars. She went past the cars. I could not see it, as the cars were between me and the transfer, until after she went by them.

From the place where I stood, I could not see the boat. The Transfer I saw coming up the river, after she passed the line of freight cars on that float. Then I could see her after that. I could not see it when it was behind that line of cars; but after she passed I could."

And it appears further from his testimony that at the time of the accident he was stooping over so far, in order to get at the line, that probably his body was out of sight.

Nor do we find any negligence on the part of the master of the Transfer by reason of the claim that he could have seen plaintiff when the Transfer was coming up the river, for the plaintiff at that time was in a place of safety. As he says:

"I was standing on the string piece. I hadn't stepped down between the boat. I was standing on the string piece when I got hit. When I looked down the river and saw the Transfer, I was on the bow of my boat; on the deck. We were just starting to get the rope up with the pike pole. We had tried it with a pike pole, and were just going to try the other way. At that time the Transfer was headed right up the river, and was, I should judge, about the length of 100 feet from me. * * * She was, I should judge, about 100 feet—not from me, but from the railroad float. She was further out in the river towards the railroad float. She was not opposite the railroad float. The tug was below the railroad float. She was coming up towards the railroad float, outside. She was about 100 feet below the railroad float."

Nor do we find any negligence in the failure of the master of the transfer to give any signal by means of whistles or bells. There are no rules of navigation which provide how warning of such a maneuver shall be given.

It is further immaterial whether upon the whole case we would have been disposed to hold that the master of the Transfer was guilty of negligence, or that the impact of the blow upon the outside float was not of such force as to raise a presumption of negligence. It may well be that the disturbance caused by such impact was no greater than the displacement which would have resulted from the waves and swell caused by such a tug in passing along up the river without stopping, or in maneuvering to enter the coal and water dock without coming in contact with any other boat. The sole question presented to us upon this record is whether there was any such evidence of negligence to go to the jury as would be sufficient to justify them in finding that the agents of defendant were negligent.

It appears from the record that defendant's agents knew that there were people living and working on and about these boats, and that, if a moving boat came in violent contact with them, it might cause injury to such persons. And, while there is considerable testimony to the effect that this blow was so slight that it could not have been communicated through the whole flotilla of boats to the place where the plaintiff was standing with such violence as to throw him down in the manner described, yet we are not at liberty to ignore the testimony of the plaintiff and mate on this point. The plaintiff testified that the first crash knocked his feet from under him. His condition sufficiently indicates the violence of the second shock.

The testimony of the mate on this point was as follows:

"I was standing on my feet. I was helping the captain. I did not have hold of anything when I fell down. I felt a jar. It affected me as if I was going down. I went. It threw me. It felt like a hard shock. It pitched me for-

ward about two and a half feet. I was on the deck of the boat. I was half of me off the boat—some on the boat and some over. I had to catch onto something. I catched onto the dock. That prevented me from falling. I heard the crash. I could not say where that was. * * * This noise which I heard was towards the river. As I was pitched forward, I fell on my hands. The deck, in reference to the dock, was pretty much near level. I lay there flat. I answered the court that I caught on the dock, or I would have fallen. But I fell. But I would have fallen into the river if it had not been for the dock."

It appears, furthermore, from the testimony of the witnesses for defendant that it is the duty of such boats, when about to execute such a maneuver, to have lookouts to notify the master if there are people working in and around the boats, and that, if the lookouts on this occasion had seen any one on the boats, they would have notified the captain, and "in that case he certainly would not have run up against them." And the experienced master of one of defendant's transfers, which was lying at the dock at the time of the collision, testified in regard to the custom in the execution of such a maneuver as follows:

"As a matter of precaution, as a matter of safety to the boats I am coming up against, I have to bring my boat in touch with the adjoining boats in such manner as not to throw any one down, or break anything."

It appears, further, that the gross tonnage of the Transfer was 102 tons.

In these circumstances, the question of defendant's negligence was submitted to the jury by the court upon an exhaustive consideration of the evidence and a fair and correct statement of the law applicable thereto, and to which no exception is urged.

We are, therefore, concluded by the verdict of the jury, and the judgment thereon must be affirmed.

NOTE.—The following is the opinion of Ray, District Judge, on motion to set aside a verdict:

RAY, District Judge. No point or question is raised that there was any error in the admission or rejection of evidence or in the charge to the jury. Under all the evidence in the case a fair question of negligence and of freedom from contributory negligence was presented for the determination of the jury. The plaintiff was very severely crushed and injured from his shoulders to his feet inclusive, and these injuries are permanent, and plaintiff will never be any better or free from pain. In all human probability he will grow worse. He will never be able to dress and undress himself, or do any labor except light work with his hands. Considering his age and his earning power both before and since the accident, and the nature and permanence of his injuries, the damages awarded were not excessive; indeed, they were moderate. There was an abundance of evidence to sustain a finding of negligence on the part of the captain of the defendant's tug that ran against the floats and jammed them against the canal boat of the plaintiff where he was at work with his mate in plain sight of the captain of the tug that did the damage going up the Harlem river. If the captain did not see them, he ought to have seen them. He had an abundance of sea room in which to maneuver and turn his tug, and evidently could have run into the water and coal dock without coming in collision with the floats had he regarded it of moment or importance so to do. His evidence disclosed that he was ignorant, self-opinionated, cold-blooded, and reckless. He ran into the line of boats moored to this wharf, the canal boat next it, then the scow, and then defendant's heavily loaded floats with another tug between, recklessly and with great and unnecessary force in any event and with an utter disregard of the safety of those on and about those vessels. The evidence of Samuel Sprague, a witness for defendant, shows

the captain of the tug in question did what he ought not to have done. The evidence tended to show the collision was exceedingly severe and then persisted in. The evidence of John Johnson, a witness for defendant, and who was on the tug, shows it was the duty of those thereon to keep a lookout for people on or about boats tied to the wharf and those tied thereto outside, and, if any one was there, not to come in collision. Still the captain of the tug said, in substance, the only purpose of a watch or lookout was to enable them to testify how the injury was done in case of a collision and resulting damage and not to enable him or make it his duty not to come in collision with vessels tied to a dock. The captain of this tug testified as to the purpose of the watch on the tug for persons on vessels tied to a dock:

"Q. What did you keep a lookout for? What was the reason for your keeping a lookout? A. It is the rule that we should carry a lookout; that is all the reason I can give you. In case of accident in case of collision, that a man should be there on the bow of the boat to see just what is met with; that is the only reason I can give you for a lookout. Q. Let me see if I understand you. The reason for your keeping a lookout was in case you injured somebody, that you might be able to tell about it? A. Yes, sir. Q. So you might be a witness? A. That is what they are stationed out there for. Q. They are not stationed there for the purpose of warning men of your approach or preventing a collision? A. No, sir. Q. They are simply put there for the purpose in case you do run a man down, and he is drowned, you may be able to testify you saw him go down? A. Yes, sir. Q. That he went down? A. Yes, sir. Q. How you came to put him down? A. Yes, sir."

This was contrary to the credible evidence in the case. The captain of this tug gave no warning of his approach or that he was intending or expected to strike this fleet of boats—plaintiff's canal boat innermost and next the dock. The plaintiff was not down between the dock and boat, but standing with his whole body from the hips up in plain view of those on the tug. The collision threw the canal boat against him, and caused him to fall down between the boat and dock, and a second surge of the boat caused by another blow of the tug crushed him. Before getting in this position he looked up and down and saw this tug going up the Harlem river in midstream and nothing to indicate it would or was intending to come in collision. He had no reason to apprehend this tug would go up, turn, and then butt head on into this line of boats. The jury was amply justified in finding absence of contributory negligence, which, indeed, was not pleaded until during the trial by amendment there allowed. All these questions were for the jury. The case was not tried or submitted on any theory that there was any presumption of negligence on the part of defendant arising from the fact of the collision and injury.

The verdict was fully justified, and the motion for a new trial is denied.

McCONNELL v. DENNIS et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1907.)

No. 2,488.

1. INJUNCTION—ACTIONS—NECESSARY PARTIES—DEFENDANTS.

In a suit in equity in a federal court to enjoin the defendant from proceeding under an oil and gas lease which obligated him to operate for oil and gas for a term of years, and to pay royalties in kind and in cash to the owner of the land, the right of complainant to relief being based on the alleged invalidity of such lease, the landowner is an indispensable party, without whose presence the court can make no decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 212.]

2. APPEAL—MATTERS REVIEWABLE—DEFECT OF PARTIES.

Where a decree was entered in favor of a complainant in a suit in which because of the absence of an indispensable party whose rights were directly affected the court was not warranted in granting any relief, the de-

fect of parties cannot be waived by the parties before the court, and the fact that no objection was made on that ground cannot prevent the consideration of the question by an appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1189; vol. 37, Parties, § 169.]

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

L. W. Keplinger (J. B. Ziegler, on the brief), for appellant.

W. H. Sproul and John H. Atwood, for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This case presents a controversy between two rival claimants to the mining rights in 320 acres of oil land situated in Chautauqua county, Kan. Prior to July, 1902, Amanda Miller, of California, owned the land. By a deed dated July 21, 1902, recorded in the office of the register of deeds of Chautauqua county on August 25, 1903, she conveyed it to Abba Clair McCready, who, on August 25, 1903, by an instrument duly recorded on August 28, 1903, leased the oil, gas, and mining rights on the land to P. D. McConnell, the defendant herein. There were reserved to the lessor as rent or royalties one-sixth interest in all the oil that might be produced from the premises and also $200 per year for each and every gas well sunk and successfully operated thereon. By an instrument dated September 18, 1902, Amanda Miller leased the same land to complainants, Dennis and others, who constituted a copartnership under the name of the Sedan Development Company. This lease in terms conferred upon the lessees an exclusive right to conduct mining operations for gas or oil on the leased premises and reserved to the lessor royalties in the event gas wells should be sunk, at the rate of $5 per month during the time product of value should be taken therefrom or in lieu thereof one-tenth of the oil or other product found therein, and until wells should be sunk the sum of $32 per year fixed, with some alternative provisions. This lease was recorded in the proper registration office February 3, 1903, and is assailed by defendant as void because unequal, uncertain, unfair, and unilateral in its covenants and for other reasons.

Complainants in their bill filed for equitable relief allege their ownership of the lease acquired from Amanda Miller, their possession of the land, and their exclusive right to mine and drill for oil, gas, and minerals. They further allege that defendant McConnell and others named as having some undescribed interest in the land, without consent of the complainants, entered upon the premises with tools, machinery, and other preparation for mining operations with the intention of taking and appropriating the gas, oil, and minerals belonging to complainants to his or their own use and prayed for an injunction restraining them from doing so. Defendant McConnell alone answered the bill. He denied complainants' possession, alleged imperfections in their title, and justified his possession and right to mine the lands under his lease from McCready. The final decree confirmed complainants in their title and ordered as follows:

"That said defendants and each of them and all persons claiming, by, through or under them or either of them, be, and they are hereby, permanently restrained and enjoined from setting up or asserting any right, title, claim, or interest in or to the oil and gas in and upon said land, as against the rights of said complainants therein, under and by virtue of their said lease, or from interfering in any way with the complainants, their heirs or assigns, in the operation of said land under their said lease."

Many objections are made to the decree, but, as one is decisive, we do not deem it essential to consider any other.

Defendant, according to the terms of his lease from McCready, owed to her constantly accruing royalties, rights, and privileges. His lease from her obligated him for a certain period of 15 years and as much longer as gas or oil should be produced in paying quantities, to deliver to her one-sixth of all the oil as and when produced in kind, to pay her $200 per year for each gas well sunk by him as long as gas should be sold therefrom, and to furnish gas for a family occupying the residence on the premises. The value of her royalties, rights, and privileges according to the terms of the lease depended upon successful mining operations to be conducted by the lessee. Anything that would interfere with or prevent his production of oil or gas on the leased premises necessarily affected, reduced, or extinguished her royalties in kind or cash and other privileges which depended upon such production.

The bill was solely for injunctive relief to restrain McConnell, the lessee, from drilling, boring, or conducting mining operations on the premises for the production of oil or gas. The decree, after finding that complainants are entitled to the relief prayed for, proceeds to confirm them in their exclusive right and title under their lease to conduct mining operations on the premises and permanently enjoined and restrained McConnell from asserting any right, title, claim, or interest thereon, or from in any manner interfering with complainants in the exercise of the exclusive right so confirmed in them. Nothing could more effectually extinguish Abba Clair McCready's rights secured by the lease than such a decree. Obedience to its command by McConnell necessarily put a stop to her royalties in kind and in money and the enjoyment of the other privileges secured to her by her lease and contract with McConnell. She was not made a party to the suit, and her contract was stricken down without any opportunity to be heard in defense of her rights under it. This is contrary to natural right and well-established principles of equity jurisprudence.

In the leading case of Shields v. Barrow, 17 How. (U. S.) 130, 141, 15 L. Ed. 158, the Supreme Court, after expounding the meaning of the forty-seventh rule in equity and the provisions of the act of February 28, 1839 (5 Stat. 321), which makes provision, when some defendant may not be an inhabitant of or found within a district or may not voluntarily appear to an action, for entertaining jurisdiction and rendering a decree binding upon the parties before the court, but without prejudice to others not brought into the case, observes as follows:

"It remains true, notwithstanding the act of Congress and the forty-seventh rule, that a Circuit Court can make no decree affecting the rights of an

absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in Elmendorf v. Taylor, 10 Wheat. (U. S.) 167, 6 L. Ed. 289: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach—as if such party be a resident of another state—ought not to prevent a decree upon its merits.' But, if the case cannot be thus completely decided, the court should make no decree."

The doctrine of that case has been repeatedly affirmed and applied by the Supreme Court to cases in which the fact appeared that no final decision could be made between the parties to the suit and those represented by them without affecting the rights of absent unrepresented parties. For the latest expressions of the rule reference is made to Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 611, 13 Sup. Ct. 691, 37 L. Ed. 577; California v. Southern Pacific, 157 U. S. 229, 249, 15 Sup. Ct. 591, 39 L. Ed. 683; Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 27 C. C. A. 73, 82 Fed. 124, 126.

In the case now before us the complainants' right to the injunctive relief prayed for necessarily depends upon the validity of the McCready lease. The question of its validity lies at the foundation of their right of action. If it is valid, the complainants are entitled to no relief. If invalid, the complainants may be entitled to some relief. She is, therefore, within the rule referred to, an indispensable party to complainant's action. Her rights are materially affected by the decree made or by any decree that can be made in the case; and it cannot proceed without her. She is in the same plight in which the New Albany & Salem Company, in the case of Northern Indiana R. Co. v. Michigan Central R. Co., 15 How. (U. S.) 232, 14 L. Ed. 674, was found. As it was impossible to decide the controversy in that case without deeply affecting the New Albany Company, the bill was dismissed. Our attention is called to the principles discussed in Osborn v. United States Bank, 9 Wheat. (U. S.) 738, 842, 6 L. Ed. 204, and Vetterlein v. Barnes, 124 U. S. 169, 172, 8 Sup. Ct. 441, 31 L. Ed. 400, but it is thought those cases involve such a different relationship between the parties to the case and those not made parties as in the light of the authorities already cited renders them inapplicable to the present case.

No objection appears to have been made below to the court's proceeding to a decree in the absence of Abba Clair McCready; but that is unimportant. The case is now here on appeal for a hearing de novo, and we cannot avoid considering the question whether the parties are sufficient to warrant a decree granting any relief. Hoe v. Wilson, 9 Wall. (U. S.) 501, 19 L. Ed. 762.

As it is possible that the defect of parties can be cured, we will not dismiss the bill, but reverse the decree as rendered and remand the cause to the Circuit Court with directions to dismiss it unless by some appropriate procedure, within a time to be fixed, indispensable parties are brought into the case. It is so ordered.

CHITWOOD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,455.

1. CRIMINAL LAW—EVIDENCE—CORROBORATIVE FACTS.

On the trial of a defendant charged, under Rev. St. § 5467 [U. S. Comp. St. 1901, p. 3691], as a post-office clerk with having secreted and embezzled letters containing articles of value, and stealing such articles from letters, the government produced witnesses who testified that they saw defendant open a letter and take therefrom an article of value, which he placed in a pigeonhole. Defendant in his own behalf testified that the letter referred to was open when received, and that the article which he placed in the pigeonhole he found lying loose on his table when assorting mail, and laid it away for proper disposition. *Held*, that he was entitled to show by other employés that the mails at the office had been very heavy for some time prior to this occurrence, and that many letters and packages came in bad condition, with the edges worn and broken, so that articles could readily fall out, as evidence tending to support his defense; its weight being for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 802, 1713.]

2. SAME—EVIDENCE OF INTENT—COMMISSION OF OTHER SIMILAR OFFENSES.

On the trial of a post-office clerk charged with secreting and embezzling letters containing articles of value and stealing the contents, the government was entitled to prove a statement made by defendant a short time previously that he had destroyed a number of election circulars, a quantity of which had come into the office for distribution, as evidence tending to show the commission of an offense of similar character to those charged and bearing on the question of intent. Sanborn, Circuit Judge, dissenting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 830.]

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

Geo. W. Murphy (Charles T. Coleman and W. M. Lewis, on the brief), for plaintiff in error.

William G. Whipple, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Defendant Chitwood, a clerk in the post office at Hot Springs, Ark., was indicted under section 5467 of the Revised Statutes [U. S. Comp. St. 1901, p. 3691] in seven counts: (1) For secreting and embezzling a letter containing a watch fob; (2) for stealing and taking the watch fob out of a letter; (3) for stealing and taking a $10 bill out of a letter; (4) for stealing and taking a $5 bill out of a letter; (5) for stealing and taking another $5 bill out of a letter; (6) for secreting and embezzling a letter containing a post-office money order; (7) for secreting and embezzling a package containing a lady's belt. He was tried and found guilty on the first count and not guilty on the others. He now prosecutes this writ of error to secure a reversal of the judgment.

There was evidence on the part of the government tending to show that while he was engaged in discharging his duties as clerk in the

evening of March 9, 1906, a letter came into his possession as such clerk to be forwarded and delivered to one Abe Levy, to whom it was addressed; that Chitwood cut it open, took a watch fob from it, threw the envelope down and took the fob and placed it in an empty pigeonhole. The inspectors, who were watching at a distance, observing the foregoing facts, arrested him before he left the post-office building. The defendant taking the stand in his own behalf contradicted the evidence of the inspectors, and testified that he found the fob loose on his table while he was assorting mail; that he picked it up and put it in a pigeonhole, intending, if he did not find the package from which it came, to turn it over in the morning to the proper clerk for disposition; that the letter addressed to Levy was open when it came into the post office, and that the defendant did not open it. In support of his testimony to the effect just stated, defendant called three witnesses, clerks and former clerks in the Hot Springs post office, and asked them, in substance, if it had not been, for two months prior to the night in question, a common and usual thing for letters and packages to be received at that post office in bad condition, with edges so broken and worn out that trinkets or other enclosures might fall out; and he offered to show that for those two months the incoming mails had been heavy and that letters and small packages had been frequently found unsealed, torn, and broken open, as circumstances tending to support his theory of the facts and his innocence. The questions so asked and the offers to prove so made were objected to by the government, the objections sustained by the court, to which the defendant duly excepted.

We think it was error to exclude that evidence. The defendant was standing on his plea of not guilty, and the burden was on the government to establish his guilt. It produced witnesses who testified directly to seeing the defendant do things consistent only with guilt. The value of their testimony depended upon the accuracy of their observations, the reliability of their memory in describing what they saw, and the credibility due them as witnesses. Defendant denied doing what they swore they had seen him do. A sharp and vital issue was thus presented for the consideration of the jury. We think, if it were true that immediately preceding and up to the time in question it had been and was a common practice in that post office for mail to come into the office in bad condition and with ends and edges so broken or worn out that solid substances might readily fall from them, such fact would be a circumstance tending to support defendant's theory. Its value might not be great as against the other direct and positive testimony with which the trial court compared it and on account of which rejected it; but that was for the jury, and not for the court, to decide. The defendant had an undoubted right to buttress his own testimony by any and all circumstances and facts fairly tending to support it, and we think the facts offered to be proved by him were admissible for that purpose. For the error in excluding that evidence, the judgment must be reversed.

As one of defendant's contentions has been earnestly debated before us and probably will be the occasion of controversy at the next trial, we deem it proper to express our opinion concerning it. Witness Reaves

was permitted to testify for the government, over defendant's objection and exception, that defendant shortly before he was arrested told him that he had recently burned up and destroyed a lot of circulars that came into the post office from Little Rock. We think there was no error in admitting that evidence. The crimes charged in the various counts of the indictment against the defendant involved the existence of an unlawful and criminal intention, a well-known element of the crimes of embezzlement and larceny. Section 5467 makes the destruction of a letter or packet by a post-office employé as much of an offense as its embezzlement. Section 5471 makes the destruction of any mail or package of newspapers as much an offense as an embezzlement of the same. Reference is made to these sections of the statutes to show that destruction of the mail is classified with its embezzlement or larceny, not only as a kindred offense, but as one of the same rank and one subjecting the offenders to the same punishment.

Moreover, the several counts of the indictment under consideration at the time the evidence in question was offered, charging the defendant with secreting letters and packages of mail, charged an offense kindred to that of destroying mail. It is familiar law that in cases both civil and criminal where the intent of a party is in issue evidence of other acts and doings of that party at or about the time in question of a kindred character is admissible to demonstrate the motive and intent which actuated him in doing the act or thing charged against him in the case. Exchange Bank v. Moss (C. C. A.) 149 Fed. 340; Wood v. United States, 16 Pet. 342, 360, 10 L. Ed. 987; Coffin v. United States, 162 U. S. 664, 672, 16 Sup. Ct. 943, 40 L. Ed. 1109, and cases cited. In an honest and legitimate investigation of that intent a reasonably wide latitude should be indulged by the trial judge, and his discretion, when fairly and unprejudicially exercised, should not be interfered with by appellate courts. Moore v. United States, 150 U. S. 57, 61, 14 Sup. Ct. 26, 37 L. Ed. 996; Dow v. United States, 27 C. C. A. 140, 82 Fed. 904, 909. The destruction of the circulars, if done by the defendant, was in the legal sense a conversion of them by him. The secreting or stealing of mail, if done by him, was likewise a conversion of it. The acts are not only kindred in their nature, but very obviously may spring from a like motive and intent. The evidence in question was properly admitted, not as evidence of a distinct offense in itself, but as bearing on the disposition and intention of the defendant in doing whatever he did do.

Other errors are assigned by defendant, but those already considered are the ones chiefly relied upon by his counsel for a reversal of the judgment. As the case must be remanded for another trial, we deem it unnecessary at the present time to express our opinion upon any other questions. We may properly assume that with the foregoing directions it will be correctly tried.

The judgment must be reversed for the error in excluding the evidence referred to in the fore part of this opinion, and it is so ordered.

SANBORN, Circuit Judge (concurring). I concur in the result in this case, but am of the opinion that it was error to receive in evidence the testimony relative to the burning of the election circulars

by the defendant. The reason for the rule that the commission by the defendant of other offenses of like character to that upon trial is admissible is that it has a tendency to prove the intent to commit the latter. If the former offenses are not like the latter, their commission has no such tendency. The commission of the offense of arson would not tend to prove an intent to commit murder. The offense charged was the secretion and embezzlement by the defendant of an article of the alleged value of $2.25 under section 5467, Rev. St., and the penalty was imprisonment at hard labor for not less than one year nor more than five years. While the destruction of such an article of value is also denounced by this section under the same penalty, the secretion, embezzlement, or destruction of circulars, papers, or letters which contain no article of value of the nature specifically described in this section is not punishable thereunder, and the destruction of circulars is not punishable under section 5471. That section denounces the destruction of newspapers only, and the penalty is imprisonment at hard labor for no more than three months.

The criminal intent requisite to the commission of the offense in this case was the intent of the defendant to secrete and convert to his own use a valuable article, the intent to secure pecuniary benefit to himself. The evidence challenged was that the defendant after working his time was unable to handle all the election circulars sent through the mail, and he burned some of them. If this be an offense, it is not denounced by either of the sections of the statutes mentioned, and it is not of a like nature or character to that of secretly taking and appropriating the property of another to one's own use. Its commission neither requires nor evidences any intent to steal or to convert to one's use anything of value or to derive any pecuniary benefit from the act. It evidences nothing but the purpose to avoid performing a duty assigned. As the reason of the rule which permits proof of similar offenses fails here, it seems to me that the rule is inapplicable.

HUBBARD v. COOK et al.

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

No. 1,364.

1. LANDLORD AND TENANT—LEASE—RIGHT TO CANCELLATION.
   A lessor of property by a lease which was recorded and assignable without his consent is not entitled to a cancellation of such lease as against an assignee in good faith because of any transactions between the original parties of which the assignee had no knowledge or notice.
2. PRINCIPAL AND AGENT—SUIT BY PRINCIPAL FOR FRAUD—SUFFICIENCY OF EVIDENCE.
   Evidence considered, and *held* insufficient to entitle a complainant to an accounting from his agents on the ground of their having fraudulently induced him to lease property for less than its fair rental value.

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

The appellant, a resident of the state of Ohio, engaged in loaning money and renting real estate, was the owner of a certain building in the city of Spo-

kane. The property was in charge of the firm of Cook & Clarke, real estate agents at Spokane. In 1901 and 1902 it was in the possession of one Camia, an Italian, under a lease which was to expire January 1, 1904; the rental being $150 per month. Camia was running a questionable resort, and was having trouble with the police. The facts in regard to the tenant and the condition of affairs were, in a series of letters, detailed by Cook & Clarke to the appellant. In the fall of 1902 Cook & Clarke recommended the execution of a lease with the appellee Rogers for a term of five years to begin January 1, 1904, at the monthly rental of $150, the tenant to make all repairs. One of the purposes of executing this lease was to get rid of Camia and to put a third party in a position to buy him out. In November, 1902, the appellee Wilson, knowing nothing of the Rogers lease, bought out Camia's stock of goods and his lease, and went into possession. In the spring or summer of 1903 he learned of the existence of the Rogers lease, saw Rogers personally, and undertook to buy the lease. Rogers demanded $1,500 which Wilson deemed exorbitant. Afterwards, through the intervention of Clarke, Rogers assigned the lease to Wilson for $750. Rogers paid Cook & Clarke $100 for this service, but Wilson paid them nothing. The appellant brought the present suit against Cook & Clarke, Rogers, and Wilson to cancel the lease. On February 6, 1906, he filed his second amended bill of complaint, in which he alleged that at the time of the execution of the Rogers lease the monthly rental value of the property was $350; that Cook & Clarke fraudulently represented to him that the rental value was not to exceed $150 per month, and advised him to execute the lease in question; that he relied upon such advice; that there was a secret and fraudulent understanding between Cook & Clarke and Wilson to share the difference between $350 per month and the $150 per month stipulated in the lease. Upon the evidence in the case the court found the equities with the appellees, and decreed the dismissal of the bill.

William T. Stoll, for appellant.

F. T. Post and Post, Avery & Higgins, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

On the trial of the case the overwhelming weight of the testimony was that the rental value of the property at the time of the execution of the Rogers lease was no more than the sum of $150, and the trial court so found. The cancellation of the lease could only be sustained on proof that Wilson was a party to fraud in its procurement. There is no evidence of such fraud in the record. The lease which he purchased from Rogers was a valid instrument of record. It was assignable without the consent of the lessor. Aside from the knowledge that such a lease had been executed, there is no evidence that Wilson had any knowledge or notice of any previous transactions between Hubbard and Rogers or between any of the other parties to the suit. So far as the record shows to the contrary, Wilson was an innnocent purchaser for value. These considerations are sufficient, so far as Wilson is concerned, to sustain the decree of the court below upon the issues which were presented upon the pleadings.

But the appellant earnestly insists that there is proof of fraud on the part of Cook & Clarke which renders them liable in equity to account to the appellant, in the fact that on October 14, 1903, Cook & Clarke wrote the appellant to the effect that Rogers was reluctant to proceed with the lease and was not eager for possession, and they were trying to get him to assign his lease to Wilson, and said: "This might be

better than to force Rogers to fulfill his contract if he thinks it no longer for his interest to take possession," and that this was written after the date when they had received a responsible offer from one Atwood of $225 per month, which offer they not only declined to accept, but did not even report to the appellant. Of course this alleged fraud cannot be availed of to cancel a lease theretofore lawfully executed to Rogers and subsequently assigned to Wilson, who had nothing to do, so far as the record shows, with the conduct of Cook & Clarke, and had no knowledge of what they were doing. Nor do we see that the proofs justify the charge that Cook & Clarke acted fraudulently in the matter. There is nothing to show that it was to their advantage to let the premises to Wilson rather than to Atwood. The offer of Atwood was made about a year after the Rogers lease had been executed and placed of record. The Rogers lease was assigned to Wilson on November 17, 1903. The date of Atwood's offer does not clearly appear. Atwood testified that it was in the summer or fall of 1903 or early in the following winter. Taking the statement which is most favorable to the appellant, that of Clarke, that it was made some two or three months before the assignment of the Rogers lease to Wilson, the question arises: What was the duty of Cook & Clarke with reference to that offer? At that time the Rogers lease was outstanding, and it was not known that Rogers would transfer it or agree to its cancellation. Atwood's offer was for a term of three years and contained no offer to make repairs. There is nothing to indicate that he would have been willing to pay Rogers any sum for the transfer of the lease. Wilson, on the other hand, had an inducement to pay Rogers the sum of $750 in the fact that he had bought out the stock, goods, and fixtures of Camia, having paid him therefor, and for the lease and the good will of the business $2,000. His payment to Rogers was equivalent to an addition of $12.50 per month to the monthly rental of the lease. It may be that Cook & Clarke were remiss in their duty in not notifying the appellant of Atwood's offer and giving him the opportunity, if he saw fit to avail himself of it, of making overtures to buy the Rogers lease. But their error, if error they made, is not shown to have been more than an error of judgment nor such a dereliction of duty as should charge them in equity with the payment of money to compensate the appellant for the additional rent which might or might not have resulted from a possible lease to Atwood. It is true that since the execution of the lease rental values have greatly increased, owing to the rapid growth and prosperity of the city of Spokane, and, in the light of subsequent events, it now appears that it would have been better not to have executed the Rogers lease. But it does not follow that it was bad judgment to execute it at the time when it was made. The appellant could judge of the advisability of making the lease as well as could the agents. As the court below said: "It was as much his duty to peer into the future as it was that of his agents." In brief, we find in the record no ground whatever to set aside the lease and no reason sufficient in equity to require Cook & Clarke to account for the difference between the $150 a month stipulated for in the Rogers lease, which also bound the lessee to make all repairs at his own expense, and the $225 per month which Atwood offered to pay, without

assuming the burden of repairs. And especially is this so when we consider that the appellant was powerless to accept the Atwood offer when it was made, even if it had been communicated to him, and that there is no proof whatever that the agents ever received directly or indirectly, any benefit from any of the transactions save and except the sum of $100 paid by Rogers for their services in selling his lease to Wilson.

The decree of the Circuit Court dismissing the bill is affirmed.

FREDERICK LEYLAND & CO., Limited, v. HOLMES.

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

No. 1,590.

1. SHIPPING—INJURY TO STEVEDORE—DUTY OF VESSEL.

The owners of a vessel owe a personal duty to the members of a stevedore's gang employed to work thereon to provide reasonable security against danger to life or limb, and to warn them of any latent danger caused by the ship, or for which the ship is responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349, 350.]

2. SAME—LIABILITY OF VESSEL—DEFECTIVE HATCH COVER.

In a suit by a stevedore's employé to recover from a vessel for a personal injury caused by the falling of a hatch cover, precipitating him into the hold, it was shown that, when in the course of his duty he went to remove the cover which had been closed by the vessel, or by those for whom she was responsible, he was not warned of any danger; that he went upon the hatch, when, without fault or negligence on his part or on the part of his fellow laborers, the supports immediately collapsed without apparent cause. *Held*, that such evidence was sufficient to make a prima facie case, which, unless overcome by countervailing evidence, entitled him to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 349, 350.]

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

Wm. C. Dufour and H. Generes Dufour, for appellant.

John D. Grace, for appellee.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

PER CURIAM. The learned judge who sat in the court below placed on record a memorandum of his reasons for refusing a new trial, which we here quote in full:

"PARLANGE, District Judge. I shall state briefly my reasons for refusing a new trial.

"The first specification of the motion for a new trial is an assertion that the court shifted the burden of proof from the libelant to the claimant and thereby committed error. That specification is entirely without foundation. When stating orally my reasons for decreeing in favor of libelant, I said that he had, in my opinion, fully met the burden of proving affirmatively the vessel's negligence and his own damages. Libelant clearly and distinctly proved by the testimony of several eyewitnesses the circumstances and the cause of

the accident. Unless there is reason for disbelieving these witnesses, or unless their evidence is outweighed by countervailing proof, it is plain that the case is with the libelant. These witnesses were not impeached. They stood well the test of cross-examination. Their testimony was not inconsistent with probability, and showed no inherent weakness. If it was said that it must be assumed, entirely without proof, that they were so biased towards libelant as to commit perjury, because of the mere fact that they, as well as himself, were longshoremen, the reply would be that such assumed bias would be offset by the bias towards the ship which the claimant's two witnesses would also have to be assumed to have labored under.

"The claimant produced only two witnesses, the first and second officers. They did not see the accident. The sum and substance of their evidence is the assertion by them that the 'fore and after' was safe, and has not been repaired. They admit that the accident happened, but they make no explanation with regard to its cause. The first officer says that the hatch was closed in Liverpool by stevedores. He cannot tell whether an officer was present at Liverpool to see that the hatches were properly put on. He admits that the hatches are often opened by the crew to clean the holds out. He testifies that 'he never knew' that the burden piece was sprung on the day of the accident. I can find but little in his evidence which can be of any benefit to the vessel. The second officer admits having a very bad memory. Being asked whether any repairs have been made to the burden pieces since he has been on the ship, he replies: 'None that I know of.' On one occasion it was necessary to straighten a burden piece on one of the hatches with block and tackle; but he cannot tell when this took place, except that it must have been within three years, because he had not been three years on the vessel. There is but little in his evidence of benefit to the claimant. There are two experts in the case. Mr. Malochee and Capt. Morse, both excellent men, who, beyond all question, testified absolutely what they believed to be the truth. But when Mr. Malochee's testimony is analyzed closely, as I have done, it will be found that it is not nearly so strong in favor of the vessel as the learned counsel for the claimant has contended. Besides Mr. Malochee has admitted frankly his lack of familiarity with hatches and with matters concerning ships. This was the first occasion on which he has viewed a hatch for the purpose which was required of him in this case. On the other hand, Capt. Morse, a man of equally high standing with Mr. Malochee, and much older and of far greater experience with vessels, who was a ship carpenter by trade and a builder of wooden and iron vessels, who was for 20 years steamship superintendent for the Southern Pacific, testifies unhesitatingly, after viewing the hatch and the 'fore and after': 'It was bent so that I would not use it in that condition. I did not consider it safe.' It is clear, therefore, that the libelant has proven his case by a large preponderance of evidence.

"While, as I have already said, I did not, when deciding the case orally, say that the accident had shifted the onus of the proof of negligence to the claimant, I did say incidentally that, besides the affirmative proof made by libelant, the cause was clearly one in which the doctrine of 'res ipsa loquitur' applies with full force. And I do not see how there can be any doubt on that point. It is doubtless true—in fact, it is familiar and elementary law—that, as a general rule, negligence will not be presumed from the mere happening of an accident. I have very often had occasion to apply the rule in master and servant cases, in which cases there are special reasons—which need not now be gone into—for the application. But there is an exception to the rule which is as familiar as the rule itself.

"The A. & E. Enc. Law (2d Ed.) verbo Negligence, vol. 21, p. 513, after stating the general rule, says: '* * * It is proper, however, to state in a general way that wherever injuries occur in the conduct of operations which common experience has shown can be safely carried on with the exercise of reasonable vigilance, judgment, and care, the mere happening of injuries will be regarded as sufficient to warrant the submission of the question of negligence to the jury'—numerous cases cited. Judge Brown, in Warn v. Davis Oil Co. (D. C.) 61 Fed. 632, said: 'This ruling is based upon the principle of

wide application in the law of torts, that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence,' etc. See Mr. Justice Lamar, in Tolsen Case, 139 U. S. 555, 11 Sup. Ct. 653, 35 L. Ed. 270. See Judge Morrow, in The Joseph B. Thomas (D. C.) 81 Fed. 578, and especially the same case affirmed in the Circuit Court of Appeals (86 Fed. 658, 30 C. C. A. 333, 46 L. R. A. 58), and the cases and authorities there cited.

"I deem it needless to cite other authorities on such a point. The burden of proof never shifts, either in a civil or a criminal case, notwithstanding loose language which may be found in the books. But when a prima facie case is made, judgment will then be rendered against the opposite party, unless he goes forward with countervailing proof which overcomes the adversary's prima facie case. This is what is sometimes erroneously termed the shifting of the burden of proof. Therefore the court did not, and could not, under its very distinct views of the question of law involved, have said that the accident shifted the burden of proof of negligence to the claimant. But it is certain that there is absolutely no proof that the libelant was in any way negligent. It is equally certain that a vessel is bound to have her hatches in such condition that her stevedores, invited by her to come on board, can open the hatches without danger to life or limb, provided they use reasonable care and prudence. It is also well settled that a vessel is bound to give notice to the stevedores of a latent danger caused by the ship or for which the ship is responsible. 'The owners of a vessel owe a personal duty to the members of the stevedore's gang to provide reasonable security against danger to life or limb.' Judge Morrow, in The Joseph B. Thomas, affirmed by the Circuit Court of Appeals, cited supra. And it is also very certain that, when it is shown that a stevedore is called by the vessel to open her hatches, which were closed by her, or by persons for whom she is responsible, and that the stevedore is not notified of any latent danger, and he goes on the hatch and undertakes to open it, using reasonable care and prudence, and immediately, and without any fault or negligence on his part or on the part of his fellow laborers, the supports of the hatches collapse without apparent cause, and the stevedore is precipitated into the hold, and he is severely injured, he will be held to have made out at least a prima facie case entitling him to recover, unless the opposite side then goes forward with the evidence and overcomes the stevedore's prima facie case.

"The damages awarded are moderate, in view of the evidence. No attempt was made to contradict the testimony of the libelant's doctor or the libelant's own testimony on the question of his injuries. No medical examination of the libelant's person was sought by the claimant. I do not see how the claimant, if it conceded arguendo its liability, could, under the evidence, reasonably contest the amount awarded as damages."

We have heard with interest the able oral argument of the proctor for the appellant, and carefully read his printed brief, and have fully examined all of the testimony set out in the transcript of the record, and find no reason therein for reversing or qualifying the action taken or the views expressed by the learned district judge as above shown, in this case.

Therefore the decree appealed from is affirmed.

WESTERN REAL ESTATE TRUSTEES et al. v. HUGHES.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1907.)

No. 2,425.

TRIAL—EXCLUSION OF EVIDENCE—INSTRUCTIONS.

In an action for damages caused by the collapse of a building during alteration, plaintiff alleged noncompliance with an ordinance requiring the issuance of a building permit before the building alterations were commenced. Defendant sought to prove what had been done with reference to securing a permit before the commencement of the work, but the court sustained plaintiff's objection, and stated that he did not see how the permit was material; that in the view he took of the case it would go to the jury on the single proposition whether the work was done in a negligent manner. The matter was not again referred to, but the court charged that in determining whether defendants were negligent the jury might consider the fact that the city ordinances required a permit to be obtained, the fact that one was not obtained, and whether the omission contributed to the injury. *Held*, that such instruction submitted an issue on which defendant had not been heard, and was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

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

Writ of error to review a judgment obtained by Hughes in an action against the Western Real Estate Trustees and others.

Wm. Baird (John C. Wharton, on the brief), for plaintiffs in error.

Irving F. Baxter (Hall & Stout, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The plaintiff, a merchant of Omaha, Neb., sued for damage to his stock of merchandise and trade fixtures and furniture resulting from the collapse of a building which he occupied as a tenant. The defendants owned the adjoining property. Between the buildings was a party wall which had been erected some years before under a contract made by the former owners. The defendants were having alterations made in their building, and during the progress of the work the party wall fell, dragging with it portions of the two buildings and causing the damage complained of. The charge in the petition is that the work was being negligently done, and also unlawfully, because no building or alteration permit had been secured from the building inspector as required by a municipal ordinance. The sections of the ordinance which were set forth prohibited the alteration of any building before a permit had been obtained and until the building had been examined and approved by the inspector as being in safe condition to be altered. At the trial the plaintiff introduced evidence tending to show negligence, showing the adoption of the ordinance by the municipal authorities, and also the fact that no permit for the work had been procured. When the evidence for the defense was being introduced the agent in charge for the defendants was asked while testifying what, if anything, had been done with reference to securing a permit before the commencement of the work. The trial court sustained plaintiff's objection to the question, and the defendants excepted. The question

was reframed and asked again, and upon a repetition of the objection the trial court said:

"I cannot see how the permit cuts any figure in this case. I will listen to each of you on that branch of the case; but, as I view the case now, it will go to the jury on the single proposition as to whether or not this work was done in a negligent and unskillful manner, leaving out of consideration the question which may arise, if any, as to party wall business. At present we will exclude it. If I am convinced before the case ends that the permit cuts any figure in this case, you will be permitted to go into that branch."

The defendants, conforming to the decision of the court, then desisted from this line of inquiry, and the matter was not again referred to until the court, in charging the jury, said that they might in determining whether the defendants were negligent consider in connection with all the evidence the fact that the ordinance required a permit to be obtained, the fact that one was not obtained, and the question whether the omission contributed to the injury. This was doubtless an inadvertence on the part of the court, but the prejudicial effect upon the defendants may well be inferred in view of the sharp conflict in the other evidence upon the issue of negligence. The ruling of the court was not merely upon the particular question asked, but it was comprehensive in scope and clearly decisive of one of the substantial features of the case. It was in favor of the defendants, and, of course, they were not required to except to it. The language of the court invited the obedience of counsel and contained a promise of warning in case of a change of its view. For the time being the question of permit or no permit was no longer in the case; for, when the court made the ruling, the case stood, so far as the defendants were concerned, as though the averments about the ordinance and permit had been stricken from the petition. They were entitled to be seasonably advised of a change in the opinion of the court so that any defense they had might be presented and be in judgment. They have not had their day in court upon that matter, and we need not speculate as to what might possibly excuse an omission to obtain a permit, or whether the ordinance in its relation to the question of negligence would be satisfied if the building inspector in point of fact inspected the building and orally authorized the alterations.

Harkison v. Harkison, 41 C. C. A. 201, 101 Fed. 71, presented a question quite similar. It was an action for fraud and willful deceit, in which under a local statute a judgment for the plaintiff entitled him to execution against the body of defendant. At the close of plaintiff's evidence the defendant moved for a nonsuit, upon the ground that the cause of action was barred by the statute of limitations, and the court in overruling the motion held that the action was in assumpsit, and not for fraud and deceit. Thereafter the defendant in making his defense did not touch upon the tortious aspect of the case as averred in the complaint, but when the court charged the jury it submitted the question of fraud and willful deceit to them, they found the defendant guilty, and a judgment of imprisonment followed. This court held that the defendant had been prejudiced in making his defense and awarded a new trial. An analogy may also be found in Michigan Insurance Bank v. Eldred, 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162.

in which a plaintiff was induced by the court's announcement of its view upon one of two defenses to refrain from introducing evidence to meet the other.

The other assignments of error do not require mention. We have examined them and found them untenable.

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

JOSEPH WILD & CO. v. PROVIDENT LIFE & TRUST CO.

(Circuit Court of Appeals, Third Circuit. April 30, 1907.)

No. 26.

BANKRUPTCY—PREFERENCES—PAYMENTS ON RUNNING ACCOUNT.

It is only where new sales succeed payments, and the net result is to increase the value of the estate, that payments made by an insolvent debtor on a running account are not to be considered as preferential transfers, under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], which must be surrendered, under section 57g, before the creditor can prove the remainder of his claim.

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

For opinion below, see 146 Fed. 142.

Max L. Powell, for appellant.

A. G. Dickson, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decision of the District Court for the Eastern District of Pennsylvania, in bankruptcy. The appellant sold merchandise to the alleged bankrupts and received payments on account, as set forth in the following statement:

1901.			Terms.		1901.		
Feb. 14	To Mdse.	4 Mos.	$ 176 58	June 29	By Cash		$ 176 58
June 5		"	175 38	Oct. 10	" "		634 78
							$ 811 36
7		"	173 64		Balance		$2,565 92
15		"	122 30				
28		"	59 66				
29		"	103 80				
				$811 36			
July 19		"	220 00				
23		"	10 00				
26		"	535 32				
Aug. 14		"	364 02				
24		"	180 60				
Sept. 6		"	175 08				
11		"	176 04				
30		"	178 20				
26		"	177 78				
Oct. 8		"	183 30				
8		"	182 88				
12		"	182 70				
			$3,377 28				$3,377 28
1902.							
Jan. 1	To balance		$2,565 92				

For this balance, claim was made against the trustee, and the same was duly referred to the referee, before whom testimony was taken and by whom the claim was afterwards allowed. The trustee then filed a petition, asking for a re-examination, which was allowed by the referee, and from his report again allowing the claim, we take the following findings:

"The trustee has filed a petition asking for a re-examination of the claim, averring that since the last of the above transactions, the claimant received from the bankrupts a payment of $634.78, which, it is contended, should be surrendered as a preference. The petition was allowed and testimony taken; from the testimony taken, supplemented by an agreement between the parties, I find the facts to be as follows: The bankrupts became insolvent on or before January 1, 1901; the claimants had no knowledge of their insolvency, and the sales and payments hereinafter referred to, were made in the usual course of business. The claimants, on various days in the month of June, 1901, shipped certain goods to the bankrupts sold on open account on four months' credit, and on October 10, 1901, the bankrupts paid the claimants for the above goods, $634.78. At various dates between July 19, and October 8, 1901, inclusive, the claimants shipped certain other goods sold by them to the bankrupts on open account on four months' credit. The total amount due on the above sales is $2,565.92. It is for the money due on the shipments last referred to, that the claim now under consideration was filed."

The referee, after an interesting discussion of the authorities, felt constrained to follow what he conceived to be the reasoning of Judge Putnam, in delivering the judgment of the Circuit Court of Appeals, in Dickson et al. v. Wyman, 49 C. C. A. 574, 111 Fed. 726. In that case, section 57g of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444]) was so construed as not to require a creditor to surrender partial payments received by him on account, in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate. This and the case of Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717, lends some support to the conclusion arrived at by the learned referee. Upon the petition of the trustee, the question was certified by the referee to the district court for review, and the order of the referee, directing the trustee to pay the claimant a dividend on $2,565.92, without surrendering the said preferential payment of $634.78, was reversed.

There is much in the natural equity of the situation that commends the contention, that, where there is an open and running account after the insolvency, in which the various transactions of delivery of goods and partial payments took place openly and honestly, both sides of the account should be considered, and if the net result is an enrichment of the bankrupt's estate, partial payments, though made within four months of the filing of the petition, should not be considered as preferences, within the meaning of section 60a of the bankrupt act (30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]). It may be admitted that the authorities are not harmonious and do not satisfactorily dispose of the precise question here presented, but, until the Supreme Court shall have decided otherwise, we feel constrained, by what seems to be the ratio decidendi of both Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, and Jaquith v. Alden, 189 U. S.

78, 23 Sup. Ct. 649, 47 L. Ed. 717, to say that it is only where new sales succeed payments and the net result is to increase the value of the estate, that payments on a running account are not to be considered as preferential transfers under section 60a, to be surrendered under section 57g. This general view is supported by Kimball v. Rosenham, 52 C. C. A. 33, 114 Fed. 85, and by Appeal of American Woolen Co., 57 C. C. A. 412, 121 Fed. 658. This court, also, in Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734, recognizing the hardship of treating partial payments on a running account as preferences under the act, uses this language:

"If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate."

The rule, that further credit must be given the bankrupt after the last partial payment, seems technical and artificial, where the payment, as in this case, made October 10th, was only two days after the last sales and credit on the account between the claimant and the bankrupt. The rule, however, has been widely recognized, is based upon sound reasoning, and has been authoritatively stated by the Supreme Court. We are not, therefore, justified in creating an exception on the special circumstances of the present case.

The judgment of the court below is therefore affirmed.

NOTE.—The facts on which this action was based arose prior to Act Cong. Feb. 5, 1903, whereby sections 57g and 60b of the bankruptcy act [U. S. Comp. St. Supp. 1905, p. 689] were amended.

MARKELL v. MATTESON.

(Circuit Court of Appeals, Third Circuit. May 13, 1907.)

No. 24.

COURTS—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where, in an action for breach of a contract for the sale of a drug business brought in a federal court, there was evidence that the business and good will was of such a value that plaintiff's share thereof, together with $500 advanced by plaintiff as a part of the price for which he also sued, would amount to $2,000, an objection that the amount in controversy was not shown equal the jurisdictional amount because there was no proof of any market value of the goods inventoried or what they would sell for was unsustainable.

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

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

L. C. Barton, for plaintiff in error.

J. M. Magee, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. The case below was an action of assumpsit, brought by the defendant, A. D. Matteson, individually, against S. C. Markell, to recover damages for a breach of contract entered into

between said Matteson and one H. B. Scoville, of the one part, and said Markell of the other part, for the purchase and sale of a certain drug store and business of the latter, situate in Washington County, Pennsylvania. Said Matteson and Scoville were not co-partners, but merely appear as would-be joint purchasers of the business.

There was evidence tending to show a verbal agreement between said Matteson and said Scoville, of the one part, and Markell, the plaintiff in error, of the other, by the terms of which plaintiff in error was to sell to the said Matteson and Scoville his drug store and business, situate as aforesaid, for whatever sum might appear as the value thereof, in the inventory to be thereafter made. Of this sum, $2,000 was to be paid in cash and the balance within a period of six years, there being no set times for the deferred payments. There was also evidence to show that, after the taking of the inventory, which amounted to the sum of $8,300, the plaintiff in error induced the said Matteson, the defendant in error, to give him $500 on account. The testimony tended to show that this had been no part of the oral understanding, and that the defendant in error would not have complied with plaintiff in error's request, had it not been that the plaintiff in error threatened to discontinue negotiations, unless this cash payment was made. The $500 was paid over to plaintiff in error, without the knowledge or authority of the said Scoville. There seems to have been an understanding that these terms were to be set out in a written agreement. The negotiations, however, failed to so result, and there is much conflict of testimony, as to which party was responsible for the failure.

Defendant in error instituted this suit to recover damages, alleged to amount to $4,520, including those for the non-return of the $500 and also for the loss occasioned by the alleged breach of the agreement by defendant to sell his drug store, with its contents, and his business or good will.

After a trial, a verdict and judgment were rendered for the $500, and interest on the same. To this judgment, the present writ of error has been sued out.

Objection is made that, as there was no proof of any market value of the goods inventoried, or of what the same would sell for, no basis was established by which any amount approaching the jurisdictional amount of $2,000, could be alleged as damages. There was proof, however, which tended to show that the business and good will was of such a value as that plaintiff's share thereof, taken together with the $500 advanced by him and for which he brought suit, would amount to the sum required.

Three of the assignments of error cover certain refusals of the court to charge requests by the defendant, and the remainder are to the refusal of the court to give peremptory instructions in favor of the defendant, for not sustaining defendant's motion for judgment, non obstante veredicto, and for not arresting judgment on defendant's motion.

The charge delivered by the learned trial judge was entirely fair to the defendant, and we see no reason why the conflicting evidence in this case should not have been submitted to the jury.

The judgment below is therefore affirmed.

TOWLE v. FIRST NAT. BANK OF BOSTON.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1907.)

No. 2,481.

TRIAL—FEDERAL COURTS—SPECIAL FINDINGS WHERE JURY IS WAIVED.

Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to the provisions of Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 935.]

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

John F. Fitzpatrick, for plaintiff in error.

Edward E. Blodgett (Henry B. Wenzell, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action at law upon a contract of guaranty executed by Uri L. Lamprey in his lifetime to the Massachusetts National Bank, an assignor of plaintiff, to recover $12,000 and interest. The amended complaint set out the contract, which was, in substance, that if the bank would loan H. G. & H. W. Stevens, as they might from time to time request, amounts not exceeding at one time $30,000, he, Lamprey, would pay any note, draft, or other obligation given by the borrowers therefor not paid by them at maturity; and averred that, relying on the guaranty, the bank loaned to the Stevenses from time to time different sums of money and took their notes therefor maturing at given dates, which were not paid. The answer denied generally each and every allegation of the complaint except as therein admitted, qualified, or denied. It then admitted the execution of the guaranty as alleged and pleaded as an affirmative defense as follows:

"That it was expressly agreed by and between the Massachusetts National Bank and the defendant that said guaranty should only cover loans and advances to H. G. and H. W. Stevens as copartners or jointly, and not loans or advances to be made to either H. G. Stevens or H. W. Stevens individually or separately; and the defendant is informed and believes, and so charges, the facts to be that said Massachusetts National Bank did not make any loans or advances whatsoever to H. G. and H. W. Stevens as copartners or jointly, but did make loans and advances to H. W. Stevens, and that the commercial obligations set forth in the complaint, if they are valid obligations at all, are the obligations of H. W. Stevens only, and not obligations of H. G. Stevens, as copartner or otherwise."

The replication put the affirmative defense in issue. A jury was waived, the case tried to the court, special findings of fact made, and judgment rendered for plaintiff for $12,080, and interest. Much evidence was heard touching the relations of the parties and the circumstances under which the contract of guaranty was executed and the loans made; and the chief issue now argued before us is whether the guaranty contemplated loans made to H. G. and H. W. Stevens as co-

partners only, or whether it also covered loans made to either of them as an individual provided only he borrowed it for a concern doing business in the name of H. G. & H. W. Stevens.

That issue was clearly and definitely joined in the pleadings, and was one apparently conceded not to be determined solely by the construction to be placed upon the language of the contract of guaranty, but in part by competent proof aliunde that instrument. The instrument nowhere expressly refers to the Stevenses as copartners, and yet their joint names are referred to as together desiring to make loans of the bank. There is manifestly an ambiguity here which admits of elucidation by proof, and the parties treated the issue as one of fact to be determined by proof and much evidence of the surrounding facts, acts, and conduct of the parties was taken. On all this evidence counsel for plaintiff contend that the instrument guarantied advances made to a concern called "H. G. & H. W. Stevens" as it then existed, regardless of its personnel, and that a reasonable construction gathered from the language of the instrument, in the light of surrounding circumstances and of the cotemporaneous construction placed upon it by the parties, makes this contention clear. Counsel for defendant contend, on the other hand, that all the proof shows that the instrument was intended to guaranty the payment of loans made to the Stevenses as copartners, and not otherwise. This issue distinctly made in the pleadings and tried by the evidence should have been found by the trial court one way or the other, but was not. It was the vital issue in the case, and one which is now pressed upon us by both parties as decisive of it. But it is said that the trial court in effect made a finding on that issue as a result of its other findings; that the finding that the several loans which formed the basis of the suit were made by the bank to said H. G. & H. W. Stevens "relying upon and in consideration of said agreement and guaranty" is on the authority of Fox v. Haarstick, 156 U. S. 674, 15 Sup. Ct. 457, 39 L. Ed. 576, the equivalent of a finding against the defendant on the issue as to partnership tendered by him.

We think the findings as made cannot fairly be held to involve or imply a finding on the issue in question. Conceding that the loans were made "relying upon and in consideration of said agreement of guaranty," yet that concession does not determine what the parties meant by the ambiguous and indefinite reference to "H. G. & H. W. Stevens" found in the guaranty. In other words, the loans may have been made in reliance upon and in consideration of the guaranty, and yet may or may not have been made to H. G. and H. W. Stevens as copartners or on their joint liability.

Special findings by a trial judge in actions at law made pursuant to the provisions of Act March 3, 1865, c. 86, 13 Stat. 501, when a jury has been waived have the same effect as special verdicts of a jury. Section 649, Rev. St. 1878 [U. S. Comp. St. 1901, p. 525]; Norris v. Jackson, 9 Wall. (U. S.) 125, 19 L. Ed. 608; Miller v. Life Ins. Co., 12 Wall. (U. S.) 285, 301, 20 L. Ed. 398. The latter must embrace a finding on every material issue joined in the case. Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. Ed. 224; Barnes v. Williams, 11 Wheat. (U. S.) 416, 6 L. Ed. 508; Prentice v. Zane's Adm'r,

8 How. (U. S.) 470, 484, 12 L. Ed. 1160; Graham v. Bayne, 18 How. 60, 63, 15 L. Ed. 265; Ward v. Cochran, 150 U. S. 597, 608, 14 Sup. Ct. 230, 37 L. Ed. 1195.

When findings are not made on all the material issues, the result is a mistrial and the cause must be remanded for a new trial. Cases, supra, and Suydam v. Williamson, 20 How. (U. S.) 427, 441, 15 L. Ed. 978.

There was, in our opinion, a clear disregard of this well-settled rule in the trial of this case. No finding was made on a material and vital issue joined between the parties. Without that finding the judgment as rendered cannot be sustained. The defendant assigned for error that the judgment as rendered was not justified by the facts as found and from what has been said that assignment must be held good.

The judgment is reversed, and the cause remanded to the Circuit Court, with directions to grant a new trial.

SHERIDAN v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,459.

INTERNAL REVENUE—SALE OF PROPERTY UNDER DISTRAINT WARRANT—REPLEVIN BY THIRD PARTY.

A sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not directed, and the true owner may assert his title and right of possession by replevin against the purchaser after the officer has made the sale and transferred possession, and has thus completed his official acts with respect to the property. A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceedings for violation of the customs or internal revenue laws, and passes only the interest of the tax debtor.

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

For opinion below, see 145 Fed. 963.

Henry W. Blodgett (Walter N. Davis, on the brief), for plaintiff in error.

E. P. Johnson, Asst. U. S. Atty., for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The Commissioner of Internal Revenue made an assessment against one C. J. Knott of $900 for taxes due as a manufacturer of oleomargarine and certified it to Allen, the collector at St. Louis, Mo., for collection. The collector's demand for payment was refused, and he thereupon issued a distraint warrant and levied it upon a buggy, a wagon, and a horse as the property of Knott. The property was advertised by the collector and sold to three purchasers. Immediately after the sale, Sheridan, a constable of St. Louis, seized the property under a writ of replevin issued by a justice

of the peace in an action commenced by Madge Knott, the wife of the delinquent manufacturer. Thereupon the collector and the purchasers filed a joint petition in the Circuit Court of the United States for the Eastern District of Missouri for an order on the constable to surrender the property at once to the collector or the purchasers. The constable demurred to the petition, saying that it did not state facts sufficient to entitle the plaintiffs to relief. The trial court overruled the demurrer, the constable stood thereon and refused to plead further, and the order prayed for was made. Hence this writ of error by the constable. The question is whether the petition states a cause of action, and this involves the right of Madge Knott to maintain her replevin action, assuming her to have been the owner of the property. It is not averred in the petition of the collector and the purchasers that the constable took the property from the possession of the collector. The mere charge that he seized the property immediately after the sale will not bear that construction, and the suggestion to the contrary is negatived by the further averment that the constable withholds the property "from the possession of the parties above named to whom the same was sold by said collector." Nor was it averred that possession was being withheld from the collector. It is charged that the replevin action is illegal and in violation of the laws of the United States, etc.; but no facts are set forth from which such legal conclusions might be drawn or showing that the collector was in any manner interfered with or obstructed during the performance of his official duties and before the full completion thereof. So the case should be considered as though the collector had completed the sale, had delivered the property to the purchasers, and were now endeavoring to protect them from a claim of ownership by a third person who was not indebted to the government and whose property he had no right to seize. If the collector had no duty which remained unperformed, and no official interest which he was authorized to protect by an action of this character, the constable's demurrer should have been sustained, because the purchasers who joined with him as coplaintiffs are not entitled to proceed in this way for the assertion or defense of purely private rights. It may at once be conceded that, as long as the collector remained in possession under the distraint warrant, he could not lawfully be disturbed in the performance of his duties by a replevin action brought by any person whomsoever. The property so held is expressly declared to be in the custody of the law and irrepleviable. Rev. St. § 934 [U. S. Comp. St. 1901, p. 689]; Treat v. Staples, Holmes 1, Fed. Cas. No. 14,162. Nor could C. J. Knott, the debtor in the distraint warrant, afterwards recover the property by replevin from the purchasers upon the ground that he did not owe the tax or that there was some defect in the proceedings of the collector. Nor could any person maintain a suit to enjoin the collector from proceeding with the sale of the property for the collection of the tax. Rev. St. § 3224; Pullman v. Kinsinger, 2 Abb. (U. S.) 94, Fed. Cas. No. 11,463. But the case before us presents none of these conditions. No one interfered with the possession of the collector or obstructed him in doing his duty, and the tax debtor is not here questioning his responsibility or the title that passed

to the purchasers. The real questions which arise are whether the sale of property by a revenue officer under a distraint warrant for the collection of a tax cuts off the title of a third person who does not owe the tax and against whose property the warrant is not directed; and, if not, whether the true owner may assert his title and right of possession by replevin against the purchasers after the officer has made the sale. It is elementary that property does not always remain in the custody of the law merely because it was once in the possession and subject to the jurisdiction of a court or public officer. When jurisdiction has been exhausted and possession relinquished, it is as much the subject of seizure at the instance of any one not concluded by the prior proceedings as other property.

The proceedings of a collector for the collection of a tax, such as were taken in this case, are distinguishable from a forfeiture and condemnation of property seized for violation of the customs or internal revenue laws. In a case of the latter character the proceeding is in rem. The offense which has been committed is attached to the property itself. In a sense the property is proceeded against as the offender. When a forfeiture of personal property arising from illegal act or omission has been made effective by condemnation and sale, all title passes to the purchaser, and in some instances without reference to any personal delinquency of the owner. The owner may or may not be innocent; the property may or may not belong to him who is guilty. But not so in a case like that before us. There was no proceeding for forfeiture and condemnation for any delinquency of C. J. Knott. He simply failed to pay a tax assessed against him and a writ in the nature of an execution was issued for its collection. In such cases the acts of Congress limit the lien of the government to the property belonging to the tax debtor, and it is only such property that the collector is authorized to levy upon and sell. Moreover, it is expressly provided that the collector's certificate of sale "shall transfer to the purchaser all right, title and interest of such delinquent in and to the property sold." Rev. St. §§ 3188, 3190, 3194, 3186, as amended by Act March 1, 1879, c. 125, § 1, 20 Stat. 327 [U. S. Comp. St. 1901, p. 2060]. Naturally the purchaser gets no more than the collector is authorized to seize and sell, and we know of no rule, statutory or judicial, that in such cases bars a third person who was not a party to or concluded by the proceedings and who claims to own the property from asserting his claim against the purchaser in any forum having cognizance of ordinary controversies between individuals.

The order of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BETTIS v. FREDERICK LEYLAND & CO., Limited.

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

No. 1,585.

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL OWNER.

The owner of a vessel which was seaworthy and properly equipped is not liable, under the admiralty law, for an injury to a stevedore's employé caused by the negligence of himself or other employés handling the hatch coverings when discharging the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 342, 349.]

Appeal from the District Court of the United States, Eastern District of Louisiana.

Armand Romain, for appellant.

Henry P. Dart and Benj. W. Keran, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Judge Parlange gave the following reasons for dismissing the libel:

PARLANGE, District Judge. The sole fault or negligence charged is "that said accident was due entirely to the fault of the agent or foreman of the owner of said steamship and of the mate thereof, who refused to have said burden piece removed while said work was going on; that said burden piece should have been taken off as is regular and customary; that your libelant was unnecessarily subjected to great risk not contemplated, and that your libelant in no way contributed to said injuries." An additional contention is made in the brief, based upon certain testimony, which was objected to, that the burden piece should have been bolted. No such issue was raised by the libel. However, even if it had been raised, the result of the suit would, under my view, be the same. The charge in the libel is not that the ship was unseaworthy, or that she was or that any of her appurtenances were defective. The only charge is that libelant was required to do dangerous work, and that the foreman and mate were negligent as to the manner of directing the work and having it performed. It would seem that on exception of "no cause of action," the libel would have been dismissed. The libel does not aver and the testimony does not show any legal liability on the part of the vessel under the doctrine of The Osceola, 189 U. S. 158–175, 23 Sup. Ct. 483, 47 L. Ed. 760. It may be said incidentally—though the matter is not necessary to the decision of the case—that it would seem that the libelant assumed the risk. In admiralty, the doctrine of assumption of risk is recognized, though the doctrine of contributory negligence does not necessarily defeat an action. The libel must be dismissed at libelant's costs.

These reasons were sufficient and conclusive. The appellant, however, contends that as the original libel was changed from one against the ship to one in personam against the owners, the libelant is entitled to recover because he says the evidence shows that the owners did not furnish the libelant a safe place, and the libelant was made to work in unsafe premises. It would be difficult to point out wherein in cases of this kind a greater liability rests upon the owners than upon the ship. The proctor for libelant has not pointed out the distinction further than as made in his contention. The authorities cited are common-law cases. We need not, however, discuss it, because from the evidence in the case the owners furnished as reasonably safe premises and surroundings for

libelant to work in as the nature of the case permitted. The place or premises were only made dangerously unsafe by the negligent handling of the hatch furniture which was entirely under the control of the libelant and his colaborers. They took out enough of the hatch coverings to answer their purpose when they were removing goods from between decks from aft the hatch; and when they changed to removing goods from forward of the hatch they should have taken out the alleged burden piece the subsequent fall of which injured the libelant. For not taking it out, neither the ship nor its owners were in any wise negligent or liable.

The decree appealed from is affirmed.

JOHNSON v. FREDERICK LEYLAND & CO., Limited.

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

No. 1,586.

SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL OWNER.

Evidence *held* not to sustain the allegations of a libel, that an injury to libelant resulted from a defect in the fittings of a vessel, in view of the rule that a libelant in such case must establish his claim with reasonable certainty.

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

Armand Romain, for appellant.

Henry P. Dart and Benj. W. Kernan, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In dismissing the libel in this case, Judge Parlange gave the following reasons transmitted in the record:

Memorandum of Reasons for Dismissing Libel.

PARLANGE, District Judge. The libelant was bound to make his case reasonably clear and certain. A careful perusal of the evidence entirely fails to convince me that the facts as alleged in the libel are true. The fault charged is that the burden piece was too short. If this had been proven, the vessel would be liable. But it is contended on behalf of the claimants that the cause of the accident was that the libelant or his fellow laborers did not put the burden piece in the place intended for it. If this is true, the vessel is not liable. No failure of supervision by the foreman of the officers of the vessel, could, under the circumstances of this case, render the vessel liable. As to all of these conclusions, see The Osceola, 189 U. S. 159–175, 23 Sup. Ct. 483, 47 L. Ed. 760. The least that can be said as to the effect of the testimony is that it leaves the libelant's case in such uncertainty that a decree in his favor would not be justifiable. But it may be that there is a preponderance of proof against the libelant, although it is not necessary to so find, in order to dismiss the libel. Any bias which the witnesses for the claimants may have had, resulting from the fact of their employment by the vessel, is offset by other considerations operating on libelant's witnesses in his favor. In all cases similar to the present one, a decision can be reached with almost absolute certainty, on the testimony of one or more disinterested witnesses charged to view and survey the alleged defective appliance. It is evident to me, under the evidence, that it was in the power of either party in this case to have a survey made. As the case is not one in which the party alone

could have had a survey made, no presumption arises against the claimants. It seems that the law is that when it is in the power of either party to produce certain evidence and neither produces it, no presumption arises against either. 11 A. & E. Enc. Law (2d Ed.) p. 504, note; vol. 22, A. & E. Enc. Law (2d Ed.) p. 1262. Still, the fact remains that it was in the power of the libelant to have had a survey made and it was his duty to make his case reasonably clear and certain. He has not done so though having the means. The decree must therefore be against him. The libel must be dismissed at libelant's costs.

We are not prepared to say that under the evidence it was in the power of either party in the case to have had a survey made—certainly not equally in the power of either party, for consideration must be given to the fact that the libelant, following his injuries, was laid up, and the ship very soon sailed away. It is true the ship returned at a later date, but then a survey, to be conclusive, would have needed to be supplemented with proof that there had been no changes made in the alleged defective burden and fore and after pieces of the third hatch, and this would have been more in the power of the owners than of the libelant. However this may be from a very careful consideration of the case, keeping in mind that the libelant was bound to make his case reasonably probable and certain, we are unable to find that the trial judge erred in dismissing the libel.

The judgment of the District Court is affirmed.

LESTERSHIRE LUMBER & BOX CO. v. W. M. RITTER LUMBER CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1907.)

No. 189.

SALES—WARRANTY OF QUALITY—EFFECT OF ACCEPTANCE.

A provision of an executory contract for a sale of lumber that "it is understood that this stock will be dry and in condition to work on arrival," if construed as a warranty, is not one which survived the acceptance and retention of the lumber by the purchaser, under the law as settled by decision in New York; the condition of the lumber being obvious on inspection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 818.]

Wallace, J., dissenting.

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

The case comes here upon the pleadings and the report and opinion of the referee to whom the issues were referred by stipulation of the parties.

Carver, Deyo & Hitchcock, for plaintiff in error.

Kernan & Kernan, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. After a careful examination of the report and able and comprehensive opinion of the referee we see no reason to disturb his conclusions of law.

The only question which we regard as at all doubtful is that presented by the second and third assignments of error, namely, whether or

not the referee erred in finding that the provision of the contract, "It is understood that this stock will be dry and in condition to work on arrival" was a sale by words of description only, not constituting an express warranty, there being in no event a warranty which survived the acceptance of the lumber.

The defendant was entitled to have dry and workable lumber delivered; its condition in this regard was obvious and could have been easily ascertained by defendant's inspectors. It is not a case of secret imperfections or latent defects. With full opportunity to discover the condition of the lumber as to dryness, the defendant, having ascertained the facts, was under no obligation to keep the lumber if not up to the contract standard, but, having accepted and used it, the warranty, even assuming the language used to be in the nature of a warranty, was lost; it did not survive the acceptance.

There is some conflict of authority upon this question, but we agree with the referee that the facts bring the controversy within the rule of Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305. In that case the plaintiffs converted the property and months after delivery and acceptance brought an action to recover damages resulting from its being improperly cured and being in bad condition when delivered. The defendant had agreed to deliver the merchandise (tobacco) "well-cured and boxed, and in good condition." The court held that in an executory contract of sale the right to recover damages because the goods do not correspond with the contract will not survive an acceptance and retention of the property with full opportunity to ascertain the defect, in the absence of notice to the vendor or proof of fraud.

Reed and Randall is a leading case and has been the law of New York for nearly half a century. Its application has by subsequent adjudications been somewhat circumscribed, but we think it cannot be distinguished on the facts from the present controversy.

See, also, Waeber v. Talbot, 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712; Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660; Studer v. Bleistein, 115 N. Y. 317, 22 N. E. 243, 5 L. R. A. 702.

It follows that the judgment must be affirmed with costs.

LACOMBE, Circuit Judge. I concur in the result arrived at by Judge COXE because I am of the opinion that the provision as to dryness of the timber was not a warranty.

WALLACE, Circuit Judge. I dissent. In my opinion there was an express warranty as to the condition of dryness, as well as to the quality, of the lumber, and the defendant was not precluded by accepting the lumber, after an opportunity to discover that it did not comply with the warranty, from recovering by way of recoupment the damages resulting from the breach. See Bagley v. Cleveland Rolling Mill Co., 22 Blatchf. 342, 21 Fed. 159, and Zabriskie v. C. V. R. R. Co., 131 N. Y. 72, 29 N. E. 1006.

W. M. RITTER LUMBER CO. v. LESTERSHIRE LUMBER & BOX CO.

(Circuit Court of Appeals, Second Circuit. April 8, 1907.)

No. 177.

1. SALES—CONSTRUCTION OF CONTRACT—ACTION FOR BREACH.
An order for lumber given in January, 1902, stating that "you may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year 1901 and in accordance with our contract dated February 18, 1901," did not render the contract made by its acceptance a continuation of the prior contract, which is referred to merely in connection with the grade, and especially where the price named was different, and a breach of the first contract by the purchaser afforded no ground for the refusal of the seller to perform the second.

2. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT BY REFEREE.
Where the testimony taken before a referee is not in the record as sent to an appellate court, his findings of fact, or upon mixed questions of law and fact, cannot be reviewed.

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

For opinion below, see 144 Fed. 568.

On writ of error to review a judgment for $24,397.33 damages, interest and costs, entered April 17, 1906, in favor of the plaintiff for damages occasioned by the failure of the defendant to deliver lumber to the plaintiff pursuant to an order for 4,000,000 feet of lumber, dated January 2, 1902, which order was duly accepted by the defendant. The case comes here upon the pleadings, report and memorandum of the referee and also upon the opinion of the judge of the Circuit Court, delivered upon plaintiff's motion for judgment and defendant's motion for a new trial.

John D. Kernan and Kernan & Kernan, for plaintiff in error.

I. T. Deyo and Carver, Deyo & Hitchcock, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The order out of which this controversy arises is as follows:

"Lestershire, N. Y., Jan. 2, 1902.

"W. M. Ritter Lumber Co., Columbus, Ohio:

"You may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year 1901 and in accordance with our contract dated February 18, 1901. It is understood that this stock will be dry and in condition to work on arrival. Shipments are to be made during the year 1902 as we direct, and all the 4,000,000 feet is to be taken on or before January 7, 1903. It is also understood that you will deliver this stock by way of the Erie Railway at Endicott or Lestershire as we may direct and that the price will be $17 per thousand feet, delivered at either of the points named.

"Yours very truly, Lestershire Lumber & Box Co."

The defendant refused to execute the order for the reason that the plaintiff had neglected to pay for lumber sent pursuant to prior orders, which neglect resulted in a suit and a recovery against the Lestershire Company, the writ of error to review the judgment (153 Fed. 573) being argued cotemporaneously with the writ in the present action. The sole question of importance now to be determined is, was the order of January 2, 1902, a continuation of the previous agreement of Feb-

ruary 18, 1901, or was it a separate and independent agreement? If the latter, a breach of the 1901 agreement constituted no defense.

The question turns practically upon the construction to be given the words "and in accordance with our contract dated February 18, 1901." With these words omitted it cannot be seriously contended that there is any substantial ground for the contention that the 1902 contract was merely a continuation of the earlier one. Both the referee and the judge find that these words were inserted merely as a convenient method of determining the grade. The referee says of the 1902 order and acceptance:

"It is a contract complete in itself and having a different price for the lumber. The fact that the lumber is to be of the same grade as that furnished in 1901 in accordance with the contract of February, 1901, does not make the order of January, 1902, a continuance of the former one, or supplemental to it. It simply states a method of determining the grade to be furnished. The contract is a new one at a different price."

The judge says:

"The only reference in the order of January 2d to the order of February 18, 1901, is in the following language: 'You may enter our order for 4,000,000 feet of shipping cull poplar of same grading as that furnished us by you during the year nineteen hundred and one and in accordance with our contract dated February 18, 1901.' It cannot be reasonably contended that the words 'and in accordance with our contract dated February 18, 1901,' refer to anything more than the grade of the lumber to be furnished under the order. These words have no reference to any contract made February 18, 1901, to deliver a further quantity of lumber."

It is argued by both parties that it was proper in construing the agreement, which is not free from ambiguity, to take into consideration the circumstances surrounding the transaction. U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46; Empire State Type Co. v. Grant, 114 N. Y. 40, 21 N. E. 49. This is true and the referee who saw and heard the witnesses decided the issue in favor of plaintiff. Under the rule as laid down in this circuit (Chicago Co. v. Clark, 92 Fed. 968, 35 C. C. A. 120), the testimony has not been returned and we have no means of determining what the surrounding circumstances were except as they may be inferred from the report. It is manifest that we cannot reverse the finding of the referee upon questions of fact, or upon mixed questions of law and fact. St. Louis v. Rutz, 138 U. S. 226, 241, 11 Sup. Ct. 337, 34 L. Ed. 941.

We see no reason to disturb the conclusion that the 1902 agreement was independent of all the previous dealings between the parties. There can be no question as to the breach of this contract. We think the referee correctly assessed the damages.

The judgment is affirmed with interest and costs.

CONTINUOUS GLASS PRESS CO. v. SCHMERTZ WIRE GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. April 22, 1907.)

No. 8.

INJUNCTION—PRELIMINARY INJUNCTION—DISCRETION OF COURT.

While a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld if, in the exercise of a sound judgment, it is deemed necessary to prevent injustice; and an order granting such an injunction will not be reversed by an appellate court except for an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302–306.]

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

A. B. Stoughton, for appellant.

Thomas W. Bakewell and Wm. L. Pierce, for appellees.

Before GRAY, Circuit Judge, and HOLLAND and LANNING, District Judges.

LANNING, District Judge. On November 2, 1905, the Schmertz Wire Glass Company and the Mississippi Wire Glass Company filed their bill of complaint in the Circuit Court of the United States for the Western District of Pennsylvania, praying that the Continuous Glass Press Company be restrained from an alleged infringement of patent No. 791,217, for a process and apparatus for manufacturing wire glass. On March 28, 1906, an application for a preliminary injunction was denied. On April 6, 1906, an order was made providing that if the complainants, within four days from the date of the order, should file a schedule of the net prices and terms of sale of the styles of glass they alleged the defendant was manufacturing in infringement of the complainants' patent, agreeing to maintain those prices and terms during the pendency of the suit, the defendant should within one week thereafter have leave to signify its willingness to abide by such prices while the suit was pending, and that, on the defendant's failure so to do, the complainants might renew their application for a preliminary injunction. The complainants filed their schedule on the day of the date of the order, and on April 11th the defendant filed a statement signifying its willingness to abide by those prices and terms. On the same day, April 11th, the defendant issued to the trade a circular letter, the opening paragraph of which was as follows:

"By an order of court and agreements in pursuance thereof, copies of which are hereto attached, the Mississippi Wire Glass Company is after this date, April 11, 1906, debarred from selling its polished wire glass, rough wire glass, and ribbed wire glass at less than the following prices."

The complainants thereafter renewed their application for a preliminary injunction, on the ground that the circular letter was misleading in its character, and because, as it was proved, the defendant had represented at least to one party in Chicago that the order of the court was in effect a restraining order against the Mississippi

Wire Glass Company forbidding their selling wire glass at any other prices than those stated in the circular letter, and that it did not apply to the product of the defendant company. The argument on this second application was had on April 24th. The result was that the court vacated the order of March 28th and allowed a preliminary injunction. This action was based on the court's conclusion that:

"In view of the further and clearer light thrown on the fact of alleged infringement by the depositions and affidavits laid before the court subsequent to its order of March 28, 1906, refusing a preliminary injunction, and in view, also, of the action of the respondents in connection with the schedule of price lists suggested by the court, we have reconsidered our former order of March 28, 1906, refusing an injunction, and after due consideration are of opinion that our former order should be vacated and a preliminary injunction should issue."

On April 24th a second bill of complaint was filed by the same complainants against the same defendant asking for an injunction to restrain the defendant from infringing reissued patent No. 12,443, which was also for an apparatus and process for manufacturing wire glass. The above-mentioned order for a preliminary injunction was made applicable to both suits.

In this appeal complaint is made of that injunction order. The record of the case shows that the Circuit Court proceeded in the case with much deliberation and great care. While a preliminary injunction is to be cautiously used by a court of equity, it should not be withheld where, in the exercise of a sound judgment, it is necessary to prevent injustice. In the present case we are satisfied that the grant of the injunction was not in any sense an abuse of the discretionary power vested in the circuit court.

Without at present expressing any opinion on the merits of the two cases, we think the decree brought before us by this appeal should be affirmed; and it is so ordered.

MINARD v. DELAWARE, L. & W. R. CO.

(Circuit Court of Appeals, Third Circuit. April 19, 1907.)

No. 3.

COVENANTS—CONSTRUCTION—COVENANT OR CONDITION.

A provision in a deed conveying right of way to a railroad company requiring the grantee to erect a station house thereon and to stop all passenger trains there which stopped at other stations within three miles *held*, in view of other provisions, to constitute a covenant and not a condition subsequent.

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

Wm. J. Kearns, for plaintiff in error.

Conover English, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and LANNING, District Judge.

PER CURIAM. The specifications of error in this case present for decision the question whether a certain clause in a deed of convey-

ance referred to in the pleadings and offered in evidence on the trial should be construed as a covenant or a condition subsequent. In the Circuit Court Judge Cross (Minard v. Delaware, L. & W. R. Co. [C. C.] 139 Fed. 60) construed the clause as a covenant. We think the principles of law applicable to the case are correctly stated by him and we are content to rest our decision on his opinion.

The judgment of the Circuit Court is affirmed, with costs.

MARSHALL v. PETTINGELL-ANDREWS CO.

(Circuit Court, D. Massachusetts. May 7, 1907.)

No. 201.

PATENTS—INVENTION—INSULATING LININGS.

The Marshall patent, No. 784,695, for an insulating lining consisting of a paper tube held in the metallic shell by its resiliency and yet easily removable, claims 5 and 9 are void in view of the prior art, as involving merely the substitution of paper as an insulating material for vulcanized fiber previously used, with no change except the minor advantage of removability which results from the fact that paper is slightly more compressible, an advantage not involving invention, and also because both claims are devoid of patentable novelty in view of the Hart "Diamond H" switchcap which preceded the alleged invention of the Marshall patent, and had a paper lining similar in use, purpose, and function.

In Equity.

Edward P. Payson, for complainant.

Howson & Howson and Hubert Howson, for defendant.

BROWN, District Judge. The bill charges infringement of letters patent No. 784,695, issued March 14, 1905, to Norman Marshall, for an insulating lining. The claims in suit are:

"(5) An insulating-lining consisting of a paper tube having its diameter reduced for a portion of its length, substantially as described."

"(9) The combination with a metallic shell, of an insulating-sleeve consisting of an elastic, compressible paper tube held in frictional engagement with the shell by its own resiliency."

Each claim uses the term "paper tube," upon which are based the principal distinctions from the prior art.

The patent to Painter, No. 718,378, dated January 13, 1903, shows an insulating lining of the same form. It is contended by the complainant that this insulator was constructed of material such as fiber, hard rubber, etc., which does not possess the peculiar properties of a paper insulator in respect to frictional engagement with the shell. It is established that, as an insulator, paper was a well-known equivalent for fiber.

The defendant contends that the patent in suit shows merely the substitution of paper for vulcanized fiber. The complainant does not deny that, considered merely as an insulating material, this is true, but insists that the insulating lining of the patent in suit is differentiated from the prior art by a—

"new function, depending upon a previously unused capability of paper, absent in vulcanized fibre, to exercise under atmospheric changes a slight but contin-

uous grip upon a metal shell, ensuring always its normal retention, but permitting its easy withdrawal, as desired."

It is not denied by the defendant that the substitution of paper, which is more flexible than vulcanized fiber, permits a closer adherence of metallic shell and insulating lining.

The complainant offers evidence to show that commercially it was desirable that the lining should be so securely attached to the metallic shell that it would not drop out, and yet that it should not be attached so firmly as not to be easily removable. Because of its compressibility and resiliency, a paper tube may be somewhat larger in diameter than the metallic shell. Therefore, when the paper lining is pressed firmly into the shell, it remains so closely attached that it will not drop out, and yet is capable of being readily withdrawn.

The advantages which the specification of the patent in suit claims over vulcanized fiber are (1) that the paper lining will be retained in the shell at all times and under all conditions, without danger of dropping out, and without offering undue resistance to its removal; and (2) a reduction in the cost of manufacture.

The defendant contends that cheapness is the only true reason for the adoption of paper linings, and that the other advantage is of very minor importance, and is merely a "talking point." In support of this, reference is made to the testimony of complainant's witness, Mr. H. R. Sargent, the engineer of wiring supplies of the General Electric Company, complainant's largest customer in the use of these linings, who testified, in reply to the cross-interrogatory:

"Cross-Int. It is a fact, is it not, that the only real reason why your company has adopted the use of these so-called elastoid paper linings is that they are cheaper than the vulcanized fiber linings?

"Ans. It is."

The defendant also refers to a statement by Marshall in the specification of his letters patent No. 750,873, dated February 2, 1904:

"As heretofore manufactured insulating-sleeves of this shape have usually been formed from sections of fiber tubing by subjecting the tube-section to the action of dies which draw down the tube to a smaller diameter for about one-half its length. Sleeves thus formed meet the structural requirements for a satisfactory socket-lining; but owing to the comparative high cost of the fiber tubing and the waste in cutting the same into sections the sleeves or linings formed by this method are comparatively expensive."

On the other hand, Mr. F. E. Cabot, secretary of the Boston Board of Fire Underwriters, and chairman of the Electrical Committee of the National Board of Fire Underwriters, testified as follows:

"Int. What is the practical reason that paper linings have superseded the hard fiber linings?

"Ans. Because they overcame the objection which was constantly found to the fiber linings, that they did not remain in position when the socket was taken apart, either to be refinished or attached to a fixture.

"Int. What occasions are there for removing such linings from the shell?

"Ans. More particularly when the shells are to be refinished; that is, to have the outer surface retreated so as to correspond with the fixture to which they are to be attached.

"Int. Is there any practical difference between the fiber linings and the paper linings, as to their becoming fixed in the shell, so as not to be removable?

"Ans. The fiber linings sometimes, though not invariably, are stuck to the outer shell so that they are not easily removable."

There is testimony showing that mechanical devices were used to prevent the fiber lining from dropping out of the shell. Mr. Cabot states also:

"It is a requirement of a successful commercial socket that the lining should be easily removable."

"As a commercial article, a socket without a removable lining is not as salable as one with a removable lining."

"It was the usual commercial practice to put a mark on boxes containing sockets with removable linings."

It has not been made to appear that it was impractical to make a fiber lining of such size that, when introduced into the shell, it would not drop out. On the contrary, the evidence shows that nonremovable fiber linings were well known. The substantial feature of the patented lining, therefore, must be that it shall be easily removable, and this, so far as appears from the testimony, is desirable principally in case it is desired to refinish the shell.

The defendant contends that the difference from the lining of the prior art is simply a question of degree; that vulcanized fiber is paper that has been chemically treated to harden it; that it is thus rendered mechanically stronger, but as a substance less compressible. But it is said that the paper which the defendant uses has been made quite hard by mechanical compression. It is said that the case does not involve even the substitution of one material for another, but involves simply the substitution of material in one condition of relative softness for the same material in another condition—one of relative hardness.

Claim 5 is clearly too broad, if read to cover the substitution of paper for fiber without a limitation to the relation between the lining and the shell. The mere mechanical advantage of removability, if this be the invention, is not enough to give the complainant the sole right to use paper as an insulating lining.

Claim 9 seems to state more correctly what the complainant alleges to be the invention; for it is only when the insulating lining is made of such size in relation to the metallic shell that it will be held firmly by its own resiliency, and yet be removable, that the complainant's alleged invention is employed. If removability is of consequence principally when refinishing is desired, and only in a comparatively small number of cases, the patent cannot be construed to cover the use of a well-known insulating equivalent for the old fiber in the very large number of cases where removability is of no practical consequence.

The defendant further contends that the capacity of a paper tube or shell to stick to another tube or shell which it was intended to fit has been known ever since the patents to Powers, No. 156,591, and to Van Vechten, No. 185,598; in fact, ever since pill boxes were invented.

I am of the opinion that the substitution of paper for vulcanized fiber cannot be regarded as a patentable invention even if, by reason of the greater compressibility of paper, the lining can be made some-

what larger and more closely fitting than the fiber lining. Mr. Livermore, defendant's expert, says:

"It is a matter of common knowledge that a paper tube or article such as the tubular flange of the head shown in the Van Vechten patent may be crowded into a correspondingly shaped recess, such as the end of the cylindrical body portion of the box sufficiently tightly to remain held in the recess by the frictional engagement due to the resiliency of the paper, and consequently the construction set forth in the Van Vechten patent exhibits all of the characteristics and capabilities of paper material which are referred to in the Marshall patent sued upon as discoveries of Marshall, and nothing but intelligent observation would have been required on the part of persons familiar with the paper articles and their manufacture as known for years prior to the time of the Marshall patent sued upon to ascertain that paper possessed the characteristics referred to in the Marshall patent, and would, if employed as the material for making the molded linings of the Painter patent, produce an insulating lining identical with that set forth in the Marshall patent sued upon."

Complainant's counsel lays stress upon the newly utilized self-holding function of the paper tube; but it is difficult to see wherein there is any novelty in respect to this function over the ordinary paper pill box. It is a tax upon credulity to believe that the dominating idea in substituting paper for the much more expensive fiber was not the use of a cheaper material, but was to use a material which would hold better. But it is said that there was a problem of maintaining two parts in contact, due to the fact that with atmospheric changes the parts do not contract and expand equally. If this was the sole problem, it was a matter of common knowledge that a more flexible and more compressible material would obviate this objection; and the search among insulating materials for such a substitute and the finding of paper, a well-known insulator, does not seem to amount to invention.

The views of Mr. Livermore, defendant's expert, are in accordance with the decisions of the Circuit Court of Appeals in this circuit. In L. E. Waterman Co. v. Lockwood, 125 Fed. 497, 60 C. C. A. 333, a similar mechanical problem was involved, that of making a close-fitting cap for a fountain pen. "Elastic pressure" was relied upon as a feature, and a "tapered interior member," not differing substantially from complainant's sleeve with the "diameter reduced for a portion of its length," was shown, and "an elastic progressive wedge union joint" was an element claimed; yet it was held that this involved "merely mechanical skill, and in no degree inventive faculty." This apparently was also the view of the Circuit Court (L. E. Waterman Co. v. Johnson [C. C.] 123 Fed. 303, 305), and of the Circuit Court of the Second Circuit (L. E. Waterman v. Forsyth [C. C.] 121 Fed. 103). So, in Perry v. Revere Rubber Co., 103 Fed. 314, 315, 43 C. C. A. 248, a distinction was drawn between old forms of rigid coupling and a compressible coupling for a steam joint packing. It was said:

"To make a coupling-pin solid and incompressible for use in an incompressible tubing or packing, or hollow and compressible for use in a compressible tubing or packing, does not involve inventive thought."

See, also, Rubber-Tip Pencil Co. v. Howard, 20 Wall. 498, 22 L. Ed. 410.

It is also urged that the discovery that paper tubing could be so worked as to form articles formerly made of fiber was the result of a novel and inventive thought. The special means of manufacture are not covered by the claims, and there is no process claim. It is not contended that the claims are limited to a paper tube having its diameter reduced for a portion of its length by dies.

This matter, though referred to in the specification, is outside the claims. Furthermore, there is no evidence which shows that mechanically hardened paper was not as suitable for the Painter process of making insulating lining shown in letters patent No. 718,378, as was vulcanized fiber or hard rubber. The difference between vulcanized fiber and heavily calendered paper board is not so great as to make it an inventive thought to try the same process on the latter as was used on the former. The exhibits show practically no difference in the result of the pressure of the dies upon the materials; and no evidence of experimentation is offered to show that difficulties had to be overcome in working hard paper board by dies made for fiber, hard rubber, etc.

In General Electric Co. v. Yost (C. C.) 131 Fed. 874, affirmed, 139 Fed. 568, 71 C. C. A. 552, it was held that the Painter process was old in making cartridge shells. That the dies of the complainant are of such length that the tube is confined substantially throughout its entire length to prevent buckling does not seem more than such variation of Painter's dies as would occur to the ordinary mechanic.

The defendant also contends that the patent in suit is anticipated by the one-piece paper lining of the Hart "Diamond H" switch-cap. This was a switch-cap of metal completely lined with paper. The articles are closely like the complainant's in respect to use, purpose, and function. They are made by dies which compress the lining in the metal under great pressure. It is apparent from the exhibits that the paper insulating lining is easily removable, and can be replaced within the metallic shell so that it retains its place by its own resiliency. I am of the opinion that the testimony of the defendant satisfactorily proves the priority of this switch-cap.

The relevancy of switch-caps as anticipations seems to be recognized by the complainant, by the introduction in evidence of patents showing that fiber linings of switch-caps were often attached mechanically. It is said, however, that it was not the intention of the manufacturer that the switch-cap lining should be easily or readily removed, and that:

> "The slight frictional grip of the paper which is the soul of the invention and of its use for socket linings is designedly destroyed and not intended to be utilized in the strong relentless grip of the paper cap linings."

But we find in the switch-cap the combination of a metallic shell, an insulating-lining of elastic compressible paper held in frictional engagement with the shell by its own resiliency. Mr. Hart had clearly shown a perception of the advantages of the substitution of paper for fiber. He had shown the use of dies to draw his paper insulating lining into its required shape. While he makes his lining from

a disc instead of by drawing down a tube and in cup shape instead of in tube shape, there is such resiliency of the tubular walls of his insulating material that, when the lining is removed from the metallic cap and replaced, it adheres by virtue of the resiliency of the paper. While it is said by the complainant that removal was not contemplated, Mr. Hart testifies that, having previously lined his switch-caps with paper glued in, he made the change because a one-piece liner was better, more convenient of insertion, and avoided the necessity of gluing or fastening in any other way than by the resiliency of the paper; that it could also be removed if it were necessary to refinish the cap; and that it stuck in its place by its elasticity or resiliency.

It would seem as desirable that an insulating lining should adhere to the switch-cap while it is being fixed to the wall as that it should adhere to the socket when it is fixed to the lamp bracket, and as desirable and as useful that the insulating lining should be removable from the switch-cap, if one wishes to refinish it, as that the lining should be removable from the socket if one wishes to refinish the socket. Mr. Hart says specifically that he had in mind the matter of removability; and, whether he did or not, he has produced an article which so nearly resembles the lining of the patent in suit as to render claims 5 and 9 devoid of patentable novelty.

Complainant's expert, William H. Walker, testifies as follows:

"You state that the Diamond H switch-cap and the paper-lined lamp sockets are alike in three respects. In the first of these, namely, that they are both electrical devices with metallic shells lined with paper for the purpose of insulation, I agree. I can also agree with the second statement in so far that the linings of both stay in place by reason of the resiliency of the paper, but I cannot agree with the implied statement that this resiliency is exercised in both devices in the same way."

It must be admitted that the Hart switch-cap was a complete solution of the problem of making a paper lining that would stay in. It is criticised on the ground that the lining is inserted by a machine, and that Marshall used a lining which can be inserted by hand and not by a machine. The case does not call for refinements as to the mode in which the shell and paper co-operate in varying atmospheric changes. The simple fact is that paper, by reason of its compressibility, can be pushed in and will stay in exactly as a cork, by reason of its compressibility and resiliency, will stay in when pushed into a bottle. It is merely the familiar mechanical result which follows when a compressible substance is thrust into a tube which is somewhat smaller.

Upon the evidence I am of the opinion that the principal reason why paper has superseded fiber is on account of its cheapness, and that, while the use of paper involves the minor advantage of a closer adherence to the shell, this is clearly insufficient to support claims for the use of compressible paper tubes as an insulating lining, and does not amount to patentable invention. While the practical importance of the feature of removability seems much exaggerated, yet, if it be conceded that it is of some commercial importance, this is not sufficient to support the patent. I find that both claims are

void, in view of the prior art, since they involve merely the substitution of one well-known insulating material for another very similar material, with no change except the minor advantage of removability, which results from the fact that paper is slightly more compressible than fiber, an advantage not involving invention; and also because both claims are devoid of patentable novelty in view of the Hart "Diamond H" switch-cap, which preceded the alleged invention of the patent in suit.

The bill will be dismissed.

FOSTER HOSE SUPPORTER CO. v. O'BRIEN.

(Circuit Court, D. Massachusetts. May 7, 1907.)

No. 193.

PATENTS—ANTICIPATION—ABDOMINAL PAD AND HOSE SUPPORTER.

The Young patent, No. 638,540, for a combined abdominal pad and hose supporter, the prominent feature of which is a pad to depress the most prominent portion of the abdomen of the wearer, and aid in producing a proper carriage of the body, was not anticipated by the O'Byrne design patent, No. 29,777, for a hose supporter, nor by anything shown in the prior art and discloses patentable invention. Also *held* infringed as to claim 1.

In Equity.

Philipp, Sawyer, Rice & Kennedy and J. J. Kennedy, for complainant.

Emery & Booth and Charles S. Jones, for defendant.

BROWN, District Judge. This suit is for infringement of letters patent No. 638,540, granted December 5, 1899, on an application filed October 19, 1897, by Ella Foster Young. The specification describes the object of the invention:

"My invention relates to combined abdominal pads and hose-supporters, and has for its object to provide a device of this character which will serve not only to support the hose in an efficient manner and in such a way as to avoid objections attendant upon hose-supporters as heretofore constructed, but will also serve to aid in producing a proper carriage of the body of the wearer and in maintaining the abdominal viscera in proper position."

Claim 1 only is in suit:

"1. In a combined abdominal pad and hose-supporter, the combination with a flat abdominal pad having a continuous integral body with a smooth unbroken bearing or contact surface and of a size about equal to that of the upper central portion of the hypogastric region, of supports attached to said pad at its upper edge and hose-supporting straps attached to the lower edge of said pad, whereby in use strain is applied to said pad in substantially vertical lines and the pressure is localized, substantially as described."

The patent has been sustained in the Second Circuit. Young v. Wolfe (C. C.) 120 Fed. 956, affirmed on appeal, 130 Fed. 891, 65 C. C. A. 199.

What seems to be new matter is the O'Byrne design patent No. 29,777, dated December 6, 1898. If the patent in suit were to be regarded merely as for a hose supporter, the O'Byrne patent might

be of importance; but clearly the patent in suit, upon any proper construction, cannot be regarded as for a mere hose supporter, since it is for a device specially designed to perform functions additional to hose support, namely, to depress the most prominent portion of the abdomen and aid in producing a proper carriage of the body. There is no suggestion in the O'Byrne patent of the performance of this function; and the cutting away of the central portion of the belt to which the hose-supporting straps are attached makes the O'Byrne device unsuitable to perform the function of depressing the prominent portion of the abdomen and devoid of any suggestion to this effect. It lacks the abdominal pad which is the important element of the patent in suit.

The defendant also introduces a number of patents showing devices for supporting the hose at the sides: Andrews, No. 550,551, November 26, 1895; Banfield, No. 197,587, November 27, 1877; Fraser, No. 178,272, June 6, 1876; George, No. 208,387, September 24, 1878. The George patent was before the courts of the Second Circuit, as were the patents to Stiger, No. 106,885, Minthorn, No. 13,011, and Schmidt, No. 421,086. As to the Fraser, Banfield, and George devices, which have enlargements of the belt over the hips for the purpose of distributing the strain of the hose-supporting straps, it is now argued that no change is required other than to remove one of the hip pads and the attached supporting straps, and to place the other in the front so that it will hold up both stockings instead of one, and that such reshaping as might be required would involve nothing beyond the mere skill of a dressmaker.

The idea of employing the strain of the hose supporter for the purpose of effecting a depression of the abdomen, and of thus improving the appearance of the wearer, was not involved in any of these devices, and none of these devices suggested a proper construction for the embodiment of such an idea. It is conceded that the George, Frazer, and Banfield devices would require, not only to be transferred from the side to the front, but also reconstruction and reshaping, in order to perform the new function; and this is a sufficient answer to the defendant's contention that the patent is merely for a double use of any of these devices of the prior art.

The defendant further contends that the decision of the Circuit Court of Appeals for the Second Circuit in Parramore v. Siegel-Cooper Co., 143 Fed. 516, 74 C. C. A. 386, is indicative of such a complete change of opinion of that court as to amount to a reversal of its opinion in Young v. Wolfe, 130 Fed. 891, 65 C. C. A. 199. This contention is clearly not well founded.

Reference is made also to the decision of the Circuit Court of Appeals of the Seventh Circuit in I. B. Kleinart Rubber Co. v. Stein, 133 Fed. 288, 66 C. C. A. 282, wherein the Parramore device was involved. Assuming it to be correctly held by the Circuit Court of Appeals of the Seventh Circuit that the transfer of an old detachable hose supporter from the side to the front did not constitute invention, even though, by such transfer, the effect of pressing in the abdomen was produced, and giving due consideration to the following

language of the learned court (page 231 of 133 Fed., page 285 of 66 C. C. A.):

"Straight fronts, in the figure of women, having come into vogue, it appears to us to have been but the ordinary and natural exercise of common sense to have brought the hose supporter from the side to the front. Patentability cannot be decreed to every little shift that a woman may make in the arrangement of her garments, or the location of the means through which such arrangements are effected,"

—it must yet be held that the decision does not avail the defendant for the reason that the present case shows no device in the prior art which, merely by transfer from one position to another, is capable of performing practically the functions of the Young device. In the decision in the Circuit Court by Judge Kohlsaat (Parramore v. Stein [C. C.] 125 Fed. 19) the Parramore patent was regarded as for a hose supporter and nothing more. He distinguishes the Young patent in suit, saying:

"It discloses an abdominal pad for suppressing the stomach from which the supporters depend."

The use of a pad for the mere purpose of support is not analogous to the use of a pad for the purpose of improving the carriage of the female figure. To use the pull of the hose supporters at a particular place, in which heretofore it had not been used, with so remote an object and with so nonanalogous a purpose as the effecting a change in the figure, was a thought not suggested by any of the devices of the prior art, and which required the construction of special apparatus.

The inventor of the O'Byrne device deemed it undesirable to do what the patentee of the patent in suit desired to do. This is an indication that the patentee's idea was not obvious. Judge Coxe, in Young v. Wolfe (C. C.) 120 Fed. 956, 958, refers to the fact that the examiners in chief carefully considered the matter, saying:

"In the Rogers device there are no supporters at the upper edge of the pad, and the strain is exerted in lateral or horizontal lines, instead of in a vertical direction. The use of the hose supporting feature in the Rogers device is purely incidental, as is shown by the statement on page 1, lines 65 to 68, of the patent, while in the applicant's device the strain produced by the tension on the hose supporters is relied upon to produce the results desired."

The Circuit Court of Appeals of the Second Circuit, in Young v. Wolfe, 130 Fed. 891, 892, 65 C. C. A. 199, 200, said:

"The essence of the invention was the provision of new means to accomplish a new result in a new way by a radical departure from the prior art. In these circumstances, the fact that the old George pocket of 1878 might be forced around to a position in which it might receive and hold the prominence of the abdomen, instead of that of the hip bone is immaterial."

This clearly meets all of the defendant's defenses except that based upon the O'Byrne design patent. It clearly appears that the court passed adversely upon one of the principal contentions of the defendant in this case; that it gave proper effect to that function which the patentee insists upon as a novel function, and held that the patentee's means were new. I fully concur in these views of the learned court.

The complainant, to show that the decision of the Circuit Court of Appeals for the Second Circuit in the Parramore Case, 143 Fed. 516, 74 C. C. A. 386, was not regarded in the Second Circuit as inconsistent with the opinion sustaining the Young patent, refers to the later decisions by Judge Lacombe in Foster Hose Supporter Co. v. Mayper, January 9, 1905 (no opinion), and by Judge Thomas in Foster Hose Supporter Co. v. Cohen (C. C.) 148 Fed. 92, July 16, 1906, granting motions for preliminary injunctions against infringement of the patent in suit. The defendant clearly infringes claim 1 of the patent in suit.

A decree for the complainant may be entered accordingly.

BELLOWS v. UNITED ELECTRICAL MFG. CO. et al.

(Circuit Court, S. D. New York. May 23, 1907.)

PATENTS—INFRINGEMENT—TELEGRAPH KEY.

The Coffee patent, No. 812,183, for an improvement in telegraph instruments for transmitting signals, and known as a "telegraph key," construed, and, as limited by the prior art, *held* not infringed.

In Equity. Suit for alleged infringement of United States letters patent No. 812,183, issued February 13, 1906, to Benjamin F. Bellows, on application filed January 11, 1904, by William O. Coffee, for improvement in telegraph instruments for transmitting signals, and known as a "telegraph key."

Lyman Ward (E. L. Thurston, of counsel), for complainant.

Kerr, Page & Cooper (Parker W. Page and Thomas B. Kerr, of counsel), for defendants

RAY, District Judge. Claims 11, 12, 13, 16, 18, 19, 21, 23, 25, 26, 27, and 28 of the patent mentioned are in suit. Complainant charges infringement by the manufacture, use, and sale of certain telegraph keys invented by one Martin. Specimens of Martin's keys are marked "Complainant's Exhibit, Defendants' Key," and "Defendants' Exhibit, Defendants' Key." Two questions are involved: First, the validity of the patent in suit; and, second, if valid, are the claims in issue infringed?

I do not think, in view of the prior art, the patent in suit can be so broadly construed as to embrace or cover defendants' key. If so broadly construed, the claims in suit cover keys of a prior patent to Martin, No. 732,648, and are invalid, because anticipated, and Coffee was not the first inventor.

There will be a decree dismissing the bill of complaint, with costs.

MARTIN v. WALL.

(Circuit Court, S. D. New York. May 23, 1907.)

PATENTS—INFRINGEMENT—TELEGRAPH TRANSMITTERS.

The Martin patent, No. 767,303, for an improvement in telegraph transmitters, *held* valid and infringed.

In Equity. Suit to restrain alleged infringement of claims 1 and 2 of United States Letters Patent No. 767,303, dated August 9, 1904, and issued to Horace G. Martin, the complainant, for an improvement in telegraph transmitters.

Kerr, Page & Cooper, Parker W. Page, and Thomas B. Kerr, for complainant.

E. L. Thurston, for defendant.

RAY, District Judge. In Bellows v. United Electrical Manufacturing Company and Horace G. Martin, 153 Fed. 588 (Equity No. 9,446), this court has just held that the Martin patent, No. 767,303, does not infringe the Coffee patent, No. 812,183, contrued as it must be, or, if so broadly construed as to include or cover Martin's invention, it is invalid, because Martin was the first inventor. The said patent to Coffee is in evidence here, but I do not find any evidence regarding it. It seems to have been stipulated into the case. The defendant here gave no evidence aside from such patent, except such as may have been drawn out on cross-examination of the complainant's witnesses. The final hearing was had on the pleadings, complainant's record, and said Coffee patent.

Wall uses and sells telegraphic transmitters or keys, specimens of which are in evidence, marked "Complainant's Exhibit, Defendant's Key, No. 1," "Complainant's Exhibit, Defendant's Key, No. 2," and "Complainant's Exhibit, Defendant's Key, No. 3." These seem to differ somewhat in details of construction, but are identical in operation and the same in principle. The parties have stipulated that all patents in evidence shall be presumed to date from the time when applications therefor were filed. This makes the Coffee patent date January 11, 1904. Application for the patent in suit to Martin was filed May 7, 1904. Martin has another patent, 732,648, application for which was filed October 6, 1902. Complainant also gave considerable evidence, which is well supported by that of other witnesses, as to the actual date of his invention, and makes it much earlier than that of Coffee. I do not think Martin abandoned his invention, and it seems to me the evidence establishes that he was the first inventor, and that defendant infringes.

There will be a decree for the complainant, with costs.

UNITED STATES v. CHIN SING.

(District Court, D. Oregon. April 8, 1907.)

No. 4,803.

ALIENS—CHINESE EXCLUSION ACTS—MINOR CHILDREN OF CHINESE MERCHANT.

The fact that a Chinese person, who as shown by the uncontradicted evidence entered the United States in 1898, when a minor 14 or 15 years old, his father being at the time a merchant engaged in business in San Francisco, did not have a certificate under section 6, Act May 6, 1882, c. 126, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307], does not raise any presumption that his entry was unlawful, no such certificates being then required under the decisions of the Supreme Court to entitle the wives and children of Chinese merchants residing in this country to entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Aliens, §§ 75, 81.]

James Cole, Asst. U. S. Atty.
R. B. Sinnott, for defendant.

WOLVERTON, District Judge. This is an appeal from the judgment of the United States commissioner directing the deportation of the defendant, a Chinaman, as not being entitled to remain in the United States. The cause has been submitted upon the evidence. It is shown by Chin Sing, the defendant, and one other witness, Chin On, that the defendant entered the United States in the year 1898, and that at that date he was 14 or 15 years old; that his father was a Chinese merchant, engaged in the hardware and Chinese provisions business on Washington street, in San Francisco, and was such merchant, and a resident of San Francisco, at the time the defendant came into the country. The father continued to engage in such business for three years, when he failed, and the business was closed up. The defendant worked in the store after his arrival as a helper, in the way of making sales, wrapping parcels, etc. Later, about 1902, the defendant and Chin On left San Francisco together, and came to Portland, where they have lived ever since.

The defendant states that he came in on a paper furnished by his father, and that none was given to him personally to show his right to enter the United States. The testimony of these witnesses is not discredited in any way, except that the defendant made some statements to the Chinese inspector in charge at this port, at the time of his examination when arrested, in some respects contradictory of his present testimony. Mr. Barbour testifies that prior to 1900 it was the practice of the customs officials to require the wives and children of Chinese merchants to procure certificates, under section 6 of the act of 1882 (Act May 6, 1882, c. 126, 22 Stat. 60 [U. S. Comp. St. 1901, p. 1307]), as amended in 1884 (Act July 5, 1884, c. 220, 23 Stat. 116), showing their right of entry, thus creating the inference that the defendant, having never been furnished such a certificate, had somehow gotten into the country unlawfully. By reference to the authorities, however, I find that it was held, as early as 1890, in this court, that no certificates were required for the wives and children of Chinese

merchants residing in this country to entitle them to entry. In re Chung Toy Ho and Wong Choy Sin (C. C.) 42 Fed. 398, 9 L. R. A. 204. The doctrine of this case has been reiterated and affirmed in the case of United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544. The stipulated facts in the latter case are almost exactly as the facts have been developed in this case. The fathers were merchants residing and doing business in the city of Walla Walla, state of Washington, and had sent for their sons to come from China to live with them, and the question arose whether the sons were entitled to enter without first procuring certificates as required by section 6 of the act above specified. It was held directly—the court making special reference to the opinion of Judge Deady in the Chung Toy Ho Case—that the sons had that right, and hence they were discharged from the order made for their deportation. So that, while it may be that the practice existed as asserted by Mr. Barbour, yet a nonobservance of it was not an evasion of the law, and it is quite probable that the defendant came to the United States in the way he has explained. The defendant's contradictory statements are only apparent when read in the light of his explanation.

It is required that a Chinese person who is charged with being unlawfully within the United States shall establish, by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his lawful right to remain. Considering the evidence which has been adduced, I am satisfied that the defendant came to this country while a minor, and that, being the son of a resident Chinese merchant, he is lawfully entitled to remain here.

The defendant will therefore be discharged from the order of the commissioner directing his deportation.

THOMAS v. F. B. VANDEGRIFT & CO.

(Circuit Court, E. D. Pennsylvania. February 21, 1907.)

No. 48 (1,553).

CUSTOMS DUTIES—CLASSIFICATION—BOILER TUBES—FLUES—FURNACES.

Held, that so-called arched Purves furnaces are not commercially known as furnaces, and that, therefore, they are not dutiable as such under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1641], but under the provision in the same paragraph for boiler tubes or flues.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

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

These proceedings were brought in the name of C. Wesley Thomas, collector of customs at the port of Philadelphia, to secure a review of a decision of the Board of General Appraisers, which had reversed the collector's assessment of duty on certain imported articles. These articles were invoiced as "arched Purves furnaces." The importers contended that they had been improperly classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 152, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1641], as "welded cylindrical furnaces, made from plate metal," and that they should have been classified under the further

provision in the same paragraph for "lap welded, butt welded, seamed, or jointed iron or steel boiler tubes, pipes, flues, or stays." The board found that the articles were not furnaces, but tubes used in making furnaces, and sustained the importers' contention.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for collector.

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

HOLLAND, District Judge. In 1892 this same article of importation was before the district court in Delaware county, in the state of Delaware, in this circuit, and it was then held:

"So far as inventors, manufacturers, and importers can fix the designation of an article under the revenue laws, it has been done in the present case through letters patent, invoices, and advertisements. An English patent, No. 3,722, dated March 23, 1885, was issued to David Purves for 'a new and useful improvement in boiler flues,' and he subsequently obtained letters patent for the same invention from the United States, No. 372,487, dated November 1, 1887. This flue has acquired a high reputation among scientific writers and practical steam engineers, and is known as 'Purves' ribbed flue,' as 'Purves' ribbed furnaces,' and as 'Purves' ribbed boiler flue.'" In re Whitney (C. C.) 53 Fed. 237.

In that case the classification assigned to the imported article was under the unenumerated iron and steel clause of the act of October 1, 1890, and duties assessed under the provisions of paragraph 215, Schedule C, § 1, c. 1244, 26 Stat. 582. The importer protested against this classification, insisting that the article was not a furnace, but was a "Purves' ribbed boiler flue," and the District Court sustained the decision of the board in this view. Since that time there has been other legislation, and it is true that under Act July 24, 1897, c. 11, par. 152, § 1, Schedule C, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1641], "welded cylindrical furnaces made from plate metal" are dutiable at two and one-half cents per pound. But at the time this legislation was enacted this article of importation was not, by a definite, uniform, and general usage, commercially designated as a furnace. 1 Fed. St. Ann. C. When first made, they were known as "flues," and then as "flues or furnaces," and are becoming more and more referred to as "furnaces," but they are still known in the trade, to some extent, as "flues."

In view of the fact that the court has passed upon this question and the article is known by both terms in the trade, and the further fact that the Board of General Appraisers has uniformly required the articles imported to be classified as flues when the matter was before them, we are not convinced that the government in this case has established that the commercial name of this article is a furnace.

The decision of the Board of General Appraisers is affirmed.

DAIGNEAU v. GRAND TRUNK RY. CO.

(Circuit Court, D. Massachusetts. May 8, 1906.)

No. 72.

1. DAMAGES—PERSONAL INJURY—FUTURE CONSEQUENCES OF INJURY.
In an action for a personal injury, the plaintiff is entitled to recover damages for future consequences of the injury only with respect to such consequences as the evidence shows are reasonably certain to ensue.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 69, 70.]

2. COURTS—FEDERAL COURTS—NEW TRIAL—CONDITIONS ON GRANTING NEW TRIAL—REDUCTION OF EXCESS OF RECOVERY.
Where a verdict awarding damages for a personal injury returned in a federal court is excessive, the court has power in its discretion to require a remittitur of a stated sum as a condition to the overruling of a motion for a new trial.

At Law. On motion for new trial.

Wm. D. Chapple and Charles W. Bartlett, for complainant.
Coolidge & Hight, for defendant.

BROWN, District Judge. I am of the opinion that the jury in arriving at a verdict of $6,500 in this case must have made a very much larger allowance for prospective damages than is warranted by the proof. According to the strong preponderance of evidence, the plaintiff, within a comparatively short time, will recover entirely from the wrenching and bruising of his back, and will recover in a very great degree from his nervous condition upon the termination of this litigation.

The plaintiff is entitled to recover for such future consequences of the injury inflicted as the proofs showed are reasonably certain to ensue. Kennon v. Gilmer, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110; Thompson on Negligence, 7205. The plaintiff has the burden of proof. Evidence which leaves the matter entirely in doubt, or establishes a mere possibility of future damages, does not satisfy the rule which requires proof that future consequences are reasonably certain to ensue.

When the verdict was returned, it struck me as excessive, and a careful consideration of the case confirms this opinion. I have hesitated whether to grant a new trial unconditionally, or only in the event that the plaintiff shall not file a remittitur. While there is force in the objection that the court cannot order a remittitur without itself passing upon the question of damages, the practice is so well established and so convenient that I shall adopt it. Arkansas Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Northern Pacific R. R. Co. v. Herbert, 116 U. S. 642, 646, 6 Sup. Ct. 590, 29 L. Ed. 755; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746.

A new trial will be granted on the question of damages, unless, within 14 days, the plaintiff shall remit the sum of $2,000, and consent to judgment for the plaintiff for $4,500 and costs.

UNITED STATES v. COURTIN & GOLDEN.

(Circuit Court, S. D. New York. February 21, 1907.)

No. 4,261.

CUSTOMS DUTIES—NONIMPORTATION—ROTTEN FRUIT CONDEMNED BY HEALTH AUTHORITIES.

Before being unladen, but after being free from customs supervision, certain imported fruit was condemned by local health authorities whenever a considerable portion of any crate appeared to be decayed, and the entire contents of such crates were condemned, and required to be dumped in the sea, no portion thereof becoming a subject of commerce within the United States. *Held*, that such condemned fruit should be treated as a nonimportation, and as not dutiable.

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

For decision below, see G. A. 6,356 (T. D. 27,324), affirming the assessment of duty by the collector of customs at the port of New York.

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

Henry S. J. Flynn, for importers.

HOUGH, District Judge. Certain pineapples in crates having been brought into the United States by the appellees, a considerable portion of the same were destroyed by a representative of the health department of the city of New York as not being "fruit * * * sound, wholesome and safe for human food." Sanitary Code of New York City, § 42. The method of condemning the fruit was to examine each crate, and, if a considerable portion of the contents thereof appeared to be decayed, the whole crate was condemned, and the ship upon which it was found required to convey the same again to sea, and dump it overboard. This condemnation took place while the goods were being unloaded, and after a "tropical permit" for the unloading thereof and delivery to the importers had been granted by the custom house. This appeal raises the point whether any rebate or reduction in duties should be allowed to the importers, inasmuch as the pineapples in question were freed from custom supervision by the granting of the tropical permit above referred to. The evidence leaves it undoubted that no portion of the condemned goods ever passed into the actual control of the importers or became a subject of commerce within the United States.

The action of the health department of this city clearly was a lawful exercise of police power, and in my opinion this case is entirely within the doctrine of Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178. The facts in that case were indeed quite different, but the doctrine as interpreted in Stone v. Shallus (C. C. A., 4th Circuit, T. D. 27,133) 143 Fed. 486, 74 C. C. A. 506, is directly applicable. In the Shallus Case the importation was of oranges in boxes, and "the shortage by rot was not discoverable or discovered until those boxes were opened under the supervision of the government inspector." I think it makes no difference whether the rot was dis-

covered under the supervision of a government inspector or under the lawful supervision of an inspector of the health department, as long as it was discovered before the rotten article had passed into the actual control of the importer. Before these pineapples could be lawfully used by the importer they had to pass not only the federal customs officers, but also the lawful police authorities of the city of New York, each standing at the portal of the country and each authorized to forbid admission. What was dutiable in the Shallus Case, supra, was "pounds of oranges imported," what was dutiable in this case was packages of pineapples; and, if the government received "the full duty leviable upon the entire [number of packages of pineapples] which actually came into the country as such," I think the law is complied with.

The decision of the Board of Appraisers is affirmed.

UNITED STATES v. HATTERS' FUR EXCHANGE.

(Circuit Court, S. D. New York. February 21, 1907.)

No. 4,266.

1. CUSTOMS DUTIES—CLASSIFICATION—WASTE—FUR COMBINGS.

As to combings of loose or dead hair obtained in preparing rabbit or hare skins, which are commercially known as "hares' combings" or "fur waste," and which, after further treatment, are used as an adulterant in cheap hats, *held*, that they are dutiable as waste under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], and not as furs prepared for hatters' use under paragraph 426, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1675], nor free of duty as "furs, undressed," under section 2, Free List, par. 561, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1683.]

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

2. SAME—APPEAL—ASSIGNMENTS OF ERROR.

The board sustained the more favorable of the two alternative contentions made in an importer's protest. The government appealed to the Circuit Court, asserting in the assignment of errors that the board's decision was erroneous, and that the merchandise should have been held to have been properly assessed. *Held*, that the court might decide the merchandise to be dutiable in accordance with the importer's alternative contention, notwithstanding the absence of a specific assignment on that point by the government.

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

Note Wimpfheimer v. Erhardt (C. C.) 59 Fed. 451.

The Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of New York. The government's assignments of error, as stated in the application for review of the board's decision, read as follows:

"And for the errors of law and fact in the decision of said board herein complained of, your petitioner states: (1) That the said board was in error in holding the merchandise in question to be free of duty under the provisions of paragraph 561 of said act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1683]). (2) In not finding the same to be dutiable at 20 per cent. ad valorem under paragraph 426 of the said act, as assessed.

(3) In finding as a matter of fact that the said merchandise is unfitted for use in hat making except as an adulterant. (4) In not finding the same to be furs not on the skin prepared for hatters' use. (5) In sustaining the protest of the importers and in reversing the decision of your petitioner, as collector of customs, in the premises."

J. Osgood Nichols, Asst. U. S. Atty.
Jacob Fromme (B. A. Levett, of counsel), for importers.

HOUGH, District Judge. From the fur of the rabbit or hare there is removed by a process of combing loose or dead hair and fur. This is done to clean the skin or pelt preparatory to making it ready for use in the manufacture of hats.

The import under consideration consists of the material removed by the combing process above referred to. The testimony amply supports the proposition that it is known commercially as "hare's combings" or "fur waste," and the method of obtaining it fairly classifies it as "waste"; that is, "superfluous or rejected material of the same kind as the material utilized for the intended purpose." U. S. v. Schroeder, 93 Fed. 450, 35 C. C. A. 376. It is used as an adulterant in the manufacture of cheap hats, and as imported in this case requires further treatment before it can be used for even that humble purpose.

It was appraised by the collector as "furs not on the skin prepared for hatters' use," under paragraph 426 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1675]). On appeal the Board of General Appraisers held it to be "furs, undressed," under paragraph 561, Act July 24, 1897, c. 11, § 2, Free List [U. S. Comp. St. 1901, p. 1683], and from this finding the government has appealed. In my opinion the decisions both of the collector and of the Board of Appraisers were erroneous, and the article was clearly "waste not specially provided for" under paragraph 463.

As the assignments of error in this court specifically allege that the finding of the Board of Appraisers was erroneous, and as the protest of the importer alleged the applicability of paragraph 463 in the alternative, I find no difficulty under section 15 of the act of June 10, 1890 (Act 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]), as amended, in reversing the decision of the Board of Appraisers and directing judgment in accordance with this opinion.

LEHIGH MFG. CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. February 28, 1907.)

No. 50 (1,772).

1. CUSTOMS DUTIES—CLASSIFICATION—FINISHED CASTINGS.

The provision for "castings" in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 148, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1640], does not include cast-iron machinery parts, which have been drilled, bored, planed, fitted, and finished.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

2. SAME—APPEAL—FAILURE TO OFFER EVIDENCE BEFORE GENERAL APPRAISERS.
If an importer desires to have his case heard by the Board of General Appraisers without evidence, on the facts presented to the board by the collector of customs, he may submit it in that form; and on appeal from the board to the Circuit Court, the fact that no evidence was introduced before the board or in the Circuit Court is not ground for dismissal of the appeal.

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

The Board of General Appraisers, on the authority of former decisions by the board—G. A. 1,410 (T. D. 12,814), and G. A. 5,397 (T. D. 24,604)—affirmed the assessment of duty by the collector of customs at the port of Philadelphia. The articles in controversy were described in the reports made by the collector in transmitting the importers' protests to the board as consisting of "parts of a lace-curtain machine, drilled, bored, planed, fitted, and finished beyond the condition or appearance of castings," and as having been classified for duty as manufactures of metal under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 193, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645], against the importers' contention that they should have been assessed under the provision for "castings" in the paragraph 148, 30 Stat. 163 [U. S. Comp. St. 1901, p. 1640]. No evidence was introduced by the importers before the board or in the Circuit Court.

Hatch, Keener & Clute (Walter F. Welch, of counsel), for importers.
Jasper Yeates Brinton, Asst. U. S. Atty.

HOLLAND, District Judge. It is urged by the government in this case that the court should dismiss the appeal, because no evidence was taken at all before the Board of General Appraisers or on the appeal. The importer, however, insists that sufficient facts appear in the certificate of the collector to enable the board and the court to pass upon the questions involved, and he is entitled to be heard. In this view we think the importer is right. If he concludes that his case can be properly heard without any evidence, there is nothing in the law to prevent him from submitting it in that form. In this case, however, the record shows that the classification of the collector was correct.

It was approved by the Board of General Appraisers, and its findings are affirmed.

In re GRIVE.

(District Court, D. Connecticut. May 7, 1907.)

No. 1,658.

BANKRUPTCY—LIEN CREDITORS—RIGHTS.
Where creditors of a bankrupt contractor, after filing liens against the property of persons indebted to the estate on account of the same claims, filed and proved their claims against the bankrupt's estate as "unsecured," such claimants were entitled, on surrendering their liens, to share generally in the estate's assets, or on agreeing as to the value of the security covered by the liens, and crediting such amounts on the claims, prove the balance against the bankrupt's estate, as authorized by Bankr. Act July 1, 1898, c. 541, § 57, subd. h, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444].

In Bankruptcy. On petition for review.
For former opinion, see 151 Fed. 711.

Eugene B. Peck, for petitioner.

PLATT, District Judge. The bankrupt was a contractor, carpenter, and builder. Certain creditors have proved their claims against the bankrupt estate as "unsecured." It appears that they have also, as subcontractors, filed liens against the property of certain persons indebted to said estate on account of the same claims, and that these liens prevent the trustee from collecting from said persons the amounts which they owe the estate.

So far as the form of proof is concerned, the referee acted properly, in the light of the record; but, in treating them strictly as unsecured for the purposes of a dividend, further thought is required. Here equity steps in and forbids one to follow too literally the text of the bankrupt law. From an equitable point of view, and looking at the final results, the claims in question ought to be treated as secured, to the amount which the liens recorded against others by reason of them represent. If the creditors will surrender to the trustee their rights as lienors, then they would be entitled to an equal share in such assets as the trustee can gather together for all. If they prefer to hold their liens, then the way to get at exact justice is to make use of the method of adjustment suggested in Act July 1, 1898, c. 541, § 57, subd. h, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3444].

Let the trustee and the creditors holding such liens get together and determine, by agreement, compromise, or arbitration, what the security covered by said liens is worth, and, after crediting such amounts upon the claims, let the balance, if any, come in and share equally with other creditors not so favored. The estate ought to be closed within a reasonable time, and the right of subrogation is not practicable. By neglecting to prosecute their liens, the creditors have hampered the trustee, and the above-suggested method will reach the highest equity.

This memorandum is intended to sustain the decision of the referee which is under review, and to advise him as to the proper steps next to be taken.

UNITED STATES v. VACUUM OIL CO.

SAME v. STANDARD OIL CO. OF NEW YORK (two cases).

(District Court, W. D. New York. March 29, 1907.)

Nos. 420, 421, 422.

1. CARRIERS—VIOLATION OF INTERSTATE COMMERCE ACT—DEPARTURE FROM PUBLISHED ACTS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], as supplemented by the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]), an initial carrier which has become a party to a joint through-rate for the transportation of property over its own and connecting lines between two points in different states, which rate has been filed and published as required by the act, cannot lawfully transport property between such points at a less and unpublished rate over another route and with different connections.

2. SAME—INDICTMENT FOR RECEIVING CONCESSIONS IN RATES—SUFFICIENCY.

An indictment under the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]), charging a shipper with having received a rebate or concession from the joint rate published and filed

by a carrier for the transportation of property between points in different states, is not defective because it does not specifically charge that such rate was required to be filed by the statute, where it alleges that it was published and filed as required by law, nor because it does not charge that the defendant solicited the concession, nor need it name any other shipper who has been charged and paid the higher rate as is required where discrimination is charged, or that any shipment was actually made at the published rate.

3. SAME.

Because an indictment under the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]), for receiving a concession from the published rate on an interstate shipment of property alleges that such shipment was made in car load lots, or in cars not owned by the carrier, it does not follow as matter of law that such fact justified the departure from the published rate so as to render the indictment demurrable.

4. SAME—DISCRIMINATION IN RATES—CONSTRUCTION OF STATUTE.

In considering the sufficiency of an indictment for receiving an unjust discrimination in rates from a carrier on an interstate shipment of property in violation of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], as supplemented by the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]), any doubts as to the correct construction of the statute should be resolved in favor of the evident intention of Congress that equality among shippers should be maintained, and unjust discrimination and favoritism of all kinds condemned, leaving the question whether the existing conditions justified the difference in rates charged to be determined as one of fact on the trial.

5. SAME—SCOPE OF STATUTE.

The Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]), is not restricted in its provisions to departures from an established tariff rate, but is violated if any other advantage is given to a shipper whereby a discrimination is practiced.

On Demurrers to Indictments.

Charles H. Brown and S. Wallace Dempsey, for the United States.

John G. Milburn, Martin Carey, and J. McC. Mitchell, for demurrants.

HAZEL, District Judge. The indictments, Nos. 420, 421, and 422, allege violations by the Vacuum Oil Company and the Standard Oil Company of New York of the act to regulate commerce and its amendments, including the so-called "Elkins Act," passed February 19, 1903. Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 601]. The demurrers interposed to said indictments were practically argued at the same time. The cases involved similar transactions and legal questions, and will therefore be considered together.

It is commonly understood that the object of the interstate commerce act was to correct abuses which were being practiced in matters of transportation, and to prevent unjust discrimination between shippers and establish uniform and reasonable freight rates. Congress, from motives of public welfare, has thought necessary to regulate the established tariff rates for transporting property interstate, and by section 2 of the act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]) provided:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed to be guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

To compel strict adherence to the mandate of Congress the Elkins act was subsequently passed, section 1 of which says:

"It shall be unlawful for any person, persons or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

The Rutland Indictments.

The indictments (Nos. 420, 422) charge the defendants, Standard Oil Company of New York and Vacuum Oil Company, with having knowingly received from the Pennsylvania Railroad Company, a corporation subject to the provisions of the interstate commerce act, concessions whereby certain shipments of petroleum from Olean, in the state of New York, to Rutland, in the state of Vermont, were transported at a less rate than that named in the tariff of rates established by such carrier as prescribed by said act. It is alleged that from January 1, 1904, to May 1, 1905, said carrier was engaged in the transportation of property from Olean, N. Y., to Genesee Junction, N. Y., under a common arrangement with the New York Central & Hudson River Railroad Company, the Boston & Maine Railroad Company, and the Rutland Railroad Company for a continuous or through shipment to Rutland, Vt., and kept open for public inspection and had filed with the Interstate Commerce Commission its established tariff of rates for transporting petroleum at 19 cents per 100 pounds from Olean to Rutland by the said route; that, while such rate was in force, the Pennsylvania Railroad Company transported petroleum in tank cars for the defendants from Olean to Rutland, over another route, the Pennsylvania Railroad Company, the New York Central & Hudson River Railroad Company, and the Rutland Railroad Company, at the tariff rate of 16.1 cents per 100 pounds; that such shipment was under a common arrangement between said three railroad companies for a through and continuous shipment from the point where the commodity was placed in the cars; that such shipment was accompanied by shipping orders indicating the distances and manner of transportation.

The defendants demur to the indictments on the grounds that the offense is not sufficiently described therein, and that the facts stated do not constitute a crime, and urge numerous objections attacking the validity thereof. It is claimed that the indictments do not charge the

character and description of the published tariff of rates—that is, whether the rate was for shipments in car load lots or in cars supplied by the shipper—that shipments were ever made at the 19-cent rate from Olean to Rutland; that the rate paid was not published and filed as required by the act; that the tariff charges paid were not the established rates between the termini specified in the indictment; that such rate was not known or open to all shippers; and, finally, that the indictment is defective, in that it fails to charge that the 16.1 rate was made by the Pennsylvania Railroad Company at the request of the defendant.

The principal objection is that the fact that the defendants received a less rate by one route between two stated points than that in force between the same termini over a different route does not constitute a concession; and in support of this proposition defendants cite Interstate Commerce Commission v. Alabama & Midland Ry. Co., 168 U. S. 144, 18 Sup. Ct. 45, 42 L. Ed. 414, and Atchison, Topeka & Santa Fé R. Co. v. Denver & N. O. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291. In the first-mentioned case the Supreme Court construed section 2 of the act of 1887, holding it of sufficient scope to compel equality between shippers over the same line and to prohibit any rebate or other device by which freight is transported by a different shipper at different rates for the same distances over the same line; the circumstances and conditions not being dissimilar. Apparently the gist of the decision is found in the statement of the court that the words "under substantially similar circumstances and conditions" in section 2 are inapplicable to competing lines, but are restricted to matters of carriage. In the latter case the question related to charging different rates over different routes between similar points where connecting arrangements have been made for joint carriage. The court held that the Constitution of the state of Colorado forbidding discrimination in rates was not violated by the railroad company refusing to give a connecting road the same arrangement as to through rates as those given to another connecting line; the conditions as to the transportation being substantially alike in both cases. These cases are not helpful to a decision of the proposition under consideration.

Before proceeding further in the consideration of the objections raised by the demurrers, an answer to the inquiry, Who are amenable to the interstate commerce act? may simplify the discussion by the court. Concededly two classes of carriers come within its scope—carriers engaged in interstate commerce having independent facilities for through carriage from a point in a state to a point in another state and carriers which have entered into a compact establishing a joint traffic rate, the shipments being interstate over through or continuous lines. The defendants claim that a common carrier subject to the provisions of the act which has established a joint traffic arrangement does not offend against the statute if the property is carried between termini over another and different connecting route; that section 6 of the act of 1887, read in connection with section 2 thereof, relates specifically to common carriers having through lines. To enforce this point reference is made to that portion of section 6 which reads:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission."

And the following provision:

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."

At the argument emphasis was laid by counsel for the defendants upon the words "for any service in connection therewith between any points as to which a joint tariff is named thereon," as indicating that there must be a deviation from joint tariff rates on the established route, as distinguished from a shipment of property over any connecting road for which no joint tariff arrangement has been published and filed. The contention for such an interpretation of sections 2 and 6 is thought to be clearly answered by the provisions of the Elkins act, which, in unambiguous terms, is declaratory of the illegality of giving or accepting any concession or discrimination in respect to the interstate shipment of freight whereby the result therein forbidden is accomplished. If the claim of the defendants upon this point were to prevail, a carrier having other connecting facilities may conform to the provisions of the statute when it chooses, and remain at liberty to exact the established joint rate from one shipper and transport the goods interstate of a more favored shipper at a cheaper rate over another connecting line or route. The initial carrier, possessing facilities for connecting with different routes to transport the petroleum in question, undoubtedly could ignore the established rate and carry such commodity over any connecting route, but it could not, within the intent and spirit of the interstate commerce act, charge or exact in arrangement with such connecting lines a less sum or rate for transportation than that which had been established. In other words, the initial carrier, when it has once established a joint traffic compact to transport property over a certain route between points in different states, cannot transport over any connecting route pursuant to traffic arrangement at a less rate than that published and filed in conformity with the tariff act. If the contention of the defendants is sound, the intent of Congress is not expressed in the act, the remedial purpose of the statute is defeated, and its provisions would secure to favored shippers the intolerable advantages and discriminations which it was enacted to prevent. The intent of Congress must be ascertained from a consideration of the entire act. The evil sought to be remedied must always be considered, and in the act to regulate commerce the desideratum was the eradication of such evil practices as resulted in the carriage interstate of goods belonging to powerful interests or industries to the detriment of less favored shippers. The decision of the Supreme Court in New York, N. H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515, bears upon

the scope of the enactment. There the question was whether a carrier engaged in interstate traffic and also a dealer in the merchandise transported comes within its provisions. It was urged that as the act did not expressly forbid carriers becoming dealers in the commodity transported by them the enforcement of its requirements would result in prohibiting a carrier from becoming such dealer. But the Supreme Court stated:

"Because no express provision against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not apply and be given their lawful effect."

The court held that, even though compliance with the act necessitated a discontinuance of the mercantile pursuit in which the carrier engaged, it nevertheless could not be relieved from the operation of the statute. Applying this principle to the cases under consideration, the fact that the indictments do not specify whether the shipments were in cars furnished by the shipper, or, in view of the published tariff of rates, that such shipments may not consist of the sum of the locals, is thought immaterial, and the omission to allege such facts will not enable the accused to escape liability for the accomplishment of the prohibited result. In my opinion if a railroad company has entered into an arrangement with connecting carrier companies to transport property on a through line between two points situated in different states, charges for transportation being agreed upon, and copies of such joint tariff of rates being filed and published in conformity with the provisions of the act, the initial carrier, intending to evade the provisions of the act by which a uniformity of rates to all shippers is established, cannot legally transport property at a less rate over other connecting roads between the same termini. Such I conceive was also the decision in United States v. Standard Oil Company (D. C.) 148 Fed. 719. Upon this point Judge Landis vigorously states:

"It is written in every section and line of the law that the thing sought by Congress was a fixed rate, absolutely, unvaryingly uniform, to be adhered to until publicly changed in the manner provided by law. The thing prohibited was the departure from that rate by any means whatsoever, whether direct between the parties or indirect by the employment of the most deviously circuitous subterfuge."

It is true that the established rate may be increased or decreased and other arrangements for continuous carriage of merchandise may be entered into, but this can only be done upon compliance with the provisions of the act relating to a joint tariff compact and publication of change in rates.

The point that section 6 does not require the publication and filing of a joint rate, but relates only to the initial carrier's line, and that the indictment is defective because it does not specifically charge such requirement, is untenable. The allegations in the indictments that the tariffs were published and filed as required by law would seem to justify the presumption that such publication and filing were pursuant to the direction of the Interstate Commerce Commission.

The next point is that the conditions of the shipments complained of were dissimilar; that the published rate was for less than car loads

or in special cars furnished by the shipper. This question is thought to be a matter of defense, and may await the trial of the case.

It is further urged that no shipper is named in the indictment who was required to pay a different rate over the so-called "Norwood Route." This omission is not thought to be a defect in pleading. In United States v. Hanley (D. C.) 71 Fed. 672, cited by defendants, the indictment charged discrimination between shippers, and it was held that the indictment must allege that some other person designated in the indictment had been charged a higher rate. The court substantially stated that the crime of unlawful discrimination under section 2 of the act necessarily involved two shipments, one of which fared better than the other, when both should have fared alike; the character of the shipments not being dissimilar. It will be observed that the proposition with which we are here concerned is not whether the defendants have been benefited by an unjust discrimination as against other shippers over the same route, but have the defendants been given a concession from the published tariff rate, a rate of which the public is presumed to have knowledge and upon which other shippers of petroleum have a right to place reliance. The word "concession" does not appear in the earlier acts to regulate commerce, but is used for the first time in section 1 of the Elkins act, which is apparently a "catchall" provision for any practice by either carrier or shipper which by any device whatever would tend to defeat the purpose of the law. The term "concession" does not necessarily imply that the shipper solicited a concession or privilege which the carrier could give. The statute is clearly violated if the defendant has accepted or received any concession or discrimination which resulted in the carriage of the freight in question at a less rate than that established under the act. If, notwithstanding the published rate, there was in fact no concession given or there was no legal departure from the published rate, the defendants cannot complain of unjust treatment if they are required to prove the fact upon the trial. Nor, in my judgment, was it necessary to allege in the indictment that a shipment at the 19-cent rate was actually ever made. The legal rate according to the indictment was published and filed, and, as already stated, shippers of freight are presumed to have derived their knowledge of freight rates between the points in controversy from such publication. The presumption that the asserted sum of the locals rate paid was duly published or filed is not warranted because the failure to publish such rate is not affirmatively set forth in the indictment. It is not controverted that there are occasions when a reasonable departure in rates is permissible, as, for instance, when the conditions of shipment are essentially different, but whether the circumstances and conditions of the shipment permitted the carrier to charge a less rate than that published and filed is not a question for present determination. It does not follow as a matter of law that because the indictment alleges that the commodity was transported in a car owned by the Union Tank Line, or that the shipment was in bulk, that such conditions and circumstances warranted a rate less than the established rate or were such as to exonerate the accused from responsibility. It follows from what has been said that a prima facie

infraction of section 1 of the Elkins act is alleged in the indictments, and is therein set forth with sufficient precision.

The demurrers are overruled.

The Burlington Indictment, No. 421.

The Burlington indictment has 123 counts, and charges the defendant, the Standard Oil Company of New York, with having knowingly received an unjust discrimination from the Pennsylvania Railroad Company in relation to the shipment of certain petroleum from Olean, N. Y., to Burlington, Vt., in violation of section 1 of the Elkins act. Concededly the vital question involved is whether a discrimination between localities or a discrimination between shippers is charged. By section 2 of the act to regulate commerce it is made an offense for a carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for transporting any freight than it receives from any other person for doing a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions. Under the Elkins act the person or corporation who receives a discrimination in his favor offends against the statute. The gist of the offense described by section 2 is the payment of a different rate for performing a like service; the traffic being the same, under substantially the same conditions and circumstances. By section 3 of the act of 1887, undue and unreasonable preferences and advantages to any shipper or locality are forbidden. This section is broader than section 2, and includes the questions of reasonableness or unreasonableness of rates charged and any advantages in facilities and conveniences given or received. United States v. Delaware, L. & W. R. Co. (C. C.) 40 Fed. 101.

Having become acquainted with the pertinent clauses of the act, we may briefly examine the salient allegations of the indictment. It is alleged that the initial carrier, the Pennsylvania Railroad Company, pursuant to a common arrangement with the New York Central & Hudson River Railroad Company, the Rutland Railroad Company, and the Central Vermont Railway Company, connecting carriers, transported petroleum for the defendant from Olean, N. Y., to Burlington, Vt. (468 miles distant), at the agreed rate of 17.8 cents per 100 pounds, and refused to accept at said rate any petroleum for transportation from shippers located in Bradford and certain other towns in Pennsylvania, mentioned in the indictment, which are farther distant from Burlington than Olean, from 20 to 136 miles, or at a proportionately greater rate based upon their greater distances from Burlington; that the carriers which had made a traffic arrangement for a continuous transportation of petroleum from Olean to Burlington refused to accept shipments to Burlington from such other places and localities (other than Olean) at a less rate than 33 cents per 100 pounds; that the circumstances and conditions of the transportation of oil from said places to Burlington were substantially similar to the existing conditions and circumstances surrounding the transportation of such commodity from Olean to Burlington. The indictment further charges

that shippers from towns and localities in the state of Pennsylvania, except Bradford, were charged for forwarding property to points in other states located in a southerly or westerly direction from Olean, except petroleum, the same tariff rates as were exacted from shippers from Olean, while shippers from Bradford of goods, except petroleum, were charged the same tariff rates for forwarding in all directions as were charged shippers from Olean. That the relatively excessive rates come within the purview of the act to regulate commerce is not seriously disputed; but it is vigorously contended that it was not an unjust discrimination against shippers at the various points specified, as that term is legally defined. The argument proceeds upon the theory that the recitals in the indictment are in the nature of an offense by the carriers against the localities and places mentioned therein which is forbidden by section 3, and therefore the indictment on its face is defective and must be dismissed. After painstaking consideration of the problems and difficulties presented by counsel for defendant, I have reached the conclusion that any doubts that I may have in relation to the correct interpretation of the statute must be resolved in favor of the evident intendment of Congress, namely, that equality among shippers should be maintained, and unjust discrimination and favoritism of all kinds condemned.

It is undeniable that the defendant may prove at the trial that the conditions and circumstances of the shipments from Bradford and the other points specified in the indictment to Burlington were, in fact, essentially different from what they were from Olean. The higher rate charged at other points, it is true, may be due to the increased distance, the greater expense in transportation, to difficulties in loading on cars, or because the territory is mountainous or the grade tortuous. Such, however, are questions of fact, and, if these conditions actually existed, the departure in the rates would probably be explained. In other words, as was said by Judge Shipman in Interstate Commerce Commission v. Texas & Pac. Ry. Co., 57 Fed. 948, 6 C. C. A. 653:

"While it is true that under sections 2 and 4 of the statute substantially dissimilar conditions may justify dissimilarity in rates, it does not follow that any dissimilar condition, of whatever kind it may be, justifies any discrepancy in rates."

And further in the opinion he states in effect that, though dissimilar conditions create dissimilarity in rates, yet the amount of dissimilarity in rates is of importance. The defendant, however, contends that, as no discrimination between shippers is directly charged, its criminality must rest upon the doctrine enunciated by Judge Brewer in Tozer v. United States (C. C.) 52 Fed. 917, that, where the rate charged is unreasonable, the fact of the unreasonableness must first be established by a jury before an indictment such as this can be sustained. I think the principle of the Tozer Case is inapplicable. In that case no standard was alleged in the indictment by which it could be perceived of what the alleged unlawful act actually consisted. The Court of Appeals, reversing the conviction of the lower court, held that the tariff of rates for a continuous shipment from Chicago to Hepler via Hannibal was not controlled by the sum of the locals

rate, and that such rate was not the standard by which a violation of section 3 could be determined. I think the case of Texas & Pac. Railway Co. v. Abilene Cotton Oil Co. (recently decided by the Supreme Court of the United States), 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. —, and to which my attention has been called subsequent to the argument, may also be distinguished from the case at bar. In this case the indictment alleges that there were shippers at Bradford and other localities named therein who would have shipped petroleum from such localities to Burlington if it were not for the excessive rate demanded, and that such shipments would have been under substantially similar circumstances and conditions to those from Olean, and, furthermore, that shippers from Bradford were charged the same forwarding or carrying rates on all traffic except petroleum in all directions as were charged shippers from Olean. Whether the existing conditions justified a dissimilarity of rates such as the carriers choose to make must be determined as a question of fact on the trial. It is true that in the case of Wight v. United States, 167 U. S. 512, 17 Sup. Ct. 822, 42 L. Ed. 258, the Supreme Court declared that section 2 prohibited any "rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage are compelled to pay different prices therefor." And, while this holding would seem to support the view that the shipment must be "the same distance" as that phrase is literally understood, still when applied to the transportation of freight, such a construction is thought to be too narrow. The court does not say that there must be the same mileage distance. If it is true that Bradford was regarded by the carriers as being practically in the same freight zone, then it is apparent that the ordinary signification of the phrase quoted is of latitudinal extent, and does not imply any precise space or limits between different points. The signification of the phrase, therefore, "between carrying points," must be governed by what is commonly understood between carriers.

In United States v. Hanley (D. C.) 71 Fed. 674, it was held that, to substantiate the offense under section 2, there must be two shippers, one receiving a more advantageous rate than the other. It is true that in this indictment no instance of a shipment from Bradford and the other localities to Burlington at the greater rate quoted is shown, but it sufficiently appears that there were other refiners located at the points mentioned who were competitors of the defendant who would have shipped to Burlington had the rates been equal. In this respect the Hanley Case is distinguishable; and, the admitted facts being different, it is not a controlling authority upon the question under consideration.

The next point is that the indictment is defective because it does not allege a departure from a tariff rate printed and filed in accordance with section 6. The Elkins act, however, is not restricted to alleged departures from an established tariff rate, but the statute is violated if any other advantage is given to a shipper whereby a discrimination is practiced. So that, notwithstanding a schedule of rates may have been published and filed in accordance with the law, as the acceptance by a shipper of a concession or discrimination is

expressly forbidden, it would seem to be immaterial whether the 17-cent rate was or was not published and filed. The cases cited by counsel for the defendant (Van Patten v. Chicago, etc., R. Co. [C. C.] 81 Fed. 545, and Winsor Coal Co. v. Chicago, etc., R. Co. [C. C.] 52 Fed. 716) are not thought to app'y, as the Elkins act in terms substantially provides that, irrespective of the publication or filing of the schedule of rates, a liability under its provisions may arise whenever the property is transported "by any device whatever * * * whereby any other advantage is given or discrimination practiced." Upon this point the defendant urges in argument that if the indictment is held by the court to properly charge the defendant with having accepted an unjust discrimination, and if it be assumed that the rate was published and filed as required by the act, there being no negative allegation of filing in the indictment, then the shipper before making the shipment is required to take into consideration a number of troublesome elements, such as distances, conditions of shipments between stated localities, and he would also be burdened with the onus of ascertaining before shipment that there was no discrimination against shippers in other localities. The argument presented upon this point is not strictly warranted by the alleged facts which are admitted by the demurrer. Even though the indictment fails to charge the filing and publication of the 17-cent rate, it nevertheless alleges that the 33-cent rate from Bradford and other localities was quoted to shippers at those points, and that the carrier refused to accept shipments of oil from shippers at such points at a rate less than 33 cents, all of which was known to the defendant. In these circumstances it may be presumed that the defendant had knowledge that oil producers in the localities specified in the indictment, except Olean, were absolutely prevented from shipping their commodity to Burlington in competition with defendant because of the unjust, extortionate, and discriminating freight charges demanded by the carrier of other shippers. It may be presumed that the Standard Oil Company was aware that it received an advantage such as enabled it to dispose of its commodity in the Burlington market, to the detriment and exclusion of other shippers. It may be presumed that it knew that the difference between the rate paid by it and the 33-cent rate quoted to other shippers was relatively too high, and that no reasonable differential was made by the carrier. The acceptance of such advantages manifestly evidenced a favoritism which is abhorred by the interstate commerce act, and in the situation presented the defendant must be held to have unlawfully received a discrimination or concession in its favor.

The demurrer is overruled.

UNITED STATES v. MICHAEL.

(District Court, W. D. Texas, San Antonio Division. May 17, 1907.)

No. 1,975.

1. ARMY AND NAVY—CLOTHING OF SOLDIER—SALE.

The sale of military clothing issued to a soldier during his term of service constitutes an offense against the military law, for which he may be punished by a court-martial, as provided by the seventeenth article of war, as amended by Act July 27, 1892, c. 272, 27 Stat. 277 [U. S. Comp. St. 1901, p. 947], declaring that any soldier who sells or through neglect loses or spoils his horse, arms, or accoutrements, shall be punished as the court-martial shall adjudge, etc.

2. SAME—PLEDGE—LIABILITY OF PLEDGEE.

The receiving in pledge, by a civilian from a soldier, of clothing issued to the latter during the term of his enlistment, does not constitute a penal offense, within Rev. St. § 5438 [U. S. Comp. St. 1901, p. 3675], providing that every person who purchases or receives in pledge from a soldier any arms, equipment, ammunition, clothing, military stores, or other public property, such soldier not having the lawful right to pledge or sell the same, shall be imprisoned, etc., since the clothing on being issued to the soldier becomes his individual property and ceases to belong to the United States.

Charles A. Boynton, U. S. Atty., and Capt. Charles E. Hay, Jr., Acting Judge Advocate, for the United States.

C. K. Brenneman, for defendant.

MAXEY, District Judge (charging jury). It is charged in the indictment that the defendant knowingly received in pledge, for an obligation or indebtedness, from a soldier of the United States, Lucilus H. Turner, in the military service of the United States, stationed at the military post of Ft. Sam Houston, Bexar county, Tex., certain clothes; that is to say, one overcoat of the value of, to wit, $20, the same being public property of the United States, the said soldier aforesaid, to wit, Lucilus H. Turner, not having then and there the lawful right to pledge the same. The indictment is based upon that part of section 5438, Rev. St. [U. S. Comp. St. 1901, p. 3675], which reads as follows:

"And every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

It is the evident purpose of the statute to denounce as an offense the purchase or receiving in pledge of public property from a soldier or other person called into or employed in the military or naval service, and the duty devolves upon the court to determine whether the overcoat described in the indictment is public property within the meaning of the law.

The question submitted for consideration is an important one to the government, as well as to the defendant, and its solution is not

altogether free from difficulty. That clothing not issued by the government to a soldier is public property, there can be no doubt; but the facts in this case show that the overcoat in question, when pledged to the defendant, had been issued to Turner, and hence it is claimed by the defendant's counsel that it was Turner's private property. If the contention of the defendant be true, it necessarily follows that your verdict must be in his favor. The question then is: Was the overcoat under the facts and circumstances of this case the private property of Turner, or was it public property within the meaning of the statute? At a former term of this court it was held that clothing, after its issuance to the soldier, was private property, and a verdict of acquittal was instructed by the court. Since that time other courts have placed a different construction upon the statute, and in view of this difference of opinion among judges the question has been examined with unusual care by the court with a view of reaching, if possible, a correct conclusion.

At the outset, it may be well to inquire as to the rule governing the construction of penal statutes. Sutherland on Statutory Construction, § 520, lays down the rule as follows:

"A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. It is axiomatic that statutes creating and defining crime cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

It is said by the Supreme Court, citing United States v. Sharp, Pet. C. C. 118, Fed. Cas. No. 16,264 and United States v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625, 33 L. Ed. 1080:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. * * * Before a man can be punished, his case must be plainly and unmistakably within the statute." United States v. Brewer, 139 U. S. 288, 11 Sup. Ct. 538, 35 L. Ed. 190.

And by Judge Dillon, in United States v. Whittier, 5 Dill. 39, Fed. Cas. No. 16,688, it is said:

"Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the Legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused."

To determine whether the act charged against the defendant is plainly embraced within the statute—that is, whether the overcoat described is public or private property—it is necessary to look to the soldier's contract of enlistment, and to ascertain what the government agrees to pay or furnish the soldier in consideration of the military service to be by him performed. By article 864 of the army regulations of 1904, which have the force and effect of law when sanctioned by the President, and are within the sphere of his legal and constitutional authority (Krutz v. Moffitt, 115 U. S. 503, 6 Sup. Ct. 148, 29 L. Ed. 458; United States v. Eliason, 16 Pet. 291, 10 L.

Ed. 968; United States v. Freeman, 3 How 567, 11 L. Ed. 724; Gratiot v. United States, 4 How. 118, 11 L. Ed. 884; Davis, Military Law, pp. 6, 7, and note; 16 Op. Atty. Gen. 38), a person upon entering the service of the government, as a soldier, engages, under oath, to accept from the United States, in satisfaction of his services, "such bounty, pay, rations and clothing as are or may be established by law." Enlistment is, properly speaking, a contract between the government and the party entering its service, and before the latter is permitted to sign this contract the recruiting officer is expressly enjoined to explain it to him by article 863 of the army regulations, which is in the following language:

"Recruiting officers will not allow any man to be enticed into the service by false representations, but will, in person, explain to every man before he signs the enlistment paper, the nature of the service, the length of the term, the amount of pay, clothing, rations, and other allowances to which a soldier is entitled by law."

The monthly pay of the soldier is $13 (Rev. St. § 1280 [U. S. Comp. St. 1901, p. 907]), and by section 1296 of the revision the President is authorized to prescribe the uniform of the army and quantity and kind of clothing which shall be issued annually to the troops of the United States. Under this authority tables are issued showing the price of clothing, the allowance in kind to each soldier for each year of his enlistment, thus giving the money value of his clothing allowances, and these are changed from time to time in orders. Dig. Op. Judge Advocates General 1901, par. 828; Army Regulations, art. 1153. The estimated cost of the clothing allowance for the full term of the soldier's enlistment is $165.52. Under his contract of enlistment the soldier is entitled to draw from the government clothing to the amount named, and, if during his term of service he draws less than the amount to which he is entitled, the remainder is payable to him in money upon his final discharge from the service. This is expressly provided for by Rev. St. § 1302 [U. S. Comp. St. 1901, p. 923], which is in the following words:

"The money value of all clothing overdrawn by the soldier beyond his allowance shall be charged against him, every six months, on the muster-roll of his company, or on his final statements if sooner discharged, and he shall receive pay for such articles of clothing as have not been issued to him in any year, or which may be due to him at the time of his discharge, according to the annual estimated value thereof. The amount due him for clothing when he draws less than his allowance, shall not be paid to him until his final discharge from the service."

It will thus be seen that by virtue of the contract entered into between the government and the soldier the latter is allowed certain monthly pay, together with a clothing allowance, the amount of which is fixed under executive authority. Certainly under the contract with the government the soldier is entitled to the money earned by him, and why should not the clothing, issued under the circumstances named, be his property, and not that of the government, although he may not possess the unqualified right of disposition of it during his term of service? The clothing furnished, as well as the money paid him, is supplied by virtue of his contractual relations with the government, and the government would have no more legal right to refuse

the clothing than it would have to withhold his monthly pay. Since the contract of enlistment requires clothing to be furnished to the soldier, it follows that so long as he observes his part of the contract, and refrains from committing a breach of discipline or other offense which might possibly subject the clothing allowance to forfeiture (which is not claimed in this case), his right thereto seems to be beyond question. The clothing issued to a soldier is intended for his use, as a soldier, and quite properly, for disciplinary purposes, its sale by him during his term of service constitutes an offense against military law for which he may be punished as a court-martial may adjudge, subject to the revisory power of the chief executive. Thus it is provided by the seventeenth article of war, as amended by the act of July 27, 1892:

"Any soldier who sells or through neglect loses or spoils his horse, arms, clothing, or accoutrements shall be punished as a court martial may adjudge, subject to such limitation as may be prescribed by the President by virtue of the power vested in him." 27 Stat. 277, c. 272 [U. S. Comp. St. 1901, p. 947]; Davis on Military Law, p. 373; Dig. Op. Judge Advocates General 1901, pars. 5–12.

In the case of the United States v. Hart (D. C.) 146 Fed. 202, the only reported case on this subject brought to the attention of the court, Judge Bethea held that articles of clothing, issued to soldiers while they were employed in the military service of the United States, were public property under Rev. St. § 5438. Referring to the seventeenth article of war and section 3748 of the statutes [U. S. Comp. St. 1901, p. 2527], he observed that those two sections indicated "that the title to clothing issued to soldiers remains in the United States." The prohibition, contained in the seventeenth article of war, is directed against the sale, etc., by a soldier of his horse, arms, clothing, or accoutrements; and, as before stated, for the purpose of maintaining military discipline, the offending soldier is subject to punishment for a violation of the article. "The description," it is said by Judge Advocate General Davis, in his work on Military Law (page 373), "'his horse, arms, clothing,' etc., refers to articles which are regularly issued to the soldier for his use in the service and with the safe-keeping of which he is charged. His property in them is qualified by the trust that he cannot dispose of them while he is in the military service, and can only use them for military purposes."

Whether clothing issued to a soldier be public or private property, its sale by the soldier is prohibited by the seventeenth article of war. The seventeenth article acts upon the soldier, upon the sale, there being no reference to one who may purchase the clothing, and the court fails to observe any language in this article indicating that clothing issued to a soldier remains, after its issuance, public property.

Let us next examine section 3748 of the Revised Statutes, referred to by Judge Bethea, and endeavor to ascertain its exact bearing upon the question before the court. That section is in the following words:

"The clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, tl-

tle, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accoutrements by any person not a soldier or officer of the United States, shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift."

This section, it will be observed, refers to clothes, arms, etc., furnished by the government to the soldier. It prohibits the sale, etc., of such articles; it declares that no person, not a soldier, etc., having possession of the articles, shall have any right, title, or interest therein; it provides for the summary seizure of such articles by any officer, civil or military, and it finally declares that the possession of the articles by any person not a soldier, or officer of the United States, shall be presumptive evidence of a sale, barter, etc. Hence it will be seen that there is nothing in the language of the section defining clothing, furnished to a soldier, to be public property. It merely gives emphasis to the articles of war and other parts of the statutes that the clothing of a soldier may not be sold, bartered, exchanged, pledged, etc., while the soldier remains in the military service; and the only penalty denounced, for the unlawful sale, is the seizure of the articles when found in the possession of one not a soldier or duly authorized officer of the United States. The purchase of such articles is not made a penal offense by the section quoted; the sole punishment to which the purchaser is subjected being the loss of the articles of which he is the purchaser or pledgee.

It may be instructive in this connection to trace the origin of Rev. St. § 3748. See United States v. Lacher, 134 U. S. 626, 627, 10 Sup. Ct. 625, 33 L. Ed. 1080. Upon examination of the statutes it will be seen that it corresponds with section 23 of the act of March 3, 1863, entitled "An act for enrolling and calling out the National forces, and for other purposes." 12 Stat. 735, c. 75. Under section 23 of the act of 1863, as under Rev. St. § 3748, the sale, etc., of clothes, arms, etc., furnished by the United States to a soldier, is prohibited; but seizure is the extent of the penalty which the purchaser incurs by his forbidden purchase. Going back somewhat, and consulting sections 1 and 3 of the act of March 2, 1863 (12 Stat. 697, 698, c. 67), it will be observed that the purchase, etc., by a person not in the military or naval service, of any arms, equipments, ammunition, clothes, or military stores, or other public property, from a soldier, was denounced as an offense. And by section 24 of the act of March 3, 1863 (12 Stat. 735, c. 75), it was provided that:

"Every person, not subject to the rules and articles of war, * * * who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof * * * shall be fined," etc.

Section 24, entire, is as follows:

"And be it further enacted, that every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure or entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such; or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent

or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and he shall be imprisoned not exceeding two years nor less than six months."

See, also, Act March 16, 1802, c. 9, § 19, 2 Stat. 136.

Section 23 of the act of March 3, 1863, was carried forward and incorporated into the Revised Statutes, as before intimated, as section 3748; and a portion of section 24 of that act and the act of July 1, 1864 (13 Stat. 343, c. 204), now form section 5455 of the Revised Statutes [U. S. Comp. St. 1901, p. 3682]. Upon comparing section 24 of the act of March 3, 1863 with section 5455 of the Revised Statutes (the act of July 1, 1864 not being relevant in this connection), it will be discovered that the following words of the former were not brought forward by the revisers, to wit: "Or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof." These omitted words, under section 5596 of the Revised Statutes [U. S. Comp. St. 1901, p. 3750] therefore stand repealed. See United States v. Bowen, 100 U. S. 508–513, 25 L. Ed. 631. As these pretermitted words stood in the twenty-fourth section of the act of 1863, as well as in the act of March 16, 1802, the purchase by a civilian from a soldier of his arms, clothing, etc., was denounced as a crime and made punishable by fine and imprisonment. United States v. Brown, 24 Fed. Cas. 1271 (No. 14,669). But there is no existing statute, at least none which the court has been able to discover, denouncing as a penal offense the purchase from a soldier of "his arms, clothing," etc., unless section 5438 of the Revised Statutes be so construed, upon the assumption that the words "his arms, clothing," etc., are embraced within the general description "public property." Just why the omitted words, above mentioned, were not incorporated into the Revised Statutes, it is somewhat difficult to explain. It may be that the omission resulted from oversight, or that Congress deemed the summary seizure of a soldier's clothing, in the hands of a civilian, sufficient punishment for the purchase of the prohibited article. At all events, the omission of the words quoted is significant and tends strongly to indicate that it was not the intention of Congress to denounce as a crime the purchase by a civilian of a soldier's clothing. From the fact that soldiers' clothing may be, under some circumstances, the property of the United States, it by no means follows that "public property" and "soldiers' clothing" are synonymous terms. The one implies public ownership, with title residing in the government of the United States, and hence public property; while the other, after its issuance, imports individual ownership, a title vested in the soldier —in a word, private property. Under sections 1 and 3 of the act of March 2, 1863, above referred to, the purchase of public property, whether clothing or other articles, was expressly made a penal offense, and such is the present law as it stands in section 5438 of the Revised Statutes. But the court is of the opinion that existing statutes fail to punish, as a crime, the purchase by a civilian of a soldier's

clothing, the same being his property, and not that of the government. To hold otherwise in the present case would, it is thought, violate a cardinal principle, applied by the courts, in the construction of penal statutes—that is, that before a man can be punished his case must be plainly within the statute—and, further, that such a statute will never be extended, by mere implication, to things not expressly brought within its terms. The court is further of the opinion, for the reasons given, that an overcoat, issued to a soldier as a part of his clothing allowance, ceases to be public property after its issuance and becomes the property of the soldier, although for disciplinary purposes he may not be invested with the absolute jus disponendi until his discharge from the service. A similar conclusion is expressed by Judge Advocate General Davis in the following language:

"Clothing issued and charged to a soldier is not now (as it was formerly) regarded as remaining the property of the United States. It is now considered as becoming, upon issue, the property of a soldier, although his use of it is, for purposes of discipline, qualified and restricted. Thus he commits a military offense by disposing of it as specified in this article (seventeenth article of war), though the United States may suffer no loss." Davis, Military Law, p. 374.

To the same effect, see Dig. Op. Judge Advocates General, p. 9, par. 11; Id. pars. 824, 382.

To avoid misapprehension it is deemed proper to remark that a civilian may not with impunity purchase from a soldier, in the public service, arms, equipments, ammunition, clothes, military stores, or other property of which the government of the United States is the owner, since the purchase of such property is denounced as an offense by section 5438 of the Revised Statutes. The question, and the sole question, decided by the court, is that the law, as it now stands, does not denounce as a penal offense the purchase, or receiving in pledge, by a civilian from a soldier of the latter's clothing, after the same has been issued to him under the circumstances as shown by the testimony in this case.

From what has been said, it follows that it becomes my duty to say to you that the defendant is not guilty of the offense charged against him, and you are instructed to return a verdict in his favor.

AMERICAN BREWING CO. v. BIENVILLE BREWERY.

(Circuit Court, S. D. Alabama. August 10, 1906.)

No. 249.

1. TRADE-MARKS AND TRADE-NAMES—DESCRIPTIVE WORD.

The word "Bohemian," placed on bottles of beer, is a descriptive term, indicating a brand of beer in the manufacture of which Bohemian hops are used and cannot be monopolized as a trade-mark by a particular manufacturer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 13. Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to Searle & Hereth Co. v. Warner, 50 C. C. A. 323.]

2. SAME—UNFAIR COMPETITION—IMITATION OF LABELS.

To warrant the granting of an injunction against unfair competition by the imitation of a label, it must either be manifest to the court on an inspection of the two labels that the similarity as a whole is such as would be likely to deceive ordinarily attentive and observing retail purchasers, or there must be proof of actual mistake by purchasers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 91. Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

3. SAME—BEER BOTTLE LABELS—COMPARISON.

The labels used by the respective parties on bottles of beer compared, and *held* not to show such similarity as a whole as to warrant the granting of a preliminary injunction restraining defendant from using its label on the ground of unfair competition, in the absence of any evidence of actual deception of the public.

In Equity. Suit for infringement of trade-mark and unfair competition. On motion for preliminary injunction.

Hugh K. Wagner and Inge & Armbrecht, for complainant.
Stevens & Lyons, for defendant.

TOULMIN, District Judge. Complainant claims that it has the exclusive right to make and sell beer under the name "Bohemian," as marked by its trade-mark, and that the public has acquiesced in its ownership of its trade-mark and in its exclusive use of the word "Bohemian" as a trade-mark for beer. It avers that the defendant has put up and sold beer in bottles and packages bearing upon them the trade-name "Bohemian" in violation of the complainant's rights, and with an imitation of complainant's trade-mark as shown by the labels on defendant's bottles. In short, complainant claims that the defendant is guilty of an infringement of its technical trade-mark, and also of unfair competition in business by the use of the word "Bohemian," and also by the imitation of the bottle labels of which the complainant makes use.

The first question is whether the complainant's trade-mark is infringed by the label adopted and used by the defendant. (2) Has the defendant been guilty of unfair competition, resulting in confusion of goods, to the injury of the public, or to the invasion of the complainant's legal rights? "A trade-mark is an arbitrary, distinctive name, symbol, or device to indicate or authenticate the origin of the product to which it is attached. An infringement of such trade-mark consists in the use of the genuine upon substituted goods, or of an exact copy or reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product. Unfair competition is distinguishable from the infringement of a trade-mark, in this; that it does not involve the exclusive right of another to the use of the name, symbol, or device. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be unfair use of it which will constitute unfair competition. It may be so used by another unfairly, producing confusion of goods, and so come under the condemnation of unfair trade,

and its use will be enjoined. * * * Whether such confusion has been, or is likely to be, produced by the acts charged is a question of fact, to be resolved either by evidence of actual sales of the one product for the other, of actual mistake of one for the other, of fraudulent palming off of the one for the other, or, on the other hand, failing such evidence, by comparison of the two brands to determine whether the one can be readily mistaken for the other, even by the inattentive and unobserving retail purchaser." Cole Co. v. Am. Cement & Oil Co., 130 Fed. 705, 65 C. C. A. 105; Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847; Galena-Signal Oil Co. v. Fuller (C. C.) 142 Fed. 1002. "To acquire a right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark points distinctly to the origin, manufacture, or ownership of the article on which it is stamped, and is designed to indicate the owner or producer of the commodity and to distinguish it from like articles manufactured by others. If a device, mark, or symbol is adopted or placed upon an article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark." Columbia Mill Co. v. Alcorn, supra; Cole Co. v. Am. Cement & Oil Co., supra; Williams v. Mitchell, 106 Fed. 168, 45 C. C. A. 265; Galena-Signal Oil Co. v. Fuller, supra.

Undisputed evidence in this case shows that the term "Bohemian" is a generic designation of the product, or descriptive term, indicating the character or kind of beer spoken of; that the term "Bohemian," used in reference to beer, indicates beer having the property of "Bohemian" hops in its manufacture; and that many breweries use and have for years used the word "Bohemian" in the bottling and sale of beer to indicate its kind or class. In fact, the registered trade-mark of complainant contains the word "Bohemian," prefixed by the letters "A. B. C.," as one of its "brands." I am of opinion from the evidence now submitted that the term "Bohemian" thus used does not point distinctly to the origin, manufacture, or ownership of the article on which it is stamped and to distinguish it from like articles manufactured by others, but that it is so placed to identify the class or quality of the article, and that it is not capable of becoming a valid trade-mark and cannot be sustained as such. While a descriptive word cannot constitute a technical trade-mark, yet, where an article has come to be known by the descriptive word, one may not use that word to palm off his goods as the goods of another who first adopted it, and by which appellation the goods have come to be known. If he uses the descriptive word, it must be so used as not to deprive another of his rights, or to deceive the public, and the name must be accompanied with such indications that the thing manufactured is the work of the one making it as would unmistakably inform the public of the fact. Williams v. Mitchell, supra.

The great weight of evidence in this case is that the complainant's beer is universally known, called, and sold as "A. B. C." beer, and

that its "Bohemian" brand is known and sometimes called for and sold as "A. B. C. Bohemian," but oftener as "A. B. C." beer. That such is the fact in the state of Alabama and adjoining states in the United States can hardly be questioned in view of the evidence on the subject, and that the same is to some extent true in the island of Cuba is likewise shown. But in a case of an alleged violation of a valid trade-mark the similarity of brands must be such as to mislead ordinary observers in order to justify a restraining injunction. A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Columbia Mill Co. v. Alcorn, supra; Howe Scale Co. v. Wyckoff, 198 U. S. 140, 25 Sup. Ct. 609, 49 L. Ed. 972. "It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." Saxlehner v. Eisner & Mendelson Co., 179 U. S. 33, 21 Sup. Ct. 7, 45 L. Ed. 60. Nor is proof of the existence of actual deception of purchasers essential. In the case of a manifest liability to deception there need be no such proof; but where it is not manifest to the court, upon inspection of the label, that the public would be imposed upon by the dress of the article, there should be proof of actual mistake by purchasers. There are no affidavits to this effect by purchasers or proposed purchasers of either beer in question. There are affidavits on the subject by persons in Cuba, where complainant has a considerable trade with its beer. Some of the persons making said affidavits are either dealers in or agents for complainant's beer, and their statements are mostly expressions of opinion, belief, and conclusions of the affiants as to the likelihood of deception and of unfair competition in trade, but none of actual sales of one product for the other, or of actual mistake of one for the other. Failing such evidence, the court must, by comparison of the two brands, determine whether the one can be readily mistaken for the other by the ordinarily attentive and observing retail purchaser. "In determining the question of fraudulent imitation of packages and labels, merely noting points of difference and similarity is not sufficient. The packages must be considered as a whole." P. Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496. In the course of its opinion the court said:

"The question is whether, taking the defendant's package and label as a whole, it so far copies or resembles the plaintiff's package and label that a person of ordinary intelligence would be misled into buying the one, supposing that he was buying the other."

The court further said:

"The two principal ways by which an article is distinguished in trade are, first, the name of the manufacturer; second, the descriptive name."

By comparison, we find the characteristic trade-marks and labels of the respective parties to this suit to be as follows: The essential features of the complainant's trade-mark, as declared in its statement, are:

"The pictorial representation of a globe and an American eagle perched thereon, holding with one talon the United States flag and holding in its beak a pennant or streamer bearing the letters and punctuation marks A. B. C."

On the defendant's label there is no representation of a globe. The American eagle thereon is much smaller and of a different color than that of the complainant's. The United States flag is in a different position, is larger, of a brighter coloring, and more conspicuous, and it is not held in the talon of the eagle. There is a wreath of leaves in its beak, instead of a pennant or streamer, and there is an entire absence of the letters and punctuation marks "A. B. C." which prominently appear on the label of the complainant above the word "Bohemian," and which letters are declared to be essential features of its trade-mark. The word "Bohemian" appears on both labels. It is not mentioned in the description of complainant's trade-mark as one of the essential features of it, but on the defendant's label it seems to be the prominent word. It is of larger type and light blue in color, while on the complainant's it occupies a secondary position with regard to the letters "A. B. C.," is smaller type and white in color, with very small pale blue outlines. The labels are about the same size and shape. Both labels have the names of the respective breweries in large red letters, and the names of their location—the complainant's in prominent red letters and the defendant's in black letters. Are the labels apt to be mistaken by purchasers? There are some minor points of resemblance. Each has an eagle and the United States flag, but of different size and color, and in different position. Each has the word "Bohemian," but different in size of type and color. But we should look at the matter as a whole—both at the resemblances and differences—to ascertain whether, in view of the differences, the resemblances are so marked that the ordinary purchaser would be likely to be deceived or misled. Lorillard v. Peper, supra; Galena-Signal Oil Co. v. Fuller, supra; Lamont Corliss Co. v. Hershey (C. C.) 140 Fed. 763. The court in Lorillard v. Peper said:

"The court must use its own judgment as to similarity of packages and labels, and the fact that others may differ with it in opinion, or that a few isolated purchasers have been misled, does not necessarily bind it."

In the case at bar we find on their respective labels the names of the manufacturers distinctly and prominently appearing, and also the descriptive name of the beer manufactured by each—on the one "A. B. C. Bohemian," on the other "Bohemian," on the one "Saint Louis" in large red letters at the top of the label, on the other "Mobile, Ala." at the bottom of the label. Other distinguishing characteristics have already been shown, and, as before suggested, there is no proof that any purchasers have actually been misled. The infringement of the complainant's trade-mark, as charged, must be clearly shown; and the charge that the defendant is guilty of unfair competition, resulting in confusion of goods, to the injury of the public and to the invasion of complainant's rights, must be satisfactorily proved.

By inspection and comparison of said trade-mark and of the respective labels, as exhibited on the beer bottles of the respective parties, I am unable to find such a degree of resemblance between them as would, in my opinion, be likely to deceive or mislead the ordinary purchaser buying with reasonable care. My opinion is that such infringement has not been shown; and I am not convinced that the claim

of unfair competition is sufficiently established by the ex parte proofs, submitted on this hearing, to warrant the granting of a preliminary injunction.

The motion, therefore, is denied.

GLUCOSE SUGAR REFINING CO. v. CITY OF MARSHALLTOWN et al.

(Circuit Court, S. D. Iowa, C. D. March 4, 1907.)

No. 2,436.

1. CONTRACTS—PARTIAL INVALIDITY—SEPARATION.

Where a city, in order to construct a sewerage plant, borrowed $25,000 from complainant to construct the same, and agreed to repay the loan in installments in various ways, a provision of the contract that, in case after the year 1901 the total taxable value of all complainant's property should be fixed and kept at a sum not to exceed $5,000, then complainant for each year in addition to other credits would credit on the loan a sum equal to 14 times the taxes on $5,000, or such proportionate amount in case the valuation exceeded $5,000, was separable from the remainder of the contract, and, if invalid, did not invalidate the balance.

[Ed. Note.—Divisibility of contracts, see note to Saunders v. Short, 30 C. C. A. 467.]

2. MUNICIPAL CORPORATIONS—BORROWING MONEY—SEWERS—CONSTRUCTION—POWERS.

A city having express statutory authority to construct sewers as provided by Iowa Code 1897, §§ 791, 794, 796, 810, 820, 831, 841, had power to borrow money for the purpose of constructing a plant for the disposition of the sewage.

3. SAME—CONTRACTS—VALIDITY—RELIEF FROM TAXATION.

A contract by which complainant agreed to loan defendant city the sum of $25,000 for the construction of a sewerage plant to be repaid by a return of all water rents owing to the city from complainant, together with all taxes due the city on a specified valuation of the company's property, etc., was not objectionable as relieving complainant from the burden of taxation.

In Equity.

G. W. Kretzinger and T. Binford, for complainant.

J. L. Carney and George H. Carr, for defendants.

McPHERSON, District Judge. This case is by a bill in equity and demurrers thereto. The principal recitals of the bill are as follows: The city is of about 15,000 people, on the Iowa river, near which city complainant has a plant or works. In January, 1900, there was pending in the state district court at Marshalltown an action by residents below the city against the glucose company, and suits were threatened against the city for polluting the waters of the river with sewerage and filth.

To avoid those suits, and remedy the evils, complainant by its officers and the city by resolution adopted by its council and approved by the mayor entered into a written contract, which, stated in an abbreviated form, is as follows: There are four "whereases." One is that the city has 15,000 people, and has no adequate means for the proper or scientific disposal of its sewerage and that of its residents

and the factories therein. Another is that said sewerage empties into the said river, and that the people below are complaining. Another recites the pendency of said suit, and that other suits are threatened against the city to enjoin and abate the nuisances. The last "whereas" recites that an urgent and immediate necessity exists for the prompt erection and construction by the city of a suitable plant to care for the sewerage from its residents and said plants, and the health and welfare of the citizens of the city. Following which it was agreed as follows: (1) The glucose company advances for said purposes $25,000 to be paid to a trustee named. (2) The city was to at once purchase sufficient land and construct and erect a suitable sewerage plant. The glucose company has the right to empty its sewerage therein free of charge, and the trustee out of said moneys was to pay for constructing the sewerage plant on the written orders of the city, and said plants to be constructed under the supervision of the city. (3) The trustee was to take the title to the lands in his name. When the city had fully performed its part of the contract, the trustee was to make a conveyance to the city, but, if the city at any time fails to thus comply, the trustee is to convey to the glucose company for its damages for such breach of the contract, upon the city paying to the glucose company the full amount then remaining unpaid, including the amount the trustee may have in his hands. And the amount not necessary to buy the lands and construct said plant is to be refunded to the company. (4) The city is to have the care, use, and control of the lands and plant, and is to maintain and operate the same, and receive and retain all revenues therefrom. (5) In consideration whereof the city agrees: (a) To refund and rebate to the company until said $25,000, with interest thereon at 3 per cent., is fully paid, all water rents to become owing the city from the company. (b) The city during the years 1900 and 1901 is to refund, rebate, and pay back to the company all taxes due the city from the company on the valuation of the company's property already fixed at $75,000, the amount of which taxes is to be credited on said $25,000. (c) If after the year 1901 the total taxable value of all the company's property shall be fixed and kept at a sum not to exceed $5,000, then the company for each year, in addition to other credits, shall credit on said $25,000 a sum equal to 14 times the taxes on $5,000. But, if the valuation exceeds $5,000, the amount to be credited shall be decreased in proportion as the valuation is increased. (d) The company is not to pay the city any taxes or water rents until the full sum of $25,000 and interest is fully repaid to the company. (6) If the company ceases to operate its plant, or remove its plant from the city, then the trustee may make conveyance to the city of the lands on which the sewerage plant is located. (7) The city may pay to the company at any time the $25,000, with interest.

Then it is alleged that pursuant to the contract the company loaned for said purposes to the city said $25,000, and that by the action of the city council in making said contract and in accepting the money and ratifying the contract said taxes each and every year and water rentals were thereby appropriated in equal amounts thereto to the payment of the company on account of said loan. But in the year

1902 the county treasurer collected said taxes and paid over to the city its share thereof which the city retains, and it has attempted to repudiate the entire contract, and refuses to pay over the money, although the company in all respects has complied with and observed said contract. During the years 1903, 1904, and the one-half of 1905 the company paid on account of taxes $14,016.96, and the part unknown to complainant due the city was paid the city by the county treasurer. But to obtain such credit each year would require many actions, and it is entitled to have the city restrained from collecting said taxes, or, if collected, from appropriating the same without giving credit. And an accounting is asked, and an injunction is asked against levying on or selling any of its property on account of such city taxes. The city, its mayor, and treasurer, and the county treasurer are made defendants. Such in a way quite general is the bill in equity which, of course, is taken as true in all respects on demurrer.

The defendants contend that the entire contract is illegal, for the reason, as is urged, that clause "c," paragraph 5, of the contract, is illegal, and that such illegality poisons and destroys the entire contract. Each side has cited many authorities on the question, which I shall not review, for the reason that no one can have doubt as to what the rule is. There can be no difficulty in the case as to the law; the only doubt arising being as to the application of the law to the contract sought to be enforced. The rule is, as stated by Bishop on Contracts, § 487, concurred in by all text-writers, judges, and lawyers, as follows:

"A contract illegal in part and legal as to the residue is void as to all, when the parts cannot be separated. When they can be, the good will stand and the rest will fall. One entire consideration can not, within this rule, be separated, though composed of distinct items, some of which are legal and others illegal."

Each city has an assessor, who assesses all taxable property. After his return is made, the city council raises or lowers such assessments of individuals and corporations as the facts require. Then the city makes the levies, which, multiplied by the assessments thus equalized, shows the amount of taxes the city is to have. This in due time goes into the hands of the county treasurer, who collects the city taxes, either on voluntary payments, or by sale of the taxpayer's property. When collected, the county treasurer pays over the city taxes to the city treasurer, to be disbursed on vote of the city council. Both the county and city treasurers perform only ministerial duties, and have no discretion. But the city council, the mayor acting therewith, have discretion, both as to equalizing the assessments and appropriating the money. Such being the situation, it is urged that the paragraph "c" is in the nature of a bribe, or otherwise of a corrupting tendency. It is said that the tendency would be to lessen the company's taxes, not only to the city, but to the school district, county, and state, in which the city is not interested other than indirectly except the city taxes. Of course no honest councilman or mayor would be thus influenced, and, if the contract as to paragraph "c" is corrupt, then both the officers of the company and the officers of the city alike were corrupt. Like many other crimes, one alone cannot be guilty. It is a crime requiring parties on both sides to be guilty. And such is

not to be assumed. But whether such clause is a corrupt one, or one against the public policy, need not be determined. In my opinion that clause can be entirely eliminated without interfering with any other feature of the contract. The city desired, and the health, convenience, business, and welfare of the people required, sewers. It had no money. The money was loaned to it by the company. The city was to repay it with interest. Clause "c" was no part of the consideration, which on the one hand was $25,000 and on the other agreeing to use it for sewerage purposes and to repay it. All that can be said is that one of the annual payments was to be made of moneys derived in an unlawful way. Eliminate one of those annual partial payments, and the result in all other respects is the same. Therefore this case will be determined as though clause "c" was not to be found in the contract.

The bill recites that the city borrowed from the company $25,000, to be paid in installments, and that it now has part of the money holding it in trust for complainant, the amount of which is unknown, and that, by insisting on taxing the company, a cloud will be placed on the title to its property and the property sold. The city refuses to recognize the contract or to make payments. All persons agree, or should agree, that a municipality should as rigidly observe its contracts as an individual, and, when it borrows money, it should repay it with the same fidelity that an individual of character does. Aside from the moral phase of the question, in no other way can a standing worthy of credit be maintained. And, when a municipality repudiates its obligations for money borrowed, it only remains for the courts to enforce payment, unless the transaction is an illegal one, or one beyond the powers of the city to contract for. And the question is whether the contract to borrow the money and to create a fund with which to repay it was authorized by law, so that the city could make a valid and binding contract. The city is located on a river. The people below the city in Marshall and Tama counties have the right to use the waters of the river, and to have it unpolluted. The company had already been sued and the city was threatened with suits. Not only so, but the health and welfare of the people of the city required sewers. But, as urgent as the situation was for sewers, it would be worse than an idle performance to construct sewers with the mouths thereof on the commons; so that sewers must either empty into a stream, or the filth carried must otherwise be taken care of. According to the bill, carrying the filth into the stream was such a nuisance to the people below as not to be permitted. Then but the one thing remained, and that was to carry it from the city, take care of it, and protect the people below. If the city had the authority to do this, then the city council, the mayor concurring, was the sole and exclusive judge as to the means of doing it. It is not for a court to sit in judgment on the question of whether the council acted wisely, nor is it for the succeeding council to change the plan as to the method adopted, by declaring the former action unwise, and therefore shall not be paid for. City councils, like men, often borrow money, and expend it with extravagance, and sometimes foolishly. How it was in this case does not yet appear, as the city has not yet answered as to the facts.

This court at this time is only dealing with the question of the power

of a city to borrow money on an agreement to repay. Under Code, §§ 791, 794, 796, 810, 820, 831, 841, and other sections, cities are given the power to construct sewers. Many of those sections are with reference to the procedure, and assessment of adjacent property to pay the expense. But that the city has the power to construct sewers is not debatable. And the power is expressly conferred by statute. And, as incident to that express power, does not the implied power exist to find a suitable mouth for the sewer, and at such place as not to harm the people below? And, if there is an implied power, then it is the same as though recited in express terms in the statute as was held by the Supreme Court in case of Gelpcke v. Dubuque, 1 Wall. 220, 17 L. Ed. 530. And, the city having the power to construct sewers, the power is almost express by section 680 of the Code, where cities are empowered by ordinances to carry into effect its duties and powers to preserve the health and convenience of the people.

But, aside from all this, the duty of the city is to protect and maintain the health and convenience of the people; and that sewers are necessary for the health and convenience of the people need not be discussed. They are not only a convenience, but are a necessity, as all people know in a city of the size of Marshalltown; that is to say, while the sewers and basins need not be of a particular pattern, the filth must be carried off. And it must be carried away, and all the distance away, and not part of the way. And it does not follow that the distance is to be measured in feet and inches. But it is a necessity that it be carried to such place as not to be harmful to others, as well as to remove the causes of pestilence in the city. And in the language of Judge Dillon in his work on Municipal Corporations:

"In doing this, the city must have a choice of means adapted to ends, and are not to be confined to any one mode of operations."

As to the implied powers of a city, in connection with, or in the absence of expressly conferred powers, I am unable to reach any other conclusion than that the city had the power. The authorities are very numerous. Some of the following hold, and the reasoning in others in my judgment conclude, the question. Crawfordsville v. Braden, 28 N. E. 849, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. Rep. 214; Myer v. Muscatine, 1 Wall. 384, 17 L. Ed. 564; Drexel v. Town of Lake, 127 Ill. 54, 20 N. E. 38; Cochran v. Village, 138 Ill. 295, 27 N. E. 939; Maywood v. Village, 140 Ill. 216, 29 N. E. 704. It is said that there is a legislative construction in conflict with the foregoing by reason of chapter 37, p. 28, Acts 30th Gen. Assem. 1904. That statute expressly conferred the power, but at a date subsequent to the statute. I fully appreciate the force and weight to be given such construction. But we all know that many statutes are enacted to get rid of conflicting holdings of the courts. Others are enacted to make clear that which is in dispute, and just such disputes as we have in the case at bar. Sutherland on Statutory Construction, § 311, says:

"Legislative construction of old laws has no judicial force. Whether right or wrong the courts must determine the proper interpretation from the statutes themselves. A practical construction of a statute of doubtful meaning,

long continued and acquiesced in, and which has operated as a rule of property, and under which many important rights have accrued, will seldom be disturbed." Crawfordsville v. Braden, 28 N. E. 849, 130 Ind. 149, 14 L. R. A. 268, 30 Am. St. Rep. 214; Elliott on Streets, par. 469.

In my opinion the late statute is declaratory of what was regarded as the law by the courts. The contract in suit does not relieve the company from taxation, a scheme so denounced by Justice Miller in speaking for the Supreme Court in Topeka v. Loan Association, 20 Wall. 655, 22 L. Ed. 455. The company was to be taxed, but a credit of like amount was to be made on the obligation. And this plan was upheld by the Iowa Supreme Court in case of Grant v. City of Davenport, 36 Iowa, 396. The Iowa Supreme Court has adhered to that holding many times since, and the courts of other states have many times followed it.

Without discussing the many questions further, I am content with the foregoing.

The several demurrers will be overruled.

UNITED STATES v. PENNSYLVANIA R. CO.

(District Court, W. D. New York. April 4, 1907.)

1. CARRIERS—DISCRIMINATION—INDICTMENT—JOINT RATES—FILING.

   Where in a prosecution against a carrier for discrimination in violation of the Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158], the indictment alleged that a common arrangement existed between defendant and three other connecting carriers named for a continuous forwarding of property, in interstate commerce, between two specified points, and that defendant kept open for public inspection its printed tariff of rates, and filed the same as required by law, with the allegation that the shipment in question was accompanied by written shipping orders, waybills, and transfer slips showing a continuous shipment between such points, it sufficiently charged the establishment of a joint tariff of rates for the commodity in question, without alleging that all the connecting carriers concurred in such joint rate, or that it was filed with the interstate commerce commission by their joint action.

2. SAME—JOINT RATE—DEPARTURE.

   Where a tariff has been established on a commodity for a through interstate shipment, as provided by Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158], there can be no departure therefrom unless made according to law.

3. SAME—DIFFERENT ROUTES.

   Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158], declares that it shall be unlawful for any common carrier, party to any joint tariff, to charge or receive a greater or less compensation for the transportation of persons or property or for any services in connection therewith, between any points as to which a joint rate is named thereon than specified in the schedule filed by the commission in force at the time. *Held*, that the words "between two points" did not limit such section to points on the established route, but that the section prohibited the transportation of property between terminals in different states at a greater or less rate than the established rate, without reference to routes.

4. SAME—INDICTMENT.

   Where an interstate carrier was indicted for charging a lower rate than that established by a filed joint tariff over a specified route for

transportation of petroleum between the same termini over a different route, the indictment was not defective for failure to allege that the lower rate over the latter route was not scheduled and filed as required by Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158].

5. SAME—BURDEN OF PROOF.

In a prosecution of an interstate carrier for charging a less rate for the transportation of petroleum between two specified termini in different states than that scheduled in a filed joint tariff, in violation of Interstate Commerce Law, Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158], the burden is on the government to show a common arrangement for a continuous carriage between the points mentioned in the filed joint tariff.

6. SAME—INDICTMENT—THROUGH SHIPMENT.

An indictment against an interstate carrier for discrimination alleging that, under a common arrangement between the connecting carriers, the commodity which was contained in tank cars was transported without stoppage or interruption and was accompanied by written shipping orders, waybills, and transfer slips indicating a through transportation, the rate and place of destination, sufficiently alleged prima facie a common arrangement between the carriers for a through shipment.

On Demurrer to Indictment.

Charles H. Brown and S. Wallace Dempsey, for the United States.
Frank Rumsey, for defendant.

HAZEL, District Judge. The indictment in 23 counts charges that the defendant, the Pennsylvania Railroad Company, the New York Central & Hudson River Railroad Company, the Boston & Maine Railroad Company, and the Rutland Railroad Company established a joint traffic arrangement for the transportation of petroleum from Olean, N. Y., to Rutland, Vt., and a schedule showing the rates and charges for the transportation thereof between such points to be 19 cents per 100 pounds was filed with the Interstate Commerce Commission; that subsequently, while said traffic arrangement was in force, the defendant transported petroleum in tank cars from Olean to Rutland for the Standard Oil Company of New York over another route at the rate of 16.1 cents per 100 pounds, under an alleged arrangement for a continuous carriage with the New York Central & Hudson River Railroad Company and the Rutland Railroad Company, connecting carriers; and that the defendant deviated from the joint rate so published and filed in giving the Standard Oil Company a concession whereby its product could be forwarded to Rutland at less than the established rate. The provision of section 6 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3158]), under which the offense is charged, reads:

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."

The twenty-fourth count charges the defendant with a violation of the Elkins act in willfully failing to file and publish the tariff arrangement between the defendant and the connecting carriers over whose

lines the commodity was transported. The defendant has demurred to the indictment on the grounds that it does not allege a joint tariff arrangement between the defendant and the three mentioned connecting carriers; that no deviation from an established rate is shown; that it is not alleged that the rate at which petroleum was conveyed was not duly published and filed; that the indictment discloses an intrastate shipment, and accordingly the defendant could legally forward the freight over a different route specified between the same termini. The objections will be considered briefly in the order stated.

1. The allegations that a common arrangement existed between the defendant and the three connecting carriers named for a continuous forwarding of property, in interstate commerce, from Olean to Rutland, and that the defendant kept open for public inspection its printed tariff of rates and filed the same as required by law, together with the allegation that the shipment was accompanied by written shipping orders, waybills and transfer slips showing a continuous shipment from Olean to Rutland, sufficiently charge prima facie the establishment of a joint tariff of rates for the commodity in question. A specific charge that all the connecting carriers concurred in such joint rate, or that it was filed with the Interstate Commerce Commission by their joint action is not essential to the validity of the indictment. Such allegations would seem to be assertions of fact which may be presumed within the defendant's own knowledge, and therefore particularity of pleading in relation thereto is not necessary. 22 Cyc. 306.

2. In the decisions handed down to-day in the indictments against the Standard Oil Company of New York, this court said that, when a tariff of rates has been established on a commodity for a through interstate shipment under the provisions of section 6 of the interstate commerce act, there can be no departure therefrom unless made according to law. It is optional with railroad companies which have connecting facilities for a through shipment interstate to enter into a compact establishing a joint traffic rate for the continuous shipment of property between termini and for their proportional tariff rates, but, whenever such an arrangement has been made, then the act to regulate commerce steps in and points out to shippers the method by which a uniform rate and equality of treatment may be secured. If section 6 of the act were given the narrow construction claimed by defendant, namely, that the phrase "between two points" is limited to points on the established route and does not extend to any other route which the carrier may secretly establish, then manifestly the provisions of the act are ineffectual. The full text of the act to regulate commerce necessitates a broader interpretation, and I think that the clause containing the words quoted forbids the transporting of property between terminals in different states at a greater or less rate than the established rate.

3. The next point relates to the failure to allege in the indictment that the rate over the so-called Norwood Route, over which the property was conveyed to Rutland, was not published and filed. If such rate in fact was published and filed as required by law, evidence thereof may be given by the defendant on the trial. It is undeniable that several continuous routings between points in different states and different tariff rates between the same termini are not forbidden by the

statute. A publication and filing, however, of such established tariff rates by carriers subject to the provisions of the act for the information and inspection of shippers is required to the end that one shipper may not be favored over another. Gulf, etc., v. Hefley, 158 U. S. 101, 15 Sup. Ct. 802, 39 L. Ed. 910. But the omission to allege that the lower rate over the Norwood Route was not scheduled and filed as provided by the act is not thought fatal to the indictment. Upon this point counsel for the government cites United States v. Nelson (D. C.) 29 Fed. 202, and Shelp v. United States, 81 Fed. 694, 26 C. C. A. 570. Although these cases do not decide the precise point here considered, yet the rule there stated by analogy bears upon the same.

4. Further objection is made that the indictment does not properly allege a shipment to Rutland via Rochester and Norwood under through bill of lading and a conventional division of the tariff rate for such shipment, and hence no arrangement for a through shipment within the meaning of the act to regulate commerce is shown. If, as suggested by the defendant, the forwarding was simply from Olean to a point of junction with the New York Central & Hudson River Railroad under a local bill of lading, and was not pursuant to an arrangement for a continuous shipment, then the statute manifestly has not been violated. The burden is upon the government to show a common arrangement for a continuous carriage between the points mentioned. Upon this point the case of Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, is illuminative. There it is held:

"That when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce."

And the court, continuing, says:

"When we speak of a through bill of lading, we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management, or arrangement might not be otherwise manifested."

See, also, United States v. Seaboard Railway Co. (C. C.) 82 Fed. 563.

In United States v. Camden Iron Works (D. C.) 150 Fed. 214, Judge Holland, on motion in arrest of judgment and for new trial, substantially says that any evidence which tends to establish that a commodity was transported on a through bill of lading or any other document or writing from any place in the United States, the shipment being interstate upon a contract of continuous shipment, the defendant must be deemed to have subjected its road to an arrangement for a through forwarding of freight within the purview of the act to regulate commerce. The indictment in this case specifically alleges that under a common arrangement between the carriers the commodity, which was contained in tank cars, was transported without stoppage or interruption, and was accompanied by written shipping orders, waybills, and transfer slips, indicating a through transportation, the rate, and place of destination. This allegation I think is prima

facie evidence that the shipment was under a common arrangement between the carriers for a through shipment.

5. The fifth point relates to the claim that different rates for transportation between the same termini may exist contemporaneously, and are available to both shipper and carrier. I have already intimated my views upon this point. My attention has not been directed to any objection in the statute to the establishment of several continuous routes between points located in different states under a conventional division of the charges. The cases cited upon this proposition by the defendant (Pankey v. Richmond & Danville Co., 3 Interst. Com. R. 33, and Dewey Bros. Co. v. B. & O. R. R. Co., 9 Interst. Com. R. 481) are not thought to throw any particular light upon the subject under consideration. The defendant contends particularly that the failure to allege in the indictment the existence of a joint rate with the carriers of the petroleum in question was a fatal defect in pleading, and, moreover, that the intrastate character of the shipments affirmatively appears from the allegations relating to a total rate charged. As stated elsewhere in this decision, it is incumbent upon the government to show a common arrangement for a continuous shipment under a conventional division of the tariff rates with the carriers mentioned in the indictment; but such an arrangement may be shown in the manner set forth by the Supreme Court in Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com., supra. See, also, United States v. De Coursey (D. C.) 82 Fed. 302. The cases cited apparently are a complete answer to the point that the consent of the other connecting carriers to the establishment of a joint rate is not shown. The concurrence would seem to be shown by the facts contained in the indictment charging an arrangement with the other railroad companies for a through shipment of petroleum at an agreed rate from Olean to Rutland. The manner in which the entire rate charged the shipper was apportioned among the carriers is unimportant. Under the circumstances, the defendant became subject to the provisions of the interstate commerce act, and in my opinion was obliged for the benefit of the public to file a schedule of its rates with the interstate commerce commissioners.

The indictment sufficiently charges, first, a deviation from joint tariff rates for the transportation of petroleum from Olean to Rutland, a rate which had been filed and scheduled in accordance with the law; and, second, that the defendant willfully failed to file and publish the tariff of rates over the Norwood route, the route over which the commodity was conveyed.

It follows that the demurrer interposed by the defendant must be overruled.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(District Court, W. D. New York. April 4, 1907.)

1. CARRIERS—INTERSTATE COMMERCE—TRAFFIC—FAILURE TO FILE—INDICTMENT.
An indictment against a carrier for failure to file its tariff between intrastate points as a part of an interstate shipment of petroleum in violation of Elkins act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) alleged that a nine-cent rate per 100 for carrying petroleum in tank cars between designated intrastate terminals was established and in force under a common arrangement between connecting carriers named for a continuous shipment; and that it was agreed that defendant and the P. Railroad Company, which was to receive nine cents a barrel, should collect a separate freight charge, while the other carriers, parties to the common arrangement, should receive $23 for each tank car of oil transported from one of such terminals to a point in another state, making the aggregate charge per hundred pounds for transportation from the initial point of shipment to destination 15.34 cents. The indictment also alleged that each of the shipments were under shipping orders, transfer slips, and waybills, showing that the commodity was to be transported from the initial shipping point by continuous route to destination without unloading or transhipment. *Held*, that such allegations sufficiently showed that defendant's road, though entirely an intrastate railroad, was part of a joint through route over which interstate commerce was transported, and was therefore subject to the provisions of such act.

2. SAME—SEVERAL CARRIERS—DUTY TO FILE RATES.
Under the interstate commerce act (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380), as amended March 2, 1889 (25 Stat. 855, c. 302, § 1 [U. S. Comp. St. 1901, p. 3156]), requiring several common carriers operating a through line engaged in interstate commerce to file schedules of rates constituting the basis of a through interstate rate, each carrier, though operating a line wholly within a state, which line is a portion of a through route engaged in interstate commerce through a common arrangement between several connecting carriers, is bound to comply with such act.

3. SAME—INDICTMENT—COMMON ARRANGEMENT.
An indictment of a carrier for failure to file its tariff of rates for petroleum, established under a common arrangement for interstate shipment, in violation of the Elkins act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), alleged the establishment of a rate for carrying petroleum between intrastate terminals under a common arrangement for a continuous interstate shipment, and that each of the shipments under such rate were under shipping orders, transfer slips, and waybills, showing that the commodity was to be transported from the point of shipment to destination by a continuous route without unloading or transhipment. *Held*, that the indictment sufficiently charged a common arrangement between the various carriers for a through interstate shipment under a joint tariff.

4. SAME—STATUTES—REPEAL.
Under Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], providing that the repeal of any statute shall not operate as a release from liability incurred under such statute unless the repealing act shall expressly so provide, the saving clause contained in the Hepburn act (Act June 29, 1906, § 10, 34 Stat. p. 584, c. 3591), relating to interstate commerce, did not repeal Elkins act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), in so far as it affected an indictable offense thereunder, previously committed.

[Ed. Note.—Construction and operation of provisos, exceptions and saving clauses, see note to United States v. R. F. Downing & Co., 76 C. C. A. 381.]

On Demurrer to Indictment.

Charles H. Brown and S. Wallace Dempsey, for the United States.
Charles A. Pooley, for defendant.

HAZEL, District Judge. The defendant, the New York Central & Hudson River Railroad Company, a domestic corporation, stands indicted with having knowingly failed to file with the Interstate Commerce Commission its tariff of rates and charges for conveying petroleum from Rochester to Norwood, in the state of New York, which it had established under a common arrangement with the Pennsylvania Railroad Company, the Central Vermont Railway Company, and the Rutland Railroad Company for a continuous carriage interstate from Olean, N. Y., to Burlington, Vt., in violation of section 1 of the Elkins Act, passed February 19, 1903. Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]. The defendant demurs to the indictment on the ground that the shipments complained of were intrastate, and therefore the provisions of the act to regulate commerce relating to publishing and filing tariff rates do not apply to such shipments. Another ground of demurrer is that the statute relating to the alleged offense was repealed prior to the indictment. The argument advanced at the hearing by the defendant and repeated in its brief is directed principally to the alleged insufficiency of the indictment, in that it does not charge a common arrangement between the carriers for a continuous shipment, and that it appears therefrom that no joint tariff of rates was established, but that the charge was simply the local rate.

A brief consideration of the objections urged will suffice. The entire road of the defendant is in the state of New York, and concededly it was free from any obligation to carry the oil under the provisions of the interstate commerce act. Upon this demurrer, however, the truth of the facts alleged in the indictment must be assumed, and thus postulated I think the defendant by its acts became amenable to the control of said act. The indictment alleges that a nine-cent rate per 100 pounds for carrying petroleum in tank cars from Rochester to Norwood, intrastate terminals, was established and in force under a common arrangement between the carriers hereinabove named, for a continuous shipment, and that the defendant and the Pennsylvania Railroad Company, which was to receive 9 cents per barrel, should collect and receive from the shipper a separate freight charge, while the other carriers, parties to the common arrangement, should receive $23 for each tank car of oil transported from Norwood to Burlington, and that the aggregate charge per 100 pounds for transportation from Olean to Burlington was 15.34 cents. There is also an allegation that each of the shipments complained of were under shipping orders, transfer slips and waybills, showing that the commodity was to be transported from the initial shipping point by continuous routing to Burlington without unloading or transhipment. Was the defendant under these conditions subject to the provisions of the interstate commerce act? The answer requires an examination of the pertinent clauses in the act relating to the filing and publish-

ing of the schedule of rates, and is determinable upon the existence of a common arrangement between the carriers for a through shipment and a conventional division of the rates. By the provisions of section 6 of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]) as amended March 2, 1889 (25 Stat. 855, c. 382, § 1), every common carrier engaged in interstate transportation is obliged to print and keep open to public inspection schedules showing the established rates for the transportation of property which are then in force upon its route. Provision is also made for printing the schedule and posting the same in the depot or office of the carrier. The latter provision would seem to apply to a single carrier. In Consolidated Forwarding Company v. Southern Pacific Company, 9 Interst. Com. R. 205, the provision to which reference has just been made is thus interpreted:

"Every continuous rail line or route authorized by the sixth section of the act is of necessity constituted by two or more separate roads uniting by voluntary agreement and fixing joint through rates over the line thus formed. Such a route is in every instance as definite and specific a physical line as is either of the separate roads which constitute it. The formation of through routes is not compulsory, but when established and so long as they exist, the obligations, restraints and regulations of the law attach to them in all respects as fully as to a line composed of a single road. By the provisions of the sixth section of the act two kinds or classes of routes are recognized and provided for. The first is that of a single individual or separate road, which is required to print, keep open to inspection at stations along its line, and file with the Commission such rates of fares and charges for transportation as it may establish. The other is a continuous line or route operated by more than one carrier where the several carriers operating such a line or route establish joint tariffs of rates or fares or charges for such continuous line or route."

In United States v. Wood (D. C.) 145 Fed. 405, the provision was similarly interpreted. And a subsequent clause of the act provides that, where freight passes over continuous lines or routes operated by different common carriers which have established joint tariffs of rates, copies of such joint tariffs shall also be filed with the commission, and be made public by the carriers in the discretion of the commission. Provision is also made for increasing or reducing the joint rates upon notice to the commission. That a schedule of rates must be printed, published, and filed by the carriers operating a single line which extends into or through different states is apparent from a reading of the act. That copies of schedules of tariff rates must be filed to effectuate a continuous transportation pursuant to an agreement between the carriers under a joint tariff of rates is also thought to be quite clear. It is probably true that such provisions relating to the filing of joint rates is somewhat indefinite, in that it does not expressly state that the several carriers, parties to a joint tariff agreement, shall each file such copies; but, as the phrase "the several common carriers operating such line" precedes in the same paragraph the requirement relating to the filing, it is a fair supposition that Congress intended that each of the several common carriers must comply with said provision. Such evidently was the interpretation Justice Brewer put upon this clause. Gulf, Col. & Santa Fé R. Co. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910.

Moreover, this provision of the statute should receive a construction in harmony with the spirit of the act, and, though ordinarily a statute which imposed a penalty is not strictly construed against a defendant, yet, where the manifest purpose of the statute is remedial, the object of the Legislature in enacting the same is the important consideration. Thus interpreted, it is unnecessary for the indictment to specifically charge that none of the other carriers filed copies of the joint tariffs.

In support of the contention that a common arrangement between the carriers named for a through shipment interstate and a joint tariff of rates is not charged in the indictment, reliance is placed upon several prior adjudications, which, in my opinion, do not decide the precise question under consideration. It is true, the Supreme Court in C., N. O. & T. P. Ry. Co. v. Int. Com. Com., 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, says that, in the absence of a through bill of lading for moving freight interstate and an agreement to participate in through rates or charges, an intrastate carrier does not subject itself to the act to regulate commerce. The Supreme Court, however, as pointed out in the quotation from its opinion, found in the decision of this court in United States v. Pennsylvania Railroad Company (this day filed), 153 Fed. 625, does not restrict the term "through bill of lading" to that precise document. In United States v. Chicago, etc., R. Co. (C. C.) 81 Fed. 783, the freight was forwarded on a local bill of lading under an arrangement limiting the transportation to the carrying line. In United States v. Geddes, 131 Fed. 452, 65 C. C. A. 320, there is no through bill of lading, and the freight was unloaded at the connecting points, where it was delivered to the defendant for forwarding at the local rate and without agreement to divide the tariff charges. In United States v. Mellon (D. C.) 53 Fed. 229, the indictment was held bad because it failed to charge the existence of a joint tariff under an agreement between the several carrying roads. The court held in its opinion that such an indictment was open to the presumption that merely the local rate was exacted by the carriers. It is not necessary to disagree with that decision; for in my view of this contention the facts pleaded in the indictment tend to disclose a joint rate, as that term is legally defined, although such rate was to have been separately collected by the different carriers. In L. & N. R. R. Co. v. Behlmer, 175 U. S. 648, 20 Sup. Ct. 209, 44 L. Ed. 309, the carriers divided the tariff rate under an agreement between them, and added the local rate for shipment to Summerville to the Charleston rate, so that the rate consisted in part of a joint tariff and in part of a local rate, and it was contended that no continuous line was constituted under the interstate commerce act, but the court held that such an arrangement comes under its prohibitions. Counsel for defendant earnestly argues the point that, as there was no through bill of lading in the case at bar, the shipment must be considered as wholly within the state. But, as stated, I do not think that a continuous transportation interstate is evidenced only by a through bill of lading. It is true that several of the cases to which attention has been directed, and which are cited in defendant's brief, lay stress upon the forward-

ing of the freight under a through bill of lading as indicative of a common arrangement to convey the property interstate, but in view of the decision by the Supreme Court in the case of C., N. O. & T. P. Ry. Co. v. Int. Com. Com., supra, and the decisions in United States v. Seaboard Ry. Co. (C. C.) 82 Fed. 564, and United States v. Camden Iron Works, 150 Fed. 214, and the waybills and shipping orders, together with the assertion in the indictment that the carriage was without interruption or unloading and under a common arrangement for through routing, the shipment here cannot be regarded as an independent carriage by the defendant from Rochester to Norwood. In United States v. Wood (D. C.) 145 Fed. 405, it was held that the test of subjection to the act was through routing in interstate commerce. The court says:

"When a carrier unites with one or others in making a rate for interstate traffic, and a through bill is issued therefor, it is subject to the act. An express agreement for a through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers in interstate traffic, under through bills or any arrangement for a continuous carriage over their lines, constitutes assent to such common arrangement for the carriage within the meaning of the act."

Since the briefs were filed herein, counsel for the defendant has directed my attention to the case of Gulf, Col. & Santa Fé R. Co. v. State of Texas (recently decided by the Supreme Court of the United States) 27 Sup. Ct. 360, 51 L. Ed. ——. In that case the shipment was unquestionably a local one, nor was the shipment accompanied by a bill of lading from Texarkana to Goldthwaite until after the arrival of the freight at Texarkana. The distinction between that case and the case at bar is quite clear; for here, according to the indictment, the rate, though separately charged and collected, was pursuant to an arrangement for a through carriage. Considering the indictment in its entirety, I think it sufficiently charges a common arrangement between the carriers for a through shipment interstate under a joint tariff of rates to effectuate such carriage, and the defendant is liable for omitting to file the schedule of rates in accordance with the provisions of the act.

The next point is that the saving clause contained in section 10 of the Hepburn act, approved June 29, 1906 (34 Stat. p. 584, c. 3591), repeals section 1 of the Elkins act, under which the defendant is indicted. Upon this point it is important to consider section 13 of the Revised Statutes of the United States (Act Feb. 25, 1871, c. 71, § 4, 16 Stat. 432 [U. S. Comp. St. 1901, p. 6]), which substantially provides that the repeal of any statute shall not operate as a release from liability incurred under such statute, unless the repealing act shall expressly so provide. The defendant, referring to the saving clause in the Hepburn act, contends that the words, "shall not affect causes now pending in courts of the United States," must be given the full weight intended by Congress—that it is a repealing act operating as a remission of all prior offenses against the provisions of the statute under consideration. The question submitted is not free from difficulty, but I have reached the conclusion that the language of section 10 is not susceptible to the broad scope claimed by the defendant. In the

absence of language expressing such intention, the release from liability and punishment by Congress of prior offenders against the provisions of the Elkins act is not implied, although apparently from an abundance of caution, and perhaps to "prescribe a mode of procedure," Congress inserted the provision in the repealing act that pending causes should not be affected thereby. There has been much discussion in the courts of the United States in relation to section 13 of the Revised Statutes (United States v. Barr, 24 Fed. Cas. 1016; United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480; Lang v. United States, 133 Fed. 201, 66 C. C. A. 255), and its proper construction has, indeed, been exhaustively considered and passed upon in connection with the Elkins act by Judge Landis in United States v. Standard Oil Co. (D. C.) 148 Fed. 719, by Judge Morris of the Fourth Division, District of Minnesota, in United States v. Chicago, etc., R. Co., 151 Fed. 84, and by Judge Holt of the Southern District of New York, in United States v. Delaware, L. & W. R. Co. (C. C.) 152 Fed. 269. In view of the complete discussion of this question in these opinions, and the reasons therein assigned for the conclusions which have been arrived at, I do not regard it necessary to pass upon the objections as fully as if the proposition came before me as an original one. There appears to be a divergence of judicial view upon the subject. See dissenting opinion of Judge Jenkins in Lang v. United States, supra, and by Judge Lochren in United States v. Chicago, etc., R. Co., supra. The weight of authority, however, would seem to be that under section 13 of the Revised Statutes, which concededly abrogated the common-law rule no repealing statute can be given the effect of putting an end to the punishment for an offense previously committed and for which an indictment will lie, unless the repealing act expressly so declares. Such is not the saving clause in question, and accordingly the objection is not sustained.

The demurrer is overruled.

THE MAINE.

THE MANHATTAN.

(District Court, S. D. New York. May 3, 1907.)

COLLISION—STEAM VESSELS MEETING—MUTUAL FAULT.

A collision in the East river, near the Brooklyn Bridge, between a barge in tow on the starboard side of the steamer Manhattan, bound up the river to Pier 24 on the Manhattan side, and the steamer Maine, bound from New Bedford to her pier in the North river, *held* due to the fault of both steamers. The Manhattan *held* in fault for attempting to pass on the starboard side of the Maine from a head and head position without an agreement, and for stopping and reversing after starboarding her helm on failing to receive an answer to her signal, which threw her directly across the Maine's course, and the Maine for not answering signals promptly and for excessive speed, but not for being somewhat on the Brooklyn side of the channel as she was required by the presence of other vessels to depart from the East river rule of the state to keep in the middle, and as the narrow channel rule does not apply to those waters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 40.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

In Admiralty. Suit for collision.

Kneeland & Harrison, for libellant.
Wing, Putnam & Burlingham, for the Maine.
Carpenter, Park & Symmers, for the Manhattan.

ADAMS, District Judge. This action arose out of a collision which occurred slightly above the Brooklyn Bridge in the East River on the 1st day of September, 1905, a few minutes after 8 o'clock in the morning, between the barge Abram Collerd, being towed on the starboard side of the steamer Manhattan, and the steamer Maine, which struck the Collerd on the starboard side about amidships, causing her to capsize and lose her deck load of pig lead and vitriol, valued at over $10,000. The libellant was the owner of the cargo and brought the action against both steamers to recover the said value. The collision was about one-third of the way from Brooklyn to Manhattan. The weather was clear and the tide flood, of three or four knots in strength.

The Collerd was taken in tow at Perth Amboy early in the morning by the Manhattan on a hawser which she continued to use until in the vicinity of pier 24 when the hawser was taken in and the barge placed alongside, projecting about 20 feet ahead of the Manhattan, which was about 95 feet long, somewhat shorter than the barge. They were bound for the Joy Line pier, No. 24 on the Manhattan side of the river.

The propeller Maine, 302.7 feet long and 44 feet beam, was bound from New Bedford to her pier in the North River, with freight and passengers. One of the latter was a Mr. Cushman, a member of the admiralty bar of this court, who has given some valuable testimony in this complicated case with respect to the movements of the Maine. As the vessels approached each other they were about the same distance from the Brooklyn shore and in situations to pass port to port upon porting their helms slightly. About two days before the Maine had broken off one of her propeller blades and she was navigating with three blades which somewhat impaired her speed in going ahead and in reversing and gave her a rough and unsteady motion.

At and near the place of collision the river was very congested, there being numerous vessels proceeding up the river and there was a schooner anchored under the bridge near the Brooklyn shore. There was also a schooner going to the eastward under full sail.

The libellant claims that both vessels were in fault:

The Manhattan.

1. For blowing a signal of two whistles and attempting to cross the course of the Maine.

The Maine.

For not promptly answering the Manhattan's signal of two whistles.

2. For proceeding down the river on the Brooklyn side.

3. For proceeding at an excessive rate of speed under the existing conditions and in not checking her speed and reversing sooner than she did.

The Manhattan charges the Maine with fault, as follows:

1. In proceeding upon the southerly side of the middle of the river in violation of the laws of the State of New York.

2. In failing to answer the Manhattan's signal of two whistles promptly and in failing to give any signals to the Manhattan until a collision was imminent.

3. In failing to proceed at a moderate rate of speed having due regard to the presence of many vessels in that neighborhood and failing to stop and reverse in time to avoid collision.

4. That the Manhattan was proceeding in accordance with the usual custom for tows upon the flood tide in making a landing upon the Manhattan shore and the Maine was proceeding in violation of the statute both with respect to locality and speed.

The Maine charges the Manhattan with fault, as follows:

1. In not keeping a good lookout.

2. In giving a signal of two whistles when she was nearly head and head with the Maine and in attempting to cross the bow of the Maine instead of stopping until the carfloats and the schooner had passed.

3. In stopping and reversing after she had given a signal of two blasts and thus bringing her tow into collision with the Maine.

4. In not giving a signal of one whistle and porting her helm and passing the Maine port to port.

The Manhattan.

When the vessels were about a fourth of a mile apart and each the same distance from the Brooklyn shore, say 500 feet, the Manhattan blew a signal of two whistles to the Maine, which the Manhattan claims was not answered by the Maine and therefore the Manhattan stopped and reversed her engines, which had the effect of stopping her in the water and of throwing her head to the port. The Manhattan claims that being bound to the Manhattan shore she was justified in following the Brooklyn shore in order to have ample room for the purpose of manœuvring for her destination on the other side which brought her into the position she first occupied with respect to the Maine, that is practically head and head. There can be no doubt that if she had continued on the contemplated course to Manhattan, she would have passed safely to the starboard of the Maine. The question of a reply from the Maine to the Manhattan's signal of two blasts therefore becomes of some consequence in the case because there can be no doubt that it was by reason of the absence or supposed absence of the reply, that the Manhattan stopped broadside ahead of the Maine. It will be noticed that the Maine's charges of fault are based mainly upon the actions of the Manhattan in attempting a two whistle course when a one whistle course was the proper one under the rules. Whether or not there was a timely reply from the Maine to the proposed course of the Manhattan will be hereafter discussed when the Maine's alleged faults are considered. In any event, it was the manifest duty of the Manhattan in proposing a deviation from the rule to pass the Maine to the right, to obtain her consent before acting, instead of which the Manhattan put her wheel to starboard when or before she first blew to the

Maine and kept it so. Her bow was thus thrown to port and while heading nearly across the river, she stopped and reversed. She was thus thrown directly in the Maine's path and the collision occurred as stated above. The Manhattan was obviously in fault in this respect.

The Maine.

1. The Manhattan blew the first signal of two whistles when the vessels were about 1500 feet apart. The Maine claims that she answered promptly, but while it is difficult, in the midst of so many conflicting estimates, including those from outside vessels, to determine with any degree of accuracy when the reply was given, I have no doubt that some little time elapsed, enough to cause the Manhattan to be uncertain with respect to any consent to her proposed manœuvre and to cause her reversal. In this particular the Maine was in fault.

2. The Maine was not in fault for her position in the river. She was necessarily somewhat on the Brooklyn side on account of several vessels passing her starboard to starboard and therefore could not be in the middle of the river under the state law. It is also urged against her that she should have been on the Manhattan side of the river under the Narrow Channel Rule but it has been held that such rule does not apply to the East River. The question was presented to this court some time since and so decided in The Hartford (D. C.) 125 Fed. 559, where it was said (560):

"The rule requiring vessels to keep in the middle of the East River established by state statute has not been changed by the pilot rules enacted by Congress June 7, 1897, c. 4, 30 St. 96 [U. S. Comp. St. 1901, p. 2876], the object of the local rule being to keep vessels away from the vicinity of the piers, in order that vessels properly using the wharves shall not be imperiled by vessels going up or down the river. The Breakwater v. New York, L. E. & W. R. Co., 155 U. S. 252, 15 Sup. Ct. 99, 39 L. Ed. 139. And the United States statutory regulations for the prevention of collisions, especially provide (article 30) that:

'Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbor, river, or inland waters.' Act Aug. 19, 1890, c. 802, 26 Stat. 328 [U. S. Comp. St. 1901, p. 2871]."

This was affirmed upon the opinion of this court. 135 Fed. 1021, 68 C. C. A. 230.

3. The speed of the Maine was apparently excessive. It is not claimed that she was proceeding over the ground at a rate of less than 8 miles as she approached a point where it became necessary to take precautions on account of the presence of other vessels. It appears that prior to the collision she stopped and reversed her engine but did not succeed in stopping her headway even with the aid of the tide and cut almost through the barge at her deck and to her keel below. This was no doubt partly accounted for by the movement of the barge with the tide but such fact does not seem to explain the damage done and I think the testimony of several witnesses that the Maine was going ahead, at variously estimated rates of speed, when the blow came must be credited. The engineer of the Maine, who was handling the engine, said that the bell rang for Hunts Point at 7.08 o'clock, and the steamer was then going hooked up with the throttle about two-thirds open. He

further said that he did not know of the collision until an oiler advised him of it and prior to that, at 8.08 o'clock, he received a bell to slow down; in about 15 seconds he received another bell to stop; that in two minutes received two bells to back and a jingle and he threw the engine wide open; that then he received another jingle and he put the pass over on. This pass over let the live steam into the engine and caused the low pressure to do more work. It was necessary because of the defective condition of the propeller, which a couple of days before had lost one of its blades and was not as efficient as when in perfect condition. The loss of the blade greatly increased the vibration but does not seem to have affected the working of the boat apart from reducing her speed a knot or two but the resort to the pass over was considered by the engineer necessary in view of the propeller's condition. From Hunts Point to the place of collision is approximately 10 miles. Having covered this distance in an hour, notwithstanding the adverse tide, which of course was more of a deterrent in Hell Gate and that vicinity, where the current ran at a greater speed, her speed at or just before reaching the place of collision must have been considerably in excess of the statutory rate of eight miles an hour allowed in this vicinity. It is also evident that the Maine did not stop and reverse in time and should be found in fault in such respects.

The foregoing requires the entry of a decree for the libellant against both vessels, with an order of reference.

THE AUGUST BELMONT.

(District Court, S. D. Georgia, E. D. April 24, 1907.)

1. ADMIRALTY—PLEADING—OBJECTIONS TO JURISDICTION.
   An objection to the jurisdiction of a court of admiralty over a cause should be made by plea, or, where the want of jurisdiction is palpable, by demurrer.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 260.]

2. SAME—JURISDICTION—SUIT BY SEAMEN AGAINST FOREIGN VESSEL.
   A United States court of admiralty has jurisdiction of a suit by a seaman against a foreign vessel to recover wages, and the exercise of such jurisdiction is discretionary. Where the libelant is an American citizen, signed in an American port, although on board the vessel, and claims to have been wrongfully discharged, jurisdiction will be entertained.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 134.]

3. SEAMEN—WAGES—ADVANCES.
   Evidence considered, and *held* to show that the voyage for which a libelant signed as a seaman was to terminate in a foreign port, and that he was therefore rightfully discharged in such port, but that he was entitled to recover a sum deducted from his wages on account of an advance payment made by the master when libelant signed in an American port, in violation of Act June 26, 1884, c. 121, 23 Stat. 55 amended by Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3080].

In Admiralty. Suit by seaman for wages.

William R. Hewlett, for libelant.

Robert L. Colding, for respondent.

SPEER, District Judge. John Salter, a seaman and American citizen, has presented a libel in rem against the steamship August Belmont and her equipment. He alleges that in September, 1905, he engaged as coal passer with the master of the vessel for a voyage from Pensacola, Fla., to Germany and return, for wages of $30 a month. When the vessel reached Bremen, Germany, he claims that without cause he was unlawfully discharged. The American consul in that city then appealed to the master on his behalf, and he was permitted to return to the vessel as a "workaway"—a term applied to destitute seamen who work their passage home without compensation. The August Belmont, after touching at Hamburg, sailed for Savannah, where the libelant left the vessel. He claims that he was paid by the British consul at Bremen only £3 English money for the 25 days of the voyage from Pensacola, and $10 was illegally withheld. For this and other alleged earnings for the return trip to Savannah, besides a month's additional pay, authorized as a penalty for improper discharge by section 4527, Rev. St. [U. S. Comp. St. 1901, p. 3077], he brings his libel. The master contends that Salter was legally discharged, because the voyage ended at Bremen by the terms of the agreement under which he shipped, and that the money claimed to have been unlawfully withheld from his wages properly belonged to the master for a debt which the latter had personally paid for Salter, with his full and free consent, before the vessel left Pensacola.

The respondent further states that:

"The contract entered into was made on board a British steamship, before the British consul, at a time when said vessel was not within the jurisdiction of the Southern District of Georgia, and the contract terminated in Bremen, Germany, and, having been so made, the District Court of the United States is without jurisdiction of the subject-matter."

The question of jurisdiction is thus generally raised by answer. Proper pleading, however, requires that such defenses should be made by plea, or, where the defect is palpable, by demurrer. Knight v. Attila, Fed. Cas. No. 7,881; Teasdale v. The Ramler, Fed. Cas. No. 13,815. While this is true, the court has no doubt of its jurisdiction to determine the merits of the controversy. There are numerous precedents, but the rule is defined by Mr. Justice Bradley, in the Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152, as follows:

"Circumstances often exist, which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum, as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts, or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category, and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction, not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul."

Here, it will be observed, the libelant is an American citizen, the parties and the vessel are within reach of the processes of the court,

the voyage is ended, and the libelant, as contended, wrongfully dismissed. In the case of the Amalia (D. C.) 3 Fed. 653, it was held:

"It cannot admit of question that the District Court, unless restricted by some treaty stipulation, has jurisdiction in a case for wages against a foreign vessel, and that the exercise of such jurisdiction is discretionary."

Indeed, even where all the parties, the vessel, and the subject-matter are foreign, the courts of the United States constantly exercise their authority to prevent and ameliorate cruelty and injustice. The common seaman has ever been the ward of admiralty tribunals the world around. The principle is stated by Judge Simonton, in Wilson v. The John Ritson (D. C.) 35 Fed. 664:

"We have a case of a controversy between master and seaman of a foreign vessel, under a foreign flag, growing out of a contract made in their own country. There can be no question that, in the absence of treaty regulations to the contrary, this court has jurisdiction of the question, and that the exercise of the jurisdiction is wholly within its own discretion."

And the same doctrine is reiterated in the more recent case of Fairgrieve v. Marine Insurance Company of London, 94 Fed. 687, 37 C. C. A. 190, where said Judge Caldwell for the Eighth Circuit Court of Appeals:

"It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court."

Other authorities to the same effect are: 2 Pars. Mar. Law, 543; The Karoo (D. C.) 49 Fed. 651; Bolden v. Jensen (D. C.) 70 Fed. 505. It is therefore obvious that, although the libelant may have signed shipping articles aboard a British ship, the conditions of his agreement were, nevertheless, subject to the regulations established by Congress, and to the remediable cognizance of our admiralty courts.

William Barnes, the master, testifies that the shipping articles of the vessel were filed with the British Board of Trade, and parol evidence has been submitted to show their tenor. The master testifies that Salter signed the articles on board the ship at Pensacola, in the presence of the British consul (now dead) and two witnesses, and that, previous to his signature, the consul read the articles, and said to each seaman: "This voyage is to terminate on the Continent, or the United Kingdom, at the master's option." The vessel, it appears, left Pensacola on September 30th, and, having reached Bremen on October 22d, Salter and others of the crew were discharged and paid on the 24th by the British consul at that port. The master denies that the libelant claimed any right to be brought back to America, and that his first intimation of this was a letter from the American consul on behalf of Salter and two other men. "Out of pity," he says, "I agreed to bring him back. The other men told me they would not work for nothing, and I said, 'There is the shore.' This man said the same thing, but, when I told him that, he said, 'Oh, captain, I want to go over,' and he stayed." The captain testifies that the libelant did his work as fireman on the voyage to Bremen in an incompetent, indifferent way, and on his return acted only as "a workaway on deck, and had no employment in the fireroom."

John Clark, first mate of the vessel, corroborates the master's testi-

mony that Salter was given distinctly to understand before he signed the shipping articles that the voyage was to terminate in the United Kingdom or on the Continent, and that all of the crew's contracts terminated at Bremen, and he as well as others now on the vessel were employed under fresh agreements.

Matthew McKenzie, the engineer, testifies, substantially to the same effect, that Salter left the ship when he was paid off, and made no appearance until the vessel left Bremen for Hamburg.

The evidence shows that the libelant was an ignorant, country negro, whom the engineer testifies was shipped at Pensacola because a yellow fever epidemic made good seamen very scarce. On his own behalf, he testifies that he signed as a coal passer, and told the master: " 'I will sign provided you bring me back to the port you got me from,' and he said 'If you are a good boy, and work up all right, I will do that.' " He admits, however, that he signed the shipping articles in the presence of the consul, the engineer, and other witnesses.

George James, for the libelant, testifies that the latter understood from the captain that he would be returned to an American port, that the captain said, if he was coming back, he would bring him, and, if not, he would try to get him on some other ship. This, however, is only hearsay evidence of what Salter told the witness, and has little probative value.

The shipping articles are not before the court, but the proof indicates that the voyage was to terminate on the other side of the water, and that Salter understood this. Indeed, the only evidence to the contrary is a vague statement, said to have been made by the master, that, if libelant's work was satisfactory, he would see that he got back to America. Nothing whatever was said as to wages, nor was there any contract even to re-engage the libelant on the vessel. The contract of $30 a month wages, by all the testimony, terminated when the vessel reached Bremen. The libelant, by the permission of the master, slept and was fed on board the vessel for several days after reaching Savannah, until he found employment. His treatment was proper and kindly throughout the voyage. He does not appear to have made any demand for additional wages until the filing of this libel, and his claim therefor will be denied.

There is, however, one item which he may recover. This is the $10 withheld by the master when the crew were paid at Bremen. The master testifies that he personally paid a debt for Salter at his request before the ship left Pensacola, to save the trouble of sending the money from Europe, and he claims he had the right to withhold this amount from the libelant's wages. Such action on the master's part in paying the money and reimbursing himself was clearly in violation of the Revised Statutes of the United States. These provide, in section 10a of Act June 26, 1884, c. 121, 23 Stat. 55, as amended by Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3080]:

"That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. * * * The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after

the same shall have been actually earned, and shall be no defence to a libel, suit, or action, for the recovery of such wages. * * *"

And in section 4548, Rev. St. [U. S. Comp. St. 1901, p. 3088]:

"Moneys paid under the laws of the United States, by direction of consular officers or agents, at any foreign port or place, as wages, extra or otherwise, due American seamen, shall be paid in gold or its equivalent, without any deduction whatever, any contract to the contrary notwithstanding."

The only exceptions to the absolute prohibition against advance payments are in cases of allotments to relatives, and, within strict limits, to creditors for board or clothing. Such a debt must have been contracted prior to the engagement, and, to be valid, the allotment note must be signed and approved by a shipping commissioner and inserted in the shipping articles. Salter testifies that the money was paid to supply him with a bed on board the vessel. If this is true, the violation of the statute is more flagrant. At all events, there has been no compliance with its provisions, and the vessel is civilly liable for the amount, if the master himself has not committed a misdemeanor.

The recovery of the libelant, therefore, will be limited to the amount of this advance payment, and judgment may be entered for him accordingly, with costs.

UNITED STATES v. 218½ CARATS LOOSE EMERALDS

(District Court, S. D. New York. January 11, 1907.)

No. 219.

1. CUSTOMS DUTIES—FRAUDULENT ENTRY—FALSE STATEMENT, ETC.
   The first part of section 9, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], relating to fraudulent or false invoices, statements, practices, or appliances, has application only when such means are employed in connection with goods the importation of which is not concealed.

2. SAME—FORFEITURE—WILLFUL ACT OR OMISSION.
   The penalty of forfeiture prescribed by Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], where any importer is "guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties," is incurred where a passenger on a steamer willfully omits to mention to the customs officials merchandise in his possession.

3. SAME—"BAGGAGE"—ARTICLES ON THE PERSON.
   Precious stones carried loose in a pocket of a passenger arriving in the United States, though not "baggage" within the common-law definition of that term, are baggage within the meaning of section 2802, Rev. St. [U. S. Comp. St. 1901, p. 1873]; and the passenger is bound to declare them in the same way as articles contained in his trunk.

   [Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison's Mfg. Co. v. U. S., 18 C. C. A. 545.]

4. SAME—MERCHANDISE UNLADEN WITHOUT PERMIT—ARTICLES ON THE PERSON.
   Where a person arriving in the United States took with him from the vessel articles which he had willfully omitted to declare to the customs officers, he was guilty of unloading merchandise without a permit, in violation of section 2872, Rev. St. [U. S. Comp. St. 1901, p. 1910].

5. SAME—PRODUCTION OF INVOICE—SMUGGLED GOODS.
Customs Administrative Act June 10, 1890, c. 407, § 4, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1888], requiring the production of an invoice or declaration of imported merchandise, applies only where there has been an actual, intentional entry of merchandise, and not where the entry has been concealed.

6. SAME—SMUGGLING—COMPLETION—SEIZURE WITHIN CUSTOMS LINES.
A person arriving in the United States omitted from his declaration made to the customs officials on shipboard any mention of a package of emeralds contained in his clothing, and at the time of the examination of his baggage on the dock falsely stated to such officers that he had no precious stones in his possession. Said emeralds were then seized under section 2865, Rev. St. [U. S. Comp. St. 1901, p. 1905], providing for the forfeiture of smuggled goods. *Held*, that the act of smuggling was complete when he had passed from the vessel to the shore, and that it was immaterial that he had not gone beyond the customs lines established on the dock for convenience in examining baggage.

On Information for Forfeiture.

Henry L. Stimson, U. S. Atty., and Winfred T. Denison and Felix Frankfurter, Asst. U. S. Attys.

Louis S. Phillips, for claimant.

HOLT, District Judge. This action is brought for the forfeiture of certain emeralds alleged to have been brought into this country in violation of the customs laws. The claimant, Manuel J. Suarez, a resident of Bogota, in the republic of Colombia, South America, arrived at New York on October 3, 1906, on the steamship Oceanic, from England. His native language was Spanish. He could not speak English, but had some knowledge of the French language, although how much does not clearly appear. On the arrival of the ship the customs officer who took the declarations of the passengers asked him, in French, if he understood French, and he said that he did. He asked him how many pieces of baggage he had, and he answered, "Three." The examiner testified that he did not seem to clearly understand his questions as to what particular kind of baggage he had. The examiner thereupon drew his pen through the printed form on the declaration for the insertion of the number of trunks, bags, or valises, boxes, and other packages, and wrote under the head of "Total," at the end, the figure "3." The officer asked him, in French, whether he had anything to declare, whether he had any gifts for other persons, and whether he had anything to sell, to all of which he answered, "No." Thereupon Suarez signed his name at the end of the declaration, and swore to it before the officer. Suarez then left the ship, and went on the dock. He had as baggage a trunk, a box, and two handbags tied together. He stated to the customs officer on the dock that he was going to Colombia, that he wished to leave with the collector the trunk and the box, and that he wished to take with him while in this country the two bags. They were thereupon opened, the contents examined and found to contain nothing dutiable, and were labeled by the customs inspector as being passed. The customs inspector then called another inspector, who spoke Spanish, and directed him to ask Suarez whether he had any precious stones or jewelry upon his person or in his pockets. The inspector did so in Spanish, putting vari-

ous specific and particular inquiries, and to all of them Suarez answered in the negative. He was then taken on board the steamer and searched, and in the pocket of his overcoat was found a package which contained cut emeralds, loose and unpierced, weighing 218½ carats, which were thereupon seized by the government and which are the subject of this suit for confiscation. The information claims that these goods should be forfeited on the ground that the merchandise was imported by means of a fraudulent and false written statement and affidavit, to wit, the sworn baggage declaration, and by means of a fraudulent and false verbal statement, to wit, the false statement that he had not any precious stones in his baggage, and by means of a false and fraudulent practice, to wit, that he had the emeralds concealed on his person at the time of landing, in violation of section 9 of Act Cong. June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], commonly called the "Customs Administration Act." The essential part of such section is as follows:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited."

In my opinion the first part of section 9 relates to fraudulent or false invoices or other papers or statements, written or verbal, or practices or appliances, resorted to or employed in connection with the entry of merchandise, the entry of which itself is not concealed. I think, therefore, that the evidence in this case does not establish the charge contained in the original first cause of forfeiture alleged in the information. Upon the trial, however, the first cause of information was amended by alleging that Suarez was guilty of a willful act and omission by means whereof the United States might be and was deprived of lawful duties accruing upon the said merchandise, to wit, in willfully omitting to mention said merchandise in the declaration and statements, written and oral, made by him to the customs officers. This amendment states a case covered by the latter part of section 9 of the customs administration act, and, in my opinion, is established by the evidence. The baggage declaration which Suarez signed and swore to states, in its printed form, that he arrived with the total of three pieces of baggage, and, regarding the two handbags which were fastened together as one, this statement was correct. I think that, strictly speaking, this package of emeralds was not baggage or a part of baggage. It may, however, have been brought over in one of the trunks, boxes, or bags of Suarez, in which case it would have been his duty to declare it in the declaration. The fact that French was not his native language, and that he was not examined in Spanish at the time the declaration was made, would make it proper not to lay too much weight on his omission to declare these emeralds as part of his baggage, although the inspector testified that he asked him whether he had any-

thing to declare or any gifts, or anything to sell. But the evidence of Hawes, the inspector who spoke Spanish, that he explicitly and repeatedly asked him whether he had any jewelry or precious stones in his pockets or about his person, to all of which questions he replied, "No," satisfies me that Suarez understood the purpose of the inquiry, and was intentionally concealing the fact. He states, in the written statement which he made immediately after the seizure, as follows:

"When the interpreter asked me if I had brought here any jewelry or precious stones, and I told him no, it was not with the intention of denying that I had brought the larger package, but, as they were not intended to be left here, I did not think they should be declared, and especially so as they should be taken charge of by the collector."

I think, therefore, that the evidence establishes that Suarez was guilty of a willful act or omission by means whereof the United States was deprived of the lawful duties accruing upon the emeralds by carrying them concealed in his coat pocket and denying that he had any such precious stones upon his person.

The second cause of forfeiture alleged in the information charges that the emeralds were found in the baggage of Suarez, to wit, in a parcel carried by him in his pocket, and that the merchandise was not mentioned at the time of making entry of his baggage, contrary to the provisions of section 2802 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 1873]. There is nothing in the evidence to show that these stones ever were carried in the trunk, box, or bags constituting Suarez's baggage. Even if they had been, they would not be strictly baggage. These were loose unpierced cut emeralds. They could not be used for any personal purpose, and did not constitute baggage, in the common-law sense of that term. The steamship company would not have been subject to the liability which a common carrier is under in respect to the baggage of a traveler, if they had been lost while in its custody. They were, in fact, merchandise, being brought into this country on the person of Suarez. It is a singular fact that the United States statutes contain no specific provision applicable to such a case. The general provisions in regard to the importation of merchandise have in view the ordinary importation of goods as a part of the cargo of a ship, and not in the personal custody of any one. The provision in regard to a passenger's baggage assumes that whatever small articles a passenger brings into this country will be contained in his trunk or bags. The case of a person bringing merchandise into this country in his pockets is not specifically provided for by any statute. I think, however, that such merchandise may be treated as baggage within the sense of the customs laws. A package carried in the pocket does not differ essentially from a package carried in the hand, and, in my opinion, if it contains dutiable merchandise, the passenger is bound to declare it in all respects the same as he is bound to declare merchandise contained in his trunk.

The third cause of forfeiture stated in the information is, in substance, that Suarez unloaded the said merchandise from the vessel without a permit from the collector or any naval officer, as required by section 2872 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 1910]. This section obviously is intended generally to ap-

ply to the unloading of general merchandise, which has been imported in a vessel in the ordinary manner, unaccompanied by the owner or consignee; and it seems at first a rather strained construction to apply it to the case of a passenger carrying merchandise upon his person, but I think it applies. These emeralds were either merchandise or baggage. If they were merchandise, they could not be landed from the vessel without a permit, and the permit, in the case of a passenger carrying them upon his person, would be obtained upon his declaring, before he left the ship, that he had them, and providing for the payment of the duties on them. I think the evidence in this case sustains the third cause of forfeiture alleged in the information.

The fourth cause of forfeiture alleges two distinct grounds of proceedings. The first is, in substance, that these emeralds were imported without an invoice or declaration, as required by section 4 of the customs administration act. I think that this section prescribes what papers shall be produced and what proceedings shall be taken in connection with an actual intentional entry of merchandise, and that it does not apply to a case where the entry of the merchandise itself is concealed. The second ground stated in the fourth cause of forfeiture is that Suarez unlawfully and knowingly smuggled and clandestinely introduced the emeralds into the United States, in violation of section 2865 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 1905]. This is the general section providing for the forfeiture of smuggled goods. The United States Supreme Court held, in Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, that under this section goods cannot be forfeited as having been smuggled until they have actually left the ship and reached the shore. In that case, the owner of certain diamonds in Europe requested the captain of a steamer to bring the package containing them to this country, and mail it to the address of a person who was his partner in the West, assuring the captain that the package contained nothing valuable. The goods were seized by the customs inspectors before they left the ship. The Supreme Court held, against a strong dissenting opinion, that the goods were not forfeited under this smuggling statute, because the offense of smuggling at common-law was not completed until the goods had left the ship and reached the shore; that, although it was apparent that the owner intended to smuggle when he delivered them to the captain of the vessel, he could change his mind at any time until they actually left the ship; and, if he had done so, the goods would not have been forfeited. Counsel for the claimant in the case at bar claims that that case controls in this case. The evidence shows that the emeralds in question, although they were taken off the ship onto the dock, had not been taken outside of the custom house lines on the dock. It is argued that the custom house lines on the dock are simply established for the convenience of passengers; that the custom house officers might examine the property on the vessel; that, until any property has passed the custom house lines, it is to be regarded as being on the vessel; and that, therefore, the smuggling act does not apply to these emeralds. But, in my opinion, the fact that these emeralds were taken off the ship to the shore is sufficient to make them subject to the provisions of the section prohibiting smuggling. Suarez took them with

him on the dock. He had them with him when his baggage was examined. He was particularly interrogated as to whether he had any such stones with him, and denied it. The argument of the claimant's counsel would go the length of saying that under those circumstances the customs authorities could do nothing, and must wait until he had gone out through the custom house lines before they could arrest the person of the passenger or seize the precious stones concealed upon his person. I think that when the proper officer of the customs examined his baggage and put to him the questions whether he had any personal property which he had not declared, or any precious stones upon his person or in his pockets, he was obliged to state the truth, and that when that examination was finished, and he still had these emeralds in his pocket, without having admitted it, the act of smuggling was complete.

I felt at first some doubt in this case. Suarez speaks no English. He lives in South America, and was going there. He declared his intention of leaving a portion of his baggage with the collector, and my first impression was that, being ignorant of our language and of our customs laws, and of the practice of declaring dutiable articles on arrival at this port, he might really have intended to leave these emeralds with the collector while he stopped in New York with a part of his luggage. But a careful consideration of the evidence convinces me that he completely comprehended what the questions were that were put to him, and that if he had honestly intended to make no use of these emeralds in this country, but to take them with him to South America, he would either have put them in the trunk or box which he was to leave with the collector, or would have announced, at the same time that he said he was going to leave his trunk and box with the collector, that he also had a package of emeralds which he would leave with him. His own declaration made at the time shows that he understood the questions which were put to him, and the reasons that he gives for giving false answers to the questions are in my opinion unsatisfactory and entirely insufficient.

My conclusion is that the government is entitled to a judgment of forfeiture in this case.

CORBITT & MACLEAY CO. v. UNITED STATES.

(Circuit Court, D. Oregon. March 18, 1907.)

No. 2,371 (1,361).

1. CUSTOMS DUTIES—CLASSIFICATION—BURLAPS—DOUBLE-WARP BAGGING.

The provision for "burlaps," in Tariff Act Aug. 27, 1894, c. 349, § 2, Free List, par. 424½, 28 Stat. 539, does not include so-called double-warp Dundee bagging.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

2. SAME—PROTEST—SUFFICIENCY—WRONG CLAIM.

Goods, which should have been classified free of duty under a paragraph relating to "jute bagging," were asserted in the importers' protest to be free under a paragraph relating to "burlaps," and there was no suggestion that the importers at the time of filing the protest had in mind

the former provision. *Held*, that the protest did not set forth the importers' objections "distinctly and specifically," within the meaning of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

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

Williams, Wood & Linthicum, for appellant.
W. C. Bristol, U. S. Atty.

WOLVERTON, District Judge. This is an application for a review of the decision of the United States General Appraisers relative to the duty imposed upon a certain jute cloth imported by the Corbitt & Macleay Company August 21, 1895. The collector of customs assessed a duty of 35 per cent. ad valorem under paragraph 277 of the act of August 27, 1894 (chapter 349, Schedule J, 28 Stat. 530). The importers made protest as follows:

"We claim the same to be burlaps (hop cloth) and is provided for under paragraph 424½ tariff act of Aug. 28, 1894, and entitled to entry free of duty, as the same is known in the market and by common usage as burlaps, and that paragraph 424½ relates to this article particularly as burlaps not otherwise provided for, and that paragraph 277 does not specially provide for this class of goods."

The General Appraisers ruled adversely to the protest, for the reason that the protestants claimed that the fabric imported was burlap, entitled to free entry under paragraph 424½ of the existing tariff act, and the appraisers found that it was not burlap because the warp was double. Act Aug. 27, 1894, c. 349, Free List, 28 Stat. 539.

Two questions are presented for consideration: First, whether the importation should be classed under the tariff act as burlap; and, second, if not, whether it should be admitted free of duty as jute bagging under paragraph 392½. The appraisers found that the fabric was what is known as "double-warp Dundee bagging, commonly invoiced as D. W. Bagging"; that it was made of jute, and was double-warp in its structure; that it was "not the article known as burlaps, nor was it known as such at or before the 28th day of August, 1894, commercially or otherwise"; and that "so far as the Board is advised, it has never been classed as a burlap in customs practice at any port in this country." By a former decision, in the matter of the protest of D. W. MacLeod & Co. (G. A. 1,129), the Board found and decided:

"That the word 'burlap' or 'burlaps' is a commercial term of American origin, and is understood to mean in the trade a coarse textile fabric composed of flax, hemp, or jute (but more recently of jute only), plain woven in a single weft and single warp, and varies in width from 12 to 216 inches, and in weight from 16 to 20 ounces per yard, according to the uses for which the goods are designed."

This decision was affirmed in the case In re White (C. C.) 53 Fed. 787. The court does not attempt, however, to define the word "burlap" or "burlaps," and it is only in a general way that the decision of the appraisers in that regard is approved. A reference to a fabric

of similar texture is made in the case of McLeod v. United States (C. C.) 75 Fed. 927, wherein the court says:

"The articles in question are manufactures of jute, with the single warp and single weft characteristic of burlaps."

This would seem to indicate that the court was of the opinion that burlaps consisted of a single warp and single weft only, thus differentiating them from goods having a double warp and single woof. However this may be, and whatever may be the technical definition of burlaps, and whether the term is properly applicable to the article here under consideration, it is clear from the finding of the appraisers that it is not known in commerce as burlap, but, on the other hand, is known as jute bagging, and commonly invoiced as such; and it is this condition that fixes the classification.

Paragraph 277 of the tariff act reads:

"All manufactures of flax, hemp, jute, or other vegetable fiber, except cotton, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty-five per centum ad valorem."

And under the free list, paragraph 392½ reads:

"Bagging for cotton, gunny cloth, and all similar material suitable for covering cotton, composed in whole or in part of hemp, flax, jute, or jute butts."

And paragraph 424½:

"Burlaps, and bags for grain made of burlaps."

So that, in consideration of the appraisers' findings as to the known commercial designation of the goods, it was not entitled to classification as burlaps, under paragraph 424½.

As it relates to the second question, it is very apparent that it was admissible free of duty as jute bagging, under paragraph 392½. But the government urges that the claim made was not specific to bring it within that paragraph, and that therefore the importers are precluded from now insisting that it is so exempt from duty.

By the fourteenth section of the act of June 10, 1890, which is now in force and effect, the protestant is required to set forth his claim "distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon." 26 Stat. 137, c. 407 [U. S. Comp. St. 1901, p. 1933]. This statute is an amendment of a prior one, but without changing the purpose as it respects the subject-matter under consideration. In dealing with the purpose of the prior statute, Mr. Justice Curtis has said, in Warren v. Peaslee, Fed. Cas. No. 17,198, that the act "had two main objects in view; one being to apprise the collector of the objections entertained by the importer, before it should be too late to remove them, if capable of being removed; the other, to hold the importer to those objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed by the payment of the money into the treasury."

In a later case (Davies v. Arthur, 96 U. S. 148, 24 L. Ed. 758) it is said:

"Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated."

And so in another case (Schell's Executors v. Fauché, 138 U. S. 562, 11 Sup. Ct. 376, 34 L. Ed. 1040):

"A protest which indicates to an intelligent man the ground of the importer's objection to the duties levied upon the articles should not be discarded because of the brevity with which the objection is stated."

In pursuance of these rulings it has been held, where the protest referred to an act that had been superseded by a later one, it being apparent that the protestant had made a mistake as to the law then in force, that his claim should not be rejected, and that the claim was sufficiently specific to bring it within the intendment of the act of June 10, 1890. Shaw v. United States, 122 Fed. 443, 58 C. C. A. 425. So, in another case, where the protest set forth "that the said goods under existing laws are dutiable at two cents per pound, and the exaction of a higher rate is unjust and illegal," it was held that it was sufficient, in view of the fact that there were but three paragraphs bearing upon the article subject to duty, and two of these made the article bear duty at two cents per pound. It is said there, by Mr. Justice Shiras, who announced the opinion of the court, that:

"The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely, paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound." United States v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167.

These cases are illustrative, and indicate that absolute precision is not required, so that the specific claim that the protestant has in mind is brought with reasonable intendment to the attention of the collector of customs, to the end that that officer may make the correction, if an error has been made in his assessment.

In the case of Herrman v. Robertson, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538, it was held that the protest was defective and insufficient, because it failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question as to which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable.

United States v. Bayersdorfer & Co., 126 Fed. 732, 62 C. C. A. 16, is in point. The claim in that case was that the goods were free of duty either under paragraph 617 or 548 of the present act, or that, if dutiable, they were subject to a duty of only 10 per centum under section 6. The Board of Appraisers found that the merchandise was on the free list, and was properly referable to paragraph 566, yet held that, because the claim of the protestants was not made under that

paragraph, nor was so specified as to bring it within the purview thereof, it should be rejected. The matter coming before the Circuit Court, the finding of the appraisers was reversed; but, on appeal to the Circuit Court of Appeals, the Circuit Court was reversed, and the decision of the appraisers affirmed, for the reason assigned by them. The court says:

"But the protests in question here not only failed to call the collector's attention to the paragraph which it is now claimed governed, but the importers based their objections upon other specified provisions of the act, under which they claimed that the merchandise was either entitled to free entry, or was subject to a less rate of duty than the collector had assessed. Having regard to the terms of these protests, how can it be said that an objection which is grounded upon a paragraph not therein mentioned or referred to was at the time in the mind of the importers, or that it was so 'distinctly and specifically' brought to the notice of the collector as to apprise him of the 'true nature and character' of the objection, 'to the end that he might ascertain the facts, and have an opportunity to correct the mistake'?"

In another case, decided by the same court at the same time (United States v. George Knowles & Son, 126 Fed. 737, 62 C. C. A. 62) the importation involved was of merchandise invoiced as crude flint stone. The collector assessed it for duty under paragraph 98 of the tariff act of October 1, 1890 (chapter 1244, Schedule B, 26 Stat. 571). The importers filed a protest claiming free entry under paragraph 574. The Board of Appraisers held that paragraph 574 did not apply, and affirmed the collector's decision. The view was expressed that paragraph 651 of the free list applied; but, notwithstanding, the board held that, inasmuch as the importers had not called the attention of the collector to that paragraph, but in their protest had put their claim upon paragraph 574, they were bound thereby. This case, like the former one, was appealed to the Circuit Court and reversed; but, upon an appeal to the Court of Appeals, the Circuit Court was reversed, and the decision of the Board of Appraisers affirmed. The facts of this latter case are so similar to those found here that there is left no room for distinction. The protestants here claimed specifically that the fabric was burlap, free of duty under paragraph 424½; but, as I have shown, it is not subject to classification as burlaps, because not so commercially known in the market. There was no claim made that it was jute bagging, or that it was nondutiable under paragraph 392½. No reference whatever was made to that paragraph, and, from a reading of the claim in its entirety, there is no suggestion that the protestants had in mind at the time of filing the protest that the fabric was admissible free of duty under paragraph 392½. The only indication anywhere in the claim which would suggest that they intended to bring it within that paragraph is the use of the term "Hop cloth" contained in parenthesis; but that was only inserted as another name for burlap, and not that it was designed to indicate that the fabric was jute bagging.

For the reason therefore, that the claim was not preferred in view of paragraph 392½, but was that the fabric was burlap, admissible free of duty under paragraph 424½, the judgment of the appraisers must be affirmed, and it is so ordered.

FRANKLIN SUGAR REFINING CO. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. March 22, 1907.)

No. 63 (1,809).

1. CUSTOMS DUTIES—ESTOPPEL—DELAY OF CUSTOMS OFFICERS.
There was a delay of several years by customs officers in forwarding an importer's protests to the Board of General Appraisers for decision, and during this period the value of the importer's evidence became impaired. *Held*, that no right against the government arose by reason of this delay, particularly when not intentional or negligent.

2. SAME—CLASSIFICATION—SUGAR ABOVE NO. 16 DUTCH STANDARD—BEET SUGAR.
In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], relating to "sugar above number sixteen Dutch standard in color, and * * * sugar which has gone through a process of refining," *held*, that it is not necessary that, in order to come within the first clause of this provision, sugar should be capable of being used commercially, without refining, as cane sugar; and therefore beet sugar, which is not so capable, is included therein.
[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

3. STATUTORY CONSTRUCTION—UNAMBIGUOUS LANGUAGE.
Where the language of a statute is incapable of more than one construction and does not lead to an absurd result, a court has no power to vary the meaning by going outside the unambiguous language adopted by the lawmakers.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 266.]

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

William M. Stewart, Jr., for importers.
J. Whitaker Thompson, U. S. Atty., and Jasper Yeates Brinton, Asst. U. S. Atty.

J. B. McPHERSON, District Judge. This petition seeks to review the decision of the Board of General Appraisers, sustaining the collector of the port of Philadelphia in classifying 3,500 bags of beet sugar, imported by the Franklin Sugar Refining Company, as below No. 16 Dutch standard in color, and imposing duty accordingly. These bags were part of five cargoes brought to the port in June and July, 1898, the details being as follows:

1,000	bags	out	of	40,148	bags,	carried	by	the Strathtay.
1,000	"	"	"	60,000	"	"	"	Brazilla.
500	"	"	"	27,500	"	"	"	St. George.
500	"	"	"	19,993	"	"	"	Sophie Rickmers.
500	"	"	"	36,728	"	"	"	Planet Mercury.

The importer's direction to the shippers was that all the sugar must be under No. 16 Dutch standard in color, and the rest of the five cargoes conformed to this direction. The bags in question, however, were reported by the government officials to be above this standard, and, accordingly, the higher rate of duty prescribed by paragraph 209 of the tariff act of July 24, 1897 (Act July 24, 1897, c. 11, § 1, Sched-

ule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]) was imposed. That paragraph is in part as follows (2 Supp. Rev. St. 662):

"Sugars not above number sixteen Dutch standard in color, * * * testing by the polariscope not above seventy-five degrees, ninety-five one-hundredths of one per cent. per pound, and for every additional degree shown by the polariscopic test, thirty-five one thousandths of one cent per pound additional, and fractions of a degree in proportion; and on sugar above number sixteen Dutch standard in color, and on all sugar which has gone through a process of refining, one cent and ninety-five hundredths of one cent per pound."

This paragraph requires all imported sugar to be first subjected to the test of visual inspection, in order that its color may be compared with the color known as "No. 16 Dutch standard." If the color is lighter, or higher, than this standard—or if the sugar has gone through a process of refining, an alternative which need not now be considered—a duty of one cent and ninety-five hundredths of a cent per pound is to be imposed. If the sugar is of the same color as the standard, or darker or lower, the polariscope test is to be applied and lower rates of duty are to be imposed. The present dispute is, therefore, essentially a dispute of fact. If the bags in question were below the standard color, the importer has been charged too much. If they were above the standard, the collector and the Board were right, and their action should stand.

The opinion of the Board, affirming the classification of the collector, is as follows (Somerville and Hay, Appraisers):

"The question in these cases is whether the sugar under consideration is below or above No. 16 Dutch standard. The sugar was imported in the year 1898. The hearing took place at Philadelphia December 5, 1905.

"The testimony shows that the examination of the samples made at the time the sugar was imported showed that they were above 16 Dutch standard, and the entries were liquidated by the collector upon this basis. The importers introduced samples which had been in their possession between seven and eight years.

"The evidence shows that beet sugar changes its color and becomes darker with the lapse of time. While the evidence shows that these samples of the importers were under 16 Dutch standard, it does not, in our opinion, justify us in authorizing the collector to assess duty based upon the condition of the sugar at the time of the hearing, for the reason, as we have said, that it had undergone a change. It would be a dangerous practice to allow cases to be continued for so long a time, and to follow the practice insisted on by the importers. The protests are all overruled, and the decision of the collector affirmed in each case."

It will be observed, therefore, that in this proceeding the importer starts with the presumption against his contention. Two administrative tribunals, each charged with the duty of determining whether the sugar in question was above or below the standard, have decided against him, and the Board of General Appraisers has so decided after the oral hearing of several witnesses upon one side and the other. The presumption of correctness which thus arises was attacked by the importer in the Circuit Court, and witnesses were called for this purpose, to whom the government replied by taking further testimony in support of the collector's classification. The whole case from the beginning is, therefore, now before the court, and the final result depends upon the question of fact to which reference has already been made. I shall not discuss the evidenc in detail. It has all been

carefully examined and considered in the light of the able argument presented on behalf of the importer; but it leads me to the conclusion that the company has not made out its case, and that the action of the collector and of the board should not be disturbed.

It is unfortunate that, apparently by some misunderstanding, the protest of the importer was not transmitted to the Board until September, 1905. So far as the evidence enables me to judge, the delay was neither intentional nor negligent on the part of the government, but was due to a mistaken belief that the protest raised a different question—one that was already in the courts for decision—and therefore that the present dispute might, without harm to any one concerned, await the final determination of the suit already pending. During the interval, however, the samples taken by the government from the bags in question have disappeared; and, while the importer produced two samples, which were averred to have been taken by its own agent from one of the cargoes, their value in 1906, when the hearing before the Board took place, was much impaired by the lapse of time—which affects the color of sugar—and no samples at all were produced from the other four cargoes. At the argument the importer laid a good deal of stress upon the alleged negligence of the government in delaying the hearing and in failing to preserve the official samples; but, even if the delay had been shown to be the fault of the government, and the failure to preserve the samples had appeared to be due to culpable neglect, this, in itself, would not be decisive in favor of the importer's contention. No doubt, if the government appeared to be at fault in these respects, the court would more readily incline toward the importer's view, and would be more easily persuaded that the presumption of official correctness had been overcome; but where, as here, the testimony as a whole shows with sufficient clearness that the classification was right, a fault in procedure cannot be allowed to destroy the government's right to exact the proper duty.

It was also contended that the purpose of Congress in imposing a duty of one cent and ninety-five hundredths of a cent upon sugars above No. 16 Dutch standard was to tax sugars that had undergone a process of refining, or, at all events, were capable of being used commercially without undergoing that process. It was, therefore, urged upon the court that, since raw beet sugar, such as the importation in question, was so offensive to the senses that it could not be used until it had been refined, the court should so construe the second clause of paragraph 209 as to exclude raw beet sugar altogether, and to confine the phrase "sugar above number 16 Dutch standard in color" to raw sugar that is made from cane. In my opinion, the answer to this argument is that the clause in question is without the slightest ambiguity. It imposes the duty referred to upon all sugar above No. 16 Dutch standard in color, making no exception whatever, and therefore it is beyond the power of the court to limit the clear statutory provision by the process of construction. No doubt it is perfectly proper for a court so to construe an ambiguous provision in a statute as to reach, if possible, the true meaning of the law-making body; but where the language is incapable of more than one construction, and does not lead to an absurd result, all the author-

ities agree that a court has no power to vary the meaning by going outside the unambiguous language adopted by the lawmaking power. If Congress had intended to exclude raw beet sugars, they would, I think, have said so. At all events, I am bound to assume that they would have made this exception, if they had desired so to do, and it is therefore my duty, as I conceive it, to carry out the plainly expressed will of the national legislature.

The decision of the Board of General Appraisers is affirmed.

TAYLOR et al. v. TREAT.

(Circuit Court, S. D. New York. March 7, 1907.)

1. INTERNAL REVENUE—VERMUTH—WINE.
   Vermuth is not "wine" within either the commercial or the popular meaning of that term, and therefore is not subject to the stamp tax on "sparkling or other wines," provided in War Revenue Act June 13, 1898, c. 448, 30 Stat. 463 [U. S. Comp. St. 1901, p. 1654].
   [Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]
2. SAME—ACTS—INTERPRETATION WITH REFERENCE TO TARIFF ACTS.
   Internal revenue acts should be interpreted in harmony with the tariff legislation of the country.
3. SAME—TRADE-NAMES—FOREIGN NOMENCLATURE—EVIDENCE.
   Evidence of foreign trade-names is not material to the question of the meaning of terms used in United States revenue acts.
4. SAME—JUDGMENT FOR ILLEGAL EXACTION—INTEREST—DEMAND.
   Certain parties became entitled to a judgment against an internal revenue collector for the cost of stamps which he had illegally compelled them to use. *Held* that, inasmuch as they had purchased the revenue stamps in large quantities and evidently for other purposes than that of paying the unlawful tax, they were entitled to interest only from the date of their demand.

At Law. Action for the repayment of internal revenue taxes illegally imposed.

These proceedings were brought by William A. Taylor and Irving K. Taylor, as copartners doing business under the name of W. A. Taylor & Co., against Charles H. Treat, formerly a collector of internal revenue in the city of New York. The case was tried before the court without a jury.

Comstock & Washburn (Albert H. Washburn, of counsel), for plaintiffs.

D. Frank Lloyd, Asst. U. S. Atty., and Charles Duane Baker, for defendant.

HOUGH, District Judge. The war revenue act of 1898 (Act June 13, 1898, c. 448, 30 Stat. 463 [U. S. Comp. St. 1901, p. 1654]), provides for payment, by cancellation of internal revenue stamps, of a certain tax on "sparkling or other wines." Plaintiffs are importers of and dealers in Italian vermuth, and allege that, while the act above referred to was in force, the defendant, one of the collectors of internal revenue in New York City, compelled them to pay for and affix to bottles of

vermuth imported by their firm stamps to the value of $7,603.20, for which amount they bring this suit, alleging that vermuth is not, within the meaning of the statute in question, a "sparkling or other wine."

The testimony adduced here has related principally to the nature and commercial designation of vermuth; but a preliminary question is raised as to the sufficiency of plaintiffs' proof that stamps to the value sued for were really bought, affixed, and canceled at the cost of the plaintiffs. It is shown that stamps to a larger value than is the subject of this suit were purchased by the plaintiffs, were sent by them to the Italian vermuth manufacturers, and that plaintiffs' importations arrived here with canceled stamps affixed. The money claim in the complaint is arrived at by multiplying the number of bottles imported during the life of the act by the value of each stamp, with proper deductions for purchase of so large a quantity. In my opinion the direct proof of damage is sufficient; but all doubt is resolved by the action of the defendant himself, who certified the amount of the claim in suit to be correct when the usual application for refund was made to the commissioner of internal revenue prior to the institution of this action.

As to the composition and principal ingredients of vermuth, there can be no doubt, whether the French or Italian article be considered. The basis of manufacture is a white wine, frequently a blend or mixture of several wines of varying cost, to which is added sufficient alcohol to raise the spirituous proportion to about 15 per cent., and the mixture is completed by the addition of herbs, spices, and sugar in quantities and proportions depending on the manufacturer's taste and tradition—but always including some wormwood, from the German name for which plant the finished product takes its title—and both name and thing have been known in the countries of origin for more than 100 years. It is, I think, proven that while both here and abroad vermuth is commonly referred to by that name only, the complete title of the product is in Italy "vino vermouth," and in France "vin de vermouth"—names sufficiently recognizing its vinous nature. It is not shown to be native to any other countries. In consumption its appears to be used in Latin countries as a beverage in like manner as wines of similar strength, but in the United States it has not received wide recognition except as a component of the native "mixed drink." In American commercial usage, as evidenced by trade circulars and advertisements, it is never classed with wines, and if with any other drinkables, with cordials and liquors; but usually it figures alone, as though sui generis. The definitions found in dictionaries describe it as a "liqueur" (Standard) and "a sort of mild cordial" (Century). It cannot be both, and I derive from these definitions no other assistance than to note that it is not denominated a wine, nor do the definitions of wine in either dictionary allude to vermuth.

From the evidence of trade usage and nomenclature introduced, I find that there is no general trade consensus of opinion regarding this article. The plaintiffs' witnesses are sure that vermuth is not a wine, and not known or regarded as wine in the United States; but they are largely interested in the event of this suit. Those opposing them too frequently limit their statement that vermuth is a wine to their per-

sonal opinion to render it possible for me to believe that they are testifying to any general custom or uniform usage. But a considerable majority of all the witnesses agree that they buy and sell, advertise and drink, vermuth by that name alone. It is urged that this habit means no more than does the custom of alluding to sherry or port by those names without adding the word "wine"; but this argument does not meet the proven method (above alluded to) of advertising vermuth in circulars and newspapers. I therefore find that the fluid has no other trade name or fame except as vermuth simpliciter, and is in the minds of American dealers and consumers an article of its own class, having no more mental relation to wine than chartreuse has to brandy.

The defendant shows that, in a prosecution against one making counterfeit vermuth (without using any wine at all), the Italian courts sustained the application of a statute of that country relating (semble) to adulteration or imitation of "wine"; but this evidence, if otherwise admissible, cannot affect the issue here, any more than Italian usage as to nomenclature, if this case be regarded as one of "trade-names," for the "name abroad is of no materiality whatever." Lamb v. Robertson (C. C.) 38 Fed. 718.

Considering the question here involved as one of commercial designation only, the scale would be turned in favor of the plaintiffs by the doctrine repeated in Hartranft v. Wiegmann, 121 U. S. 616, 7 Sup. Ct. 1240, 30 L. Ed. 1012, for, if the question be one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." But in my opinion the plaintiffs are overwhelmingly entitled to judgment upon consideration of past tariff legislation on this subject. Vermuth first appeared as a dutiable article in Act July 14, 1870, 16 Stat. 263, c. 255, and it is there classified with "cordials, liqueurs, arrack, absinthe," etc., in phraseology almost exactly borrowed from a similar catalogue (omitting vermuth) in Act Aug. 30, 1842, 45 Stat. 560, c. 270. In Act June 6, 1872, 17 Stat. 233, c. 315, section 4 provides: "On vermuth the same duty as on wines of the same cost." Here for the first time vermuth is separated from cordials and liqueurs. In Act March 3, 1883, c. 121, § 1, Schedule H, par. 296, 22 Stat. 505 [U. S. Comp. St. 1901, p. 1654], there is provided on "vermuth the same duty as on still wines." In Act Oct. 1, 1890, c. 1244, § 1, Schedule H, 26 Stat. 589 [U. S. Comp. St. 1901, p. 1654], paragraph 336 lays a duty on "still wines including ginger wine or ginger cordial and vermouth in casks, 50 cents per gallon," and this phraseology was repeated in Act Aug. 27, 1894, c. 349, § 1, Schedule H, par. 244, 28 Stat. 589 [U. S. Comp. St. 1901, p. 1654]. By the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule H, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]), which was in force at the time of the passage of the war revenue act, it is provided in paragraph 296, that "still wines including ginger wine or ginger cordial and vermouth" shall pay duty in proportion to the amount of alcohol therein contained, provided that any "wine, ginger cordial or vermouth imported containing more than 24 per cent. of alcohol shall be classed as spirits and pay duty accordingly." The reciprocity section (3) of the same act of 1897 speaks of "still wines and vermouth."

As was done in Seeburger v. Castro, 153 U. S. 32, 14 Sup. Ct. 766, 38 L. Ed. 624, it seems to me necessary to interpret the internal revenue act in harmony with the tariff legislation of the country. From the foregoing résumé of tariff acts, it is, I think, clear that at no time has any revenue act of the United States regarded vermuth as a wine. It is in composition quite as much changed as the "Bovrill wine," which was refused classification with wine in United States v. Shoemaker (C. C.) 84 Fed. 146, a case decided under the tariff act of 1890 (above quoted).

Again, the use of the word "including" in the later tariff statutes is in my opinion destructive of the defendant's contention. It cannot be denied that, had not vermuth eo nomine been "included" in the later tariff statutes in the wine schedule, no court would have held vermuth dutiable as a wine. If the word "including" is not to be regarded in the tariff acts as pure surplusage (Hills Bros. v. U. S., 99 Fed. 264, 39 C. C. A. 500; Hiller v. U. S., 106 Fed 73, 45 C. C. A. 229), it cannot I think be successfully argued that vermuth was intended to be taxed as a wine, or with wines, in the war revenue act of 1898.

The plaintiffs are entitled to judgment, but, inasmuch as their purchases of revenue stamps were of large quantities, and evidently for other purposes than that of paying unlawful taxes on vermuth, they are entitled to interest only from the date of their demand.

It is therefore directed, in accordance with the stipulation herein, that judgment be entered for the plaintiffs and against the defendant in the sum of $7,603.20, with lawful interest thereon from June 27, 1902, and with costs to be taxed.

THE SALLIE ION.

(District Court, E. D. Pennsylvania. May 17, 1907.)

No. 42 of 1906.

ADMIRALTY—REMEDIES IN REM—TORTS—ASSAULT BY MASTER.

Under admiralty rule 16, providing that in all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only, a libel against a vessel will not lie for an unprovoked assault committed by the master on a seaman upon the vessel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 284.

Jurisdiction of torts, see note to Campbell v. H. Hackfeld & Co., 62 C. C. A. 279.]

In Admiralty. Exceptions to libel.

Joseph Hill Brinton, for libelant.

Edward F. Pugh, for respondent.

J. B. McPHERSON, District Judge. This action in rem against the schooner Sallie Ion seeks to recover damages for an assault committed by the master upon a member of the crew under circumstances that are thus set forth in the libel:

"That the said schooner Sallie Ion, while lying in the port of Baltimore, Md., on August 7, 1906, shipped and hired the libelant to serve as able seaman on

said vessel for a voyage to Jacksonville, Fla., and back to Philadelphia, the port of discharge, for the right of wages of thirty dollars per month. That the libelant went on board and entered into the service of said schooner and performed his duties until October 13, 1906, when he was discharged at the port of Philadelphia, Pa.

"That on or about September 21, 1906, whilst the vessel was lying in the port of Jacksonville, Fla., the libelant being informed that the master had logged him for going ashore, at about noon went to the master's cabin for the purpose of ascertaining the truth of this report. The libelant was informed by the master that he had been logged, whereupon the libelant called him a hypocrite. Without further provocation of any character whatsoever, and without warning, the master drew a revolver and fired upon the libelant; the ball passing through his left leg above the knee, causing the libelant great pain and suffering and permanent disability. The libelant avers that he did not by word or act in any manner threaten to harm the master, and that the attack was without provocation. As a result of the wound the libelant was sent to the Marine Hospital at Jacksonville, Fla., where he remained undergoing treatment for a period of about twelve days."

To this libel the vessel has excepted on the ground, inter alia, that an action in rem will not lie for such an assault, and in my opinion the position of the ship is well taken, being supported by the express provision of section 16 of the admiralty rules laid down by the Supreme Court. The rule is as follows:

"In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only."

The plain and natural meaning of this language covers such a case as is now before the court, and I am unable to see upon what ground a construction can be fairly rested that will in effect disregard the prohibition of the rule, and permit a suit in rem to be brought against a vessel for an assault by the master upon a member of the crew. It is true that several cases in the lower courts are to be found that have allowed a recovery in rem for the negligence of the master, but all of them were decided before the publication of the decision in The Osceola (1903) 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, and, so far as they are in conflict therewith, must of course be regarded as overruled.

One of the conclusions announced in The Osceola was this:

"(4) That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and care, whether the injuries were received by negligence or accident."

This conclusion was recently followed in this district: The Astral (D. C.) 134 Fed. 1017. Now, surely, if an action in rem will not lie to redress an injury caused by the negligence of the master, still less will such an action be permitted, where the wrong of the master has been wanton and malicious, an act not even connected with the performance of his duty in the care and management of the ship. In The Osceola, the master was engaged in the business of navigating the vessel, and negligently gave a wrong order. Here, he was not employed in any branch of his duty, but committed the assault on the libelant without provocation or just cause—in other words, wantonly and maliciously. At least in the absence of proof that the master was known to be of violent temper and given to such dangerous outbreaks —and perhaps not even then—there is no reason why the ship should be liable for conduct of this kind, and rule 16 is probably founded on

the injustice of making the vessel suffer for a criminal act that is only connected with the ship because it has been committed upon her deck by one of her officers. But, whatever the reason for the rule may be, I am unable to limit its apparent scope, and must therefore hold that it embraces the case of an assault by the master upon a member of the crew.

The cases cited upon the brief of libelant's counsel are to the following effect: The City of Alexandria (D. C. 1883) 17 Fed. 390, decided that the cook of a vessel who was injured by the negligence of its officers, was entitled to medical care, nursing, attendance, and cure, so far as cure was possible, at the expense of the ship, and to wages to the end of the voyage; and that, having received such treatment and wages, he could not hold the ship liable for the negligence of its officers. Whitney v. Olsen (1901) 108 Fed. 292, 47 C. C. A. 331, was apparently an action in personam against the master and owners of a schooner, in which they were held liable for failure to put into the nearest available port, in order that the libelant, an injured mate, might receive proper care and treatment; but, even if the action was in rem, the case is evidently not in point. In The Eva B. Hall (D. C. 1902) 114 Fed. 755, a seaman, whose arm had been broken by a blow, struck by the mate with a capstan bar, was compelled by the master to continue at work; and it was held that, although the vessel could not be held for the blow, she was liable for the master's misconduct in compelling the libelant to work, instead of seeing that he had the necessary rest and care. In Sherwood v. Hall (1837) Fed. Cas. No. 12,777, Mr. Justice Story held the owners of a vessel liable in an action in personam for the tort of the master in shipping a minor with notice that the shipment was unauthorized by, and against the will of, the father. The case of The A. Heaton, 43 Fed. 598, was decided by Mr. Justice Gray in 1890, and holds, in conflict with The Osceola, that a seaman, who had been permanently injured by "the master's gross, not to say reckless, neglect of the duty which he owed to the crew under his command and care," might recover damages from the ship, over and above his wages and the expenses of his cure. The Marion Chilcott (D. C. 1899) 95 Fed. 688, holds that, while rule 16 protects the ship from liability in damages for assaults committed by the officers, she is liable for injury inflicted on a seaman by reason of the master's neglect to protect him from continued abusive treatment by a subordinate officer. To the same effect is The Lizzie Burrill (D. C. 1902) 115 Fed. 1015. The case of Gabrielson v. Waydell (C. C. 1895) 67 Fed. 342, was an action at law against the owners, in which a verdict for the plaintiff was sustained; the suit being brought to recover damages for violent injury inflicted by the master, while the vessel was on the high seas. And in Spencer v. Kelley (C. C. 1887) 32 Fed. 838, the action was also at law against the owner, on the ground that the master had assaulted the plaintiff; and it was held that it must be shown that the master was acting within the scope of his duty, and in the exercise of his control over the plaintiff. It is evident, I think, that these decisions do not modify The Osceola—even if they were competent so to do—and therefore, upon the whole case, I am of opinion that the libel must be dismissed for want of jurisdiction.

A decree to that effect may be entered.

WILBUR v. RED JACKET CONSOL. COAL & COKE CO.

(Circuit Court, S. D. West Virginia. April 13, 1907.)

No. 125.

REMOVAL OF CAUSES—AMENDMENT OF PETITION—POWER OF COURT TO ALLOW.

Where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the fact so as to show that the court has jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 178.]

Trespass on the Case. On motion to remand to state court and petition for leave to amend petition for removal.

This action was brought by the plaintiff in the circuit court of Mingo county, W. Va., and the defendant, within the time prescribed therefor by law, filed in that court its petition for the removal of the cause to this court, alleging in said petition that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000; that the plaintiff at the commencement of the suit was, and still is, a citizen of the state of Kentucky; and that the defendant corporation at the commencement of the suit was and still is a citizen of the state of Virginia, etc. This petition was accompanied by the bond prescribed by statute, and thereupon the circuit court of Mingo county entered an order removing the cause to this court and declining to proceed further therein. On the first day of the next term of this court, sitting at Huntington, the cause was duly docketed, and on the same day the plaintiff by his counsel moved the court to remand the cause to the circuit court of Mingo county, upon the ground that upon the showing of the petition the suit should be remanded in accordance with the decision of this court in Foulk v. Gray (C. C.) 120 Fed. 156, because under the showing of the petition for removal neither the plaintiff nor the defendant was a citizen or resident of the state of West Virginia. Thereupon the defendant asked leave of the court to amend the petition for removal so as to show that the plaintiff, Leo H. Wilbur, at the commencement of this suit was, and still is, a citizen of West Virginia, residing at Corbin post office, Kanawha county, in the Southern district of West Virginia, and in support thereof filed the affidavit of J. M. Boling as to the fact of plaintiffs' residence and citizenship, and the affidavit of Wells Goodykoontz, Esq., as to the misinformation under which he had prepared the original petition in which it was stated that plaintiff was a citizen of Kentucky. To the amendment of the petition for removal the plaintiff objected, and the case is now before me upon the motion to remand and the petition asking leave to amend the original petition for removal.

Stokes & Bronson, for plaintiff.
Sheppard, Goodykoontz & Scherr, for defendant.

KELLER, District Judge. The sole question to be determined in this case is as to whether a petition of removal is amendable as to any of its statements of fact at the discretion of the court, and, if so, whether this is an instance in which the court should exercise its discretion to permit such amendment.

In the first place, I may say that almost all the Circuit Courts have held that the allegations of the petition for removal as originally filed in this case are sufficient to give absolute jurisdiction to hear and determine the cause. I have held that such allegations were sufficient to give such jurisdiction in the absence of any motion by plaintiff to remand the case. In this case such motion is made, and thereupon the

defendant asks leave to amend his petition so as to show more clearly the facts making this case one legally removable to this court, and thereupon files an affidavit alleging that the plaintiff at the commencement of the suit was and still is a citizen of the state of West Virginia, and a resident of the Southern district thereof.

What is the nature and office of a petition for removal? The Supreme Court of the United States, in the case of Kinney v. Columbia Savings & Loan Association, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, speaking by Justice Brewer, says:

"It is frequently stated that amendments are within the discretion of the court, and that, unless it appears that the discretion has been abused, no error is shown. A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court."

The court goes on to quote the familiar provisions of law authorizing the amendment of process, pleadings, and other proceedings in courts of the United States, found in sections 948 and 954, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 695, 696]. In the Kinney Case the allegation as to citizenship was as follows:

"That the controversy in said suit is between citizens of different states, and that the defendant in the above-entitled suit was at the time of the commencement of the suit, and still is, a resident and a citizen of the city of Denver, and state of Colorado."

It will be seen that in this case, while the citizenship of the defendant was fully and accurately stated, the citizenship of the plaintiffs was not stated at all, the petition merely containing a general averment that the controversy was between citizens of different states; and the amendment of the petition was permitted. In the case at bar the citizenship of the defendant was accurately stated, and a specific averment was made that "at the commencement of this suit Leo H. Wilbur [the plaintiff] was and still is a citizen of the state of Kentucky." It subsequently appeared that the defendant's counsel was misinformed as to plaintiff's citizenship, and he now asks to be permitted to make the facts to appear on the record.

The motion to remand was predicated on my opinion in the case of Foulk v. Gray (C. C.) 120 Fed. 156, and it is a fact, no doubt well known to counsel on both sides, that in most jurisdictions the courts sustain their jurisdiction on removal upon allegations as to citizenship similar to those appearing in the original petition for removal. While I am still convinced that my decision in the case of Foulk v. Gray, ante, was correct, and that a motion by the plaintiff to remand in this case would have had to be sustained had he been in fact a citizen and a resident of Kentucky, in support of which view see opinion of court in Cochran v. Montgomery County, 199 U. S. 273, 26 Sup. Ct. 58, 50 L. Ed. 182, and Gebbie & Co. v. Review of Reviews Co. (C. C.) 134 Fed. 150, yet, upon the authority of Kinney v. Columbia, etc., Association, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, Powers v. Chesapeake & O. R. Co., 169 U. S. 91, 18 Sup. Ct. 264, 42 L. Ed. 673, Parker v. Overman, 18 How. 137, 15 L. Ed. 318, Carson v. Dunham, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992, and many others, I hold that the motion to amend the petition for removal should be sus-

tained. In the case of Parker v. Overman, ante, Mr. Justice Grier, delivering the opinion of the court, said:

"In the petition to remove this case from the state court there was not a proper averment as to the citizenship of the plaintiff in error. It is alleged that Parker resided in Tennessee and White in Maryland. 'Citizenship' and 'residence' are not synonymous terms; but, as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this court have, undoubted jurisdiction of the case."

The tendency of all of these decisions is to recognize the right of amendment of the petition for removal to the extent of the correction of erroneous statements, and the addition of statements to more fully show the facts which support the grounds of removal. The grounds of removal in this case are the facts that this is a civil suit, in which the amount in dispute exceeds the sum of $2,000, exclusive of interest and costs, in which the parties are citizens of different states, and the amendment offered is for the purpose of more particularly and accurately stating the citizenship and residence of the parties so as to show that this court has jurisdiction of the cause.

I think it proper, before closing this opinion, to call the attention of counsel to the advisability, to say the least, of conforming in these removal proceedings to the approved proceedings and forms laid down in text authorities upon the practice in United States courts. For example, in the present case the petition is not verified, nor does the original petition set forth the residence of the plaintiff. That of the defendant (it being a corporation) is necessarily in the state of its citizenship. See Wilcox & Gibbs G. Co. v. Phœnix Ins. Co. (C. C.) 60 Fed. 929. While it is true that the courts are very liberal in overlooking such defects in the petition, especially where it has been received by the state court without objection (see Meyer v. Del. R. R. Construction Co., 100 U. S. 457, 25 L. Ed. 593), still, inasmuch as the jurisdiction of the federal courts is a limited jurisdiction, dependent upon a substantial compliance with the conditions requisite to invoking it, due care should be taken to pattern the forms and proceedings so as to conform to the best approved models.

An order may be entered overruling the motion to remand, and amending the petition for removal.

In re FULTON.

(District Court, E. D. New York. April 16, 1907.)

1. CHATTEL MORTGAGES—REAL ESTATE LEASES.
   A lease of real estate for 10 years was a chattel real, as provided by Real Property Law N. Y. p. 563, c. 547, § 23, and was not, therefore, the proper subject of a chattel mortgage.
2. BANKRUPTCY—RECEIVERS—SALE OF ASSETS.
   Where the receiver of a bankrupt acquired possession of a leasehold as a part of the bankrupt's estate, the receiver should not have attempted to make a sale of the lease prior to the trustee obtaining possession.
3. SAME—TITLE OF TRUSTEE.
   The title of a trustee in bankruptcy relates back to the adjudication.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 194.]

4. SAME—SALE BY RECEIVER—AUTHORITY—CONFIRMATION.

A sale of a chattel real by a receiver of a bankrupt without the express direction of the court conveys no title, and such defect cannot be cured by a motion to confirm the sale and to quiet adverse claims to the property sold.

Thomas & Oppenheimer, for receiver.
Backus & Lewis, for Welz & Zerweck.

CHATFIELD, District Judge. The alleged bankrupt, John Fulton, upon the 6th day of March, 1902, executed a chattel mortgage in the sum of $6,000 to Welz & Zerweck, a corporation, covering certain chattels on the premises 1752 Fulton street, borough of Brooklyn, and also a leasehold of those premises. The chattel mortgage, it is claimed, has been refiled and is alive today. On April 17, 1905, the said John Fulton obtained a further lease of said premises from Welz & Zerweck for the store 1752 Fulton street, and three flats, to be used as a hotel and liquor store, for the term of ten years, at the annual rental of $1,800 a year.

On or about the 4th day of March, 1907, a petition in involuntary bankruptcy was filed against the said Fulton, and a receiver appointed. On April 11, 1907, the schedules were filed, and the lease above referred to is nowhere included, unless covered by the statement that all books, papers, and documents relating to the business are in the hands of the receiver. Upon the 4th day of April, 1907, the appraisers filed their certified appraisal, showing (1) $1,501.17, personal property; (2) $2,208.65, property affected by the chattel mortgage; and (3) the lease of Welz & Zerweck to John Fulton, with eight years to run, upon which a valuation is placed of $1,600. Upon the 8th of March, 1907, the receiver filed a petition asking for the appointment of appraisers and directing that the said property of the alleged bankrupt be sold at private sale, providing bids therefor be received for not less than the appraised value, and, if not so sold, that the same be sold at public auction, etc. This petition recited that as receiver he was in possession of the property of the bankrupt, consisting of a "stock of merchandise, including wines, liquors, and cigars, contained in the premises known as 1752 Fulton street, borough of Brooklyn, city of New York; likewise the fixtures usual and incident to a general saloon and restaurant business, and furnishings used in a Raines Law hotel." No mention is made by the receiver of the lease. The appraisal was not directed, nor the sale authorized, upon any application to have the receiver attempt to sell the chattel real, but upon the sale the lease was put up at auction and a bid of $1,000 made therefor.

Welz & Zerweck has verbally disputed the right of the receiver to sell this lease, as well as the other property which it claims is covered by its mortgage, and the receiver and his attorneys are desirous of completing the sales and delivering the property sold to the purchasers. Under these circumstances the receiver obtained an order directing Welz & Zerweck, or its attorneys, to appear and show cause why an order should not be made confirming the sale of the property by the receiver, and, if the said Welz & Zerweck should fail to show cause, that said Welz & Zerweck be "forever foreclosed and barred

from in any wise or manner claiming title or possession in and to the said property." Upon the return of the order to show cause, Welz & Zerweck, by its attorneys, appeared specially to question the jurisdiction of the court, and asserted its title to the lease in question and to the other property covered by the chattel mortgage. Upon the suggestion of the court, it was stipulated that the property other than the lease, which had been sold and which seemed to be covered by the chattel mortgage, should be transferred to the purchasers, and the proceeds from the sale thereof retained as a separate fund until a determination in the bankruptcy proceedings of the validity of the lien claimed by Welz & Zerweck.

As to the lease, objection was made that upon affidavits the title to property could not be determined, and that the court had no jurisdiction to pass upon such an issue on this motion. This point seems to be well taken. The lease in question was not made until three years after the chattel mortgage, was for a period of ten years, and by section 23, c. 547, p. 563, of the real property law of the state of New York was therefore a chattel real, and not the proper subject for a chattel mortgage. A mortgage upon such an asset would have to be recorded, and regarded as a mortgage upon real estate, and there may be valid objection to the enforcement of the alleged lien arising from the chattel mortgage on the lease when the question can be properly raised. Further, although the point has not been urged, it does not seem that the receiver should have attempted to make a sale of the lease in question. Matters relating to rent or the possession of the property should be attended to by the receiver, and the appointment of a trustee should be facilitated in every way, in order that the title to the chattel real may devolve upon the trustee as soon as possible.

It might be argued that a sale could be had by order of the court before the election of a trustee, and confirmatory deeds given thereafter. The title of the trustee relates back to the adjudication in bankruptcy, and he could be directed to execute a conveyance in order to carry out the terms of a sale. But nevertheless it is apparently certain that a sale of a chattel real by a receiver without the express direction of the court conveys no title. The defect in the sale cannot be cured by a motion to confirm the sale and to quiet adverse claims to the property sold. It does not appear from the motion papers whether the purchaser has offered to complete the purchase, and no action by Welz & Zerweck to test the purchaser's title has been possible.

The claim of Welz & Zerweck under their chattel mortgage can be determined by the proper proceedings after a trustee is appointed, but all that can be done on this motion is to confirm the sale of the chattels covered by the mortgage under the stipulation which has been made. As to the lease the attempted sale must be set aside.

In re KUFFLER.

(District Court, E. D. New York. April 23, 1907.)

1. BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHTS OF SCHEDULE CREDITOR.
Where a bankrupt's schedules disclosed the claim of P., and that the bankrupt claimed the same was barred by limitations, P. was entitled to examine the bankrupt as to the extent of his estate at an adjourned meeting of creditors before P. had formally filed his claim with the referee, in order that P. might determine whether the size of any possible dividend was sufficient to justify the expense of proving the claim, notwithstanding the rule requiring a creditor to file a formal claim before any examination.

2. SAME—DEBTS DISCHARGED—PROOF.
Where a claim against a bankrupt is duly scheduled, it is included in his discharge, whether the creditor proves it or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 772.]

See 144 Fed. 445.

Saul S. Myers, for bankrupt.
Benjamin Ruska, for creditor.

CHATFIELD, District Judge. Adolph Kuffler was adjudicated a bankrupt in the United States District Court for the Southern District of New York, in 1899. A dividend upon his debts was paid; but his discharge was opposed, and the application therefor ultimately dismissed. In December, 1905, he filed a voluntary petition in this district, and included in his schedules the greater portion of the debts from which he had sought a discharge in the former proceedings in the Southern District. One of the debts scheduled is a claim owned by one Louis Peters, who appeared by attorney at an adjourned meeting of creditors before the referee and asked for leave to examine the bankrupt. This leave was denied, under a rule existing in this district which requires a creditor to file a formal claim with the referee before any examination. The certificate furnished by the referee shows that the creditor, Louis Peters, had not at that time, and has not yet, filed his claim against the bankrupt, but that the debt of the said Louis Peters is included in the bankrupt's schedules. The schedules further show that the bankrupt claims the bar of the statute of limitations as a defense to this particular debt.

There seems to be good reason for the rule which has been adopted in this district. A rule can always be waived or amended, however, when it seems to conflict with the necessities of the situation or a positive right arising from the effect upon the case of either statutes or decisions. Under the present circumstances, the creditor, Louis Peters, comes before the referee because of the fact that he has been included in the schedules. It is apparent from the papers that the bankrupt is likely to set up the defense of the statute of limitations. The amount of assets, upon which depends the size of any possible dividend, is a material factor, which the creditor may properly take into account in determining whether his prospect of success, if he attempts to overcome the defense of the statute of limitations, is sufficient to justify the expense of proving his claim. The creditor asserts to the

referee his identity with the creditor named in the schedules. He asserts, also, that he has a claim which is provable. His debt will be discharged, whether he proves his claim or not, if the bankrupt secures a discharge in this proceeding.

The statute of limitations is a defense, and not a part of the affirmative claim; and it has been held in a number of cases that a debt may be provable, even where the defense of the statute of limitations is good as against an action brought in the state courts of the state in which the bankruptcy proceeding has been instituted. In re Ray, 1 N. B. R. 203, Fed. Cas. No. 11,589; In re Shepard, 1 N. B. R. 439, Fed. Cas. No. 12,753. Such debts, therefore, being provable and covered by a discharge, it would seem that all the more a creditor included in the schedules, whose identity is established satisfactorily to the referee, is entitled to be given an opportunity to ascertain the exact condition of the bankrupt's estate before he determines whether it is worth his while to become a party to the proceeding and attempt to obtain a portion of whatever dividend may be declared. The precise point has been considered in the case of In re Jehu (D. C.) 94 Fed. 638; the court using the following language:

"The creditors may properly decline to incur the expense of proving their claims until it appears that some good will result from so doing. The referee should be satisfied that the party applying for the order is in fact a creditor of the bankrupt; but, if this fact be shown, no good reason exists why the examination should not be had, even though the creditor may not have proved his claim in set form."

In the case of In re Walker (D. C.) 96 Fed. 550, the court uses the following language in deciding that a creditor who has not filed a claim is privileged to examine the bankrupt, in order to see if it is worth while so to do:

"Subdivision 'b' of section 55 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3442]), provides as follows: 'At the first meeting of creditors the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined, at the instance of any creditor.' Section 21 of the act also provides that a court of bankruptcy may, upon application of any creditor, require the bankrupt to appear in court to be examined concerning his acts, conduct, or property. The question raised before the referee depends upon the meaning of the term 'creditor,' as employed in these sections. By section 1 of the act it is provided that, unless the same be inconsistent with the context, the word 'creditor' shall be construed to include 'any one who owns a demand or claim provable in bankruptcy.' There is nothing in the context which requires a restricted meaning of the term as employed in the sections above quoted. Throughout the act, whenever the word is used in a narrow sense, apt language is employed to indicate such an intention. For example, only those whose claims have been allowed are permitted to vote for the trustee (section 56), or share in the dividends (section 65), or determine whether a composition shall be accepted (section 12b). These are some of the cases in which the context shows that the term 'creditor' is used in a narrower sense than that indicated by the definition in section 1, and, when no such restriction is declared by the context, the general terms of the definition must be held to apply. Under the act of 1867, after much conflict, it was finally settled that a creditor who had not proved his claim was entitled to oppose the discharge of the bankrupt. In re Smith, Fed. Cas. No. 12,977; In re Murdock, Fed. Cas. No. 9,939. If he is entitled to oppose the discharge without proving his claim, he ought likewise to be allowed to examine the bankrupt for the purpose of establishing

the grounds of his objections; and it has been expressly decided that a creditor is entitled to make such examination without first filing specifications of his objections to the discharge."

These cases all support the view that under the circumstances a person listed as a creditor in the bankrupt's schedules is within the meaning of sections 1, 21a, and 55b of the bankruptcy law. If an outsider should appear at any time in bankruptcy proceedings and demand the right to examine the bankrupt, for the purpose of obtaining evidence, in order to make up his mind whether he should claim to be a creditor, the situation would be entirely different. But when, as in the present case, a person listed as a creditor states that he has a claim against the bankrupt's estate, and demands an examination in order to decide whether he will take an affirmative part in the bankruptcy proceedings, it would seem that the court has power to let him do so. This will not in any way abrogate the rule in this district, which is entirely proper for general purposes, and the permission granted the creditor upon this motion will not free him from any responsibilities or obligations to meet the pecuniary expenses of the examination he desires.

Under all the circumstances, the creditor, Louis Peters, upon the certificate of the referee and the record of the case, should have the examination he desires.

Ex parte BARCLAY.

(Circuit Court, D. Maine. May 29, 1907.)

No. 50.

FINES—ENFORCEMENT—IMPRISONMENT.

Rev. St. § 3062 [U. S. Comp. St. 1901, p. 2007], provides that if any person who may be driving or conducting or in charge of any carriage, vehicle, or beast, or any person traveling shall willfully refuse to stop and allow search and examination to be made by United States revenue officers for goods imported without payment of duty, when required to do so, he shall be punished by a fine of not more than $1,000 nor less than $50. *Held* that, where a fine imposed under such section was not paid, the court had common-law jurisdiction, according to local usage since the original judiciary act, to commit the defendant to jail until the fine was paid or he should be otherwise discharged according to law.

Frederick W. Hinckley, for petitioner.

Robert T. Whitehouse, U. S. Dist. Atty., for the United States and William M. Pennell, sheriff and jailer.

PUTNAM, Circuit Judge. The petitioner was tried and convicted in this court under section 3062 of the Revised Statutes [U. S. Comp. St. 1901, p. 2007]. The only penalty imposed for the offense is a fine of not more than $1,000 nor less than $50. No penalty of imprisonment is provided. The sentence imposed, or the order incorporated therewith, directed in the usual form that, in default of payment of the fine, Barclay should stand committed to jail until the fine should be paid or he should be otherwise discharged according to law.

The mittimus or warrant followed the sentence in this respect. Thereupon this application was filed for a writ of habeas corpus to issue to the jailer; and, on perusing the petition, the court ordered notice to show cause to issue, with a further notice to the attorney of the United States for this district. On the return day the attorney for the United States appeared and filed a motion to dismiss on the ground that the petition failed to show sufficient facts to justify the issuance of the writ, and, further, answered to the merits, accompanying the answer with an agreed statement, which answer and agreed statement were allowed to be filed without prejudice to the motion to dismiss. As the motion to dismiss did not touch the jurisdiction of the court, we proceeded immediately to consider the merits.

The petitioner rested his case on the proposition that neither section 3062 of the Revised Statutes, nor any other statute of the United States, authorized the court to enter the order or judgment it did enter in default of the payment of the fine, and that the only method of collecting the fine, if not paid, was by an execution, as authorized by section 1041 of the Revised Statutes. So far as any express statutory phraseology is concerned, this proposition is correct. Also it is correct that, with regard to substantial matters, criminal proceedings in the Circuit Court must find a foundation in some express provision of an act of Congress. Of course, it is conceded that a statutory implication may have the force of express phraseology. On the other hand, it is the recognized rule of the Supreme Court that, where there is no statute regulating the criminal practice and proceedings of the federal courts, they may adopt, and perhaps for the most part must adopt, the forms of practice and proceedings which were fully authorized within the territory constituting the district in which the court sits at the time of the enactment of the original judiciary act. Inasmuch as the alternative form of sentence or order, whichever it may be, which was used by the court in this case, was in conformity with the practice and forms of proceedings prevailing wherever the common law prevailed in the United States at the time of the passage of the original judiciary act, this alternative form has been constantly used in the Circuit Courts and District Courts of the United States. Of course, if it was a new question, it might well be said that there was some doubt whether so substantial a matter as this came within the rule of the Supreme Court in this particular as to the local practice and proceedings in criminal matters. It might well be said that it was of so substantial a character that it should be found to rest on some federal statute or could not be sustained. However, we cannot disregard the settled judicial usage of more than 100 years; and, in addition thereto, while all other citations brought to our attention by the petitioner and the United States are dicta pro and con, Jackson, Petitioner, 96 U. S. 727, 728, 737, 24 L. Ed. 877, seems to be directly in point in favor of the regularity of the proceedings to which this petition relates. That case grew out of a prosecution under section 3894 of the Revised Statutes, which, so far as we are concerned, is in the same form as the section proceeded on here. The point now made was made by the petition in Jackson, Petitioner. It was not argued, so far as the re-

port discloses, by either party, and therefore it may be assumed to have been abandoned by the petitioner. Nevertheless it was apparently squarely ruled in favor of the United States at page 737 of 96 U. S. (24 L. Ed. 877).

In addition to the above, turning to sections 1041 and 1042 of the Revised Statutes, which are re-enactments of Act June 1, 1872, c. 225, 17 Stat. 198 [U. S. Comp. St. 1901, p. 724], constituting the first statutory provision claimed by either party to bear on this topic, while it may well be claimed that the provisions of these two sections do not necessarily recognize the practice of the federal courts in the particulars which we have stated, yet the fair construction of them is to the effect that they impliedly and fully confirm it. We are compelled to refuse the petitioner any relief.

The petition is dismissed.

UNITED STATES v. AUGER et al.

(Circuit Court, W. D. Wisconsin. May 24, 1907.)

No. 131.

INDIANS—INDIAN LANDS—ALLOTMENT—PATENTS—RESTRICTIONS—SALE OF TIMBER—RIGHTS OF UNITED STATES.

Lands in controversy were allotted to certain Chippewa Indians under treaty of September 30, 1854, and patented to them with the restriction that they should not sell, lease, or in any manner alienate the land without the consent of the President of the United States, which restriction was inserted by authority conferred on the President by article 3 of such treaty (10 Stat. 1110). *Held*, that the patent devested the United States of all title to the land or timber growing thereon, notwithstanding the restriction; and that the United States had therefore no capacity to sue to recover the value of timber cut from such allotments under an improvident contract between defendants and the allottees.

The Attorney General and Wm. G. Wheeler and Henry H. Morgan, U. S. Attys.

Victor T. Pierrelee and W. M. Tomkins, for defendant Auger.

Geo. F. Merrill, for defendants Peppard.

SANBORN, District Judge. Bill in equity to recover the value of certain timber cut from allotments of certain Chippewa Indians of Lake Superior, on the Bad River reservation.

The lands were allotted to the Indians under the treaty of September 30, 1854, and patented to them with the restriction that they should not sell, lease, or in any manner alienate the tract of land described in the patent, without the consent of the President of the United States. These restrictions were written into the patents pursuant to the provisions of article 3 of the La Pointe treaty of September 30, 1854 (10 Stat. 1110), which provides that the United States would define the boundaries of the reserved tracts whenever it might be necessary, by actual survey, and the President might from time to time, at his discretion, cause the whole to be surveyed, and might assign to each head of a family or single person over 21 years of age 80 acres of land for his or their separate use; and he might, at his discretion, as fast

as the occupants became capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions on the power of alienation as he might see fit to impose. Without some such provision in the treaty, or in some act of Congress, the restrictions in the patent would have been invalid. Francis v. Francis, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. ——.

General demurrer to the bill was filed by the defendants, setting up want of equity and want of title in the complainants. Under the patents mentioned the full title to the lands passed to the Indian allottees. The United States has retained no interest whatever. As said by Mr. Justice Brown, in Schrimpscher v. Stockton, 183 U. S. 290, 299, 22 Sup. Ct. 107, 111, 46 L. Ed. 203:

"The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent (against alienation without the consent of the Secretary of the Interior) would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him notwithstanding any alienation that he might make."

It appears from the bill that the timber was sold by the Indians without the consent of the President. Undoubtedly it is true that no title to the timber passed to the defendants, and that the Indians themselves by actions at law in their own names might recover in replevin suits or its value in trespass or trover; but it is difficult to see how the government has retained any interest. If the timber, which is real estate until severed, had been sold by consent of the President upon condition that the proceeds should be held by the Indian agent for the benefit of the Indians, there would be a trust relation between the government and the Indians which might support an action. A similar trust was enforced by the United States Circuit Court of Appeals of the Eighth Circuit in United States v. Thurston County, 143 Fed. 287, 74 C. C. A. 425. And such a relation might sustain an action in equity by the government against any person interfering with the fund, but in this case the President has consented to nothing. The Indian has simply undertaken to sell the timber without any right so to do, and the purchaser has taken it off and sold it to other persons. The sole right of action is in the Indian allottees. There seems to be nothing upon which a trust relation can be founded. The late case of United States v. Paine Lumber Co., 27 Sup. Ct. 697, 51 L. Ed. ——, seems to be decisive of the question here involved.

It is no doubt true that the Indian allottees will not bring suits, and that in the practical sense there is no remedy in such a case as this. If it were possible to find any remedy, it ought to be applied, and some means found to protect the Indians in their improvidence; but Congress has not seen fit to give any remedy, and the demurrer should therefore be sustained.

In re BENNETT.

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

No. 1,603.

1. BANKRUPTCY—DISTRIBUTION OF ESTATE—PRIORITIES UNDER STATE LAW.
While a state law cannot of its own force determine priorities under a national bankruptcy law, Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], which provides that "debts owing to any person who by the laws of the state * * * is entitled to priority" shall be given priority in the distribution of the bankrupt's estate, adopts the law of the state, and makes it the applicable federal law in determining priorities.

[Ed. Note.—Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors, see note to Carling v. Seymour Lumber Co., 51 C. C. A. 11.]

2. SAME—CLAIM FOR MATERIALS FURNISHED TO MANUFACTURING COMPANY—KENTUCKY STATUTE.
Ky. St. 1903, § 2487, which provides, inter alia, that persons who shall have furnished materials or supplies for the carrying on of the business of any manufacturing company shall have a lien therefor on its property and effects involved in the business, when the same shall be assigned for the benefit of creditors, or shall in any way come to be distributed among creditors, whether by operation of law or by act of such company, which lien, as provided by following sections, is superior to any mortgage or incumbrance thereafter created, while it may not create a technical lien until the happening of one of the conditions mentioned, gives a substantial right in or inchoate lien upon the property from the date of the furnishing of the material or supplies which comes within the spirit and purpose of Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], and on the bankruptcy of the company entitles such a claim to priority over the claims of general creditors.

3. SAME—STATUTES—CONSTRUCTION—KENTUCKY LIEN STATUTES.
Ky. St. 1903, § 2494, which provides that "no lien provided for in this article" shall attach, unless a claim therefor is filed in the county clerk's office within 60 days after the last day of the last month in which any labor was performed or material was furnished for which the lien is claimed, refers solely to liens provided for in section 2492 for labor or materials furnished in the construction of works of public improvement, and has no application to the liens given by section 2487 for materials or supplies furnished to a manufacturing company in case of the distribution of its property among creditors, notwithstanding the general language "lien provided for in this article"; the two classes of liens having their origin in different statutes, which with a third were carried without substantial change into the article in question, and sections 2492 to 2495 inclusive comprising one of the prior acts, while section 2487 formed part of another.

4. SAME—CLAIMS ENTITLED TO PRIORITY—EFFECT OF ASSIGNMENT.
A claim which is given priority by Bankr. Act July 1, 1898, c. 541, § 64b(5), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], because of a state statute by which the right of priority is given to the debt, and not to the creditor, may be assigned before bankruptcy, and the right of priority will pass to the assignee.

Petition to Review an Order of the District Court of the United States for the Eastern District of Kentucky.

O. T. Wimberly and A. R. Burnam, Jr., for petitioner.
John B. Baskin, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The question is whether the claims of the appellees against the bankrupt's estate were properly allowed priority of payment as debts which by the law of the state are entitled to priority under section 64b(5) of the bankrupt act. Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]. The bankrupt is a manufacturing corporation organized under the law of Kentucky, and doing business in that state. The claims are for materials supplied to and used in the business of the bankrupt corporation. Priority is claimed by virtue of section 2487, Ky. St. 1903. The trustee admitted the debt, but denied priority. The bankrupt court held that the debt was one entitled to priority under the statute referred to. From this judgment allowing the debt as a prior claim, the trustee has appealed, and also filed a petition for review.

If under section 2487, Ky. St. 1903, a priority is accorded to claims of creditors of such companies as the bankrupt corporation for materials and supplies furnished to carry on the business of the bankrupt, is that right of priority lost by reason of the operation of the bankrupt law? It is not a question as to whether the bankrupt law is a law superior within its field to a state law in the same field, but a question whether a priority given is preserved by the bankrupt law. This is answered by section 64b(5) of the bankrupt act. That provides that "debts owing to any person who by the laws of the state or of the United States is entitled to priority" shall be entitled to priority in the distribution of a bankrupt's general estate. Counsel for the trustee say that the Kentucky statute referred to above "applies only to the distribution of insolvent estates in the courts of Kentucky, and has no application to the distribution of estates under the national bankrupt law." It is idle to consider whether a state law can of its own force determine priorities under a national bankrupt law. No such contention is made or could be sustained. But it is another thing when the national bankrupt law prescribes that effect shall be given to state laws which do give priority to certain debts. The Congress might have dictated a single and uniform rule of distribution. If it had, that would have been the absolute law, notwithstanding state laws prescribing a different rule. But Congress has elected to prescribe as one rule of distribution that debts entitled to priority under any state law or law of the United States shall be accorded a like priority in the distribution of a bankrupt's estate. The law which we administer is thus the national bankrupt law; that is, the preference in bankruptcy, thus accorded, is a preference prescribed by the bankrupt law which for this purpose adopts the law of the state as the applicable federal law. This is the view which has been taken by many careful judges and accords with our own view.

In re Wright (D. C.) 95 Fed. 807, is a decision by Judge Lowell which was affirmed by the Circuit Court of Appeals in a case reported under the style of In re Worcester County, 102 Fed. 808, 815, 42 C. C. A. 637. In that case there was involved a priority given to the county under the insolvent laws of Massachusetts. It was held that this priority was preserved by section 64b(5) of the bankrupt act.

In the case styled In re Crow (D. C.) 116 Fed. 110, 112, a question arose as to whether a debt due by a bankrupt guardian to his ward was

entitled to priority by reason of a Kentucky statute, which provided that, in the distribution of an insolvent's estate, debts due as guardian should be preferred. Judge Evans very tersely sustained the right of priority, saying that:

"The bankrupt law does not in such cases supersede or mean to supersede the operation of the state law. On the contrary, the bankrupt act expressly recognizes the existence of the state statute, and makes that statute the basis for allowing priority of payment to certain classes of claims agains the debtor. Its effect is, in the most manifest way, to keep alive such provisions of the state law as give priority of payment, and while the bankrupt law, speaking generally, does by its operations supersede the force of any state laws which conflict with it the case before us presents an exception to the general rule, whereby the applicable provisions of the state law are expressly enforced through the bankruptcy act itself."

In Re Falls City Shirt Manufacturing Co. (D. C.) 98 Fed. 592, Judge Evans gave priority for a claim for rent because, under section 2317, Ky. St., such a claim was a lien upon the property of the renter upon the premises. He also sustained a claim under 2487, the provisions here involved.

In Re Daniels (D. C.) 110 Fed. 745, costs, incurred in an action against the bankrupt prior to the adjudication, which would constitute a preferred claim under the insolvency statutes of Rhode Island, were held entitled to priority under section 64b(5).

In Re Byrne (D. C.) 97 Fed. 762, a preference given by a statute of Iowa to labor claims was given a priority over a landlord's lien, because that was held to be the order of priority under the Iowa statute preserved by section 64b(5).

In Re Goldberg Bros. (D. C.) 144 Fed. 566, priority was given to costs incurred by an attaching creditor, because under the insolvent statutes of Maine priority was given to such costs "if the suit was commenced in good faith for the benefit of all the creditors."

In the case styled In re Laird, 109 Fed. 550, 554, 48 C. C. A. 538, the question was whether certain claims for labor were a prior charge upon the funds in a bankrupt trustee's hands. The result depended upon the construction of section 3206a, Rev. St. Ohio 1906. The applicable part was in these words:

"And in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee, is appointed shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and costs of administering the trust."

Judge Day, now Justice Day, for this court, said:

"It is not specifically stated in this connection that the claim in favor of the laborer thus to be preferred shall be a lien upon the debtor's property, but it is provided that, in the event property of an employer is placed in the hands of an assignee, receiver, or trustee, such claim shall be first paid out of the trust funds in preference to all other claims, excepting only taxes and costs of administering the trust. As the statute reads claims of all classes are to be postponed to the labor claims accruing within the period mentioned whether the same have theretofore constituted liens upon the property or not. It is the manifest purpose of this statute to give this class of claims a preference over all other demands whatsoever, with the exception of taxes and costs of administration."

The decision was, however, rested upon the proposition that the property came into the trustee's possession charged with the prior payment of the labor claims which was held to be, in legal effect and force, a lien created by the statute of the state, and thus not avoided by the bankrupt law. The learned and industrious counsel for the appellant have with modest earnestness contended that the cases cited, which sustain preferences given by state statutes, are not sound. They cite to support their view Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, In re Allen (D. C.) 96 Fed. 512, In re Young (D. C.) 96 Fed. 606, and In re Beaver Coal Co. (D. C.) 107 Fed. 98. The claim for a lien for professional services denied in Randolph v. Scruggs was for services in preparing a deed of general assignment, which, having been made within four months of bankruptcy, was avoided as a consequence of the adjudication of bankruptcy. This deed of assignment provided that the fees of Randolph et al. should be first paid by the trustee thereunder; but the court said that the effect of avoiding the deed of assignment was to avoid it as a whole, and that the "appellants can assert no preference by way of lien under the deed." There was no claim of any preference under any state statute given to counsel preparing such an assignment. The assignment was valid under the law of that state, but when it was avoided the security provided by the deed for the professional services stood upon no better footing than the security provided by the same instrument for every other debt of the assignor. The case is not in point at all. In Re Allen the claim to a preference was for the costs of an attachment proceeding against the bankrupt, before bankruptcy, which was avoided as a consequence of an adjudication in bankruptcy. The only claim to a right to a preference grew out of the lien secured for the debt and costs by the attachment proceeding; but, as that lien was avoided by the bankruptcy, the lien for the costs of the action went the same way. There was no statute of the state of California making the costs in such a proceeding a preferential claim in the distribution of the insolvent's estate, as was the fact under the law of Rhode Island and the law of Maine as applied in the cases touching costs, cited above, of In re Daniel and In re Goldberg Bros. The same criticism applies to In re Young. In re Beaver Coal Company is in conflict with the cases giving priorities to costs of proceedings against an insolvent set aside as an effect of a state insolvent law. Judge Bellinger does not seem to deny that a debt entitled to priority under a state law is preserved by section 64b(5) of the bankrupt law, but rather to hold that costs under the proceedings avoided by the bankrupt adjudication do not constitute a debt preferred under section 64b(5), although such costs would have been a preferred debt under the insolvent statute of Oregon.

That the unmistakable purpose of the Kentucky statute was to secure a priority to material and supply claims furnished to such a company, as described in the section heretofore set out, under almost every imaginable situation, we have no doubt. Thus a "lien" was declared to exist whenever the property of any such manufacturing company "shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for benefit of creditors,

or shall in any wise come to be distributed among creditors, whether by operation of law or by the act of such company, owner or operator." By section 2490, the lien arises whenever "the debtor shall suspend, sell or transfer such business or when the property or effects engaged in such business shall be taken in attachment or execution, so that the business shall be stopped or suspended." By section 2491, this inchoate right to the appropriation of the property of such a debtor is declared to be "superior to the lien of any mortgage or other encumbrance thereafter created." That the technical "lien" of this article does not arise until the occurrence of one of the conditions mentioned may be true, and such is the intimation of the Kentucky Court of Appeals in Winter v. Howell's Assignee, 109 Ky. 163, 58 S. W. 591, and of this court in Ohio Falls, etc., Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386.

But when, before the happening of one of the conditions which precede the technical "lien" of the statute, there exists from the origin of the debt a right to the ultimate application of the debtor's property to its payment, a right so tangible and specific as that it cannot be defeated by alienation, mortgage, or other incumbrance, nor by any process of law, receivership, assignment, or insolvency proceedings, a right which fastens itself so strongly that it adheres even after the death of the personal debtor, it is impossible to draw any very solid distinction between the equitable consequences of such a right and those of a full technical lien. The purpose of the postponement of the creation of the ripened lien until the happening of the events named would seem to be to give an equality of lien to all claims of like character then existing, rather than to each a "lien" from the date of the furnishing of materials and supplies. This purpose is not inconsistent with the acknowledgment of an inchoate right or incipient lien from the time of the furnishing of the materials, which becomes a ripened lien and fixed charge when the event happens which is named in the statute. Ohio Falls, etc., Co. v. Central Trust Co., cited above.

In Central Trust Company v. Richmond, etc., Ry. Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, we held that under section 2494, providing that no lien should attach unless the claim should be filed within the time there stated, that an inchoate or incipient lien originated with the beginning of the work or the delivery of the materials and continued as such incipient lien until perfected by the filing of the requisite notice or lost by failing to do so, as required. From the happening of one of the events named, the equitable or inchoate charge becomes a fixed lien and cannot be displaced by later debts. It may be that, if no "lien" in the technical sense of the statute existed when the bankruptcy occurred, no lien in the same sense could arise after bankruptcy. For the purposes of this case, we need go no further than hold, as we do, that this unfixed or incipient charge, a charge so effectual as to be incapable of defeat by any act of the debtor or of other creditors, or any proceeding by which the property shall "come to be distributed among creditors by operation of law or act of the debtor," manifests so plain a purpose that such debt shall be given priority as to come clearly within the spirit and purpose of section

64b(5) of the bankrupt act. Indeed, the decided cases go so far in preserving such an inchoate charge or incipient lien as to give to it all the effect of a lien. This is the plain teaching of our own case of In re Laird, heretofore cited, followed in Re City Trust Co., 121 Fed. 706, 58 C. C. A. 126.

A statute of New Jersey, giving to mechanics and materialmen a lien, provided "that no debt should be a lien, by virtue of this act, unless a claim is filed," etc., within a time named. Before this was done, bankruptcy of the debtor ensued, and it was claimed there, as here, that, as there was no technical lien when adjudication occurred, none could arise thereafter. Judge Blatchford, district judge, so ruled; but Judge Woodruff, on appeal, held that the lien attached as of the time of furnishing the materials, and reversed the ruling of the lower court. In re Dey, 9 Blatchf. 285, Fed. Cas. No. 3,871.

A statute of Pennsylvania provided that, when property upon rented premises and liable to distraint should be seized on execution, the officer making the sale should pay the rent due in preference to the execution creditor. The question was whether such rent due to a landlord should be first paid by the bankrupt estate which was liable to distraint. Justice Swayne, for the court, said:

"Before the commencement of the proceedings in bankruptcy, the defendants in error might have distrained, and it is agreed that the property upon the premises was more than sufficient to satisfy the demand. The statute of Pennsylvania of June 16, 1836, provides that, where property under such circumstances is seized and sold under execution, the rent due for a period not exceeding one year should be paid first out of the proceeds of the sale. This case is within the equity of that statute."

To the same effect are the cases of In re Hoover (D. C.) 113 Fed. 136, In re Duble (D. C.) 117 Fed. 794, and Wilson v. Penn. Trust Co. (3d Circuit) 114 Fed. 742, 52 C. C. A. 374, all under the Pennsylvania statute requiring priority of payment against an execution upon goods liable to distraint; In re Mitchell (D. C.) 116 Fed. 87, a case under a statute of Delaware which gave a preference to the landlord out of property upon the rented premises. See, also, In re Wynne, Fed. Cas. No. 18,117, In re Bowne, Fed. Cas. No. 1,741, and Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619.

We therefore conclude that the learned bankrupt judge did not err when he held that the claims of the appellees were debts entitled to priority under section 2487, Ky. St. 1903, although a technical lien had not ripened at date of adjudication, and that, under section 64b(5) of the bankrupt act, this right of prior payment would be enforced.

It is next objected that, under section 2494, Ky. St. 1903, appellees were required to file and record their claims in the county clerk's office within 60 days after the last day of the last month in which the materials were furnished, and that they did not do this, and that that section provided that no lien shall attach unless this filing is done. Judge Cochran, after an elaborate consideration of the question, reached the conclusion that section 2494 did not apply to the lien provided by section 2487. In this we concur upon the grounds stated in his opinion.

For a part of one of the claims here involved, the Hume Cooperage Company executed a note, and this note was assigned to one of the appellees. Proof of debt has been made by assignor as well as by assignee. The contention is that the statutory preference is given to him who actually furnishes the materials, and that an assignee cannot enforce the lien or priority conferred by the statute. Inasmuch as no statutory filing applies to liens claimed under section 2487, which comes from the act of 1876, the case of Frailey v. Winchester, 96 Ky. 570, 29 S. W. 446, which was based upon sections 2492 to 2495 and a part of the act of 1888, has no application, as neither the assignee nor assignor of a claim under 2487 is required to make the statement required to be made under the provisions which relate to liens under the other sections referred to. Neither does the case of Hutsell v. Banks, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403, apply. In that case it was held that the assignees of a rent note could not collect it by the "extraordinary remedy" of distress. Inasmuch as the contingent right of lien under section 2487 does not depend upon the doing of anything by the creditor, there is no reason why a priority or lien, which attaches to the claim rather than to the claimant, shall not be assignable. The case falls under the earlier Kentucky decision of Graham v. Holt, 4 B. Mon. (Ky.) 61. That case accords with the general rule in respect of the assignability of preferential claims. Thus section 64b(4) of the bankrupt act gives a preference to "wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings in bankruptcy. * * *" In Shropshire-Woodliff Co. v. Bush (decided January 7, 1907) 27 Sup. Ct. 178, 204 U. S. 186, 51 L. Ed. ——, the Supreme Court held that "the priority is attached to the debt, and not to the person of the creditor; to the claim, and not to the claimant," and that an assignee before bankruptcy might assert the claim and its priority. In Columbus, etc., R. R. Appeals, 109 Fed. 177, 48 C. C. A. 275, we held that a preferential claim, under the equity rule applied in the administration of an insolvent railroad, might be assigned, saying: "The preference attaching to a labor claim is to the claim, and not to the claimant, and passes with the claim to an assignee." See, also, Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. Ed. 490, and Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596.

That personal security was taken by a note made by the debtor corporation did not operate to release the security afforded by the statute; there being nothing inconsistent with an intention to retain and rely upon the lien. Smith v. Wells, 4 Bush (Ky.) 92. Andrews v. Kentucky Citizens' B. & L. Ass'n, 67 S. W. 826, 23 Ky. Law Rep. 2418, is not in conflict, for the note there in suit was made in 1892, and the statute giving the lien claimed provided that the lien authorized by the chapter should have no effect "if security shall have been taken for labor performed or materials furnished." This provision was repealed by Acts 1896, p. 49. In Central Trust Co. v. Richmond Railroad Co., 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458, we held with reference to the lien given under sections 2492–2494,

Ky. St. 1903, that, while the right to the lien thus given might be waived by the acceptance of a contract to pay for the work in securities whose existence would be inconsistent with the existence of a lien, the waiver would be only conditional upon the performance by the debtor of his part of the agreement. See, also, Harris v. Youngstown Bridge Co., 90 Fed. 322, 33 C. C. A. 69.

We see no error in the decree, and it will accordingly be affirmed.

NOTE.—The following is the opinion of Cochran, District Judge, in the court below on granting the order herein sought to be reviewed:

COCHRAN, District Judge. Hiram Blow & Co., a creditor of the bankrupt, claims the right to be preferred in the distribution of its assets. The trustee and certain general creditors contest this claim, and the matter is before me for determination.

The bankrupt's business was that of a manufacturer of barrels, and the consideration for the indebtedness on account of which the preference is claimed was heading and staves sold to it to enable it to carry on its business. Sections 2487 and 2491, inclusive, Ky. St. 1903, the first five sections of article 3 of chapter 79 thereof, entitled "liens," confer certain rights on persons furnishing material or supplies to a manufacturer for the carrying on of his business and these sections form the basis of the claim to preference asserted herein. It is important at the outset, therefore, to understand clearly exactly what they provide, and what rights they confer. Section 2487 provides that the employés of any mine, railroad, turnpike, canal, or other public improvement company or of any rolling mill, foundry or other manufacturing establishment and the persons who shall have furnished materials or supplies for the carrying on thereof, shall have a lien on so much of the property and effects of such company, owner, or operator as may have been involved therein, and all the accessories connected therewith, including its interest in the real estate used in carrying on the business when its property and effects "shall be assigned for the benefit of creditors or shall come into the hands of any executor, administrator, commissioner, receiver of a court, trustee or assignee for the benefit of creditors or shall in any wise come to be distributed amongst creditors, whether by operation of law or by act of such company, owner or operator." By section 2490 it is provided that said lien shall also attach "when any such company, owner or operator shall suspend, sell or transfer such business or when the property or effects engaged in such business shall be taken in attachment or execution so that the business shall be stopped or suspended." Section 2488 provides that said lien shall be superior to that of any mortgage or other incumbrance created after the rendition of the services or furnishing of the materials, and as to wages coming due within six months to that of any mortgage or other incumbrance created before the rendition of the services. Originally the section provided for a superiority of the lien, both as to services rendered and materials furnished, without limit as to extent over a mortgage or other incumbrance created before the rendition of the one or the furnishing of the other; but by an amendment of date March 21, 1896, such superiority was cut down to six months' wages. Section 2489 provides that if upon the happening of any of the contingencies by which the property and effects of the company, owner, or operator are put in process of distribution amongst creditors the business in connection therewith is continued to be operated by the party having them in charge, the net earnings thereof shall be distributed pro rata amongst the employés and materialmen. Section 2490 provides, in addition to what has already been set forth, that in case the lien attaches upon the happening of any of the contingencies set forth therein it may be enforced by proceedings in equity. And section 2491 provides that the plaintiff in such proceeding may unite with him as coplaintiffs any number of similar lienholders, shall make all lienholders and incumbrancers parties, and where the parties are numerous any one or more may be designated by the court to prosecute or defend for the class. It further provides in these words: "Suit must be filed to enforce the lien given by this article within 60 days from the date of the consignment or from the date when the

property shall go into the hands of a receiver or trustee or from the date when the business shall be stopped or suspended or the property sold; or the claims for which a lien is asserted must be filed in said time with the person authorized to receive and report claims."

The question has been raised and discussed as to when the lien provided by these sections attaches. Apparently, at least, it does not attach until the happening of one of the contingencies set forth in sections 2487 and 2490. On behalf of claimants, however, it is urged that it is to be implied from certain of the provisions in said sections that the lien attaches at the earlier date of when the services are rendered or materials are furnished. One of the provisions so relied on is that of section 2488, in relation to the superiority of the lien over a mortgage or other incumbrance created before the happening of any of said contingencies. This, however, is not inconsistent with the lien not attaching until the happening of one of said contingencies. A lien subsequent in time may be made prior in right. We have an instance of this in that section itself, in so far as it provides that the lien shall be superior to a mortgage or other incumbrance created before the rendition of services. Again, attention is called to the provisions of section 2489, that the earnings shall be distributed "amongst the persons to whom a lien is hereby given" and of section 2490, that "suit must be filed to enforce the lien given by this article within sixty days," etc. No implication, however, can be drawn from either of these provisions as to when the lien attaches.

Possibly support of the position that the lien attaches when the services are rendered or materials are furnished may be found in certain parts of opinions in certain cases involving statutes providing that, when an execution is levied on a tenant's goods, an officer having it shall first pay the landlord certain rent out of the proceeds of the goods when sold. In the case of In re Wynne, Fed. Cas. No. 18,117, the statute involved provided that no person having by deed of trust, mortgage, or otherwise a lien upon goods of a tenant on the leased premises should remove such goods without paying and securing payment of one year's rent due and to become due, and that any officer who might take such goods under legal process should pay out of the proceeds the rent in arrears and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due. Mr. Chief Justice Chase said generally: "Liens are of various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." And concerning the statute involved therein he said: "We cannot doubt that this statute creates a lien in favor of the landlord and a lien of high and peculiar character."

In the case of In re Trim, Fed. Cas. No. 14,174, Judge Bryan, as to the effect of a similar statute, said: "This lien is not dependent on a distress warrant or an execution. The charge on the property or the proceeds of the property is a charge because of the statute. Where there is an execution, the charge is paramount to the levy itself. The very fact that it is paramount to the levy proves that it is a lien. * * * The statute creates the lien, not the execution. It creates a charge upon the property which excludes even an execution. The lien, so far from being created by the execution, ousts it. If it had not a previous existence, how could this be?"

But, however it may be as to statutes of this character, it can hardly be that in case of a statute, as here, expressly providing that a lien shall attach on the happening of certain contingencies, the lien attaches before they happen at an earlier date. And it has been expressly laid down by Judge Hobson, in the case of Winter v. Howell, that the lien provided by the statutory provisions in question herein does not attach until the happening of one of the contingencies set forth therein. In that case the owner of a manufacturing establishment had made an assignment on December 28, 1896, and an employé asserted a lien for one year's salary then due him for services rendered, which covered a period of time before March 21, 1896, the date of the amendment hereinbefore referred to. There was no mortgage or other incumbrance on the property assigned, so that the claimant's rights were in

no wise affected by the amendment. But for some reason the question as to whether they were was considered. Judge Hobson said: "It is insisted for appellant that his rights are to be determined by these statutes, and not by the statute in force at the time of the assignment, because his contract of service was made while the former acts were in force. This contention cannot be maintained, for the reason that the employés were given no lien until the assignment was made. Their lien, arising by virtue of the assignment, and not attaching to the property until it was assigned for the benefit of creditors, must be governed by the law in force when the assignment was made."

Judge Lurton said as much in regard to said lien in the case of Ohio Falls Mfg. Co. v. Central Trust Co., 71 Fed. 916, 18 C. C. A. 386. He there said: "But this lien did not actually attach so long as the property remained in the hands of the debtor railway company and was managed and operated by it on its own account."

To the same effect are certain statements of Judge Evans in the case of In re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 592, to wit: "The landlord's lien was in existence June 17, 1899, at and before the adjudication; but the property of the bankrupts certainly did not come into the hands of the trustee until after that time, and probably not until July 3, 1899, when the trustee was appointed and qualified. Not until that event did the lien of the materialmen arise or exist." And, again: "As already indicated, sections 2487 and 2488 give a lien to the materialmen only when the property goes into the hands of the trustee in bankruptcy and ipso facto that event. That event occurred July 3, 1899. This lien then became at once absolute and fixed."

There is no escaping, then, from the position that the lien in question does not come into existence or attach until the happening of some one of the contingencies set forth in sections 2487 and 2490. Until the happening thereof, the only perfected right which the employé or materialman has is a personal claim against the company, owner, or operator for the amount due him. As to the lien, his right is inchoate and contingent upon such happening. And yet, though it is an inchoate and contingent right, it is still a right. When he renders services or furnishes materials, he can safely act upon the idea that, if one of the contingencies does happen, his lien will attach; and others, when dealing with the company, owner, or operator, are bound to take notice thereof and to act accordingly. The company, owner, or operator is so hedged about by contingencies on the happening of which the lien will attach that the only way in which it can prevent its attaching is for it to retain the ownership of the property and effects engaged in the business and to keep the business going. If it transfers said property and effects to another, if they go into the hands of another for the benefit of creditors, if they are attached or levied upon under an execution, or if it ceases to do business, the lien at once attaches. And when it does attach it overrides a mortgage or other incumbrance created subsequent to the rendition of the services or furnishing of the materials; and, as to six months' wages, a mortgage or other incumbrance created prior to the rendition of the services.

In the case of Ohio Falls Car Mfg. Co. v. Central Trust Co., supra, Judge Lurton referred to this inchoate right of the materialman under the statutory provisions in question herein in these words: "The plain purpose of the act was that the furnishers of materials or supplies should be preferred in the distribution of the assets of an insolvent company over mortgages or other incumbrances theretofore or thereafter created. The most that can be said is that such a creditor, prior to the happening of one or the other of the conditions mentioned in the statute, had an unfixed right in the property of the debtor, amounting at most to an inchoate lien which could be perfected upon the occurrence of one or the other of the conditions precedent named in the statute and the beginning of legal proceedings for its declaration and enforcement within the time and in the manner prescribed by the statute."

Under the mechanic's lien law of New York, no lien attaches until notice of the claim is filed in the proper clerk's office. Judge Brown, in the case of In re Emslie (D. C.) 97 Fed. 929, refers to this feature of said law in these words: "The language of the present statute of New York seems to leave no doubt that the lien in this case does not arise upon doing the work or fur-

nishing the material, but only upon filing the notice of claim in conformity with the provisions of the statute, and it is only through this proceeding that the lien is created. It is the lodging of the claim under that statute that binds the property, just as the issuing of an execution to the sheriff under a judgment binds the debtor's goods and chattels."

Notwithstanding this, however, it was held by the Court of Appeals of New York, in the case of Kane Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619, that a party who has furnished labor and material in the erection of a building has an inchoate right before the filing of a notice in the clerk's office, and such an inchoate right that upon filing notice after the making of a voluntary assignment for the benefit of all his creditors his lien will prevail over such assignment. Judge O'Brien said: "The object and purpose of the mechanic's lien law was to protect a person who with the consent of the owner of real property enhanced its value by furnishing materials or performing labor in its improvement by giving him an interest therein to the extent of the value of such material or labor. The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest. That is the manner and mode of procedure in which the right is asserted. A certain time is allowed in which the lien may be asserted or lost. During that time there is a preferential statutory right, in the nature of an imperfected equitable lien in favor of the laborer, mechanic, materialman, or subcontractor, and when a notice of lien is filed that right is perfected; but, until the 90 days allowed by the statute within which the lien may be filed have elapsed, the right cannot be defeated by the voluntary act of the party against whom it might be asserted, such as a general assignment for the benefit of creditors. If such were the effect of the assignment, no labor or materialman's claim would be secure, and the beneficial purpose of the statute could be defeated, unless a lien was filed at the time the work was commenced and from day to day thereafter. This, however, being a remedial statute, must be construed liberally with a view to carry out its intent and for the accomplishment of every beneficial purpose contemplated. It would therefore seem to be a reasonable conclusion that the assignee for the benefit of creditors takes the title to the estate of his assignor subject to this right of any lienor to assert his lien against the property or the fund within the statutory time; that is, within 90 days."

With this presentation of the provisions of said sections of the Kentucky statutes and the rights they confer, we are in position to determine the question of preference asserted herein. A convenient way to dispose of the matter is to take up and consider the various grounds urged on behalf of the trustee and contesting creditors in support of their contention that claimants are not entitled to the preference claimed.

1. It is so urged, on the ground that none of the contingencies upon the happening of which it is provided that a lien is to attach has happened, and claimants' inchoate right has not, therefore, become perfect.

It must be conceded that none of said contingencies has happened, and that claimants' inchoate right has not become perfect. It is true that the business of the bankrupt has been suspended; but the suspension was not prior to this proceeding, and was not the act of the bankrupt. It was brought about by this proceeding. The suspension contemplated by section 2490 is a voluntary suspension by the company, owner, or operator, and none other. It is true also that the property and effects of the bankrupt have by this proceeding been put in process of distribution amongst its creditors; but this mode of putting them in process of such distribution is not within the contemplation of section 2487. The only modes of so doing contemplated thereby are those specifically mentioned or some other possible mode of which the state courts would have jurisdiction, to which the general language used has reference. The Legislature of Kentucky had no power in and of itself to give any effect to a bankruptcy proceeding or to make provision as to how the property and effects of a bankrupt shall be distributed in such proceeding, and hence did not intend to do so. So it is that I am driven to the conclusion that none of the contingencies contemplated by sections 2487 and 2490 has happened, and plaintiff's inchoate right has never been perfected.

But does it follow from this that claimants are not entitled to the prefer-

ence claimed? I think not. There are two distinct grounds upon each of which separately and by itself it may be said that they are entitled to it. One of them may be termed the doctrine of equivalency. It is this: Though none of the contingencies contemplated by the statutory provisions in question has happened, that which is equivalent to certain of said contingencies, to wit, this proceeding, has come to pass, and its coming to pass has prevented the happening of any of the statutory contingencies. It is therefore equitable that the same consequences should follow from this proceeding that would have followed from the happening of one of said contingencies had it not intervened. As it has been put, the case comes within the equity of the statute. In the case of Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451, it was held that the assignee in bankruptcy should pay rent due from the bankrupt to his landlord for a period not exceeding a year prior to the bankruptcy before distributing the proceeds to the creditors generally, because of state statute providing that, where the property of a tenant is seized and sold under execution, rent due for such a period of time should be paid first out of the proceeds of sale, though no execution had been issued prior to the bankruptcy. Mr. Justice Swayne said: "This case is within the equity of the statute."

In the earlier cases of In re Wynne, supra, In re Bowne, Fed. Cas. No. 1,741, and In re Trim, supra, it was held that in the case of the existence of such a state statute the landlord should be first paid his rent before distribution in bankruptcy amongst creditors. The decisions, however, were not put on the ground that the case came within the equity of the statute, but upon the ground that the effect of the statute was to give the landlord a lien before the issuance of an execution, and the assignee in bankruptcy took the bankrupt's property subject to the existing liens.

The following later cases, to wit, In re Hoover (D. C.) 113 Fed. 136, In re Mitchell (D. C.) 116 Fed. 87, and In re Duble (D. C.) 117 Fed. 795, place the landlord's right to preference on the ground that the case comes within the equity of the statute. In the case of In re Hoover, supra, Judge Buffington said: "The bankrupt court having taken possession of this property thus liable for the rent, its process whereby the same was sold must for the purposes of this statute be regarded as an equitable execution. The case is within the equity of the statute." In this case a distress warrant had been issued and levied before the institution of the bankruptcy proceeding. In the case of In re Mitchell, supra, Judge Bradford said: "The right of the landlord, existing by law prior to the adjudication in this case, and requiring no act on his part for its creation and perfection, is, in my opinion, recognized and respected by the bankruptcy act. It is his right to be paid his accrued rent out of the proceeds of the goods and chattels in question which belonged to the tenant until they passed to the trustee in bankruptcy representing the creditors as a debt or demand payable in præsenti. * * * This right is entitled to recognition by the court in bankruptcy either as existing independently of the proceedings in bankruptcy, or as coming within the equity of the Delaware statute." In this case the preference allowed included rent to become due as well as rent already due. In the case of In re Duble, supra, Judge Archbald said: "This preference is preserved under the bankrupt act; the taking of the tenant's goods by virtue of its provisions being regarded as within the equity of the statute."

The case of Morgan v. Campbell, 22 Wall. 381, 22 L. Ed. 796, is in no way in conflict with these decisions. In that case there was no such state statute. The landlord simply had his common-law right of distress, and that right had not been exercised prior to the bankruptcy proceeding. It was held that the landlord's claim for rent was not entitled to preference. Though, in the case of Austin v. O'Reilly, Fed. Cas. No. 665, Mr. Justice Bradley held that the landlord was entitled to preference solely because of his right to distrain. His view as to the effect of a statute as to priority of payment in case an execution is levied on the tenant's goods is indicated in these words: "This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he has paid the landlord's rent or a reasonable amount (generally a year's rent) which may have accrued. Then, in Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451, the Supreme Court places special em-

phasis on this fact." This case, though decided about two months after Morgan v. Campbell, seems not to have had it in view.

The doctrine of equivalency has been applied in analogous instances in another particular. In the case of In re Brunquest, Fed. Cas. No. 2,055, a mechanic's lien was involved. The statute required a statement to be filed in a certain time and suit to be brought in another certain time after the filing of the statement. No suit was brought within the required time, but the bankruptcy proceeding was instituted within the time in which suit was required to be brought. The mechanic did not assert his lien therein within that time. It was held that he had lost his lien, but conceded that if he had asserted his lien there in proper time it would have been preserved on the ground that such assertion thereof was equivalent to bringing suit. Judge Dyer said: "I think there can be no doubt that these lien claimants could, as an equivalent for commencing suits in the state courts, have asserted or proved their liens in the bankruptcy proceedings, within the time limited by the statute creating the liens; but this was not done. To preserve a statutory lien dependent for its continued existence upon observance of the terms, they must be complied with by performance of the required act or its equivalent." And, again: "My conclusion is that because of this failure either to commence a suit in the state court for the enforcement of these demands within four months after the filing of petitions, or to do that in this court which would be equivalent to the commencement of such suits, namely, to present the claims to this court in these bankruptcy proceedings within four months for recognition and enforcement, these liens must be said to have lapsed and cannot now be recognized."

In the case of In re Kerby Dennis Co. (D. C.) 94 Fed. 818, Judge Seaman also held that the assertion of such a lien in bankruptcy proceedings was equivalent to bringing a suit in the state court to preserve the lien. He said: "With the lien kept alive and identified as the statute directs, I have no doubt this court could furnish a remedy equivalent to the action in the state court."

In this particular the equivalent act preserves the lien created by a state statute. In the former particular it gives rise to the lien or preferred right contingently provided for by the state statute. Possibly it is upon some such ground as this that the ruling in the case of In re Grissler, 136 Fed. 754, 69 C. C. A. 406, is to be placed. It was there held that in New York, the peculiarity of whose mechanic's lien law has been heretofore referred to, the mechanic is entitled to a preference in bankruptcy if he files the notice of his lien within the statutory period, even though he does not do so prior to the institution of the bankruptcy proceedings. In referring to the decision of the New York Court of Appeals in Kane Co. v. Kinney, supra, Judge Wallace said: "The court distinctly decided that the inchoate right acquired by the materialmen when perfected by the filing of his notice of lien, though filed subsequent to a general assignment of the contractor for the benefit of creditors, was superior to the right acquired by the assignee. A trustee in bankruptcy of the contractor or subcontractor stands in no better position than would the general assignee."

In the earlier case of In re Roeber (D. C.) 121 Fed. 444, the same court had held otherwise; but this decision was overruled by the later case.

Somewhat of the same idea seems to have been controlling in the Massachusetts case of Jones v. Arena Pub. Co., 171 Mass. 22, 50 N. E. 15. It was there held that the priorities created by the insolvent law should control the distribution of an estate in the hands of receivers. Judge Barker said: "It would be a plain injustice if a general creditor by resorting to equity for the administration of its debtor's goods, merely for the reason that by its aid the amount to be divided would be larger, could gain a farther advantage by reducing to the level of common creditors workmen whose wages would have priority if the assets were left to be administered at law or could thus place his own debts upon an equality with taxes which would have been paid in full had not equity intervened. The defendant corporation was subjected to our insolvency law by force of St. 1890, p. 287, c. 321, and if equity had not come in to conserve and distribute its legal assets the wages of its workmen and the taxes due from it would have priority in the distribution of its assets by the usual agencies of the common law. These agencies could not keep its

business going until the enactment of St. 1897, p. 86, c. 120. For this reason only the creditors, merely to increase the amount of the fund, asked equity to interfere in behalf of all creditors alike. It would be unjust if that interference should be at the expense of the workmen and of the public through depriving claims for labor and taxes of the priority of payment which they would have had if equity had not intervened."

Judge Lowell, in the case of In re Wright (D. C.) 95 Fed. 807, 811, said that it was "by analogy" the Supreme Court of Massachusetts so held.

The other ground upon which claimants are entitled to the preference asserted, though none of the contingencies contemplated by the statutory provisions in questions has happened, is that the bankrupt act has expressly so provided. This it has done in section 64b(5). By that clause it is provided that, amongst debts having priority and entitled to be paid in full out of the bankrupt's estate, are "debts owing to any person who by the laws of the state or the United States is entitled to priority."

In the cases of In re Hoover, supra, and In re Mitchell, supra, the preference allowed the landlord was based upon this ground also. In the Hoover Case, Judge Buffington said: "Such liens and priority by virtue of the Pennsylvania statute was one recognized and enforced by section 64b(5) of the bankrupt act." And in the Mitchell Case, Judge Bradford said: "I have no doubt of the priority of the claim under section 64b(5) of the bankruptcy act as a debt owing to the landlord who by the laws of Delaware is entitled to priority over other creditors of the tenant."

In the case of In re Crow (D. C.) 116 Fed. 110, Judge Evans held that a balance due from a guardian to his ward was entitled to preference in the distribution of the estate of the guardian in bankruptcy by virtue of section 64b(5) of the bankrupt act, because the statutes of Kentucky provided that in the distribution of an insolvent's estate, whether under a general assignment for the benefit of creditors (Ky. St. 1903, § 74), or upon a conveyance in contemplation of insolvency being converted into such an assignment when attacked within six months (Ky. St. 1903, § 1916), or upon his death (Ky. St. 1903, § 3868), debts due by a guardian shall be paid in full before any payment is made to general creditors. He said: "I am of opinion that the bankrupt law does not in such cases supersede, or mean to supersede, the operation of the state law. On the contrary, the bankrupt act expressly recognizes the existence of the state statute, and makes that statute the basis for allowing priority of payment to certain classes of claims against the debtor. Its effect is, in the most manifest way, to keep alive such provisions of the state law as give priority of payment; and while the bankrupt law, speaking generally, does by its operation supersede the force of any state laws which conflict with it, the case before us presents exception to this general rule, whereby the applicable provisions of the state law are expressly enforced through the bankruptcy act itself."

It is suggested by counsel for trustee and contesting creditors that the claimant in this case would have been entitled to preference even if there had been no such state statutes, and Perry on Trusts (5th Ed.) vol. 1, § 345, and Collier on Bankruptcy (5th Ed.) p. 558, are cited as upholding this position. They simply recognize that, if the ward's estate can be traced in the hands of the assignee in bankruptcy or other trustee for benefit of creditors and identified, he is entitled to same as against the creditors. On the other hand, they lay down the proposition that, as such cannot be done in the absence of statute, the ward stands on the footing of a general creditor and has no greater rights. To this effect are the following decisions, to wit: In re Richard (D. C.) 104 Fed. 792; In re Marsh (D. C.) 116 Fed. 396; In re Mulligan (D. C.) 116 Fed. 715; In re Kurtz (D. C.) 125 Fed. 992. In the Crow Case there was no identification of any portion of the ward's estate in the hands of the assignee in bankruptcy. There was merely a balance due him from his guardian, and he was given preference solely on the ground heretofore stated.

The same counsel rely on the decision of the Supreme Court of the United States in the case of Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, as against the position that a priority provided for in a statute touching assignments for benefit of creditors should by virtue of said clause be recognized in a distribution in bankruptcy. There it was held that a claim

for professional services rendered to a bankrupt corporation in the preparation of a deed of general assignment valid under the law of the state where made was not entitled to be paid as a preferential claim out of the estate in the hands of the trustee in bankruptcy when the adjudication in involuntary bankruptcy was made within four months after the making of the assignment, and the assignment was set aside as in contravention of the bankrupt law. The right to the preference was not based on any statute of the state providing therefor, but on a provision in the deed of assignment. Of course, as that deed was annulled, every provision in it was annulled with it. Mr. Justice Holmes said: "If by declaring the assignment an act of bankruptcy the statute means that the conveyance shall not be effectual against the bankruptcy proceedings, as is agreed, the natural and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods. The cases which we have cited and others under insolvent and bankruptcy laws evidently take that view. It follows that the appellants can assert no preference by way of lien under the deed."

The state statutes conferring priorities which have been recognized in bankruptcy by virtue of section 64b(5) so far considered are statutes not affected by the bankruptcy act, save in so far as their effect is concerned when bankruptcy proceedings are instituted. To the same extent have priorities conferred by state statutes, in their nature state insolvency laws, and therefore suspended by the bankruptcy act, been recognized by virtue of said provisions of the bankrupt act.

In the case of In re Wright (D. C.) 95 Fed. 807, it was held that a debt due to Worcester county, Mass., by the bankrupt as the price of convict labor hired by him from its house of correction, was entitled to priority of payment in the distribution of the assets of the bankrupt, because by the insolvency law of that state a debt due to a county was made a preferred claim in insolvency proceedings thereunder. It was urged therein that a state insolvency law was not within the meaning of section 64b(5), because it was suspended by the bankrupt act. In answer to this, Judge Lowell said: "The trustee contends that this section is not now a law of the state of Massachusetts, because as a part of the insolvent law of Massachusetts it has been suspended by the bankrupt law of the United States. The argument is more ingenious than sound. The bankrupt law of the United States does not repeal or altogether avoid the insolvent laws of the several states, but merely suspends their operation so far as they come in conflict with the bankrupt act or intrude upon its province." Again, he said: "An insolvent law may be amended, repealed, or enacted by a state during the existence of the bankrupt law; and such amendment, repeal, and enactment will be valid legislative action, though the operation of these acts in some respects be suspended while the bankrupt law continues in force. When the bankrupt law has been repealed, the insolvent laws of the states become operative; and, if amended during the existence of the bankrupt law, they doubtless become operative in their amended form. Counsel for the trustee sought in argument an analogy between the insolvent laws thus suspended and a law unconstitutional, and therefore void; but the analogy is very imperfect. To establish that the insolvent laws of the several states now upon their statute books are not 'laws of the states,' it must be shown that they are not laws at all; that they are wholly void, and not merely restricted in their application. Inasmuch, therefore, as the bankrupt act of 1898 expressly recognizes the existing validity of these insolvent laws as applied to proceedings commenced before the passage of the bankrupt act, and inasmuch as the insolvent laws revive, ex proprio vigore, on repeal of the bankrupt law, it follows that the insolvent laws have not been made wholly void, but are still laws of the states which adopted them." And, again, he said: "Plainly, the phrase 'laws of the states,' in section 64b(5) of the bankrupt act, was intended to have some meaning; and yet, if the trustee is right in his contention only some exceptional, additional and peculiar statutory priorities were recognized by the bankrupt act, inasmuch as the laws of the states regulating priority are generally a part of the insolvent laws. Even if by passage of the bankrupt act the insolvent laws of Massachusetts were so avoided that it has ceased to be a law of Massachusetts, yet nothing would prevent the Legislature of Massachusetts during the exist-

ence of the bankrupt law from passing a statute establishing priorities. Such a statute would have almost its sole effect in establishing priorities under the bankrupt law of the United States. It would be simply a re-enactment of the rule regarding the distribution of insolvent estates which had prevailed by statute up to the passage of the bankrupt law. To suppose that Congress meant to require such legislation by the states is unreasonable."

The decision of Judge Lowell in this case was affirmed by the Circuit Court of Appeals in the case of In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. Judge Putnam said: "We are unable to conceive of any priority to which any one may be entitled by the laws of a state, under section 64 of the bankruptcy act, unless it be a priority created by insolvent laws of that character. It is true that priorities are often created by state statutes relating to the administration of estates of deceased persons, and also to proceedings for winding up corporations; but such laws are not of that general character which can be supposed to be within the purview of the provision of the bankruptcy act which is concerned here. Of course, statutes touching assignments for the benefit of creditors must be classed with insolvency laws, strictly so called. It is settled that state insolvency laws are not annulled by the enactment of a bankruptcy act, and that the only effect of such enactment is to suspend their operation, so that they become operative again, without re-enactment, when the bankruptcy act is repealed."

In the later case of In re Lewis (D. C.) 99 Fed. 935, Judge Lowell, upon the same ground, gave priority to fees due to a sheriff accruing on a writ of attachment, founded upon a provable debt, issued before the commencement of proceedings in bankruptcy against the debtor, and continued in force at the date of the petition.

In the case of In re Daniels (D. C.) 110 Fed. 745, also, it was held that costs incurred in an action against a bankrupt, prior to the bankruptcy, which would constitute a preferred claim under the insolvency laws of the state, was entitled to preference in the bankruptcy proceedings.

Counsel for the trustee and contesting creditors question the correctness of these decisions so holding that priorities given by a state insolvency law should be regarded in a distribution in bankruptcy by virtue of section 64b(5). They seem to think that this position is inconsistent with the fact that state insolvency laws are suspended by the bankrupt act, as held in the following cases cited by them, to wit: Ex parte Eames, Fed. Cas. No. 4,237; In re Reynolds, Fed. Cas. No. 11,723; Thornhill v. Bank of La., Fed. Cas. No. 13,992; In re Independent Ins. Co., Fed. Cas. No. 7,017; In re Curtis, 1 Am. Bankr. Rep. 440, 91 Fed. 737; Westcott Co. v. Berry, 4 Am. Bankr. Rep. 264, 45 Atl. 352, 69 N. H. 505. The learned judges who decided those cases did not think that there was any such inconsistency, for they expressly recognized the fact that there was such suspension and held as they did notwithstanding this. Nor can I see any such inconsistency. To so hold is not to give effect to the state insolvency law. In such case it is the bankrupt act alone that gives effect to the priorities set forth in that law, and this it does, not by setting them forth in so many words therein, but by reference to the state insolvency law. The sole relation of that law to the matter is as to the place where the priorities which the bankrupt act by the clause in question provides for may be found. That clause is simply a short way of providing for them, and in view of the great number of state jurisdictions and the existence of different priorities in different jurisdictions, it was the only practical way of providing for them. The only possible question that could arise was whether a state insolvency law can be said to be a law of the state upon and after the enactment of the bankrupt act, so as to come within the description of the clause. That it can be said to be so is demonstrated by Judge Lowell in the extracts from his opinion in the Wright case quoted above. Nor is the suggestion of Referee Dean, in his opinion in the case of In re Crow, supra, sound. It is in these words: "As an undecided question, it might well be doubted whether it be the intention of Congress by clause 5 of section 64b to give effect to provisions in state insolvency laws when the very object and purpose of the bankruptcy law is to supersede state insolvency laws, and the referee would be inclined to hold in the negative." No effect is given to any provision of the state insolvency laws by the position in question. All that has effect is the provision of the

bankrupt act, and in referring to the former for a statement of certain of the priorities which it gives in no way prevents its supersession of those laws.

Judge Putnam, in the Worcester County Case, would seem to limit the reference of the clause in question to state insolvency laws. I cannot go that far. It no doubt includes such laws, but it is not limited thereto. Judges Buffington and Bradford, in the Hoover and Mitchell Cases, gave it a wider scope when they held that statutes providing for prior payment of a certain part of the landlord's rent when the tenant's goods are taken under the execution come within the province of that clause. So do statutes providing for priorities in a distribution under a general assignment for benefit of the creditors, as was held in the Crow Case. Judge Putnam, in the Worcester County Case, classed such statutes "with insolvency laws, strictly so called." If he meant by this that such statutes are state insolvency laws, and suspended by the bankrupt act, his position would seem not to be correct. Loveland on Bankruptcy, p. 29.

In the case of In re Rouse, Hazard & Co., 91 Fed. 96, 33 C. C. A. 356, it was held that the provision of the state insolvency law giving priority to labor claims should not be followed in a distribution in bankruptcy, because the bankrupt act (section 64b[4]) has a specific provision giving priority to such claims. Judge Jenkins said: "Our conclusion is that Congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and the provision is not to be tolled or enlarged by any general prior or subsequent provisions in that act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other and different debts than those specified in clause 4." In the Wright Case, Judge Lowell thus distinguished the decision in the Rouse, Hazard & Co. Case: "The decision was rested solely upon the ground that the specific provisions of the bankrupt act concerning labor claims were intended to override the provisions relating to wages made by the state statute; that the exemption accorded by the state statute would have been valid in the absence of the express provision of the bankrupt act concerning wages was conceded." The following cases are contra of this case: In re Laird, 109 Fed. 551, 48 C. C. A. 538; In re Slomka (D. C.) 117 Fed. 688.

Coming, then, to the statutory provisions in question, it must be held that they are not state insolvency laws, strictly so called, and were not therefore suspended by the bankrupt act. The happening of certain of the contingencies provided for the attaching of the lien will amount to an act of bankruptcy, and the institution of proceedings in bankruptcy within the proper time will invalidate the legal effect of such happenings. To no other extent does the fact of the bankruptcy have any bearing in relation to those provisions. We have here, then, a case of priority given by state laws which are not state insolvency laws, and which are not suspended by the bankruptcy act. An argument directed against priorities given by such laws being recognized in bankruptcy can therefore have no application here. Unless, then, section 64b(5) is limited to priorities so given, the case in hand comes clearly within its purview.

But it is urged by counsel on behalf of the trustee and contesting creditors that the statutory provisions in question do not confer a priority; they only confer a lien; a lien is not a priority; and therefore said provisions are not within the purview of said clause of the bankrupt act. It is true that there is a distinction between a lien and a priority. In the case of U. S. v. Fisher, 2 Cranch, 358, 2 L. Ed. 304, where the question was whether a certain indebtedness due the United States was within a statute providing priority of payment to the United States in case of insolvency or bankruptcy of its debtor, Mr. Chief Justice Marshall arguendo said: "On this subject it is to be remarked that no lien is created by this law. No bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment which, under different modifications, is a regulation in common use: and this priority is limited to a particular state of things when the debtor is living, though it takes effect generally if he be dead."

In the case of Conard v. Atlantic Ins. Co. of N. Y., 1 Pet. 386, 7 L. Ed. 189,

it was held that an indebtedness due the United States within said statute would not prevail because of its provisions over a specific and perfected lien created by the debtor. Mr. Justice Story said: "What, then, is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrides the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignee? Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignee? We are of the opinion that it clearly falls within the latter description." Again, he said: "If, then, the property of the debtor passes to the assignees, if debts due to the United States constitute no lien on such property, if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of the common fund, it would seem to follow as a necessary consequence that, even if the teas in controversy were the property of Edward Thompson, they passed by his general assignment in November, 1825 (which is not denied to have been a bona fide and valid transaction), to his assignees and became their property for distribution amongst his creditors and were not liable to the levy under the execution of the United States." And, again, in distinguishing the case of Thelusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271, he said: "It is obvious that it established no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States, and that priority is not itself equivalent to a lien."

But the distinction between the two is that a mere priority is not a lien, and not that a lien is not a priority. A lien is a priority. It is that, and something more. That something more is that it is a hold on the property covered by it that fixes the priority so that it cannot be affected by subsequent events. No other distinction was drawn in the cases cited than this. Whilst, then, the statutory provisions in question do not confer a mere priority on the employé and materialman, they do secure him a priority through the lien which they confer. And though the right conferred is termed a "lien" in all instances, there is room for saying that in certain of them it is nothing more than a mere priority or is without greater value than a mere priority. Those instances are when it attaches because the property and effects of the company, owner, or operator are put in process of distribution amongst its creditors in one of the modes specified or referred to generally in section 2487. If the statute had simply provided that in such cases the employés and materialmen should be first paid, the right conferred would have been really in no wise different in its character from and equally as valuable as the lien which it does confer. It is only when the lien attaches, upon the happening of one of the contingencies specified in section 2490 that the right conferred takes on really the character and value of a lien. The difference between the rights conferred in the two cases is recognized by sections 2490 and 2491, in that they provide that in the latter case the lien may be enforced by proceedings in equity, and in the former case all that is necessary to do is to file the claims for which the lien is asserted with the person authorized to receive and report claims. Section 2491 is confused, in that it seems to provide that in the former case an independent suit may be brought to enforce the lien. It certainly does not require a suit in such case as is essential in the other case.

It is upon this line of reasoning that I reach the conclusion that the claimants are entitled to the preference claimed, notwithstanding the fact, which I have conceded, that none of the statutory contingencies has happened, and their inchoate right has not become perfect. Either ground stated is sufficient in and of itself to establish the right to the preference claimed. Under the act of 1867, claimants would have been entitled thereto; but the basis of their right would have been limited to the first ground stated, as in that act there was no provision recognizing priorities conferred by the state laws.

The decision of Judge Evans, in the case of In re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 592, which involved the statutory provisions involved here, may be said to be authority in support of the conclusion here reached. It really assumes, without discussion, that the lien or priority conferred by those provisions can be asserted in bankruptcy, though apart from the proceedings therein none of the contingencies provided for has happened prior

thereto. The right to so assert it, however, is put upon a basis different from that on which I have placed it. The proceedings in bankruptcy and the coming of the property and effects of the bankrupt into the hands of the trustee in bankruptcy for distribution amongst creditors is treated as the happening of a contingency provided for in section 2487, and it is considered that thereupon the inchoate lien or right atttaches and becomes perfect. One question involved and determined therein was as to the priority between the bankrupt's landlord and a materialman. On the idea that said statutory provisions were the only pertinent considerations, it was held that by virtue of section 2488 the former had the prior right. The time of the attaching of the materialman's lien, and not of the creation of his debt, was treated as the time to be compared with that of the creation of the landlord's debt lien. Basing the materialman's right on the grounds put forth herein would probably not bring about a result different from that reached therein. The other question considered and determined therein was as to when it is essential for the materialman to assert his lien in the bankruptcy proceeding in order to preserve it.

In the discussion thus far, I have put to one side certain decisions cited and relied on by counsel for claimants, because I do not deem them relevant to the question in hand. Those decisions are the following, to wit: In re Kerby Denis Co. (D. C.) 94 Fed. 819; Id., 95 Fed. 116, 36 C. C. A. 677; In re Emslie, 102 Fed. 294, 42 C. C. A. 350; In re Laird, 109 Fed. 550, 48 C. C. A. 538. These decisions are not relevant to the question in hand, because they all involved liens which were perfect when the bankruptcy proceeding was instituted. In the Kerby Denis Co. Case the lien was one under a Wisconsin statute creating a lien in favor of employés performing certain kinds of labor, and providing that such lien should not continue in force, unless a statement thereof is filed within 30 days, and an action is begun within 3 months. The lien was created by the statute, and not by the acts of filing and bringing suit which merely preserve or keep it in force. Certain of the claimants had prior to the institution of the bankruptcy proceedings filed statements and brought suits within the prescribed time, and certain others had not done so. It was held that the former were entitled to preference, and the latter were not. In the Emslie Case the lien involved was one under the mechanic's lien law of New York, the peculiarity of whose law is in providing that the lien shall not attach until the filing of the notice. There the notice had been filed within the prescribed time prior to the institution of the bankruptcy proceeding. It was held that the notice was defective, and therefore claimant was not entitled to the preference, but that if it had not been defective he would have been entitled thereto. In the Laird Case the lien involved was one under an Ohio statute providing that, in all cases where the property of an employer is placed in the hands of an assignee, receiver, or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver, or trustee is appointed shall be first paid out of the trust fund in preference to all other claims against such employer, except claims for taxes and costs of administering the trust. In that case the property of the bankrupt had been placed in the hands of a receiver prior to the institution of the bankruptcy proceedings. It was held that the nature of the right of a laborer under this statute was a lien, and that the laborer claimants therein were entitled to preference. These cases involved problems of their own. One was as to the basis on which such perfected liens are entitled to preference in bankruptcy; and another was as to whether such liens were affected by the provisions of sections 67e and 67f of the bankrupt act annulling liens and incumbrances. It was held that they were not affected thereby. They did not involve any of the problems with which we have to do here, and hence it is that I have treated them as not relevant to any of the questions herein involved.

2. Another ground upon which it is urged on behalf of the trustee and contesting creditors that claimants are not entitled to preference is that their rights are affected by said provisions of the bankrupt act just referred to, to wit sections 67e and 67f. This position is really inconsistent with the foregoing one. Said provisions invalidate certain liens and incumbrances. The position that they affect claimants' rights herein presupposes that they

have liens to be affected; whereas, the former position is based upon the supposition that claimants do not have any liens, as none of the contingencies upon the happening of which liens are to attach have happened in this case. This supposition I have conceded to be correct, and being so it necessarily follows that the claimants' rights are in no wise affected by said provisions of the bankrupt act. If the liens in the Kerby Denis Co., Emslie, and Laird Cases, as held therein, were not affected by said provisions, it is hard to make out that claimants' rights, which were not liens at all, were affected thereby.

3. A third ground upon which it is so urged is that claimants, to preserve their rights, should have filed in the clerk's office of the county in which the materials were furnished a certain verified statement in writing within 60 days after the last day of the last month in which the materials were furnished, and they failed so to do. It is maintained that the state statute required the filing of such statement within such time. Of course, if the state statute so required, the failure to comply with it is fatal to claimants' rights. No such requirement is found in any of the statutory provisions heretofore considered. If it exists at all, it is to be found in section 2494, one of the succeeding sections in the same article as those provisions. Said section is in these words: "No lien provided for in this article shall attach unless the person who performs or furnishes the labor or teams shall, within sixty days after the last day of the last month in which any labor was performed or materials or team were furnished file in the county clerk's office of each county in which the labor was performed or materials or teams were furnished a statement in writing, verified by affidavit setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad, turnpike or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of the court giving the date of the filing. The clerk shall also make an abstract and entry thereof as now provided by law in case of mechanics' liens, and in the same book used for that purpose, and shall make proper index thereof. For his services the clerk shall be paid one dollar by the party filing the claim, which may be recovered by him as costs from the party against whom the claim is filed."

In order to determine the applicability of this section to the case in hand it is essential to understand the two preceding sections, to wit, sections 2492 and 2493, which intervene between it and those heretofore considered and the immediately succeeding section, to wit, section 2495, all of which are in the same article. It will be helpful also to note the provisions of the concluding sections of the article, to wit, sections 2496, 2497, 2498, 2499, so that in viewing the question now under consideration we may be, as it were, on top of the entire article.

By section 2492 it is provided that all persons who perform or furnish labor, material, supplies, or teams for the construction or improvement of any canal, railroad, turnpike, or other public improvement in this commonwealth by contract, expressed or implied, with the owner or owners thereof, or by subcontract thereunder, shall have a lien thereon and upon all of the property and franchise of the owner or owners thereof for the full contract price of such labor, material, supplies, and teams so furnished or performed, which said lien shall be prior and superior to all other liens thereafter created thereon. It is further provided therein that any person undertaking or expecting to perform or furnish labor, material, supplies, or teams may acquire a lien therefor by filing in the clerk's office of each county wherein he shall have so undertaken to perform or furnish labor, material, supplies, or teams, a statement in writing stating that he has so undertaken and expects to perform or furnish labor, material, supplies, or teams, and the price at which the same is to be furnished, and the lien for labor performed, materials, supplies, or teams furnished thereafter shall relate back and take effect from the filing of such statement. It was still further provided therein that as to all original construction such lien shall be prior to all liens theretofore or thereafter created on the part so constructed and no other part. The section as it stood originally contained neither of the last two provisions stated. They were added by an amendment of date March 21, 1896. It will be noted that the lien thus provided for is like the lien provided for in section 2487 and the

succeeding sections relating thereto, in that it relates to a canal, railroad, turnpike, or other public improvement, but differs therefrom, in that it does not also relate to a mine, rolling mill, foundry, or other manufacturing establishment; that the lien is not contingent on the happening of certain events, but attaches at once on the performance of the labor or furnishing of the materials, supplies, or teams; that it applies to subcontractors as well as contractors, and supplies and teams as well as labor and materials; that it covers all the property of the debtor, instead of being limited to the property and effects involved in the business, and all the accessories connected therewith; and that as amended, upon due compliance with the provisions of the amendment, it does not simply attach at the time of the performance of the labor or furnishing of the material, supplies, or teams, but relates back to the time of the undertaking so to do, and takes precedence not only of all liens thereafter created, but in case of original construction in every instance of all liens theretofore created on the part so constructed. This recital of the difference between the two liens is sufficient to indicate that these differences are quite marked and distinct.

By section 2493 it is provided that the liens provided for "in the foregoing section" should in no case be for a greater amount in the aggregate than the contract price of the original contractor, and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner or owners of the canal, railroad, turnpike, or other improvement, then there should be a pro rata distribution of the original price among said lienholders.

Section 2495 is in these words: "Liens acquired under this article shall be enforced by proper proceedings in equity, to which other lien-holders must be made parties, but such proceedings must be begun within one year from the filing of the claims in the county clerk's office as herein provided."

Then, as to the concluding sections of the article, to wit, sections 2496 to 2499, inclusive: By section 2496 it is provided that in a written contract for the sale of railroad equipment or rolling stock, deliverable immediately or subsequently at stipulated periods by the terms of which the purchase money in whole or in part is to be paid in the future, it may be agreed that the title to the property sold or contracted to be sold shall not pass to or vest in the vendee until the purchase money shall have been fully paid, or that the vendor shall have and retain a lien thereon for the unpaid purchase money, notwithstanding delivery thereof to the vendee; but the terms of credit should not exceed 25 years. It was further provided therein that such agreement should not be valid as against subsequent purchasers for value without notice or against creditors until acknowledged or proved, as deeds of trust and mortgages are required to be, and lodged for record in the office of the Secretary of State, where they should be recorded. By section 2497 provision is made for a conditional sale of such property in a contract of leasing and renting, the rentals as paid to be treated as purchase money and the title not to vest in the lessee, notwithstanding the delivery of the property to him, until the purchase money is paid in full, "subject, however, to the provisions contained in section 2495." By section 2498 provision is made for the release of the lien provided for in section 2496 and assignment of the obligations secured thereby. Section 2499 is in these words: "On each locomotive or car that may be sold or leased in accordance with the provisions of this article, the name of the vendor or lessor shall be distinctly marked, followed by the word 'owner' or 'lessor' as the case may be."

Sections 2487 to 2491, inclusive, are not original legislation. They are reenactments of former legislation. They were originally enacted substantially as they are contained in said article by the act of March 20, 1876 (1 Sess. Acts 1875–76, p. 115, c. 902). The only differences are that said act only related to railroad companies and the owners or operators of rolling mill, foundry, or other manufacturing establishment; that it contained a section giving a like lien to all persons whose property should have been injured by the carelessness of a railroad company or its employés for the damages sustained; and that it provided for an independent suit for the enforcement of the lien in case the lien attached because of the happening of one of the contingencies which are set forth in section 2490 of Kentucky Statutes of 1903. It con-

tained no provision for the bringing of such a suit in case the lien attached because of the happening of any of the contingencies set forth in section 2487. It evidently contemplated that in such case no suit was needed, as the happening of any said contingencies put the property and effects covered by the lien in process of distribution amongst creditors, and all that was needed was for the claimant to assert his lien before the person or court having charge of the distribution by filing his claim with him or it, and no limit was provided in which he should do this. The limit as to time of assertion of the lien had relation solely to where it was necessary to assert it by an independent suit. By an act of March 4, 1880 (1 Sess. Acts 1879–80, p. 165, c. 1382), the foregoing act was amended by cutting the right of the materialman to any lien for materials or supplies furnished to any rolling mill foundry, or other manufacturing establishment, and the lien of laboring men in rolling mills, foundries, or other manufacturing establishments for wages down to wages due within 60 days before any assignment for any purpose as specified in the original act. The law in this particular thus remained until February 25, 1893.

Likewise, sections 2492 to 2495, inclusive, are not original legislation. They, too, are re-enactments of former legislation. They were originally enacted substantially as they are contained in said article save as section 2492 embodies the amendment of March 21, 1896, by the act of March, 1888 (1 Sess. Acts 1887–88, p. 99, c. 1271). Likewise sections 2496 to 2499, inclusive, are not original legislation. They, too are a re-enactment of former legislation. They were originally enacted substantially as they are contained in said article by the act of March 17, 1882 (1 Sess. Acts 1881–82, p. 43, c. 454). On the 25th day of February, 1893, the act entitled "As concerning liens" (Sess. Acts 1891–92–93, p. 505, c. 151), became a law. Article 3 of that act was made up of a combination of said three several acts. The act of March 21, 1876, was re-enacted substantially as it was originally, save that it was enlarged to take in a turnpike, canal, and other public improvement; the amendment of March 4, 1880, being abandoned. The acts of March, 1888, and March 17, 1882, were substantially re-enacted. The third article of this act of February 25, 1893, was thus made up of these three distinct and separate strata of legislation. The phraseology of the old legislation was but slightly changed in the re-enactment, and this act of February 25, 1893, constitutes chapter 79 of Kentucky Statutes of 1903, save as it embodies the amendments of March 21, 1896. Sections 25 to 29, inclusive, of the third article of that act, substantially the act of March 21, 1876, constitute sections 2487 to 2491 inclusive, of the third article of said chapter; sections 30 to 33 inclusive of the third article of that act, substantially the act of March, 1888, constitute sections 2492 to 2495, inclusive, of the third article of said chapter; and sections 34 to 37 inclusive, of the third article of that act, substantially the act of March 17, 1882, constitute sections 2496 to 2499, inclusive, of the third article of said chapter.

With this general survey of the sections of article 3 of chapter 79 of the Kentucky Statutes of 1903, and their history we are in position to approach the question now under consideration. That question is the contention of counsel on behalf of the trustee and contesting creditors that section 2494 has application to a lien asserted under sections 2487 to 2491, inclusive, and that by reason of claimant's failure to comply with said section they are not entitled to the preference claimed. The sole basis of the contention is that in section 2494 it is said that "no lien provided for in this article" shall attach unless a statement is filed as provided therein. The lien provided for by sections 2487 to 2491 is one provided for by said article. Hence it is urged that by the very terms of section 2494 its provisions apply to such lien. But to confine one's self to these words is to stick in the bark. The thing to be determined is the intent of the Legislature, and to determine this the whole article and the history of the legislation it embodies is to be looked at. Prior to the act of February 25, 1893, as the legislation embodied in the first group of sections, to wit, sections 2487 to 2491, inclusive, stood, there was no requirement that a statement be filed in the county clerk's office to preserve the lien provided by it. If that act and the Kentucky Statutes contain such a requirement in section 32 of the one and 2494 of the other it is an innovation.

Never before in the history of this particular legislation was any such requirement made.

Again, the 13 sections constituting article 3 of chapter 79 of Kentucky Statutes of 1903 fall into three separate and distinct groups in accordance with the legislation as it stood prior thereto. Sections 2487 to 2491, inclusive, constitute the first group and represent the act of March 21, 1876. Sections 2494 to 2495, inclusive, constitute the second group and represent the act of March, 1888. And sections 2496 to 2499 constitute the third group and represent the act of March 17, 1882. The first section of each group is the leading section thereof; 2487 of the first group, 2493 of the second, and 2496 of the third. The other sections of the first group relate to its leading section, and likewise the other sections of the third group relate to its leading section. None of the subordinate sections of the third group relate to sections of the other two groups; nor does any of the subordinate sections of the third group relate to any section of the other two groups. Apparently this is not so. In section 2497 occur the words "subject, however, to the provisos contained in section 2495," which we have quoted above. In the act of February, 1893, the words are "subject, however, to the provisos contained in section 33." But evidently this is a pure mistake. The reference in the one instance is to section 2496, and in the other to section 34, the leading section of the third group. In the act of March 17, 1882, the original legislation, the words are "subject, however, to the provisions contained in section one of this act." Section 1 of that act is section 34 of the act of February 25, 1893, or section 2496 of Kentucky Statutes of 1903, the leading section of the third group. If, then, section 2494, a subordinate section of the second group, relates to any other section of the third article than its own leading section, it does that which none of the other subordinate sections of the other two groups does. It breaks the symmetry of the arrangement.

Again, the only reason for holding that section 2494 does relate to any other section than the leading section of its own group is because of the phraseology "no lien provided for in this article"; but that phraseology requires one to relate the section to the lien provided for in the leading section of the third group, as well as to the lien provided for in the first group. Yet one would hardly contend that it has any relation to the former lien.

Again, similar phraseology in other sections of the article do not have and cannot be given any such wide effect. In that portion of section 2491 which contains the limitation as to time in which suit is to be brought or claims filed, we have these words: "Suit must be filed to enforce the lien given by this article within sixty days from the date of the assignment or from the date when the property shall go into the hands of a receiver or trustee or from the date when the business shall be stopped or suspended or the property sold, or the claims for which a lien is asserted must be filed in said time with the person authorized to receive and report claims." Of course, "the lien given by this article" is more definite than "no lien provided for in this article"; but those words indicate that the draftsman at the time was thinking of the article as providing for a single lien, and that the lien provided for in section 2487. That he was still thinking of the article as providing a single lien, and that the lien provided for in section 2492, would account for his using the words "no lien provided for in this article," when no reference was intended to be had to any other lien than that provided for in section 2492. It is also true that the words used in section 2491 in describing the event from which the 60 days is to be counted show that reference is had to the lien provided for in section 2487, and not to either of the other two liens provided for in said article. But, as we shall see, there are other words used in section 2494 which show that reference is had to the lien provided for in section 2492, and in none other.

Then, in section 2495, we have these words: "Liens acquired under this article shall be enforced by proper proceedings in equity, to which the other lienholders must be made parties, but such proceedings must be begun within one year from the filing of the claim in the county clerk's office, as herein provided." Now, whilst the language here used is general, "liens acquired under this article," it is certain that reference is had solely to liens acquired under section 2492, the leading section of the group to which section 2495 be-

longs as a subordinate section. It can have no reference to liens under section 2487. All the liens provided for thereby do not have to be enforced by proper proceedings in equity. It is only when the liens attach because of the happening of the contingencies set forth in section 2490 that they have to be so enforced. When they attach because of the contingencies set forth in section 2487, all that is necessary to do is to file the claims with the person authorized to receive and report claims, as provided in section 2491. Said language can have no reference to liens under section 2487, for the additional reason that the limitation prescribed in section 2495 can have no reference thereto. This because section 2491 prescribes the limitations applicable to liens under section 2487; and, further, inasmuch as liens under section 2487 do not attach at all before the happening of one of the contingencies set forth in sections 2487 and 2490, it could not have been intended to provide that proceedings to enforce them should be brought before they came into existence.

Then, in section 2499, we have these words: "On each locomotive or car that may be sold or leased in accordance with the provisions of this article, the name of the vendor or lessor shall be distinctly marked, followed by the word 'owner' or 'lessor' as the case may be." Here the words "in accordance with the provisions of this article" can have reference solely to sections 2496 and 2497 of the group to which section 2499 belongs, and yet this broad language is used as if it might have reference to provisions in the other groups.

There are, then, four instances in the article where the word "article" is used. In three of them it has reference to the group of sections in which it occurs, and to no other group. Is it not reasonable to conclude that in the other or fourth instance it has no wider scope? Where the word "article" occurs in sections 2494 and 2495 it is in substitution for the word "act" in the act of March, 1888. Of course, there it has sole reference to the lien provided for in section 2492. So where the word "article" occurs in section 2499 it is a substitution for the word "act" in the act of March 17, 1882. The phraseology in section 2491, where the word "article" occurs, is new, and hence it is not used in substitution for anything in the original legislation.

Again, as heretofore indicated, other phraseology in section 2494 shows that the requirement of that section, notwithstanding that relied on, has reference solely to the lien provided for in section 2492, and can have no relation to that provided for in section 2487. It is that used in providing what the statement required to be filed shall contain. Amongst other things, it is provided that it shall contain "the name of the canal, railroad, turnpike or other public improvement upon which it [the lien] is claimed." The lien provided for in section 2492 is limited to persons who perform labor or furnish materials, supplies, or teams for the construction or improvement "of any canal, railroad, turnpike, or other public improvement in this commonwealth"; whereas, the lien provided for in section 2487 takes in also persons who perform labor for or furnish material to any mine or owner or operator of any rolling mill, foundry, or other manufacturing establishment. The provision of section 2494 in regard to the statement to be filed does not contemplate that said section has any application to a mine, rolling mill, foundry, or other manufacturing establishment.

And, finally, the provisions of section 2494 in regard to the filing of a statement would not seem to be germane to the lien provided for in section 2487. We must bear in mind the position taken at the outset as to the character of lien provided for in that section. It is a contingent lien, and the contingency in each instance is one over whose happening the employé or materialman has no control whatever. The happening thereof depends upon the action of the debtor or of his creditors. No other action brings it into existence. It is something that he or they do that has this effect. Now the rule, at least in statutes as to mechanics' liens and liens of a similar character where provision is made for the filing of a notice or statement, is for the lien to come into existence upon the creation of the debt, or, at the farthest, as in New York, upon the filing of the notice or statement; the failure to file same, when the lien comes into existence at the creation of the debt, forfeiting the lien. In the one instance, the filing of the notice or statement preserves the lien; in the other, creates it. It is the creation of the debt or the filing of the notice or statement by the employé or materialman which calls the lien into

existence, and invariably a provision as to filing a notice or statement in such cases is followed by a provision as to bringing suit within a certain short period of time to enforce the lien. Here, if section 2494 has application to the lien provided for in section 2487, it neither preserves nor creates the lien. It is simply a limitation upon the effect of the happening of the contingencies, and this when section 2487 contains no intimation of a limitation therein, and it has a different bearing on the lien provided for in section 2492 from what it has on that provided for in section 2487. In the former section it preserves the lien which comes into existence with the creation of the debt. Nor is there any provision as to bringing suit within a certain short period of time after the filing of the notice or statement when the lien arises under section 2487.

The limit prescribed by section 2495 has reference solely to when it arises under section 2492. Under section 2487 the lien may attach at any period of time after the creation of the debt short of the time when the debt is barred by the statute of limitation. Why prescribe that the notice or statement be filed within the short period of 60 days after the last day of the last month in which labor was performed or materials furnished, and yet allow the lien to be asserted within 5 years, and even within 15 years if a note is taken, after the debt is due? Of what value is the notice after the lapse of any great period of time? Is it of any more value than the statute and the nature of the business being carried on? If there is any severity of hardship in the lien provided for in section 2487, it is in its character, and not in the absence of a provision as to filing a notice or statement. It is said that the lien provided for in section 2487 is an anomaly, in that no other state has a similar statute. If so, and such would seem to be the case, no argument can be drawn from the uniform requirement of filing notice or statement in ordinary mechanic's lien statutes that it was intended to require such filing here, particularly when there is no requirement as to bringing suit within a period of time after the filing, which is also a uniform requirement in such statutes. The requirement as to filing a notice or statement seems out of place as to a lien of this anomalous character.

It is true, as suggested, that an examination of chapter 79 shows that the framers thereof knew the distinction between the meaning of the words "section" and "article," for they at times use the one word and at other times the other word. As, for instance, in the first article section 2468 says, "the liens mentioned in the preceding section," and section 2477 says, "the liens declared in this article," and in the second article section 2482 says, "the lien given in section 2480 and the liability mentioned in section 2481 of this article," and section 2485 says, "all persons having liens under this article," and section 2486, "the lien given by this article." But it is to be noted that the first article relates to but one kind of liens, to wit, the ordinary mechanic and materialmen's liens, and that the second article relates to but one kind of liens, to wit, watercraft liens. Neither article relates to more than one kind of liens, as does the third article, which relates, as shown, to three distinct kinds of liens. Where, then, in the first and second articles, the words "liens declared in this article" or "liens under this article" are used, they have reference and can have reference, to but one kind of liens; and where in the third article the words "lien given by this article" are used in section 2491, belonging to the first group of sections, the words "in accordance with the provisions of this article" are used in section 2499, belonging to the third group of sections, and the words "lien acquired under this article" are used in section 2495, belonging to the second group of sections, reference is had, and can be had, to but one kind of liens, to wit, the kind to which the group in which the words occur belong. And yet it is contended that the words "no lien provided for in this article," in section 2494, belonging to the second group of sections, have a wider significance than substantially the same words in the first and second articles in the first and third groups of the third article and in the second group thereof, the same group in which they occur, have; and in giving them the wider significance, all the liens in the article are not taken in, but they are limited to the liens covered by the first group, leaving out those covered by the third. Limiting the words in question to liens of a single kind and those covered by the second group of sections in which they

occur is but giving them the same significance that is given to substantially the same words wherever they occur throughout the chapter.

It is true also, as suggested, that in section 2493 the words used are "the liens provided for in the foregoing section"; whereas, in section 2494 the words used are "no lien provided for in this article." This is accounted for by the fact that section 2493 contains the same words as are contained in the original act of March, 1888. Where the latter words occur therein, are these words, "no lien provided for in this act." In making the revision or re-enactment some substitute for the word "act" had to be found, and the word "article" was used without intending to give the words any wider scope in the revision and re-enactment than that they had in the original act. If at the time the framers were thinking of the article as containing but one kind of liens, to wit, that covered by the second group of sections, the word "article" was the proper word to use in the substitution for the word "act." Of course, this view of the matter attributes to the framers thoughtlessness or carelessness. But it is conceded that in framing section 2494 they were thoughtless or careless. The only question is where the thoughtlessness or carelessness comes in. Counsel for the trustee and the contesting creditors would fix it in that portion thereof relating to the character of the statement to be filed and exclude it from the words in question. Not a single consideration occurs to me for so locating it. The numerous considerations heretofore set forth combine to locate it in the words in question. No greater significance can be given to section 2494 than if it had read "no lien shall attach," etc., leaving out the words "provided in this article."

In that case there would be no room for claiming that the section had relation to any other liens than those covered by section 2492. The words "provided for in this article," etc., therefore, are mere surplusage and without legal signification. I conclude, therefore, that this ground is not well taken.

4. A fourth ground upon which it is urged that one of the claimants is not entitled to a preference as to a portion of its claim is that it accepted personal security therefor, and thereby waived its right to a lien under the statute. The material furnished by the claimant Hiram Blow & Co. was furnished on 18 different dates between and including January 1, 1905, and February 9, 1905. The whole amount furnished came to $12,219.59, upon which $348.93 has been paid, leaving a balance due of $11,870.66. Between and including April 26, 1905, and July 19, 1905, the bankrupt on account of this indebtedness executed to said claimant 10 separate notes in different amounts, payable at Richmond National Bank, Richmond, Ky., from 30 to 60 days after date, upon all of which, except two, certain Humes connected with and interested in the bankrupt were sureties. The notes were all negotiated to certain banks, and upon nonpayment at maturity were taken up by the claimant. The contention is that the claimant Hiram Blow & Co., by taking these notes with sureties subsequent to the furnishing of the material and creation of the indebtedness therefor and the acquisition of the right to the contingent lien, waived its right thereto. In support of this contention, 19 Am. & Eng. Enc. of Law, p. 30, and Jones on Liens, vol. 2, § 1519, are cited. The statement as to the law on the subject by the former is in these words: "The prevailing doctrine as to vendors and mechanics' liens seems to be that the taking of the note of a third person or the debtor's note or bond with surety or negotiable note drawn by a third person and indorsed by the debtor is presumptively a waiver of the lien. This presumption may, however, be rebutted by parol evidence that it was not the intention of the parties that the lien should be divested." The statement by the latter is in these words: "A lien is waived by taking collateral security for the debt which by operation of the statute might be secured by the lien. This is upon the idea that the taking of full security is inconsistent with the idea of there being a mechanic's lien upon the land for the same debt, or, in other words, the taking of such security shows an intention to waive the security afforded by the statutory lien. It is immaterial what such security be, if it only be distinct security. It may be a mortgage on the same or other property; or a pledge or obligation of a third person; or a chattel mortgage, a guaranty, or an indorsed note." A further statement of Jones on Liens, vol. 2, § 152, is relied on by counsel for claimant. It is in these words: "That there are authorities which hold that

the taking of security does not of itself show an intention to waive a mechanic's lien, and that it is not waived unless the security is inconsistent with the lien. In conformity with this view, the taking of security in the form of promissory notes of third persons has been held not to discharge the lien unless the notes are expressly received in payment, and the burden of proof is upon the debtor to show by direct and positive proof that the creditor agreed so to receive them."

The point at issue seems to be whether the taking of other security for the indebtedness is presumptive evidence of a waiver of the lien or right thereto. It is not claimed that in and of itself it amounts to a waiver. According to one line of authorities, it is presumptive evidence thereof, and the burden is on the mechanic or materialman to show by relevant evidence that it was not in fact waived; and, according to the other, it is not such evidence, and the burden is on the debtor to show that in fact it was waived. I do not deem it essential to carefully examine the relevant decisions and determine on which side of the question is the weight of authority. I have an idea that such an examination thereof will disclose that the weight of authority is in favor of the position that the acceptance of personal security for his indebtedness by a mechanic or materialman is not presumptive evidence of a waiver of his lien or right thereto. In determining this question, cases involving mortgages or liens accepted by mechanic or materialman on the same or other property should be put to one side. These cases involve an element not present in cases involving personal security, merely, and that element is estopped. Howe v. Kindred, 42 Minn. 433, 44 N. W. 311. Judge Collins said: "The reason usually given in the adjudicated cases for holding that a mechanic or materialman has lost his lien by taking security either upon the property to which the lien attaches or upon other property is that subsequent lienholders and purchasers have the right to rely upon the record and should be protected against secret liens."

Possibly, also, cases involving vendors' liens should be put to one side. The vendor's lien is a creature of equity, and the same rule may not be applicable to a mechanic or materialman's lien, which is a creature of statute, as is applicable to the former. The reason why I do not deem it essential to make such examination or determination is that I think that it must be held that in Kentucky the rule is that acceptance of personal security by a mechanic or materialman is not presumptive evidence of a waiver of his lien or right thereto.

In the case of Smith v. Well's Adm'x, 4 Bush (Ky.) 92, it was held that a landlord does not waive his exclusive lien for rent upon the tenant's property, which is a creature of statute, by taking personal security for the rent. Judge Hardin said: "The second ground on which a reversal is sought involves the inquiry whether Middleton did or not, in taking personal security for the rent, waive his lien on the tenant's property; and, if he did not so waive his lien, whether the appellant, in consequence of his suretyship as the assignee of Middleton, had a claim on the property of W. W. Smith which should have been preferred to that acquired by the levy of the appellant's execution. By the provisions of the Revised Statutes of 1852 in relation to landlord and tenants, as amended in 1858 (2 Stanton, p. 99) it is provided that a landlord shall have an exclusive lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under tenant, found upon the rented premises, after possession is taken under the lease. Although it has been held under particular circumstances that a vendor may waive his lien for the purchase money by the acceptance of other security, the principle of such decisions is not, we think applicable to this case. There is nothing in the acceptance of personal security inconsistent with the lien conferred by the statute in a case like this, where there is no evidence of an intention to treat the original claim as discharged by the acceptance of any mere obligation or the creation of a new debt; and it seems to us that a lien existed for the rent, although other security was taken."

Of course, if such is the law as to the landlord's statutory lien, it is also the law as to the mechanic or materialman's statutory lien, and evidence that such is the law in the latter case may be found in the statute itself. A statute

creating the ordinary mechanic and materialman's lien was passed in this state as early as ———, and remained a law on the subject until said act of February 25, 1893 (Laws 1893, p. 505, c. 151), entitled "An act concerning liens," became a law, when it was substantially re-enacted as article 1 of that act. It contained an express provision that the liens created thereby should not have effect if security should be taken for the labor performed or materials furnished. As the provision stood in chapter 70 of the General Statutes of Kentucky, it was in these words: "Nor shall the liens authorized by this chapter have effect if security shall have been taken for the labor performed or material furnished." That chapter had relation solely to the ordinary mechanic or materialman's lien. It did not include the liens covered by the acts of March 21, 1876, March 17, 1882, and March, 1888, hereinbefore referred to. The provision as to the effect of taking security being limited to liens authorized by said chapter 70, it had no relation to the liens covered by said other acts. The effect of taking security upon the liens covered thereby was left open to be determined by the principles of the common law. The act of February 25, 1893, entitled, "An act concerning liens," combined all of said liens into one act; article 1 thereof covering the ordinary mechanic and materialman's liens, and article 3 covering said other three kinds of liens created by said several acts as hereinbefore set forth. It also combined therewith what are called watercraft liens covered by article 2, livery stable keepers' and registers' liens covered by article 4, and keeper of jacks, stallions, and bulls' liens covered by article 5. The language of the former chapter 70 of the General Statutes in regard to the effect of taking security was carried forward into article 1 of said act of February 25, 1893, exactly as it stood there, so that the liens to be affected by the taking of security was still as it had been, "liens authorized by this chapter." There it could only have relation to the ordinary mechanic and materialman's liens, because they were all the liens covered by chapter 70 of the General Statutes. The act of February 25, 1893, was not a chapter. It was merely an act. When it became incorporated in the Kentucky Statutes as a part thereof, it became a chapter, to wit, chapter 79. The act and chapter being a combination and re-enactment of a number of older acts substantially as they stood formerly, it is questionable whether it was intended that the provision as to the effect of taking personal security should have a wider scope than it had theretofore had. I have reached the conclusion that the word "article," where it is used in article 3 in substitution for the word "act" in the former acts, was not intended to give the provision where it occurs wider scope than it formerly had. It is assumed by counsel on both sides herein that said provision as to the effect of taking security had application to liens under article 3. I do not find it necessary to determine this matter. Possibly it did have such application; but, whether so or not, it has had no application since the amendment of March 21, 1896, for by said amendment said provision was repealed, and there has been since then no such statute as to any of the liens covered by chapter 79 of Kentucky Statutes.

The evidence then in the statute itself to which allusion has been made of the fact that in Kentucky the taking of personal security is not a presumptive evidence of a waiver of the mechanic or materialman's statutory lien is the provision referred to as to the effect of taking such security. It would hardly have been enacted if it had not been the law that otherwise the taking of security was not presumptive evidence of such a waiver: but, however this may be, it must be accepted that the repeal of the provision is evidence of legislative intent that the liens created by the statute should no longer be affected by the taking of security. This is not the case of a repeal of a statute covering a certain subject in toto. It is simply a repeal of a particular provision in a statute covering a certain subject. The statute as it stood with that provision enacted that the liens covered by it should be affected by the taking of security. Its repeal was as much as to say that it should not be so affected.

It is urged on behalf of claimants that, assuming that its taking personal security is presumptive evidence of waiver, and the burden is on it to show that it was not intended to waive the lien thereby, it has rebutted that presumption and shown that there was no such intention. The evidence consists of the affidavits of one of the partners in Hiram Blow & Co. and its general

manager to the effect that there was no intention on the part of said claimant to waive its lien and that the personal security was taken as additional security. I doubt whether this is sufficient evidence of intention in case the taking of personal security is presumptive evidence of waiver, or the burden is on claimant to show that it was not intended to waive the lien. I am inclined to think that in such a case some facts must be shown from which it would be legitimate to infer that there was no such intention. But for the reasons heretofore stated I conclude that this ground is not well taken.

5. A fifth and final ground upon which the trustee and contesting creditors base the contention which they have put forward is that the claimant holds as assignee the claims which it has asserted. As to the claim referred to for a balance of $11,870.66, the claimant was the original creditor. It furnished the material that gave rise to that indebtedness, and for it, as heretofore stated, it received the bankrupt's 10 different notes, which notes it negotiated to certain banks, and upon their nonpayment took up. It is therefore claimed that it holds said indebtedness as assignee, and not as originally. The other claim which it holds amounts to the sum of $2,870.63 and is on account of staves sold and delivered by Hubbard Bros. on four separate dates between and including May 25, 1905, and July 1, 1905. A note was given by the bankrupt to said Hubbard Bros. for $1,375, covering the amount of the last sale, and this note and amounts due on account of other three sales were duly assigned to the claimant, and it asserts the whole of said indebtedness as assignee of Hubbard Bros.

The position is taken that an assignee of a materialman is not entitled to the contingent lien created by the statute in question, and that upon the happening of any of the prescribed contingencies it will not attach in his favor. The general rule, no doubt, is that the assignment of an indebtedness carries with it any security it has. This is particularly true of indebtedness secured by a mortgage or vendor's lien. It is also true of the indebtedness against a railroad company which a court of chancery will favor to the extent of giving it a preference when the railroad is placed in the hands of a receiver. An assignee of such indebtedness will be given such preference as much as the original holder thereof. Trust Co. v. Walker, 107 U. S. 596, 2 Sup. Ct. 299, 27 L. Ed. 490; Burnham v. Bowen, 111 U. S. 776; 4 Sup. Ct. 675, 28 L. Ed. 596; Northern Pac. R. Co. v. Lamont, 69 Fed. 73, 16 C. C. A. 364; Columbus S. & H. R. Co. Appeals, 109 Fed. 177, 48 C. C. A. 275. In the Walker Case, Mr. Chief Justice Chase said: "This case differs from that of Union Trust Company against Souther only in the fact that Walker, the present intervener and appellee, is the assignee by purchase from the original holders of the claims, which he seeks to have paid and one of the questions arising is whether, being an assignee, and not an original holder, he is entitled to payment. We have no hesitation in answering this question in the affirmative. As we have said in Fosdick v. Schall, 99 U. S. 253, 25 L. Ed. 339, these creditors are paid, not because in law they have a lien on the mortgaged property or income, but because in equity the earnings of the company constitute a fund for the payment of the expenses which their claims represent before any income arises which ought to be applied to the discharge of the mortgage debt. Under such circumstances, it is a matter of no importance that the original creditor has parted with the claim. The right is one that attaches to the debt, and not to the person of the original creditor. Consequently the right passes with an assignment of the debt." In the Lamont Case, Judge Caldwell said: "The right of preference is one that attaches to the debt and not to the person of the original creditor. Consequently the right passes to an assignee of the debt." And, in the Columbus S. & H. R. Co. Appeals Case, Judge Lurton said: "The third assignment of error in case No. 862, being the appeal of John P. McCune, trustee, should be sustained so far as to place McCune as the assignee labor claims upon the footing of the original parties. The preference attaching to a labor claim is to the claim, and not to the claimant, and passes with the claim to an assignee."

But what we have to do with here is an indebtedness secured by a statutory lien or right of priority. The question has arisen under the bankrupt act as to whether an assignee is entitled to the priority given by section 64b(4) to wages due to workmen, clerks, or servants. It has been held that he is not in the following cases, to wit: In re Westlund (D. C.) 99 Fed. 399;

In re North Carolina Car Co. (D. C.) 127 Fed. 178. The following authorities state the law as there laid down: Loveland on Bankruptcy, 726; Brandenburg on Bankruptcy, 1043; Collier on Bankruptcy, 503; 5 Cyc. 586. It has been held that he is entitled to the priority so given in the following cases, to wit: In re Brown, Fed. Cas. No. 1,974; In re C. P. Harmon (D. C.) 128 Fed. 170. The Sixth Circuit Court of Appeals has had the question before it in the case of Shropshire, Woodliff & Co. v. Bush et al., from the District Court of the Eastern District of Tennessee. Judge Clarke of that court held that the assignee is not entitled to the priority, and the Sixth Circuit Court of Appeals at its July session, 1906, certified the question to the Supreme Court of the United States for decision. 27 Sup. Ct. 178, 204 U. S. 186, 51 L. Ed. ——. In the case of In re Campbell (D. C.) 102 Fed. 686, it was held that the right to priority might be assigned after the filing of the petition in bankruptcy.

The decisions as to whether the assignee in such instance is entitled to the priority are hardly relevant to the question here. Those as to whether the assignee of a laborer or materialman is entitled to the lien conferred by a mechanic's lien or similar statute are more in point, if not decisively so. Mr. Freeman, in his note in Kinney v. Duluth Ore Co., 49 Am. St. Rep. 530, thus states the condition of the decisions on this subject in one particular: "Perfected Liens. Although there is a direct conflict in the adjudicated cases on the subject, the great weight of authority, as well as the better reasoning, is in favor of the rule that a perfected mechanic's lien may be assigned, and the assignee may thereafter enforce it in his own name, and in the same method that the assignor might have done." It has been so held by the Supreme Court of the United States in the case of Davis v. Bilsland, 18 Wall. 659, 21 L. Ed. 969. Mr. Justice Bradley there said: "The plaintiff assigns three errors: * * * Second, that the claim of a mechanic for a statutory lien cannot be enforced by an assignee by a suit in his own name. In answer to this objection it is sufficient to refer to the fourth section of the civil practice act of Montana, which provides that actions shall be prosecuted in the name of the real party in interest. McKillican has completed his claim by filing his lien before assigning it to the plaintiff. It was perfectly lawful for him to assign his claim. It was not against any principle of public policy to do so. When assigned, the claim really belonged to the plaintiff, and according to the Code he was the proper person to bring suit upon it."

Mr. Freeman in said note thus states the law on this subject in another particular: "Assignment of Right to Lien. On this topic also there is a conflict of authority, but the great majority of the cases maintain the proposition that the assignee of a claim for work and labor or material furnished cannot file the notice required by law and thereby create a lien. The right to create and perfect such lien is personal to the mechanic and cannot be assigned. Even in most of those jurisdictions where the perfected lien is capable of assignment the mere inchoate right to a mechanic's lien before the lien has been perfected by the filing of the claim is not assignable."

I regard the law as thus stated in both these particulars to be the better doctrine. The case we have here is not that of a perfect lien at the time of the assignment. It is that of a contingent lien, and attaches only upon the happening of certain contingencies; but its so attaching does not depend upon the doing of anything by the laborer or materialman which may be said to be personal to him. As we have heretofore held, there is no requirement as to his filing a statement or notice. It attaches upon the happening of certain contingencies over which he has no control and entirely independent of him. It comes, therefore, within the doctrine of the first line of decisions, and not within that of the other.

But it is claimed that we are affected here by two decisions of the Court of Appeals of Kentucky, to wit: Frailey v. Winchester, 96 Ky. 570, 29 S. W. 446; Hutsell v. Bank, 102 Ky. 410, 43 S. W. 469, 39 L. R. A. 403. In the former case it was held that the assignee of a laborer who was entitled to a lien under the act of March, 1888, now section 2492 of the Kentucky Statutes of 1903, cannot comply with section 3 thereof, now section 2494 of Kentucky Statutes of 1903, and thus preserve the lien. The laborer alone can comply therewith. Judge Paynter said: "The laborer not having done that which

the law required as a prerequisite to the attachment of a lien, no lien followed the debt into the hands of the Pryses. The lien being a statutory right, dependent upon a substantial compliance with its terms, no rule of equity can be invoked in this case to give that relief which a statute denies or fails to furnish." This case, therefore, comes within that line of cases laying down the law as set forth by Mr. Freeman in the second particular above. It is not applicable here, because the statute in question here does not require the filing of a statement or notice by the laborer or materialman, as heretofore held. In the latter case it was held that the assignee of a rent note could not collect it by what is called the "extraordinary remedy" of distress. This was so held because the remedy by distress can be exercised only by the holder of the reversion. This case, therefore, is not in point here.

It must be held, therefore, that the assignee of a laborer or materialman is entitled to the contingent lien created by the statute in question. If so, there is the greater reason that the claimants should be entitled to that lien as to the larger claim asserted by it. As to such claim, it was the original materialman. It simply negotiated the notes which it received for its claim, becoming bound as assignor to see to their payment, and upon their nonpayment it took them up and reinstated itself in the ownership of the claim. It was held by the Court of Appeals of Kentucky, in the case of Graham v. Holt, 4 B. Mon. 61, under the ordinary mechanic's lien law, which then contained the clause that the taking of security would amount to a waiver of the lien, that a mechanic who had so negotiated notes taken for his claim and regained them was entitled to his lien. Judge Marshall said: "It is contended, however, that the statute gives the lien to the mechanics and materialmen only, and that it is destroyed by the assignment of a note for the debt which it was intended to secure. We do not concede this to be a legitimate conclusion from the premises stated, nor from the additional fact that the statute provides only for the enforcement of the lien by those persons to whom it is given. The question is not to whom the lien belongs, or by whom it may be asserted in case the debt is assigned, but whether it passes wholly to the assignee, so as that he may enforce it without even making the original creditor a party, which, however, we suppose should not be allowed, or whether a beneficial interest in it passes, to be enforced in the name or with the assent of the original creditor as a party, or whether it remains wholly in the original party, who still continues responsible for the debt, and is to be enforced only when by again becoming the holder of the note he is again the creditor. The statute gives an express lien for the benefit of the mechanics and materialmen referred to. It nowhere says, however, that it shall not be assignable, or that it shall be destroyed by the assignment of the debt which it is intended to secure. Were it conceded, then, that in consequence of the particular mode pointed out for its enforcement it does not, as other express liens do, pass absolutely to the assignee of the debt, it would be depriving the statute of the beneficial operation it was intended to have to give it such construction as would prevent the mechanic or materialman from using according to the exigencies of his business, the debt, for the security of which the lien is given, but at the peril of losing the security. The statute did not intend to prohibit the taking of a note, nor to restrict the use of it, nor, as we think, to make the destruction of the lien the consequence of the transfer of the debt. If, then, it does not pass to the assignee it remains with the payee as ultimate security for the debt for which he generally becomes responsible by his assignment; and, if the debt be due and unpaid, he may, within the year, enforce the lien for his own sole benefit, if he have taken up the note, or for the benefit of himself and the assignee, if the latter is willing to indulge him by awaiting the result of that remedy."

This case is old, it is true; but that is not against it. It is true also that it has never been followed. This is because there has been no occasion to follow it, so far as the Kentucky Reports show. Nor is it inconsistent with Frailey v. Winchester, as is evident from what has been heretofore said.

I conclude, therefore, that this ground is not well taken.

In view of the line of reasoning herein put forth, I am constrained to hold that the claimant is entitled to the priority asserted, and orders will be drawn accordingly.

THE WILLIAM CHISHOLM. THE OCEANICA. LEHIGH VALLEY TRANSP. CO. v. CHISHOLM et al.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1907.)

No. 1,620.

1. COLLISION—RULES FOR NAVIGATION OF GREAT LAKES—CONSTRUCTION OF PASSING RULE.

Rule 17 of the rules of navigation for the Great Lakes and their connecting waters (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891]), which provides that "when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each shall pass on the port side of the other," has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other.

2. SAME—STEAM VESSELS MEETING—VIOLATION OF PASSING RULES.

A collision occurred at night in Lake St. Clair, a short distance below the lower end of the cut, between the steamships Oceanica, going up, and the Chisholm, coming down. The vessels were on the usual courses, which would bring them head on when they approached each other, and the night was calm and clear. There was evidence tending to show that signals for passing port to port in accordance with the rules were exchanged, although that was in dispute; but it was shown without contradiction that, when the vessels were some 1,500 feet apart and head on the Oceanica gave a signal of two blasts, which was assented to, and that the Chisholm then put her helm hard astarboard and swung to port. It was also satisfactorily shown that the Oceanica did not starboard her wheel, but either stopped and backed, or kept to the right, and that the collision occurred some distance to the eastward of her original course. *Held*, that she was clearly chargeable with fault adequate to account for the collision, and that under the rule, which in such case raises a presumption in favor of the other vessel, which can be rebutted only by clear proof of contributory fault, the Chisholm could not be held in fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 33–42.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

3. SAME—DAMAGES RECOVERABLE—REVIEW OF FINDINGS ON APPEAL.

The findings of a commissioner as to the damages recoverable for a collision, confirmed by the District Court, will not be disturbed on appeal, except for clear error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 306.]

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

On exceptions to the commissioner's report, Swan, District Judge, delivered the following opinion in the court below:

An interlocutory decree was granted in the above-entitled cause adjudging the Oceanica solely in fault for the collision between that steamer and the steamer William Chisholm and dismissing the original libel. It was referred to the clerk to ascertain and report the damages suffered by the cross-libelants. The commissioner filed his report November 23, 1904. The libelant has filed nine exceptions to the report.

(1) The first exception includes the allowance to the owners of the Chisholm for repairs to the hull of the steamer and compensation for the loss of her use during detention for repairs necessitated by said collision.

(2) The second exception is directed specifically to the allowance of the item of repairs, $19,040.80, which is embraced in the first exception sub nom. "repairs."

These may be considered together. The reasonableness of the bills for the work done, and the fact that they were paid, is not questioned. It is denied that all the repairs made were necessitated by the collision. The inquiry is, therefore: Were they made necessary by the collision, or were they in part in renovation of old injuries to the bottom of the Chisholm done prior to the collision. Upon this question there is a conflict of testimony. It is claimed by the libelant that a large part of the repair bill was for injuries previous to the collision. While it is conceded that there were patches on the bottom plates before the collision, the cross-libelants' testimony is that, by settling on the boulders when she sank, these and other plates were impaired by the sinking so as to necessitate removal and rerolling, and that the work done to the bottom and the repair bill therefor is limited strictly to the reparation of the collision injuries and those consequent thereon by the sinking of the Chisholm after the collision. The work of repair, inclusive of the necessary removal of injured plates, required of necessity the repair of beams, angle irons, and other parts and pieces, and their repair and replacement or the substitution of new parts or pieces where required. Without discussing the proofs at length, it is sufficient to say that the evidence is not sufficient to overturn the commissioner's conclusions. These exceptions are overruled.

(3) The third exception is grounded on the allowance of $1,660.05 for lay days in dock while the Chisholm was under repair for the damages to her hull caused by the collision and sinking. The criticism on this item is that it assumes that the work of repairing the steamer's bottom was part of the collision damage, and that but seven days at the utmost were required to repair the break in the vessel's side. This assumption is not justified by the proofs. The steamer was laden with iron ore, and she was greatly injured when she settled on the boulders at the place of sinking. The testimony mainly relied upon that challenges the manner and time in which the repairs were done while the steamer was in dock is that of Mr. Oldham, but his views are not sufficient to override the conclusion reached by the commissioner on the testimony of other equally competent witnesses that it was properly and expeditiously done. The attack upon the order in which the work was done is rather upon the methods and judgment of the company which repaired the steamer. If the bottom was damaged, which is found to be the case, in what order it and other repairs should be made was for the company's determination, and not for the owner of the steamer to decide. Libelant's witness McDowell had no knowledge of the injuries and the repairs necessitated by the collision, except what he saw in the survey. McDowell's deposition, pp. 26, 27. On page 21 he expresses the opinion that $19,000 allowed by the survey "was sufficiently high to cover all the repairs called for by the survey," and, on page 17, that to repair the bottom it would be necessary to have the vessel in the drydock—"longer in the dock for the repairs to the bottom—considerably longer" than would be required for the repair of the top sides. While it may be true that the cost of repairs exceeded the estimate made by the surveyors, it is well known that a survey of this character is merely an estimate and frequently below the cost of the work.

The claim that the repairs to the bottom were not caused by the collision, and that the vessel was in dock longer than necessary, is disproved by the proofs.

It is further objected that the testimony is insufficient to sustain the commissioner's finding as to the extent and cost of the repairs. The degree of evidence insisted upon by libelant is impracticable and unnecessary. It would be impossible for any witness to testify that particular plates, beams, angle irons and other material were put in certain places, or to identify each item charged for as used in reparation of the injury. The survey recognizes most of them as needful for that purpose, and it is sufficient that the shipowner paid in good faith the bill rendered for the work. The presumption is that the work was done bona fide. Fraud is not to be presumed, but must be established clearly. Over six years had elapsed before this testimony on the reference to ascertain and report the damages was taken. This delay was largely caused by libelant. The Chisholm had been repaired entirely before the cause was tried. It would have been impossible for any workman or witness after the re-

pairs were completed to have identified all the several plates, parts, and pieces which went into the work. The painting of the vessel alone, as is customary after the metal has been restored, would have made identification next to impossible. The witness Richardson was present during most of the repairs, and Oldham, libelant's witness. The surveyors certified (Exhibit 28) that she "had been strongly and neatly repaired in accordance with the recommendation" in 1894—five years before this collision. No intervening injury to her bottom is shown until this collision. The bottom damage must be referred to this collision in the absence of proof of another cause. The proof given as to the character and extent of the injuries and of the repairs necessitated thereby, with proof of the bona fide payment of the bills, therefore, is all that can be reasonably exacted in such cases. Orhanovich v. Steam Tug America, 4 Fed. 337–341, approved in The Bulgaria, 83 Fed. 312, 314; The Bratsberg, 127 Fed. 1005; The Providence, 98 Fed. 135.

The onus of proving that repairs other than those resulting from the collision are included in the bills paid is upon the original libelant. The proofs are satisfactory that the Chisholm's bottom was injured—heavily laden as she was with iron ore—when she sank, and they make a case which justified their allowance by the commissioner.

The findings of the commissioner are presumably correct. They stand on the same plane as a master's report in respect to the weight to be accorded to them, and, where they deal with conflicting testimony, are not to be set aside except for clear error or mistake. Egbert v. Baltimore, etc., Co., 2 Benedict, 224, Fed. Cas. No. 4,305; Tilgham v. Proctor, 125 U. S. 149, 150, 8 Sup. Ct. 894, 31 L. Ed. 664; The Providence, 98 Fed. 135, 38 C. C. A. 670. This exception has no merit, and is overruled.

Fourth Exception. This is overruled. The services of the tugs were necessary. The steamer could not be safely navigated after the collision without their aid.

Fifth Exception. This is sustained. It is largely a charge for expenses of the owner of the Chisholm in preserving their rights against the insurers of the steamer. This item of $11.39 is disallowed.

Sixth Exception. This is made to allowance of $90 (Exhibit 5) for tug bills going to and from the sunken Chisholm after the collision. The bill of $10 for tug August 16, 1896, is not sustained by the testimony that the trip was necessary. Of course, it could not be allowed for taking lawyers and insurance agents to the wreck. No specific objection is made to the other items in Exhibit 5, and it is allowed at $80, instead of $90.

Seventh Exception. This must be overruled. The brief for libelant states: "We have no objection to the allowance of Carr's fee." That fee is the only subject of the exception.

Eighth Exception. This is overruled. The voucher states that the trip was made in connection with the repairs, and the testimony of Richardson (page 26) is that his expenses at Detroit and for the trip to Buffalo were not connected with the insurance of the Chisholm. There is no evidence to the contrary. This charge seems sanctioned by Hobson v. Lord, 92 U. S. 412, 23 L. Ed. 613, which is authority for allowing the expenses of an agent for the owner in like cases. If the owner were present in person for the protection of his interest in the injured vessel, in such cases his reasonable expenses and a fair allowance for his time and services would be proper as an element of the damages caused him by the collision. No reason is given why like expenses incurred by his agent in performing the services should not be reimbursed as a natural and necessary consequence of the disaster. The judgment of the commissioner who saw the witnesses and had an experience of 35 years in references involving such questions as are here presented carries great weight, and is not to be lightly disturbed. It would prolong an inquiry of this kind interminably if it were necessary for the owner of the injured vessel, in proof of damages, to adduce the testimony of every shipwright and metal worker who worked upon the repairs to verify each minute charge for labor or material which makes up the aggregate of the expense of restoration of the vessel to her condition preceding the collision or to require a sworn itemized statement of the time spent by each person employed in the work of raising and repair. The inquiry before the commissioner seems to have been search-

ingly conducted by both parties, and that officer had the benefit of full argument by the counsel for the respective parties. His conclusions were apparently the result of deliberation and his characteristically careful consideration. The proofs made it necessary for him to weigh conflicting testimony. It is not enough to discredit his findings that the court might have taken another view of contradicted questions of fact. It must be shown that this judgment was clearly wrong, or that he erred in the law. Furrer v. Ferris, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; The Cayuga, 59 Fed. 488, 8 C. C. A. 188.

Ninth Exception. This objects to the allowance of interest on cross-libelant's damages. The question was elaborately argued before the commissioner, and, as upon every other point in the case, the proofs are conflicting. The considerations urged by both sides were heard at length by the commissioner. The question of responsibility for the delay was the subject of testimony which were weighed by him, and no valid reason is shown for disapproval of his judgment upon that issue. Interest on disbursements for repairs is generally allowed as a part of the damages. It is incumbent on libelant to show error by the commissioner in holding that there was no reason for denying it in this case. The delay in taking the proof of damages would seem to have been held the fault of cross-libelant. The testimony submitted with the commissioner's report, and on which it was based, does not disprove the correctness of his finding on this point. This conclusion must stand, and the exception must be overruled.

The report as herein modified is confirmed, and all other exceptions thereto overruled. This sustains exception 5 and the charge of $10 in exception 6. The sum of the deductions from the amount allowed by the commissioner's report is therefore $21.39.

H. A. Kelley, for appellant.

H. D. Goulder and F. S. Masten, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit in admiralty, wherein the appellant, the Lehigh Valley Transportation Company, as owner of the steamship Oceanica, libeled the steamship Chisholm in a cause of collision. The appellees, claiming to be owners of the latter vessel, answered the libel, denying all fault, and filed a cross-libel against the Oceanica, charging her with being at fault and solely responsible for the consequences which ensued. The cross-libel having been answered, the testimony of the parties was taken in open court, and upon the hearing the libel of the appellant was dismissed, and the cross-libel of the appellees was sustained. The damages, with interest, were assessed at the sum of $61,618.65. A decree was entered for that amount and costs in favor of the cross-libelants. The damages of the Oceanica probably amounted to nearly an equal sum.

The collision occurred a short distance below the lower end of the Cut, a dredged channel 800 feet wide, in Lake St. Clair, at about 11 o'clock of the night of August 14, 1896. The Oceanica was a vessel about 262 feet long and 16 feet draught and was bound up, having a cargo of coal of 1,900 tons. The Chisholm was nearly as large, and was coming down carrying about the same tonnage of iron ore. A mile and three-quarters below the Cut is Windmill Point, on the port hand of vessels coming up, and on passing that the usual course for vessels of this size is, or was at that time, laid on the Lower Beacon Light, standing near the east side and at the lower end of the Cut. This course is straight east northeast, and is followed about

a mile and a half until the vessel approaches the lower end of the Cut, whereupon it swings to port about 1½ points and proceeds up, or near, the midway of the channel. The course of vessels coming down is the reverse of this. The weather was calm and clear, and there was nothing in the conditions to create any difficulty or embarrassment in the navigation of the vessels. While the Oceanica was bearing up from opposite Windmill Point, on her heading for the Lower Beacon Light at the east side of the foot of the Cut, the Chisholm was coming down the channel above. The Oceanica, directly after passing Windmill Point, had passed on her port side a tug and tow going down, with which she exchanged a signal of a single blast. The Chisholm, on coming to the lower end of the Cut, or shortly before, saw coming up on her starboard bow a small steamer, which proved to be the Cottrell and a tow. With this steamer she exchanged a signal of one blast and passed it starboard to starboard; the little steamer swinging in as the Chisholm passed out of the Cut. Thus far there is no difficulty in perceiving the situation, and we come to the period when the Oceanica and the Chisholm began, or should have begun, to establish their understanding for passing each other. From this time on, until immediately before the collision, the testimony, especiallly that concerning the signals given by each of the vessels, and much that relates to the distances between them when the signals were given, and to the maneuvers of the Oceanica for a few minutes before the collision, is in an almost hopeless conflict. The libel for the Oceanica charges that the signaling, distances, and maneuvering of the vessels were as follows:

"That the said steamers continued on their respective courses, and when within the usual signaling distance the Oceanica sounded two blasts of her steam whistle to the said steamer Chisholm, which was answered by two blasts from the Chisholm. That at the same time the helm of the Oceanica was starboarded slightly. The Chisholm was then nearly ahead, and showing her green and range lights, indicating that she would pass the Oceanica starboard to starboard. That the steamers continued to approach, until they were a short distance apart, when suddenly the Chisholm blew one blast of her steam whistle, and exhibited all of her lights to the watch on the Oceanica. The Oceanica replied with two blasts of her whistle, and her engine was immediately checked. The Oceanica then blew four or five short blasts of her whistle, and her engine was stopped and backed. But the Chisholm, without apparently reducing her speed, came on, swinging rapidly to port, and struck the stem of the Oceanica, crushing her in forward, below the water line. The headway of the Oceanica was almost stopped, and the force of the collision drew her stem around to the eastward. The engine of the Oceanica continued to back until she backed away from the Chisholm, when she turned around down the river, under a hard aport helm. The water coming in rapidly, she was headed to the westward and an effort made to reach shallow water, but she sank in deep water."

The Chisholm's statement in her answer and cross-libel is as follows:

"The Oceanica blew to the Chisholm a passing signal of one blast, to which the Chisholm promptly responded with one blast, the vessels being then substantially end on, and was about to port and draw over to starboard, the order having been given, when the Oceanica blew to her a passing signal of two blasts and shut out her red light, evidently having starboarded. The distance and positions of the vessels fully warranting it, the Chisholm replied with two blasts and promptly starboarded, in accordance with the signal, and was swinging under starboard helm. The vessels were about to pass starboard to

starboard, with no risk of danger of collision present, when, as they approached close to each other, the Oceanica opened up her red light again and blew one short blast of her whistle. The positions of the vessels then, the short distance separating them, and the fact that the Chisholm was swinging under starboard helm, made it impossible to recover and pass under single blast whistles, port to port, and so the Chisholm at once signaled to reverse her engine full speed astern, which was promptly done, engine whistles being heard on the Oceanica, but the Oceanica, swinging rapidly to starboard, came into the Chisholm, then well to the eastward, with her headway nearly or quite stopped, striking her on her starboard quarter, abreast of the engine room; and such was the speed of the Oceanica and the weight and force of her blow, delivered stem on, that she cut into the Chisholm some 10 feet, making a breach down to her bilge, through which the water poured in such quantities that the stern of the Chisholm sank immediately to the bottom, substantially where she was struck."

Thus it is seen that a very important question is whether the first passing signals given and answered were double blast signals, as claimed by the Oceanica, or single blast signals, as stated by the Chisholm. The crews on each vessel, as usual, maintain in their testimony the contest made by each; but, before passing to the proofs, we should recur to the original libel. It is there alleged that the first signal was a double-blast signal from the Oceanica, and that this was replied to by two blasts from the Chisholm. Both sides agree that at one time double blast signals were exchanged, though they do not agree as to the time when this occurred. The allegation of the libel of the appellant is that the Oceanica began the signaling with two blasts, and that at that time the Chisholm was "nearly ahead." The Chisholm was at that time, it says, showing her green light, and that she was then coming out of the Cut. Her course would then be, according to the usual navigation, to swing to starboard down the reach toward Windmill Point, and the vessels would then be nearly end on. Such would be their position as they would approach each other, and such by the concurrence of the testimony from both vessels was what in fact occurred. By rule 17 of the rules prescribed for the navigation of the Great Lakes and their connecting waters by the Act of February 8, 1895, c. 64, § 1, 28 Stat. 645 [U. S. Comp. St. 1901, p. 2891], it was provided that:

"When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each shall pass on the port side of the other."

Obviously, this language has reference to the position of the two vessels when they will be meeting and about to pass each other, and not to their position when signals are given, if at that time they are on a temporary course from which they will depart before they will nearly approach each other. The Iron Chief, 63 Fed. 289, 11 C. C. A. 196, 22 U. S. App. 473; The John L. Harbrouck, 93 U. S. 405, 23 L. Ed. 962; The Victory and The Plymothean, 168 U. S. 410, 418, 18 Sup. Ct. 149, 42 L. Ed. 519; The D. S. Stetson, 4 Ben. 508, Fed. Cas. No. 4,104; The John Taylor, 6 Ben. 227, Fed. Cas. No. 7,429; The Velocity, L. R. 3 P. C. 44; The Oceano and The Virgo, 3 Prob. Div. 60; Mars. Collisions (2d Ed.) 473.

The cases of the Velocity, supra, and of the Iron Chief, a case decided by this court, are good illustrations of this rule, the former be-

ing a case of collision in the River Thames, and the latter of a collision near the change of course from Waiska Bay into the channel below—and see the observations of Brett, L. J., in the Bywell Castle, 4 Prob. Div., at page 224. What we have here said is because the libel for the Oceanica states, as if it were a factor indicating the propriety of her course, that when the first passing signals were given "the Chisholm was then nearly ahead and showing her green and range lights, indicating that he would pass the Oceanica starboard to starboard." The captain of the Chisholm says that at about that time she had the other vessel's green and red lights, which, of course, would locate his vessel as dead ahead of the Oceanica; but he also says that he was then turning down out of the Cut and coming on to the course toward Windmill Point. It is obvious that in these conditions the Chisholm would be showing her green lights to the other vessel until she had completed her turn and was substantially head on with her, and if, as her libel implies, the Oceanica accepted the green light as an indication that the Chisholm intended to pass her on the starboard hand, it was at fault in adopting that conclusion.

But the testimony leaves no doubt that these vessels were meeting each other nearly end on for an amply sufficient time to comply with the seventeenth rule, and the answer and the proof of the Chisholm are to the effect that, at the time when the passing signals of two blasts were exchanged, the vessels were coming into that position. In these conditions the Oceanica was at fault, if, as her libel tends to show and her testimony states, she at no time gave other than double-blast signals. This she had no right to do, if they required her to take the wrong course. But we are satisfied that her libel in this respect is not true. On the contrary, we are convinced that she gave and received a signal of a single blast a considerable time before she gave her signal of two blasts, and that the latter was not given until the vessels nearly approached each other. This for several reasons: First, because from her position she would be likely to choose the ordinary way of passing; second, because the original exchanging of a single blast and the later giving of a double blast by the Oceanica explains, and is consistent with, the action of the Chisholm. It seems incredible that she should have so suddenly swung off to port under a hard astarboard wheel, unless she had suddenly been constrained by the Oceanica to alter her previous course; third, because it seems to us that the nearness of the Oceanica to the Chisholm, when, as the Oceanica states, the double blasts were exchanged, indicates that pilots having proper regard to their duties would not have so long delayed their passing agreement; besides, there is a quality in the evidence of those on the Chisholm which is more persuasive than that coming from the Oceanica, and the judge of the District Court, who saw and heard the witnesses, seems to have had the same impression; finally, the case made for the Oceanica is so irreconcilable with the locality of the collision that confidence in any part of the testimony is seriously shaken.

One would have expected that some light upon the circumstances of the collision might have been shown by the crew of the Cottrell, which was not far off. The captain of that vessel was called by the

judge to testify; neither of the parties being willing to vouch for him. But his testimony proved pointless and inane.

The darkest part of the case is the conduct of the Oceanica after the time when she gave her two-blast signal, and when she saw the Chisholm turning out abruptly on her hard astarboard wheel. There was no reason why she should not have turned to port and proceeded in accordance with her response. There was even less danger in doing that than in remaining where she was or in checking and backing, which would have a tendency to throw her stem to starboard. She gave testimony tending to show, and her counsel argues, that she nearly stopped in her course and remained almost dead on the line where she was, overcoming her progress by checking and backing, and that while she was doing this she was struck on her stem by the broadside of the Chisholm; but there are strong indications which discredit even this story, faulty as this conduct would have been. The captain of the Oceanica testifies that the Chisholm was already sunk on her heel when the two vessels came apart after the collision, and she was later found there, with her head down stream, apparently drifted around on her heel, in the direction of the current, while sinking. The place where she sunk was about 800 feet distant to the east from the course which the Oceanica would have taken if she had gone straight ahead. This demonstrates that the Oceanica had, after her signal, gone far off to starboard, and is very persuasive that she was not checking and backing until immediately before the collision. It seems difficult to believe that her conduct could be so wanton; but, in this maze of contradictions in the proof, one's judgment feels on safest ground when it finds a substantially incontestable fact from which to estimate the probabilities; and the place where the collision occurred is satisfactorily proved. The severity of the wound in the side of the Chisholm by the stem of the Oceanica, an opening 18 feet in length from top to bottom and 6 feet wide, while not conclusive, rather tends to confirm the belief that the Oceanica was still advancing with considerable speed at the time of the collision, notwithstanding she had reversed her engine a short time before, as the evidence seems to prove.

We have no hesitation in holding that the Oceanica was rightly condemned.

We are next required to consider the case against the Chisholm. The testimony from those on that vessel, to which, as we have said, we are inclined to give the greater credit, is that, while the vessels were at a proper distance apart, the Oceanica blew a passing signal of one blast, to which the Chisholm responded with one and checked down; that at this time the vessels were nearly ahead of each other; that the Chisholm ported her wheel a little; that they continued to approach each other, both vessels showing their green and red range lights; that when they were about 1,500 to 2,000 feet apart, and there was no difficulty in passing either port to port or starboard to starboard, the Oceanica blew a double blast, to which the Chisholm responded with two and immediately turned her wheel hard astarboard, turning out sharply to port, and closed out the red light of the Oceanica; that soon thereafter the Oceanica showed her red

light again and blew one blast of her whistle, to which the Chisholm did not reply, but signaled her engineer by two whistles to reverse, which was done; that the signal to the engineer was repeated, and a further signal was given to back the vessel, and these orders were complied with; that the result of the backing was to turn the stern of the Chisholm away from the direction the Oceanica was then coming, but the latter struck the Chisholm on her starboard quarter, near the engine room, well aft, at about a right angle; that the Chisholm filled rapidly at the opening and sank on her heel. If these were the facts, we see no fair ground for reversing the decree which absolved the Chisholm from fault. We are convinced that the account she gives of her conduct is substantially correct. Some criticism is made by counsel for appellant upon the statement that the Chisholm put her helm hard astarboard and swung out so rapidly to port on getting the double-blast signal of the other vessel and of her captain's explanation, when he says: "I wanted to quit that business. I wanted to get far enough away, so there would be no more exchanging of whistles." But if, as he says, there had been a reversal of the original signal, and that at the near approach of the vessels, we do not think his explanation altogether unreasonable. But both sides agree that in fact the Chisholm swung out rapidly, as stated. She must have had some motive for it; and if, as we think, her turning to port was done upon the invitation of the Oceanica, it does not lie in the mouth of the latter to complain of it. The Chisholm went off into water where the Oceanica had no right to be, and where the Chisholm was in no other danger.

We have discussed the case, as we suppose, upon all the relevant material facts, and do not differ from the conclusions of the District Court; but, upon a closer analysis of the more critical facts, we think it might be fairly summed up in this: That, without deciding the controversy whether a passing signal of a single blast had been exchanged or any other issue concerning preceding events, we find upon the concurrence of the testimony of both sides that the two vessels were approaching each other head and head, or nearly so, for a length of time before they would meet amply sufficient to make provision for passing. If they continued on such courses, there would be risk of collision. If the Oceanica, before the vessels were laid on these courses, but in anticipation thereof, had given a signal of one blast, as it was her duty to do, and that had been assented to, she had no right to change it, being under no necessity, and the other vessel was bound to assume that they were to pass port to port until the Oceanica gave clear signs that she was not complying with the agreement; if she changed her purpose while they were proceeding end on and blew two blasts, she was bound to proceed accordingly and go out to port. But if, as she claims, she had given a double blast before the vessels came head and head, and had given no other, she was equally bound to go to port for passing, and in either case there was nothing in the conditions which made this dangerous or difficult. Her double blast would mean to the Chisholm "I am directing my course to port." If she was in doubt of the intention of the other vessel, she was bound to give an alarm whistle and check or stop and reverse, if necessary,

as required by rule 26; but, if she gave no notice of any embarrassment, the Chisholm was entitled to assume that she had none, and proceed accordingly. Thus, upon any fairly possible construction of the facts, the Oceanica was grossly at fault. By her own account, although she at no time gave or assented to any other than a double-blast signal, she was never on the west side of the midway of the sailing course, and, if the clear indications are to be relied upon, she came into collision at least 800 feet to her starboard of the course she had been proceeding on, and she had given no notice of any doubt or difficulty, unless it be that she was whistling at the time when the collision was impending and beyond escape. It seems clear that but for her misconduct the collision would not have happened.

In these circumstances, the Chisholm is entitled to be judged by the rule long followed by the courts of England and of this country that when one vessel, clearly shown to have been guilty of a fault adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter, which can be rebutted only by clear proof of a contributing fault. The Catherine, 2 Hagg. Adm. 145; The Sisters, 14 L. T. N. S. 338; The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Victory and The Plymothean, 168 U. S. 410, 423, 18 Sup. Ct. 149, 42 L. Ed. 519; The D. H. Miller, 76 Fed. 877, 22 C. C. A. 597, 33 U. S. App. 717; The Comet, 9 Blatchf. 323, Fed. Cas. No. 3,051; The Sunnyside, 1 Brown's Adm. 227, Fed. Cas. No. 13,620; The Athabasca (D. C.) 45 Fed. 651; The Mexico (D. C.) 78 Fed. 653.

Tried by this rule, we think the Chisholm could not be justly held responsible. But it seems proper to say that, aside from the rule just mentioned, we should be unable to specify any ground on which we should think it right to charge that vessel.

Some questions are presented by the brief of appellant in regard to the extent of the damages recovered. One is in substance that in making repairs on the Chisholm it was found that some of her bottom plates were indented and broken, and it is alleged that they were in a defective condition at the time of the accident, and that the appellant should not be charged the expense of new material; and, further, that more new plates and more extensive repairs were made and charged for than was necessary to renew the vessel. There is evidence to show that the bottom of the Chisholm was considerably bent and the plates somewhat broken; but there was evidence that she sank on stony ground, and that the boulders under her may have been responsible for the condition of her bottom. There was also conflicting evidence in regard to the necessity for so much new material in making repairs; but these matters were fully considered by the commissioner, and his findings were confirmed by the court. We do not find such clear error in this regard as would, under the established rule, justify us in disturbing the decree. The Cayuga, 59 Fed. 483, 8 C. C. A. 188; The La Bourgoyne, 144 Fed. 781, 75 C. C. A. 647.

The commissioner's report included interest on the damages, as is the usual practice. The appellant objected to this, for the reason that the case was so long spun out by delays in taking the testimony, which continued for several years; and the delays it is said were caused by the counsel for the appellees. It is not clear to us that the ground as stated is sufficient to require the withholding of interest. But, in all events, the court below knew more about the circumstances than we can know. In fact, there is nothing in the record which we can lay hold of in order to judge whether the complaint is well founded or not, or whether one side was more responsible for the delay than the other.

The result is that the decree of the court below must be affirmed, with costs.

MILLER v. STEELE.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1907.)

No. 1,644.

1. WILLS—CREDITORS OF TESTATOR—ACTION AGAINST LEGATEE—FORM.
   An action in the federal court against a legatee in his lifetime, in which action only a money judgment without discovery or accounting was asked, was properly brought at law under Rev. St. § 723 [U. S. Comp. St. 1901, p. 583], declaring that suits in equity shall not be sustained in United States courts in any case where a plain, adequate, and complete remedy may be had at law.

2. COURTS—FEDERAL COURTS—PROCEDURE—EFFECT OF STATE LAW—WITNESSES—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED.
   In a suit in the federal court against a legatee on a contract for services rendered testator in his lifetime, whether plaintiff was a competent witness should be determined by the federal law, and not by the law of the state where the suit was brought, or the law of the state where the services were performed.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 925, 984.

   Competency in federal courts, following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 602, and Bank of California v. Cowan, 21 C. C. A. 278.]

3. WITNESSES—COMPETENCY—TRANSACTION WITH DECEDENT—ACTION AGAINST LEGATEE—STATUTES.
   Rev. St. § 858 [U. S. Comp. St. 1901, p. 659], declaring that no witness shall be excluded because of interest, except that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by testator, intestate, or ward, unless called to testify thereto by the opposite party, did not incapacitate plaintiff to testify in an action against a legatee for services rendered testator.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 653–657.]

4. WILLS—DEBTS OF TESTATOR—ACTION AGAINST LEGATEE—CONTRACT FOR SERVICES—RELATION OF PARTIES—INSTRUCTIONS.
   In a suit against a legatee on testator's express contract to pay plaintiff for services rendered him, the court properly charged that the relation of the parties was a circumstance bearing on the probability of there being such a contract, and that, if the contract was not made, if plaintiff's relation to testator was that of his betrothed or future wife, and the services were rendered in that relation, she could not recover.

5. EVIDENCE—SUFFICIENCY AND WEIGHT OF EVIDENCE.
In a suit against a legatee on a contract for services between plaintiff and testator, it was not error for the court to refuse to charge that the proof of plaintiff's claim must be clear and unequivocal in order to entitle her to recover; a preponderance of the evidence being sufficient.

6. COURTS—FEDERAL COURTS—PROCEDURE—WRIT OF ERROR—SCOPE OF REVIEW—MOTION FOR NEW TRIAL.
The action of the federal court in refusing a motion for a new trial is not reviewable on a writ of error.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 937.]

7. TRIAL—VERDICT—AMENDMENT.
A verdict may be amended with reference to both matters of form and substance during the term, either by reference to the judge's notes taken at the trial, or by other satisfactory evidence.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 791–801.]

8. SAME—INTEREST.
A petition, in an action against a legatee on an express contract between plaintiff and testator for plaintiff's services, alleged that testator died December 29, 1901, and prayed judgment for $21,000 and interest from that date. The jury returned a verdict finding the issues in favor of plaintiff and awarding her $21,000 and interest. *Held* that, the date of testator's breach of contract being fixed by his death, the court was justified in amending the verdict during the term by adding interest from that date.

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

Jacob Shroder, for plaintiff in error.
Frank W. Cottle, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action at law prosecuted by the defendant in error, Mary L. Steele, to recover from the plaintiff in error a sum which she claims to be due her under a contract for services rendered to John M. Wilson, who died December 29, 1901, leaving a will whereby he bequeathed all his estate to Eliza B. Miller, the defendant below. Miss Steele and said Wilson were residents of the city of New York at the time when the contract is alleged to have been made and while the services were being rendered; the former being a teacher in the public schools, and the latter an inspector at the customs office in that city. He died at Cincinnati, while on a visit to Mrs. Miller, who was his sister. His will was probated in New York. The husband of Mrs. Miller was appointed sole executor, administered the estate, and turned over to Mrs. Miller the whole sum remaining thereof after paying debts and expenses; the sum received by her being about $70,000. The executor's accounts were settled in the Surrogate's Court, and he was discharged May 19, 1903. Mrs. Miller was and is a citizen of Ohio, resident at Cincinnati. This suit was brought in the Circuit Court of the United States for the Southern District of Ohio, July 5, 1905. It is founded upon certain provisions of the New York Code of Civil Procedure, giving a remedy to creditors of deceased persons who have not proved their claims during the course of ordinary administration, whereby they may

obtain satisfaction of their debts from legatees and other beneficiaries who have received assets of the estate.

In her petition the plaintiff (below) stated that she rendered the work, labor, and services for which she sues as nurse for said Wilson, who was an invalid, and "that at the time of and during the performance of the work, labor and services, above referred to, said John M. Wilson, now deceased, promised and agreed to pay this plaintiff therefor the sum of $25,000, in cash, or in securities of the value of $25,000, and, in the event of his decease prior to such payment, he promised and agreed to make a testamentary bequest to plaintiff of such sum to be paid to her out of his estate, or to set aside securities of the value of $25,000, as plaintiff's property to be delivered to her upon his decease. That said plaintiff, in reliance upon said promise and agreement, fully performed such work, labor, and services on her part, but John M. Wilson, now deceased, failed to make any testamentary bequest to plaintiff of such sum or any part thereof, nor did he set aside securities of the value of $25,000 or any securities as plaintiff's property to be delivered to plaintiff upon his decease, nor has plaintiff received any payment or recompense for such services from John M. Wilson, now deceased, or from his estate, except that plaintiff has received the sum of $4,000 on account thereof." She then proceeds to state the making of the will, the death of the testator, the probate of the will, the administration, that the publication of notices to prove claims was unknown to her, and that the defendant as sole legatee had received the assets, which consisted of personal property amounting to $100,000. She thereupon prayed "judgment against the defendant for the sum of $21,000 and interest from the 29th day of December, 1901." The sections of the New York Code relied upon were sections 1837, 1838, and 1841. These, with sections 1839 and 1840, which are exhibited by the answer of the defendant read as follows:

"Sec. 1837. An action may be maintained as prescribed in this article against the surviving husband or wife of a decedent and the next of kin of an intestate or the next of kin or legatees of a testator to recover, to the extent of assets paid or distributed to them, for a debt of the decedent upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

"Sec. 1838. An action, specified in the last section, must be brought, either jointly against the surviving husband or wife and all the legatees, or all the next of kin, as the case may be, or at the plaintiff's election against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee within the meaning of each provision of this article, relating to legatees.

"Sec. 1839. Where a joint action is brought as prescribed in the last section, the whole sum which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award against each defendant separately the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expense of serving of summons upon each defendant must be taxed against him only, and one sheriff's fee for returning an execution may be taxed against each defendant against whom any sum is awarded.

"Sec. 1840. Where an action is brought against the surviving husband or wife only, or against one only of the next of kin or legatees, the sum which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in action brought as prescribed in the last section.

"Sec. 1841. If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either, (1) that no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or (2) that the value of assets, so delivered has been recovered by some other creditor; or (3) that those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for deficiency."

For the defendant a demurrer to the petition was filed on the ground, as therein assigned, "that this court is without jurisdiction at law of the cause set forth in the petition." The demurrer was overruled. The defendant thereupon answered the petition "without waiving her objection to the jurisdiction at law," admitting the death of Wilson, the making and probate of his will, the administration by the executor, her receipt of the assets as sole legatee, that the testator left no wife or children, and that, although he left next of kin, none of the assets came to them except those delivered to her. For her second defense she set out sections 1837, 1838, 1839, and 1840 of the New York Code, above mentioned, and concluded that "by reason thereof this court cannot take cognizance of this case on its law side." The making of the alleged contract between the plaintiff and Wilson was denied by the general denial of matters not admitted. Upon the trial evidence was adduced tending to show the making of the contract alleged in the petition and the rendition of the services as therein alleged. From the evidence it further appeared that, at the time when the services were rendered, the parties to the contract were engaged to be married at some future time, the date not being fixed, but depending on subsequent conditions, and that they lived in the same tenement, but on different floors, or in different rooms on the same floor, but not as husband and wife. There was evidence that he paid the rent for both, some of the time at least; but this was denied by the plaintiff. The plaintiff was permitted to testify in her own behalf, against the objection of the defendant, that she was incompetent, and an exception was duly taken. At the conclusion of the evidence several requests for instruction to the jury were presented by counsel for defendant, but only one of them need now be stated. This was as follows:

"If the relation between the plaintiff and John Wilson were as parties affianced or betrothed to each other, and if during the period of this relationship they were living in one household and as members of one family, and if during such relationship and mode of living the services claimed by plaintiff to have been rendered for Wilson were in fact rendered for him, in such case it is incumbent on plaintiff to establish her claim by clear and unequivocal proof of the existence of an express contract. In such case no claim can be allowed to rest on an implied contract. The contract must be an express one, which must be proven by clear and unequivocal proof; it is not sufficient to prove the existence of a contract or its terms by only a preponderance of the evidence. The court refused to give said special instruction, to which ruling of the court counsel for the defendant at the time excepted."

The court in its instructions to the jury, after observing that the engagement between the parties was not set up in the pleadings, but had "been brought into the case as one of the circumstances tending to throw light upon the contract which is set up and relied upon," said:

"Under this contract she was not the betrothed of Wilson; she was simply a servant. Now, the promise set up in the contract, if made with reference to making provision for her as his future wife, then such promise would not support the contract set up here; but if the promise was, as she claims it to be, a promise to pay her $25,000 for work and labor and services to an invalid, as his nurse, attendant, and companion, if the evidence satisfies you that that was the contract, and that he failed to perform it, and there is no question about that, he never did pay her $25,000, he made no provision for such payment in his will, and, so far as we are advised, he never set aside any securities to be delivered to her after his death, if that was the contract, and she performed it, then she would be entitled to recover the amount claimed in the petition, $21,000, it being admitted in the petition that $4,000 has been paid. But if the contract was not made, if her relation to him was that of his betrothed, his future wife, if that was the relation, and the services were rendered in that relation, then she would not be entitled to recover. In other words, if the purpose was to make some provision for her as his intended wife, especially in contemplation of his death, then no promise or undertaking of that kind would fall under this contract. Under this contract, she would not be entitled to recover upon any such promise. But if the promise was made under this contract, if she agreed to render service, and he agreed to pay her $25,000 for that service, irrespective of any relation existing between them as persons engaged to be married, then, as I have said, she would be entitled to recover."

The jury returned their verdict as follows:

"We, the jury, herein do find the issues joined in favor of the plaintiff, and that she be awarded $21,000 and interest."

A motion for a new trial was made and overruled, and judgment was thereupon entered. The judgment entry is as follows:

"On consideration whereof, the court, being fully advised in the premises, doth find that said motion is not well taken, and should be overruled, and that a judgment should be rendered on said verdict, including interest from December 29, 1901.

"It is therefore ordered and adjudged by the court that the motion of the defendant for a new trial be, and the same hereby is, overruled, and that the plaintiff, Mary L. Steele recover of the defendant, Eliza B. Miller, the sum of $26,817, together with her costs herein expended, taxed at $———, for which let execution issue, to all of which defendant Eliza B. Miller by her counsel excepts."

The assignments of error are very numerous. But counsel for the plaintiff in error have, for their own convenience and that of the court, summarized their points for argument in an easily managed form, a practice much to be commended. The complaint is of errors:

"(1) In the rulings of the court on the ground of jurisdiction presented in the various forms.

"(2) In the rulings of the court in the admission of evidence.

"(3) In the action of the court in refusing to give the special charges requested by the defendant below.

"(4) In the action of the court overruling the motion for a new trial.

"(5) In the judgment entered upon the verdict."

We will take them up in this order.

1. It is urged that the case of the plaintiff as stated in her petition was not cognizable at law, but was one exclusively of equity jurisdic-

tion. It should be admitted, as contended, that in the federal courts there has always been, and still continues to be, a settled, but not always clearly defined, line of distinction between cases at law and in equity, and there is a corresponding difference in the spheres of jurisdiction which the court exercises over them. It is generally true that cases of one character can not be tried in the jurisdiction appropriate to the other. The leading and dominant proposition is that, when the capacity of a court of law is sufficient to give a suitable remedy, that is the proper forum in which to try the cause and obtain the proper relief. The judiciary act (Rev. St. 723 [U. S. Comp. St. 1901, p. 583]) emphasized the rule when it declared, in section 16, that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the peculiar facts. When neither of these difficulties are in the way, there can be no reason for resorting to a court of equity. The decisions upon this subject are too numerous for an exhaustive citation. Some of them are: Boyce's Ex'rs v. Grundy, 9 Pet. 275, 9 L. Ed. 127; Hipp v. Babin, 19 How. 271, 15 L. Ed. 633; Parker v. Winnipiseogee, etc., Co., 2 Black. 545, 17 L. Ed. 333; Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Lewis v. Cocks, 23 Wall. 466, 23 L. Ed. 70; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; Drexel v. Berney, 122 U. S. 241, 7 Sup. Ct. 1200, 30 L. Ed. 1219.

There is a numerous class of cases where there is a concurrent jurisdiction in courts of law and equity. This has resulted largely from the extensions of the jurisdiction of the courts of law into the field formerly exclusively occupied by courts of equity, and in such cases the plaintiff may resort to either. See the observations of Mr. Justice Cowen in McCrea v. Purmont, 16 Wend. (N. Y.) at pages 465, 466, 30 Am. Dec. 103. And see Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 476.

In the present case the judgment sought was one for a sum of money which would be simply given or denied, according to the finding upon the issues. The proof would be the same in either court, whether of law or equity. No discovery was sought, nor was there any accounting required. It was not a case for contribution among defendants; the statute giving the right to proceed against a single legatee. And, indeed, there was but the one legatee who was answerable. The case of Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, would seem to be a distinct authority for maintaining a suit at law in such circumstances. The mere fact that equity has jurisdiction of trusts, and that the fund sought to be reached is in the nature of a trust fund, does not of itself make it necessary to resort to a court of equity, or displace the force of the rule which denies a resort to a court of equity when the law affords a full, adequate, and complete remedy. That rule extends over all classes of cases when the condition stated exists. If, in a case involving a trust, there is a necessity for the employment of the functions of a court of equity,

such as, for an accounting, or for the marshaling of assets or for contribution of proportions by several defendants, or a conditional judgment must be made, or some personal act of the defendant is required, then a resort to that court should be had; but, where there is simply an obligation to pay a sum of money, there can be no objection to a suit at law for its recovery, notwithstanding it may have become due in consequence of trust relations. Thus, where an account has been stated between the trustee and the cestui que trust of the matters of the trust, so that nothing remains but to pay over the trust fund, an action at law will lie for its recovery; and it is a sufficient answer to a bill of the cestui que trust, for the settlement of the trust and payment of the balance by the trustee, that the accounts have been settled and the balance ascertained, and that there is a suitable remedy by an action at law. Bispham, Principles of Equity (4th Ed.) § 485; 2 Perry on Trusts, § 843; 1 Story's Eq. Jur. § 523; 2 Lewin on Trusts (Flint's Ed.) 898, note 1.

We are therefore of opinion that the objection to the jurisdiction of the case because it was an action at law was properly overruled.

2. The second point is made upon the ruling of the court concerning the competency of the plaintiff to testify in her own behalf. This question does not depend upon either the law of Ohio or of New York, but upon the law of the United States relative to that subject. By section 858, Rev. St. [U. S. Comp. St. 1901, p. 659], it is provided that:

"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."

As is seen, this statute makes a party to the suit competent to testify unless the other party is an executor, administrator, or guardian. The courts have no authority to add others to the exception; nor can this be done by state legislation. White v. Wansey, 116 Fed. 345, 53 C. C. A. 634; Smith v. Township of Au Gres (C. C. A.) 150 Fed. 257; Hobbs v. McLean, 117 U. S. 567, 579, 6 Sup. Ct. 870, 29 L. Ed. 940.

The ruling of the court in this regard was therefore right.

3. In the preceding narration of occurrences during the trial, it is stated that the court was requested to give an instruction to the jury in relation to the character of the proof required to establish a liability for services rendered by one party to another while they are holding a family relation with each other, which request was refused by the court, and reference was made to the charge of the court upon that subject. The court said that the relation of the parties had "been brought into the case as one of the circumstances tending to throw light upon the contract which is set up and relied upon." The case was not tried upon the issue of a quantum meruit; and it was submitted to the jury by the court as one resting solely upon the al-

leged contract. The judge so states in his opinion on the motion for a new trial, and the bill of exceptions bears out that statement. The court was entirely right in stating that the relation of the parties was a circumstance bearing on the probability of there being such a contract. However, the court instructed the jury that:

"If the contract was not made, if her relation to him was that of his betrothed, his future wife, if that was the relation, and the services were rendered in that relation, then she would not be entitled to recover."

So that it would seem the court charged the substance of the request of counsel, except that it did not charge that the proof must be clear and unequivocal, and that a preponderance of proof would not be sufficient. For the reason above stated, namely, that the case was being tried and submitted upon the issue as to the existence of the contract, the request in this respect, as well as what was said in response to it, would seem to be rather "beside the mark," and more confusing than helpful to the jury. With regard, however, to the latter part of the request, we more than doubt whether in such a case the law requires any other than that preponderance of proof which is required in all civil actions to maintain the issue. We are not aware of any reason for such an exception from the general rule, and, although such language has sometimes been employed by lawyers and judges, yet, as was said by Judge Campbell, in the opinion of the Supreme Court of Michigan in Watkins v. Wallace, 19 Mich. 57, where the court below had charged that fraud will not be presumed from slight circumstances, that the proof must be clear and conclusive, "juries cannot be expected to be familiar with the technical and stock phrases of the bench and bar; and, as there is a well-settled popular understanding of the different degrees of proof required in civil and criminal trials as a basis of conviction, a jury instructed to act only on conclusive evidence could hardly fail to suppose they must disregard all balancing of evidence, and require a case absolutely free from doubt. "No such rule prevails in any civil case." And the judgment was reversed solely for that error in the charge. The relation of the parties is of itself one of the circumstances which a jury will weigh in estimating the probabilities. It goes into the scale to the credit of the party for whom it counts. But, if it and all the other circumstances in favor of that party conjoined still leave a preponderance of the testimony the other way, the result cannot be otherwise than that the preponderance should prevail.

4. The action of the court in refusing the motion for a new trial is not reviewable on a writ of error.

5. This question is whether the court was authorized to add the interest on the sum of $21,000 from the time of the death of the testator, Wilson, and include that in the judgment entered on the verdict. The objection is that the verdict in that regard was too uncertain to warrant the court in adding interest from that date. There can be no doubt that it is incompetent for the court to add interest to the sum found by the verdict without sufficiently definite data, to be found either in the verdict or elsewhere in some part of the record or the minutes of the trial to which reference may properly be made. The question, therefore, is whether the record and

the minutes of the trial (which the bill of exceptions shows were kept in full) contained matter from which the court could construe the meaning of the verdict with sufficient certainty. In discussing the power of the judge to amend the verdict, it is said, in 22 Encl. of Pl. & Prac. 974–5, that "it is undoubted that a verdict may be amended from data given in the verdict itself; or referred to in the pleadings or record of the case." And in Matheson v. Grant, 2 How. 263, 11 L. Ed. 261, where this subject was fully considered in the opinion by Mr. Justice Story, it was held that the verdict may be amended by reference to the judge's notes taken on the trial, or by any other clear and satisfactory evidence, and that the practice is a salutary one and in furtherance of justice. This power is not limited to matters of form while the court retains control of the judgment, although after the lapse of the term it is so limited. See the opinion of Mr. Justice Woodbury in Bank v. Moss, 6 How. 31, 12 L. Ed. 331. The bill of exceptions in this record states that it contains all the evidence given upon the trial. It also contains the judge's charge in full—from all which we are able to see what the issues were which were really contested, and what were the questions submitted to the jury. The verdict in this case itself awarded interest on the sum of $21,000. The petition prayed judgment for that sum and interest from December 29, 1901. The issues therefore covered that item, and the verdict stated that the jury found the issues joined in favor of the plaintiff. The verdict established the making of the contract and the breach of it by the testator. It was optional with him to pay the plaintiff the $25,000 in money or securities in his lifetime, or provide for it in his will. He had not paid the amount in his lifetime, and he committed the breach of the contract by not providing for the payment of the amount in money or securities. It is a general rule of law that interest is due and payable upon a contract for the payment of a fixed sum at a time which is certain, or will become certain by lapse of time, from the date when the contract should have been, but was not, performed. And this is so whether or not the obligation carried interest before maturity. 1 Am. Lead. Cases, Hare & Wal. note (4th Ed.) 506; 26 Cyc. 1473; Young v. Godbe, 15 Wall. 562, 21 L. Ed. 250; New Dunderberg Min. Co. v. Old, 97 Fed. 150, 38 C. C. A. 89; Jourolmon v. Ewing, 80 Fed. 604, 607, 26 C. C. A. 23.

And we think the court might have properly instructed the jury as matter of law that, if they should find for the plaintiff, they should add interest from the date when the contract was broken. In Young v. Godbe and New Dunderberg Co. v. Old, supra, the questions arose on error alleged in the giving of instructions to the jury to add interest from the time of the breach of the contract, and in each case the objection was overruled. In these circumstances, we are inclined to think that the court was warranted in giving the interpretation to the use of the word "interest" by the jury to mean from the time from which by law it ought to be reckoned, and, moreover, that the jury meant by that word the interest claimed by the petition, namely, interest from December 29, 1901.

The judgment will be affirmed, with costs.

OXFORD & COAST LINE R. CO. v. UNION BANK OF RICHMOND, VA.

(Circuit Court of Appeals, Fourth Circuit. April 10, 1907.)

No. 698.

1. EXCEPTIONS, BILL OF—TIME FOR PRESENTATION AND ALLOWANCE.
   A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 72½.]

2. WRIT OF ERROR—RECORD—BILL OF EXCEPTIONS—NECESSITY.
   The record of a former trial of a case made a part of an agreed statement of facts on a second trial cannot be considered by an appellate court unless incorporated in a bill of exceptions or otherwise brought into the record sent to such court.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2433.]

3. EXCEPTIONS, BILL OF—AUTHENTICATION—NECESSITY OF SIGNATURE OF JUDGE.
   Under Rev. St. § 953 [U. S. Comp. St. 1901, p. 696], which provides that a bill of exceptions shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto, no bill of exceptions is sufficiently authenticated unless signed by a judge who sat at the trial within the time required by law, and the omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 95.]
   McDowell, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina, at Raleigh.

Thomas B. Womack and A. W. Graham, for plaintiff in error.

William L. Royall (A. S. Lanier, on the brief), for defendant in error.

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

PRITCHARD, Circuit Judge. This case was before this court at November term, 1905, reported under the same title as above. 143 Fed. 193. It is again here on a writ of error based on what purports to be a bill of exceptions. Counsel for plaintiff in error moves the court to dismiss the writ of error upon the ground that the judge below who tried the case failed to sign the bill of exceptions, and also upon the further ground that there is "nothing in the record to show that any exceptions were taken or any time given in which to present a bill of exceptions except the statement of the alleged bill of exceptions." In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to

prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at the trial. However, in the district in which this case was tried there is a rule of court which only allows 20 days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within the 20 days, but, once the court permitted the 20 days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired.

This court in the case of Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 448, 20 C. C. A. 507, in commenting on the practice as to bills of exceptions, among other things, said:

"It is now a rule of practice universally followed in the courts of the United States that an exception to the ruling of a trial judge cannot be considered in the appellate court, unless it was duly noted during the trial, and preserved in a bill of exceptions, which was presented to and allowed by the court at the term during which the trial was had, or within a time provided for by an order entered during such term, or where it has been allowed under the standing rules of the court, or with the consent of the parties, or under such circumstances as clearly show that it was the intention of the court to, and that it did, retain by special order the control of the matter, for the purpose of examining, allowing, and signing the bill of exceptions."

The court further states on page 450 of 74 Fed., 20 C. C. A. 509, as follows:

"It does not appear from this record that the court below ever lost control of the matter of the preparation and signing of the bills of exceptions. There was no standing rule of the court applicable to the same, so a special order was resorted to every time that a postponement was granted. If the court could properly postpone until the succeeding regular term the consideration of the bills of exceptions by its standing rule or by its order of record—and this seems to be conceded, the authorities showing that the practice is not unusual—then surely, as long as it keeps control of the matter so postponed by due and orderly procedure, it may adjourn the hearing of the same until the matter is properly and fairly disposed of."

Had the trial judge kept control of the case by extending the time in which to file a bill of exceptions before the twenty days under the rule had expired, he could have retained control of the same a sufficient length of time to enable the plaintiff in error to prepare and file a proper bill of exceptions.

It appears that the judgment was entered June 9, 1906, and on July 16th, after the expiration of the time allowed by the rule, the bill of exceptions was filed with the trial judge. At the close of the eleventh exception of the purported bill of exceptions there is a statement in the record to the effect that the court allowed 60 days in which to make, serve, and file a bill of exceptions, apply for a writ of error, and serve citation. On the 23d of July counsel for defendant in error filed the following paper in the proceeding:

"I have read over the foregoing bill of exceptions and I object to it because it was not filed within the twenty days required by the rule of court, and I was not notified of any application to be made for an extension of the rule and heard no application made in court.

"July 23, 1906. Union Bank of Richmond,

"By its attorney, Wm. L. Royall."

The statement in the record that the court had allowed the plaintiff 60 days in which to make up and serve a bill of exceptions cannot avail plaintiff in error, inasmuch as nowhere in the record is there any order of the judge made within said 20 days, nor afterward, allowing such extension of time.

We have carefully examined the record and are unable to find anything which shows that such order was made. The court undoubtedly had the right during the 20 days to enlarge the time prescribed in the rule, and the fact that counsel for the defendant in error was not present, or notified of such action on the part of the court, would not in the slightest degree affect the right of the court to take such action.

However, assuming that the order giving 60 days in which to file the exceptions was made, nevertheless the bill was not filed within that time. The judgment was entered on the 9th day of June, 1906, and the order directing that the bill of exceptions be filed was not made until the 24th of August, 1906. Thus the record shows that more than 60 days had elapsed after the rendition of the judgment before the exceptions were filed. Therefore, in no event, can it be said that the bill of exceptions was filed within the time allowed by law.

It is insisted by the plaintiff in error that, inasmuch as there is an agreed statement of facts certified to this court by the clerk of the Circuit Court, even if there is no bill of exceptions, still the question relating to the statute of limitations is before this court, and therefore we should consider the same independently of the bill of exceptions. While it is true that the record of the trial had in 1906 was made a part of the agreement of facts, it is equally true that the same was not incorporated in any bill of exceptions, and certainly it is not to be expected that the court will cause search to be instituted for such record, nor does it follow, if it did so, it would succeed in finding the proper record. It is to obviate such difficulties that a bill of exceptions is required. It is also equally true that said record is not even incorporated into and made a part of the present record, and therefore, if we deemed it proper to notice an error not assigned, we would have no record from which we could ascertain the facts.

We now come to consider the most important question involved in this controversy. It is contended by counsel for defendant in error that what purports to be the bill of exceptions was not signed by the trial judge. Section 953 of the Revised Statutes [U. S. Comp. St. 1901, p. 696] is as follows:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

This provision of the statute is plain and explicit, and there can be no doubt as to its meaning. It evidently means that no bill of exceptions can be sufficiently authenticated unless signed by a judge who sat at the trial. The petition for writ of error does not show the date on which it was filed with the lower court. The assignments of error are marked filed with the judge July 16th and filed in the office July 18th, and the order of court directing that the bill of ex-

ceptions be filed was made August 24th, and the writ of error bears the same date. The record shows that the trial judge did not sign the bill of exceptions. The only reference to the bill of exceptions by the trial judge is contained in the following order which appears in the record:

"In this case at the request of the Oxford & Coast Line Railroad Company Hon. Thos. R. Purnell, U. S. District Judge for the Eastern District of North Carolina, has allowed, settled and signed within the time allowed by law, and the orders of the said judge the attached bill of exceptions and hereby orders the same to be filed. Thos. R. Purnell, U. S. Judge.
"Aug. 24, 1906."

This order of the learned judge who tried the case states that he had allowed, settled, and signed within the time allowed by law the "attached bill of exceptions"; but, when we come to examine the "attached bill of exceptions," there is nothing to show that the judge ever signed the same. Notwithstanding the fact that the judge certifies that he signed a bill of exceptions, plaintiff in error insists that an unsigned bill of exceptions should be treated as the bill of exceptions which the judge certifies to having signed and allowed within the time required by law. There is nothing in the record to account for the failure to produce the bill of exceptions to which the judge below refers; but, on the other hand, the plaintiff in error contents itself by producing what appears to be a copy of the bill of exceptions which it attempted to file with the court below.

The signing of a bill of exceptions is a judicial act which must be performed by the judge who tried the case, and the performance of this duty cannot be delegated to another, nor can the judge after the time within which the bill of exceptions is required to be signed cure an omission or failure to sign the same by certifying that it was allowed, settled, and signed within the time allowed by law.

In the case of Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743, the record contained a paper headed "Bill of Exceptions," at the foot of which appeared the following:

"Allowed and ordered on file Nov. 22, '83, A. B."

It was held that:

"This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. To make it clear that a seal to a bill of exceptions was not necessary to its validity, Congress, by section 4, of the act of June 1, 1872, (17 Stat. 197, c. 255), now section 953 of the Revised Statutes, [U. S. Comp. St. 1901, p. 696], enacted as follows: 'A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto.' This provision merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials 'A. B.' as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the questions purporting to be raised by the paper cannot be considered."

In the case of Harvey v. State, 5 Ind. App. 422, 31 N. E. 835, the bill of exceptions was unsigned, but the judge who tried the case had written at the foot of the same the following:

"I, George W. Grubbs, judge of the Circuit Court of said county of Morgan, certify that the foregoing and within bill of exceptions in the case of the State of Indiana v. Peter C. Harvey, was tendered to me for my signature on the 20th day of November, 1891, at the court house in said county and within the time given for preparing the same, to-wit: within sixty days after judgment was rendered in said cause. Geo. W. Grubbs, Judge."

In that case it was held that the signing of the foregoing certificate by the judge could not be treated as a signature to the bill for the purpose of identifying and authenticating the same as required by law. That case is almost on all fours with the case at bar; the only difference being that the judge certified that a bill of exceptions was tendered to him within the time allowed by law, while in this case the trial judge certifies that the bill was tendered, allowed, and signed by him.

Although it was shown by the judge's certificate that the bill of exceptions was prepared and presented to him within the time allowed by law, nevertheless the court held that, inasmuch as he failed to comply with the statute which required his signature to the bill of exceptions at the time it was presented to him, such failure on his part could not be remedied by subsequently signing a certificate to the effect that the same had been presented in due time.

Also in the case of Shilitto v. Thacker, 43 Ohio St. 63, 1 N. E. 438, the court said:

"A paper purporting to be a bill of exceptions, but which is not signed as required by statute, will not be considered as a part of the record, although the journal entry in the case recites that a bill of exceptions was duly signed, sealed, allowed, and ordered to be made part of the record, and no other paper purporting to be a bill of exceptions appears in the files of the case."

The mere recitals in a record to the effect that a judge has signed a bill of exceptions are not sufficient. Congress has wisely provided that bills of exceptions shall be authenticated by the signature of the trial judge in order that appellate courts may be definitely and accurately informed as to what actually transpired in the court below. This provision is mandatory, and must be strictly adhered to in every instance wherein a review is sought by writ of error. The court below is the sole judge as to what transpired during the progress of the trial, and it must judicially determine the same when the bill of exceptions is presented and after having done so it then becomes the duty of the judge to affix his signature thereto.

In the case of Malony v. Adsit, 175 U. S. 287, 20 Sup. Ct. 117, 44 L. Ed. 163, the court, among other things, said:

"It certainly cannot be contended that, if the trial judge is able officially to sign the bill of exceptions, it would be competent for the counsel to dispense with his action, and rely upon an agreed statement of the facts and law of the case as tried. Nor can they agree that another than the trial judge may perform his functions in that regard. In Lynch v. Craney, 95 Mich. 199, 54 N. W. 879, it was said that the practice of stipulating a bill of exceptions without the sanction of the judge cannot be commended; and, if such fact be brought to the attention of the court before the argument of the case, the appeal will be dismissed. In Coburn v. Murray, 2 Me. 336, it was held that a bill unauthenticated by the trial judge cannot be given validity by consent of counsel. We are referred to no decision of this court on the precise question whether counsel can stipulate the correctness of a bill of exceptions not signed by the trial judge. But we think that on principle this cannot be done, and we

regard the cases just cited as sound statements of the law. Accordingly, our conclusion is that the errors of the trial court alleged in the bill of exceptions, unauthenticated by the signature of the judge who sat at the trial cannot be considered by us."

While it is not the policy of the court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time, the rules of this court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the federal courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions.

In the case of Michigan Ins. Bank v. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the court, among other things, said:

"The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the court. The trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed."

It is essential to the orderly procedure of the courts that attorneys should comply with the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower court.

Mr. Justice Story, in his work on Equity Pleading (section 544), in commenting upon the necessity of adhering strictly to the prescribed forms of procedure, says:

"The want of due form constitutes a just objection to the proceedings in every court of justice, for to reject all form would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice. Every irregularity of this sort is fraught with inconvenience, and generally tends to delays and doubts. And it has been well remarked that infinite mischief has been produced by the facility of courts of justice in overlooking errors of form. It encourages carelessness and places ignorance too much on a footing with knowledge amongst those who practice the drawing of pleadings."

It follows that the judgment of the court below must be affirmed. Affirmed.

McDOWELL, District Judge. I dissent.

SOUTHERN RY. CO. v. ST. LOUIS HAY & GRAIN CO.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

No. 1,329.

1. COURTS—FEDERAL COURTS—TRIAL TO COURT—PRACTICE.

On a trial of a cause in a Circuit Court without a jury, the court cannot be required to "hold" specific propositions of law presented by the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 934.]

2. SAME—FINDINGS OF FACT.
Parties to a suit at law in a federal court, tried to the court without a jury, have no right to require the court to make a special finding.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 927, 934.]

3. SAME—WRIT OF ERROR—FEDERAL COURT—SCOPE OF REVIEW.
Where the finding of a federal court in a law case tried without a jury is general, a writ of error reaches only the court's ruling in the progress of the trial, and, if the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment, as provided by Rev. St. § 700 [U. S. Comp. St. 1901, p. 570].

4. COMMERCE—INTERSTATE COMMERCE—COMMISSION'S FINDINGS—EVIDENCE.
The interstate commerce act (Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384, as amended by Act March 2, 1889, c. 382, § 4, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]) provides that, whenever an investigation shall be made by the commission, it shall make a report in writing which shall include the findings of fact on which the commission's conclusions are based, etc., and such findings shall thereafter be deemed prima facie evidence as to each and every fact found in all judicial proceedings. *Held* that, where a proceeding to enforce the commission's findings was tried to a federal court without a jury, it was not error for the court to receive the commission's report in evidence without excluding matters of opinion stated therein, as distinguished from the commission's findings of fact.

5. WRIT OF ERROR—ADMISSION OF EVIDENCE—PREJUDICE.
Where on writ of error in a suit to enforce a finding of the Interstate Commerce Commission, the record affirmatively showed that neither the Commission nor the Circuit Court based any part of the judgment sought to be reviewed on certain evidence admitted over objection, the admission of such evidence was harmless.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153, 4185, 4186.]

6. COMMERCE—INTERSTATE COMMERCE COMMISSION—FINDINGS—EVIDENCE.
A finding by the Interstate Commerce Commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundredweight was prima facie evidence of its own truth.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 145.]

7. CARRIERS—RATES—DISCRIMINATION.
A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discriminations between nonlocal shipments of the same origin and destination.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 84.]

8. SAME—EXCESS CHARGES—RECONSIGNMENT PRIVILEGE.
An additional charge by a carrier of two cents per hundredweight for the privilege of reconsigning hay at East St. Louis, originating in northwestern territory and shipped into southeastern territory, was excessive, within Interstate Commerce Act, § 1 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]) prohibiting excessive rates, and thereby produced an unjust discrimination, in violation of sections 2 and 3.

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

For opinion below, see 149 Fed. 609.

Defendant in error began this action at law under section 16 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384, amended by Act March 2, 1889, c. 382, § 5, 25 Stat. 859 [U. S. Comp. St. 1901, p. 3165]), by filing a petition to recover judgment against plaintiff in error for the amount of a reparation awarded by the Interstate Commerce Commission. A jury having been duly waived, the court heard the evidence, made a special finding of

facts, and entered judgment for the amount of the award, together with interest, attorney's fees and costs.

The reparation was awarded by the Commission on a hearing of the complaint of defendant in error against plaintiff in error and three other railroads that run to southeastern territory. That complaint, omitting the parts descriptive of the parties, was as follows:

"(3) That defendants have adopted and maintain in force upon their respective lines of railway schedules of rates and charges wherein and whereby it is provided that the charges exacted for transporting hay in car loads over said lines, respectively, from East St. Louis to said southeastern points, shall be 2 cents per 100 pounds in addition to the regular established rates for transporting hay in carloads from Cairo, Ill., to said southeastern points, when the shipments originate at points on railroads other than those of defendants and are not reconsigned at East St. Louis; and 4 cents per 100 pounds in addition to such established rates when the shipments are reconsigned at East St. Louis. That is to say, 2 cents per 100 pounds is exacted in each instance by defendants, respectively, for the privilege of reconsignment at East St. Louis.

"(4) That complainant made shipments of hay in car loads over defendants' lines of railway, as described in Schedule A, hereto attached and made a part hereof, on or about the dates mentioned in said schedule, from East St. Louis to said southeastern points; that said shipments were reconsigned at East St. Louis; and that defendants exacted for the transportation thereof, as described in said schedule, 4 cents per 100 pounds in addition to such established rates between Cairo and said southeastern points, while they contemporaneously severally transported in car loads hay that was not reconsigned at East St. Louis, for other shippers and between exactly the same originating and destination points, for 2 cents per 100 pounds in addition to said established rates between Cairo and said southeastern points.

"(5) That the cost to defendants, respectively, in each instance, of transporting such shipments from East St. Louis to said southeastern points is the same whether the shipments are reconsigned at East St. Louis or not; that the higher transportation charge hereinbefore described is unreasonable; and that by reason of the premises each of said defendants has subjected and still is subjecting complainant and its traffic to the payment of unreasonable and unjust rates of transportation and to undue and unreasonable prejudice and disadvantage, and has given, and still is giving, to said other shippers and their traffic undue and unreasonable preferences and advantages, in violation of the provisions of the act to regulate commerce, particularly, sections 1, 2, and 3 thereof."

Plaintiff in error answered separately:

"(3) It admits the allegations contained in paragraph 3 of said complaint.

"(4) It has no information or knowledge sufficient to form a belief as to the truth of the allegations contained in the fourth paragraph of said complaint in so far as same relates to various shipments made by complainant; but in so far as said allegations refer to its tariff for reconsignment this respondent admits same.

"(5) This respondent denies the allegations contained in paragraph 5 of said complaint.

"Further answering paragraph 5 of said complaint, this respondent alleges that the reconsignment privilege allowed at St. Louis and East St. Louis involves greater cost to this respondent and other railroad companies in the handling of said traffic than is incident to through shipment of same. For with reference to traffic which is reconsigned there is additional switching, greater delay of cars, extra expense in maintenance of clerical force required by taking up the expense bills of the carrier bringing the traffic to East St. Louis, the issuance of new bills of lading, new way bills, etc. There is also extra expense involved in reloading and also the increased probability of congestion in the freight yards, etc.

"Further answering said paragraph, this respondent alleges that the charge of reconsignment is in all cases practically one cent less than the rate from East St. Louis, proper, to the territory described in the complaint as 'southeastern points' and that this privilege of reconsignment is accorded to com-

plainants and others at East St. Louis at a rate invariably less than the local shipper at East St. Louis would be called upon to pay for the transportation of hay originating at East St. Louis and destined to said 'southeastern points.'

"It is true that the reconsignment privilege at East St. Louis is granted upon the condition that a somewhat greater rate shall be charged than the through rate from the point of origin to the point of destination when reconsignment is not availed of, but the benefits to the shipper and the additional expense and trouble entailed upon the carriers fully justify the slight additional charge."

The Commission's findings on the issues thus framed are embodied in the special finding of facts and judgments as rendered by the court below:

"And now again come the parties to this suit, plaintiff and defendant, by their respective attorneys, and the court having heretofore heard the arguments of counsel for the respective parties and taken the cause under advisement, and the court now being fully advised in the premises, on consideration thereof doth find that on the hearing of this cause before and by the Interstate Commerce Commission, the said Commission found in its report and opinion in substance the following facts:

"(1) Large quantities of hay produced in territory east, north, and west of East St. Louis are consumed in southeastern territory, and much of it is carried through the East St. Louis gateway and passes over defendant's lines of railway from East St. Louis to points south of the Ohio river. With the exception of the Illinois Central, defendant's lines terminate at East St. Louis, and generally also lines of railway over which the hay is carried from said producing points to East St. Louis terminate at that point.

"(2) For the transportation from East St. Louis to said southeastern points defendant applies a proportional rate, which is 2 cents per 100 pounds greater than the rate to said southeastern points from the Ohio river, if the hay is not unloaded at a warehouse in East St. Louis, regardless of whether or not the hay is shipped locally to East St. Louis, or through billed from the point of origin to the point of final destination, and regardless of provisions in the tariffs concerning through billing; but if the hay is unloaded at a warehouse in East St. Louis defendant exacts for the transportation thereof from East St. Louis to said southeastern points a rate which is 4 cents per 100 pounds greater than the rate from the Ohio river to said southeastern points.

"(3) Complainant operates two warehouses at East St. Louis, and most of the hay it handles it purchases on the track at East St. Louis, unloads, inspects, assorts, and reloads at said warehouses, and sells at southeastern points, in competition with other hay dealers who do not unload the hay at East St. Louis. In such competition complainant is therefore prejudiced to the extent of 2 cents per 100 pounds by defendant's method of applying rates of transportation, as aforesaid. Defendant claims this 2-cent difference in rates is justified by difference in cost to it between the two kinds of transportation services it is called upon to perform.

"(4) At East St. Louis transfers of loaded cars from the northern to the southern lines and transfers of empty cars from the southern to the northern lines are generally made by a connecting railroad company, and the charge made by that company for such service is $4 per car when the hay is unloaded as aforesaid, but only $2 per car when the hay is not so unloaded, and in each instance this charge is paid by the carrier which hauls the hay south from East St. Louis.

"(5) When the hay is unloaded, as aforesaid, an empty car must be furnished for the shipment by the carrier which hauls the hay south from East St. Louis, and the service of so furnishing is fairly worth from 40 to 60 cents per car.

"(6) The car is in use from 2 to 3 days longer when the hay is unloaded, as aforesaid, than when it is not so unloaded, and a fair compensation for such use is 20 cents per day.

"(7) When hay is unloaded and reloaded at warehouses, as aforesaid, the time consumed in doing the work averages from 6 to 8 hours, but the expense of such unloading and reloading is borne entirely by the shipper.

"(8) Shipments of hay to which the rate of 2 cents per 100 pounds above the rate from the Ohio river is applied, as aforesaid, and which are not unloaded

at East St. Louis warehouses, are frequently transferred from one car to another in the railroad yards at East St. Louis, either because cars in which the hay is shipped to East St. Louis from the north are out of repair, or because the northern lines are not willing to allow cars to go south from East St. Louis. The expense of such transfer is from $1.25 to $1.50 per car, and this expense is entirely borne by the carrier which hauls the hay south from East St. Louis.

"(9) The transfer charge of $4 per car above mentioned was formerly $3 per car, and the transfer charge of $2 per car above mentioned was formerly $1.50 per car.

"(10) The weight of hay in cars shipped, as aforesaid, from East St. Louis to southeastern points is from 1,000 to 2,000 pounds greater when the hay is reloaded at East St. Louis warehouses than when it is not so reloaded. This is an advantage in favor of the reconsigned hay.

"(11) Cars from the north, after being unloaded at warehouses as aforesaid, are frequently reloaded for the south, thus avoiding expense to the southern line of placing an empty car and subtracting perhaps a day from the additional time of the car service.

"(12) That, taking everything into account, the average additional expense to southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than $2 to $2.50 per car, which is equivalent on the average loading of hay to about 1 cent per 100 pounds.

"(13) Much of the hay which actually passes through East St. Louis might reach its southern destination via other gateways. Hay grown in different sections also competes via these other gateways in the south with that which does or might pass through East St. Louis. These gateways are Cincinnati, Louisville, Evansville, Cairo, Memphis, Nashville, and perhaps others. The testimony showed that at all these points hay could be stopped off, unloaded, and treated as the complainant handles its hay at East St. Louis, without the imposition of any charge in addition to the through rate. The testimony showed that these markets all competed with East St. Louis, but the force of that competition did not appear.

"(14) That complainant actually paid to the Southern Railway Company on reconsigned shipments of hay, at the rate of 2 cents per 100 pounds, the difference between the reconsigning rate and the rate on hay not reconsigned, the sum of $3,144.17.

"And from the evidence heard and adduced on the trial of this cause in this court the court finds that the said findings of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and

"It is ordered that the said findings of fact, as above recited and set out, be and the same are adopted as the special findings of fact of the court, and that the same be set out in the record of this court accordingly.

"It is therefore considered, ordered, and adjudged by the court that the plaintiff herein have and recover of the defendant herein the sum of one thousand six hundred fifty nine and $^{41}/_{100}$ ($1,659.41) the same being the amount of reparation awarded by the said Commission to the plaintiff against the defendant, with 5 per cent. interest from the date of said award; and it is further ordered and adjudged by the court that the plaintiff have and recover of the defendant its costs herein to be taxed, including a reasonable attorney's fee to be hereafter fixed, and that execution issue against the defendant for the amount of the said judgment and the said costs."

Section 1 of the act to regulate commerce, so far as it pertains to transportation charges, reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 2 provides: "That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this

act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

And the first paragraph of section 3 provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

C. B. Northrup and Edward C. Kramer, for plaintiff in error.

P. J. Farrell and L. O. Whitwell, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

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

Of the 70 assignments of error the majority present nothing for our consideration. Many of them are addressed to the refusal of the court to "hold" certain "propositions of law" which were submitted to the court in writing by plaintiff in error, as though the court as judge were required to give instructions to the court as jury. Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190. Other assignments are based on the court's declining to entertain certain proposed findings of fact submitted in writing. Parties have no right to require a federal court, in hearing a law case without a jury, to make a special finding. If the finding is general, a writ of error reaches only "the rulings of the court in the progress of the trial"; "and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Section 700, Rev. St. U. S. [U. S. Comp. St. 1901, p. 570].

Exception was taken to receiving the Commission's report in evidence. Section 14 provides:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its representation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured, and such findings so made shall thereafter in all judicial proceedings be deemed prima facie evidence as to each and every fact found."

The findings and the conclusions of the Commission were embraced in an opinion prepared by one of the members. If this case had been tried before a jury, it might have been the court's duty to separate the findings of fact from matters of opinion and to instruct the jury to disregard the latter (Western N. Y. & P. Rld. Co. v. Penn. Refining Co., 137 Fed. 343, 70 C. C. A. 23), but such a rule is inapplicable to a trial before the court alone.

Over plaintiff in error's objection, evidence was received that at markets other than East St. Louis the "reconsigning" privilege was granted without charge. If it be conceded that this evidence was not within the issues, the ruling would not necessarily afford a ground for reversal. To constitute prejudicial error when an action at law

is tried by the court without a jury, the evidence improperly admitted must have entered into the result at which the trial court arrived. Streeter v. Sanitary District, 133 Fed. 124, 66 C. C. A. 190. Here the record affirmatively shows that neither the Commission nor the Circuit Court based any part of the judgment on the objectionable evidence.

The finding that the just and reasonable charge for the reconsigning privilege at East St. Louis was one cent a hundredweight is challenged as being unsupported by evidence on the part of defendant in error and contrary to uncontradicted evidence on the part of plaintiff in error. Plaintiff in error's evidence was not uncontradicted, for in the Circuit Court the finding of the Commission was prima facie evidence of its own truth. But, going beyond that, the shipper had evidence in the way of car rentals and switching charges made by railroads against each other at East St. Louis, which supported the finding that anything in excess of one cent a hundredweight was unjust and unreasonable. It is not our function to balance this against the carrier's method of figuring that two cents a hundredweight was a just and reasonable charge.

The remaining question presented by any proper assignment of error is whether the finding supports the judgment. Hay that comes into East St. Louis by boat or by wagon has to pay plaintiff in error, whose northwestern terminus is East St. Louis, a local rate of five cents a hundredweight to the Ohio river. Plaintiff in error is not obliged to do business beyond its own tracks; but if it does it cannot make its voluntary undertakings the ground for unreasonable rates and unjust discriminations and undue disadvantages. Shipments that originate at East St. Louis cannot avoid the southeastern railroads that begin there; but shipments that originate in northwestern territory may go by other routes. To increase its traffic plaintiff in error offers to take hay of northwestern origin from connecting roads and carry it at cheaper rates, with or without the reconsigning privilege, than it carries hay of East St. Louis origin. The rates on through business do not prove that the local rate is unreasonable; and, on the other hand, the local rate can throw no light on the justice or injustice of discriminations between shipments of northwestern hay of the same origin and destination. The local rate has nothing to do with the case as we view it. The comparison is between the through rate without the reconsigning privilege and the through rate with the reconsigning privilege. The complaint concedes, by not denying, that the through rate, aside from the reconsigning privilege, is just and reasonable. The attack is upon the charge exacted for the reconsigning privilege and upon that alone. As we have already indicated, plaintiff in error is engaging in a business which it could not have been compelled to undertake; but, undertaking it, it brings itself within the requirements of the act to regulate commerce. The finding, in our opinion, supports the conclusion that the exaction is in violation of section 1 as being excessive, and thereby produces unjust discriminations and undue disadvantages, in violation of sections 2 and 3.

The judgment is affirmed.

DR. PETER H. FAHRNEY & SONS CO. v. RUMINER et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1907.)

No. 1,343.

1. TRADE-NAMES—NAMES OF MEDICINES—UNLAWFUL COMPETITION.
Complainant manufactured and sold a patent medicine made from herbs, which since 1888 had been known and widely advertised as "Alpenkrauter." After its sale became successful, defendants advertised a similar remedy under the name "St. Bernard Alpen Krauter." *Held*, that defendants' use of such term constituted unfair competition.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 79, 82.]

2. SAME—INJUNCTION—LACHES.
In a suit to enjoin further use of the name of defendants' patent medicine as unlawful competition, complainant's inexcusable laches was not a defense to its right to an injunction restraining defendants' future misconduct.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 95.]

3. SAME—RIGHT TO RELIEF—UNCLEAN HANDS.
Complainant and its predecessors since 1888 manufactured and widely advertised and sold a patent medicine, called "Alpenkrauter," as a blood purifier, claimed to cure a great number of diseases, which in fact it did not do. The public was cautioned not to consult physicians nor druggists, because the medicine was not for sale there, and, while it claimed that the medicine was composed in part of imported herbs, complainant's witness refused before the master to disclose the ingredients of the medicine or to state from what herb houses or firms the herbs were purchased. *Held*, not to show that complainant did not come into equity with clean hands, and was therefore not entitled to relief against defendants' unfair competition by the sale of another medicine under a similar name.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 94.
Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

4. WITNESSES—QUESTIONS—REFUSAL TO ANSWER.
Where a witness is apprehensive that some wrong will be done to his personal or property rights, he may refuse to answer before a master any question propounded, and stand on such refusal until the question raised has been determined by the court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 616.]

5. EQUITY—REFERENCE TO MASTER—EVIDENCE—OBJECTIONS—WAIVER.
Where a witness refused to answer a question propounded on a hearing before a master, and the question was certified to the court, but the proponent failed to press the motion to compel the witness to answer, he waived his right to an answer.

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

The appellant (complainant in the court below) sought by its bill to restrain the appellees from using as a trade word the words St. Bernard Alpenkrauter; averring that the use of such trade words by appellees, upon appellees' bottles, and in their advertising, is in the nature of unfair competition with appellant's medicines, sold for the same ailments, and known as Dr. Forni's Alpenkrauter.

The Master found that appellant was an organization existing under the laws of the State of Illinois; that appellees were citizens and residents of the State of Indiana; that appellant manufactured and sold a blood purifier;

that in this business they succeeded their father, Peter Fahrney, who in turn had succeeded his father Jacob Fahrney, who in turn had succeeded his father Peter Fahrney—the latter of whom manufactured and sold in Maryland, Pennsylvania and Virginia, a blood remedy made from herbs; that about 1888 the term Alpenkrauter was given to this remedy; that there is spent annually, for the advertising of this remedy about eighty thousand dollars; and that appellees' use of the words St. Bernard Alpenkrauter is unfair competition.

The Master stated his conclusions of law as follows:

1. The defendants' use of the words "St. Bernard Alpen Krauter" is unfair competition.

2. The complainant is entitled to the injunctive relief prayed in the Bill of Complaint unless it should be denied such relief for either one of the following reasons: (a) the complainant has not come into Court with clean hands and (b) the complainant is not free from laches.

But each of these reasons is, in my opinion, well founded, and because of each of these reasons complainant should be denied relief in this suit. As to reason (a); complainant's representations in its advertising matter practically guarantee that its medicine, Alpen Krauter, will cure—bring about the regaining of perfect health by the person using the remedy according to the printed directions on the carton—all the diseases named on complainant's carton. Such a remedy would be a miracle worker. These representations are coupled with the cautionary advice to intending patrons which, fairly interpreted, comes to this: Do not consult a physician and do not take counsel of a druggist, avoid a medical diagnosis of your ailment, ignore the recommendation of a trained pharmacist and use a secret remedy, the ingredients of which cannot be ascertained by chemical analysis and which ingredients the proprietor declines to reveal. In view of the public policy of this State on the subject of the practice of medicine and pharmacy as expressed in legislative enactment, 3 Burns' Ann. St. 1901, §§ 7318 to 7322 and 8136a to 8136g—notwithstanding sale of proprietary medicines is permitted in these statutes—and in view of the provisions of section 1995 of Burns' Ann. St. 1901, which makes it a criminal offense for one to prescribe a secret drug or medicine, the true nature of which he, if inquired of, does not truly make known and thereby endangers life, it must be said of complainant's methods that while they gain success commercially, ethically they are reprehensible; that while they may bring relief to credulous hypochondriacs they, notwithstanding, suggest, none the less, the ways of a thaumaturgist; that while they protect a recognized property right, they do not square with the doctrine of clean hands.

As to reason (b); after complainant had received from the present defendants a flat refusal to cease to use the name St. Bernard Alpen Krauter and notwithstanding the defendants did continue in the use of such name to the damage of the complainant in the sum of several thousand dollars, the complainant waited for more than four years before bringing suit against the defendants. The facts make applicable the rule on the subject of laches stated in the case of Prince's Metallic Paint Co. v. Prince Manfg. Co., 57 Fed. 938, 6 C. C. A. 647.

And upon these findings, recommended that the bill be dismissed for want of equity, which in the Circuit Court, upon the hearing of the case, was done. Further facts are stated in the opinion.

Chester Bradford, for appellant.

John E. Iglehart, for appellee.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

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

We are of the opinion that the Master was not in error when he found that the use of the words St. Bernard's Alpenkrauter was unfair competition; and we concur with him, that unless relief on account of unclean hands or laches is denied, the injunctive relief prayed for

ought to have been granted. This reduces this case to the questions, Did appellant come into court with unclean hands? And, was he free from laches?

The second of these questions is easily disposed of. The appellee, Otto Kunath, was appointed April 3rd, 1890, one of the agents for the sale of appellant's medicines, and continued as such until 1895, whereupon, in association with the other appellees, he began the manufacture and sale of the St. Bernard Alpenkrauter; and thereupon, on the 26th of December, 1896, a letter was written to him by appellant, asking a discontinuance of the use of that name, and suggesting that court proceedings would follow unless the request was observed; to which appellees replied January 19th, 1897, that they declined to drop their present form of advertising. Thereafter nothing was done until March 7th, 1901, when the bill in this case was filed. And this is the laches complained of.

McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, was a case to restrain the infringement of a trade-mark upon a certain medicine in which it was held that acquiescence of long standing, and inexcusable laches in seeking redress, was no defense against that part of the prayer of the bill that sought to restrain an infringement in the future. And this ruling was expressly reaffirmed in Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526. Whether the delay shown here is a defense against the recovery of any damages for the past is a question that we are not now called upon to decide; for the decree appealed from dismissed the whole bill for want of equity, including the prayer for injunctive relief.

Upon the subject of unclean hands, it is our opinion that the conclusion of the Master is not supported by his finding of facts. It is true that the remedy was advertised by appellant as a cure for more diseases, perhaps, than any remedy could possibly cure. But this, in itself, is not unclean hands. Proprietary medicines, generally, promise more than they do; and for that matter licensed physicians often do the same. And with proprietary medicines, as with physicians, the object often is to give mere temporary help, under the belief of the patient that he is obtaining a cure. But whether this be an improper use of the public's confidence, or constitutes a practice against public policy, is a question to be decided by the state, through its legislature, and not by the courts under the equitable doctrine of unclean hands; for so far as this case discloses, proprietary medicines are lawful commerce, and are to be given the freedom of mere trade boasting that ordinary commerce is allowed to enjoy.

It is also true that the name Alpenkrauter connects the herb out of which it is made, in the imagination of the purchaser, with the Swiss Alps. But this is not holding out to the public that the particular root that went into the medicine was grown on the Alps. Indeed the representation in the advertising was that only a part of the herbs were imported, and a part were grown by Quakers in this country. There is therefore, in this particular, no such deception as constitutes unclean hands.

It is true also, that when appellee on cross-examination, seeking probably to find out whether any of the herbs were imported, asked

of one of the appellants what were the ingredients of the medicine, that the witness was instructed not to answer; and that when the further questions were put of what particular herb houses or firms the herbs were purchased, the witness was again instructed not to answer; from which the Master draws the inference that the herbs were not, in fact, imported; otherwise the questions would have been answered.

But all the facts of this case borne in mind, the inference drawn by the Master is not tenable. True, the witness may have been instructed not to answer, because a truthful answer would have divulged that no part of the herbs were in fact imported, or would have given a clue to the names of witnesses from whom that testimony might have been obtained. But it is equally obvious that the motive of the refusal to answer might have been an apprehension that if the ingredients were disclosed, or there was disclosed the names of the people from whom the ingredients were purchased, the whole value of the medicine as a secret preparation would be destroyed—a danger that the appellant was not willing to incur unless ordered by the court. And though a motion to compel an answer was filed, the hearing of that motion was continued to the final hearing, at which time it was not pressed. Now it is the right of a witness, apprehensive that some wrong will be done to his personal or property rights, to refuse to answer to a Master, any question propounded, and to stand upon that refusal until the question raised has been determined by the court; and when such refusal is followed by the failure of the other party to press the question in court, the legal inference is not that the facts are as the proponent claims them, but rather, the proponent failing to press the motion, that he acquiesces in the right of the witness to refuse to answer—the record thereafter standing as if no such question had been put.

It is true, too, that in their advertising, appellant advised the public not to inquire for the Alpenkrauter at drug stores. But this does not justify, it seems to us, the inference drawn by the Master that it was meant as counsel not to consult a physician, and to ignore the recommendations of a trained pharmacist—the plain motive for the suggestion being, that the Alpenkrauter was not on sale at drug stores, and that to inquire for it would result in no purchase of appellant's medicine, but might lead to the inquirer's being induced to purchase something else. Surely, so long as proprietary medicines are lawful commerce, precautions of this kind, obviously commercial, are not within the doctrine of unclean hands.

That the whole traffic in proprietary medicines may be injurious to the public; that remedies, the ingredients and formula of which are secret, should be forbidden; that the sick and ailing should be protected against every offer of help except those coming from licensed physicians and pharmacists, are each questions that the public can take up and decide for itself, through the legislative branches of its governments; but that not having been done as yet, by the public will thus expressed, it does not seem to us that the facts in the record before us furnish a reason why the courts should formulate a public

policy, or withhold the aid of the law to protect this commerce, as yet lawful, against the unlawful piracy of another.

The decree appealed from will be reversed, with instructions to grant the injunction as prayed for in the bill.

JAYNE et al. v. LODER.

(Circuit Court of Appeals, Third Circuit. May 15, 1907.)

No. 34.

COSTS—CIRCUIT COURT OF APPEALS—PRINTING RECORD.

Under amended rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii) of the rules of the Circuit Court of Appeals for the Third Circuit, which provides that, in case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given, the cost of such printing is so taxable, although it was done at the instance of the plaintiff in error and not of the clerk, as contemplated by the rule, where the record as so printed was accepted by the clerk, and no timely objection was made.

On Appeal from Taxation of Costs.

For former opinion, see 149 Fed. 21.

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

DALLAS, Circuit Judge. Our decision in this case was one of reversal, with costs, and therefore, at least prima facie, the plaintiffs in error were entitled to have the amount paid for printing the record taxed against the defendant in error; for rule 23 (150 Fed. xxxii, 79 C. C. A. xxxii), since its amendment, as well as before, contains this unequivocal provision:

"In case of reversal, affirmance or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given."

That this clause would not have been retained when rule 23 was altered if it had been intended that thereafter the cost of printing the record should not be taxed against the losing party is, as an abstract proposition, unquestionable; but it is contended that the amount paid for this particular printing is not so taxable, because it was done at the instance of the plaintiffs in error, as the original rule had prescribed, instead of being "caused" by the clerk, as the amended rule directs. The order of December 7, 1893, did make the clerk responsible for the correct printing of the record, but it made no change whatever in the ultimate liability for its cost. In the present case the clerk accepted copies supplied by counsel for the plaintiffs in error; but to this no timely objection was made, and none will now be considered. We must assume that, if they had been printed under his own supervision, the expense would have been the same.

There does not appear to be any substantial controversy respecting the amount to be allowed, and upon the general question presented enough has been said to show that the taxation of costs now appealed from should be recommitted to the clerk for correction in accordance with this opinion; and it is so ordered.

HOUGHTON v. WHITIN MACHINE WORKS.

(Circuit Court of Appeals, First Circuit. February 12, 1907.)

No. 638.

1. PATENTS—REISSUE—INVENTION—THREAD-GUIDES FOR SPINNING MACHINES.
The Houghton reissued patent, No. 12,263 (original No. 753,577), for an improved thread-guide for spinning or twisting machines, was applied for within about four months after the granting of the original patent, which was within a reasonable time, and, in view of the broadened claims which were necessary to cover the actual invention, was a proper reissue. The improvement of the patent, which consists in substituting, for the wooden finger-heads of the prior art, heads made of metal accurately hinged and properly adjusted to a vertical metal strip secured to the face of a doffing-rail, making it possible to change the thread-guide from soft to hard wire, permitting an accurate adjustment of metal parts at the outset, and under such conditions as to secure continued accuracy of position in operation, constitutes a positive advance in the practical art of cotton spinning and twisting, and discloses invention of such character as to relieve the patent in a measure from the operation of the narrow rules of construction which apply to improvement patents that only slightly advance the art. Claims 1, 2, 3, and 4, also, *held* infringed.

2. SAME—INVENTION—SUBSTITUTION OF MATERIALS.
While the mere substitution of one material for another in a structure does not constitute invention, it is something to be considered on that issue, where it makes possible changes in other elements of a combination to produce improved operation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 23.]

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

William K. Richardson and Louis W. Southgate, for appellant.
William A. Jenner, for appellee.

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

ALDRICH, District Judge. The patent in suit relates to cotton manufacturing, and the invention in question is for an improved thread-guide for spinning or twisting machines, and for an improved form of thread-guide support. It is a reissue patent, granted August 23, 1904, and numbered 12,263. The original patent was granted March 1, 1904, and numbered 753,577, and the application for reissue was filed July 16, 1904, about 4½ months after the original patent was granted.

Claim 4 of the reissue patent is precisely like claim 1 of the original patent of March 1, 1904. The proofs are only directed against the defendant as infringing claims 1, 2, 3, and 4 of the reissue patent. There is no substantial controversy about infringement so far as it relates to claims 1, 2, and 3; but infringement of claim 4 was disputed.

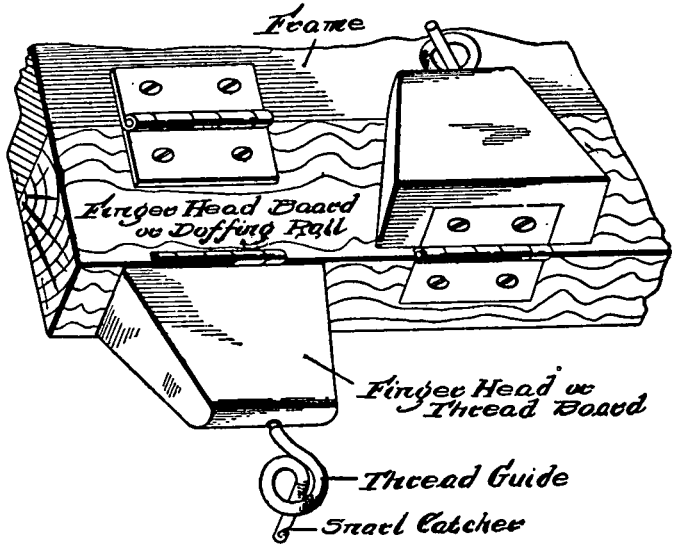
The reissue patent was attacked both upon the ground that it was invalid as a reissue, and upon the ground that its first four claims in suit did not involve invention.

We will first consider the question whether the reissue patent in suit involves invention.

We think it does.

Though the patent in its adaptation of parts involves the original and novel idea of a sheet-metal strip to which the finger-heads are attached, it is, after all, in substance and in its general effect, a patent for an improved combination of old elements in a mechanical arrangement which at once advances the art in a new direction. What the adaptation does in practical operation upon widely used machines in cotton spinning and twisting, old and new machines alike, as compared with the older adaptations, goes far towards demonstrating the fact of invention. Though the patent is for an improved thread-guide and an improved thread-guide support, rather than for a new and original discovery, its practical success is such as to entitle it to favorable consideration, and to relieve it in a measure from the operation of the narrow rules of construction which ordinarily apply to patents for improvements which only slightly advance the art, and accomplish only unimportant and inconsiderable results.

In the older art, the adaptation of construction can hardly be said to have approached the combination in question in simplicity and necessary accuracy of position of parts in operation. The following is a fair illustration of the old construction in common use:

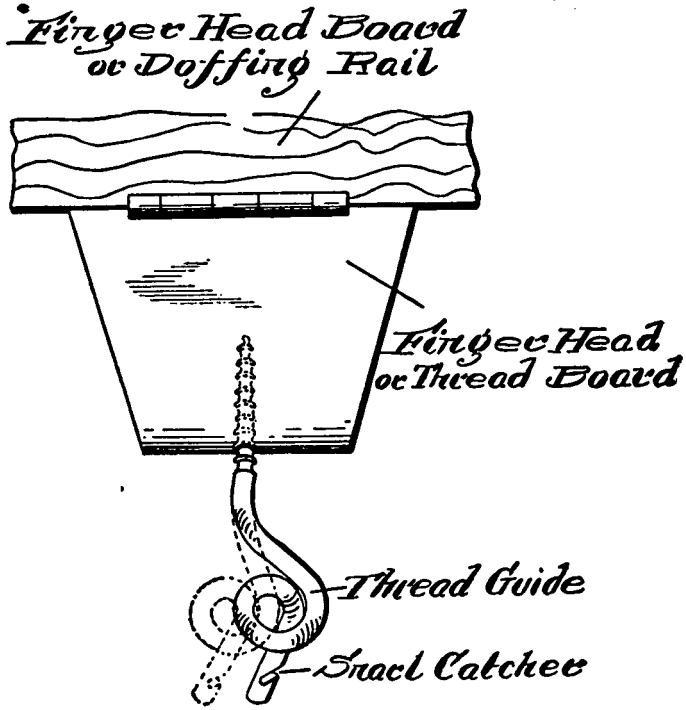


It will be seen that, among the old constructions in use, there was a finger-head board or doffing-rail, which was hinged to the framework of the machine. To this individual blocks of wood, or thread-board supports for the thread-guide, were hinged, and into the projecting face of the finger-head, or block, a metal thread-guide was screw-threaded and adjusted to guide the thread. In practical operation, precision of position with respect to the axis of the spindle is necessary. The requirements of accuracy of adjustment in this respect are so arbitrary as to put out of question the use of hardened or rigid wire bent into pigtails as thread-guides, both in the process of original adjustment and in the process of readjustment when the same get out of position in operation. This is so because, when the

thread-guide is screwed into the finger-head, it is found not to be in the necessary exact adjustment for properly guiding the thread, and so must be bent in order to bring the eye of the guide in proper relation with the axis of the spindle; and, in practical operation, the guide gets out of position, and must be bent or turned back in order to properly do its work. This being so, soft or relatively flexible wire, as distinguished from spring-tempered wire, was used, in order that it might be restored to its position of usefulness by bending or hammering, or by hand manipulation.

Moreover, in the old constructions in practical use, the finger-heads which carry the thread-guides are in large numbers individually attached directly to the doffing-rail by a hinge and screws.

The cut which follows represents well enough one of the old type with the thread-guide screwed into a wooden finger-head, and the



thread-guide is represented by this cut as having been out of position, and as having been brought into position again by bending or other manipulation.

It would seem clear enough that upon cotton spinning and twisting machines carrying a large number of spindles, from which each thread under high speed must be accurately guided, greater security and precision than anything disclosed in the mechanisms of the older art was a thing needed in the work of spinning and twisting, and that industrial conditions required that, in the particular detail of guiding the thread from the spindle, the situation should be relieved from the clumsy and

unsatisfactory conditions existing in this respect at the time Houghton took out his patent.

Now as to the Houghton invention in suit. The claims in issue are as follows:

"1. In a spinning or twisting machine, the combination of a sheet-metal strip having places stamped therein for setting finger-heads, with the finger-heads hinged to said strip so that the thread-guides of the finger-heads will be in proper position when the strip is fastened in place in the machine.

"2. In a spinning or twisting machine, the combination of a rail or supporting-board with a vertical sheet-metal strip secured to the front face thereof, said sheet-metal strip having places stamped therein for setting the finger-heads, and with the finger-heads hinged to the sheet-metal strip and extending horizontally therefrom.

"3. In a thread-guide support for spinning or twisting machines, the combination of a rail or supporting piece, and a plurality of sheet-metal finger-heads, each formed from a piece of sheet metal bent to form a top plate, and bent-down portions which engage the vertical face of the rail or supporting-piece forming stops for holding the finger-heads in horizontal position.

"4. In a thread-guide support for spinning or twisting machines, the combination of a sheet-metal strip and a plurality of sheet-metal finger-heads, each formed from a piece of sheet metal bent to form a top plate, side flanges which act as stops for holding the fingerheads in horizontal position, and integrally bent or turned tongues which intermesh with bent or turned tongues extending from the sheet-metal strip to form hinged joints."

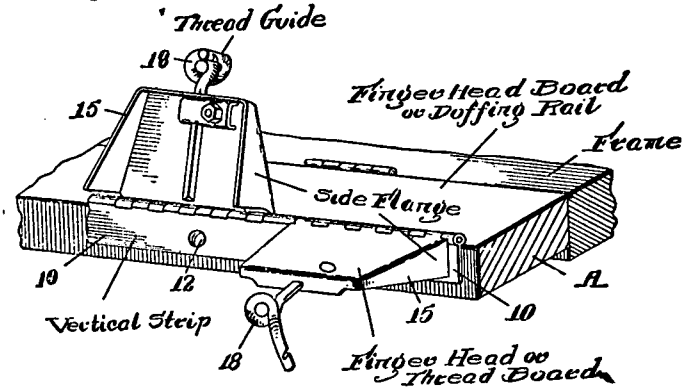
In the older practical constructions in use, we had the necessary wooden finger-heads and the necessary soft metal thread-guides with the inherent defects of insecurity of such appliances in respect to accuracy of continued adjustment. This situation was at once relieved by Houghton, because he made it possible to change the thread-guide from soft to hard wire, and the finger-heads from wood to metal securely hinged and properly adjusted to a vertical strip firmly secured to the vertical face of a doffing-rail. Houghton's adaptation thus relieved the situation from the necessity of using wooden finger-heads and soft metal guides, and permitted an accurate adjustment of metal parts at the outset, and under such conditions as to secure continued accuracy of position in operation. This, we think, constituted a very positive advance in the practical art of cotton spinning and twisting.

Quite likely the substitution alone of one material for another would not amount to invention, but the successful adaptation of the metal finger-head which made the use of highly tempered thread-guides possible is something to be considered in connection with the other elements of the combination upon the question as to whether what he did amounted to invention.

In a practical view, what the textile industry required was an accurate and reliable thread-guide which could be applied to old machines as well as new. It required something that could not only be placed in accurate relation to the machine and the spindle, but something which would remain permanently in proper relative position. Otherwise it would not reliably perform the necessary function of guiding the thread. The importance of such requirement is at once seen when it is realized that each machine in practical operation carries a large number of spindles which require some measure of personal oversight, and that the necessary personal oversight is minimized, and the work of the machine is augmented in degree according as any device for properly

guiding the thread becomes susceptible of accurate and permanent lateral and horizontal adjustment.

The leading features of the Houghton adaptation of mechanical parts can be most conveniently seen through the use of a cut illustrative of his device. For this purpose we employ, what is in substance, Fig. 1 of his reissue patent, supplemented by certain lines and words by way of description.



In this illustration we have one finger-head and the thread-guide in position, for doing its work, and another thrown out of working position, as is the case when necessary to splice the thread.

The metal vertical strip which has been spoken of as a new element in the combination is indicated by figures 10, and is something upon which a plurality of finger-heads are ingeniously spaced, gauged, and hinged in such numbers as are required. The strip when cut in proper length for a particular machine is attached to the vertical face of the finger-head board or doffing-rail by a series of screws, like 12 of the cut. This strip thus performs the function of furnishing suitable intermediate means for properly locating the finger-heads and of connecting the metal of the entire thread-guiding mechanism to the framework of the machine, and it also at once becomes a certain and fixed support to the finger-heads, because, when their side flanges abut against it, it becomes the means of accurately and permanently holding them in the necessary horizontal position.

Unquestionably, the success of Houghton's adaptation is in a large measure attributable to the relation which the new vertical strip sustains to the machine and the metal parts between that and the spindle. But, notwithstanding the fact that the vertical strip is new in its relation, and is something which in its setting performs useful and important functions, the invention, after all, resides, in a broader sense, in the conception of the combination, and in the exceedingly practical and meritorious adaptation of the various metal parts in a complete mechanical appliance capable of doing the work and of successfully meeting the requirements of an existing necessity.

In a very considerable sense, and from the very nature of things, every patent, so far as the fact of invention is concerned, is to stand, if it stands at all, upon its own inherent merit, and therefore a given situation is not much aided by authorities otherwise than by the rela-

tive measure of merit ascertained under somewhat unsatisfactory methods of comparison; but, if the ingenious barbed-wire twist, which "turned a failure into a success," was invention, surely what Houghton accomplished through a successful substitution of metal parts for wood and by way of an ingenious adaptation of hard-tempered wire and sheet metal parts, so assembled as to be easily adjustable to old and new machines alike, ought to be accepted as invention.

In the older type of construction, as will be seen by the first cut which we have used, the wooden finger-head was individually attached to the doffing-rail by a hinge and screws. Such attachment was so unreliable that it was necessary, as has been said, to employ a soft and flexible wire as the thread-guide, in order that it might be readjusted in necessary position as occasion required.

As pointed out, exactness, both in horizontal and in lateral or sidewise position, was something not only important but indispensable. In order to secure these results, Houghton describes finger-heads to be made from sheet-metal, to be hinged to a single vertical strip, the finger-heads having side flanges so bent and shaped as to engage the vertical strip, and thus secure and permanently hold themselves in the necessary horizontal position. Such security of horizontal position enabled him to use thread-guides made of hard-tempered wire, so attached to and carried in the finger-heads as to be susceptible of sidewise adjustment, and of being securely and permanently fixed in proper position with reference to the spindle. The connection between the finger-heads and the metal strip is secured by means of tongues or fingers extending from their rear edge, which intermesh with tongues or fingers extending from the upper edge of the vertical strip, the respective fingers and tongues coiling upon a hinge-pin extending the length of the strip, thus making a hinged connection between several finger-heads and a single metal strip easily adjustable to the vertical part of a given doffing-rail under such conditions as to enable the entire number of thread-guides to be thrown out of operation by an upward throw of the doffing-rail, or given thread-guides to be singly thrown out of operation if the exigency requires this only. While the hinge attachment to the metal strip is old, and in itself alone does not involve invention, in view of its peculiar setting it is something, we think, to be considered in connection with the various other parts with which it is associated in use in the mechanical adaptation as a whole.

As to the prior art, it is sufficient to say that it falls far short of anticipating Houghton's conception and efficient adaptation, or of accomplishing anything like the satisfactory commercial results reached through what Houghton described.

Next, as to the disclaimer. There was still another patent, to which we have not referred. It is numbered 677,988, and was granted to Houghton in 1901. Considerable importance has been attached to this, and it is something to be considered, because the reissue patent refers to it and makes a certain disclaimer. Both the patent of March, 1904, and the reissue of August, 1904, in fact, refer to the 1901 patent as something to be perfected and improved in construction. It is important to note that the sheet-metal strip described in the patent of 1901, to which the finger-heads were connected, was a finger-head board,

not an intermediate vertical strip, and the idea was to apply it to the top horizontal surface of the doffing-rail, and the mechanical arrangement in detail under that patent was quite different from the adaptations described in the reissue patent in question. It would seem that the Circuit Court acted upon the idea that the intended improvement of the reissue patent of 1904 had reference to tempering the thread-guide and to its adjustment in the finger-head. We think more than that was intended, and that the adaptation of parts in the patent in suit, which we have already described, was an essential and substantial improvement upon the patent of 1901. We also think that a reasonable construction of the disclaimer only carries the idea that Houghton intended to disclaim the subject-matter of the particular combination emphasized by the patent of 1901, which was a direct combination and attachment of a sheet-metal strip or finger-head board and a finger-head made with prolonged side flanges extending under and beyond the hinge for the purpose of horizontal support.

Now, as to the reissue: The somewhat recent case of Topliff v. Topliff, 145 U. S. 56, 12 Sup. Ct. 825, 36 L. Ed. 658, after summarizing the authorities, lays down certain rules as settled by the Supreme Court, and, among other things, it is there stated that the power to reissue may be exercised when the patent is inoperative, because the claims were narrower than the actual invention, provided the error arose from inadvertence or mistake. The right, however, is subject to certain limitations, and among them that the reissue shall be for the same invention, as it appears from the specification and claims, and that there must be reasonable diligence in moving. It is also stated as something to be regarded as settled by the Supreme Court that the court will not review the decision of the Commissioner of Patents upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record.

Mr. Houghton moved promptly for reissue upon discovery of what seemed to be a limitation of his new patent to the interlocking hinge, because he had the finger-heads interlocked with the thread-board in his 1901 patent. He set out in the oath appended to his application for reissue that the patent was inoperative for the reason that the specification was defective and insufficient, and that the defect and insufficiency resulted from an omission to claim the sheet-metal strip except in combination with a particular form of hinge, and that it arose from inadvertence. In view of the scope of the specification of the March 1904 patent and the limitation upon its claims, and in view of the broadened character of claims 1, 2, and 3 of the reissue, it would seem a proper case for reissue, provided there was due diligence on the part of the patentee. The application was made in a little over four months, which ordinarily would be accepted as not an unreasonable time, provided public rights have not intervened. We do not see anything in this case which should be accepted as a controlling intervention of public, or third party rights, or anything which calls for a harsh rule in respect to a time limit. In view of the whole situation, we think we should treat the reissue as seasonably applied for, and as something granted upon a proper showing of mistake, resulting from inadvertence in not giving proper breadth to the claims. The specification of the original patent, when read in connection with the cuts, mani-

festly shows that the patentee intended a broader invention than that stated in his claims; and what was stated as his invention in his specification was saved to him by the broadened claims 1, 2, and 3 of the reissue, and rightly so, we think.

With claims 1, 2, and 3 of the reissue comes claim 4 of the original patent, which gives prominence to the idea of intermeshing tongues and is verbatim with claim 1 of the original, and must have the same status as a claim that it had in the original patent. Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601.

In conclusion, as to infringement: It is not seriously contended, even if denied, that claims 1, 2, and 3 are not infringed; and as to claim 4, the defendant's leading expert, Mr. Livermore, states that the defendant's construction, broadly considered as a hinge, is an equivalent, or mechanical substitute, for the construction shown in Houghton's claim 4 of the reissue. This, in connection with an examination of the various parts and their function as used in the defendant's construction, and the other evidence in the case, satisfies us that the complainant establishes that the defendant used the Houghton idea, and that there was infringement in respect to claim 4, as well as to claims 1, 2, and 3.

The decree of the Circuit Court is reversed; the case is remanded to that court, with directions to enter a decree for the complainant on claims 1, 2, 3, and 4 of the reissued letters patent, No. 12,263, in suit; and the appellant recovers his costs of appeal.

PLUNGER ELEVATOR CO. v. STANDARD PLUNGER ELEVATOR CO.

(Circuit Court, D. Massachusetts. May 13, 1907.)

No. 126.

PATENTS—INFRINGEMENT—ELEVATOR MECHANISM.

The Cole patent, No. 700,740, for a valve mechanism for elevators of the plunger type, designed to secure an automatic slow stop of the elevator in both directions, without affecting the rate of speed in starting cannot be so broadly construed as to cover all means for accomplishing such purpose, but is limited to the means shown, which consists of an auxiliary valve mechanism or what may be fairly considered the equivalent of such mechanism; but, since the invention is not for a mere improvement, in details of construction, but represents a new and advanced step in the art, the patent is entitled to a fairly broad construction upon the question of what may be considered equivalent means. As so construed *held* not infringed by the mechanism shown in the Larsson patents, Nos. 786,653 and 786,654, which does not contain the essential feature of the Cole invention, namely, the throttling of a portion of the pilot valve passage by the movement of the main valve when the elevator is stopped nor means which are equivalent.

In Equity. On final hearing.

Brown & Durby, for complainant.

Louis W. Southgate and Clifton V. Edwards, for defendant.

COLT, Circuit Judge. This bill charges the defendant with infringement of patent No. 700,740, issued May 27, 1902, to the complainant as assignee of William F. Cole.

The Cole patent relates to hydraulic valve mechanism for regulating the starting and stopping of elevators, particularly hydraulic elevators of the plunger type. The invention is for an improved form of valve, which permits a quick start for the elevator, and at the same time insures a slow stop.

In defining the invention, the specification says:

"My invention relates to regulating mechanism for elevators, whereby the elevator car may be started and reach full speed as quickly as desired; but, however suddenly the operative may attempt to stop the car, the suddenness of stopping is regulated within a predetermined limit, thus permitting a quick start and insuring a slow stop."

"My invention consists, essentially, of means adapted to regulate at independent rates the suddenness of starting and stopping an elevator car."

"More particularly my invention consists of means attached to the valve mechanism, which limits the rate of speed of closing the main valve in either direction without affecting its rate of speed of opening."

"In modern high-speed elevators it is desirable to have the car reach its maximum rate of speed as soon as possible after starting; but any sudden stopping of the car is undesirable. Among other objections sudden stopping is the cause of an extremely unpleasant sensation which the passengers are made to feel, and in the case of the 'plunger' type of hydraulic elevator if the supply of water to the cylinder be shut off too suddenly the momentum of the rapidly-moving parts which comprise a considerable mass is so great that the plunger will be apt to jump off the water, causing an extremely disagreeable shock to be felt by the passengers."

With respect to the prior art, the specification says:

"Obviously it is not desirable to leave the possibility of sudden stopping in the hands of the operative. This has already been recognized, and a gradual stoppage has been accomplished in several ways by means entirely independent of the controlling device in the car. One method has been to make the ports of the secondary or pilot valve quite small or to throttle them down by means of a screw-plug, which is left permanently adjusted in the required position, allowing only a comparatively small volume of water to flow to or from the motor-cylinder in a given time. A similar result is sometimes accomplished by constructing the ports of the main valve of such shape that as the valve closes the water is gradually shut off. These permanent adjustments which accomplish a gradual stop, both going up and coming down, also of necessity accomplish a gradual start in either direction."

The specification then proceeds:

"To gradually overcome the energy of such a large mass of rapidly-moving matter as is required in an elevator without the undesirable effects above referred to, it is necessary to begin to slow down several feet before the floor at which it is desired to stop is reached. To accomplish this, the movement of the main valve in closing must be very gradual. When the elevator is started, however, it is not necessary nor desirable that full speed should be as gradually reached from full stop as was full stop when the elevator was running at full speed. In fact, full speed can be safely acquired in several feet less travel than within which it would be desirable to stop a car from full speed. Therefore it is not necessary that the main valve should move as gradually in opening or that the same means, if any, should be employed for a gradual start as must of necessity exist in the means for gradual stoppage, which I have referred to above."

The specification further says:

"My invention of throttling device is not limited to the form of throttling-valve shown, as other throttling devices or governors might be applied to accomplish the object, and many changes might be made in the detail of construction and mode of attachment to the reciprocating parts of the valve."

The patent contains 29 claims. Most of these claims are of a broad character. It is sufficient for illustration and for the purposes of this suit to give the first five:

"1. In an elevator, the combination with the car, of motor means for running said car, controlling means adapted to be operated from the car, and an automatic quick-starting, slow-stopping device adapted to permit of a quick start and to regulate the suddenness of stopping whereby the car will be brought to rest gradually.

"2. The combination with the main three-way valve, of means for opening and closing said valve in either direction, and automatic means for regulating the opening and closing movements at different rates of speed.

"3. The combination with the main valve for controlling the passage of fluid under pressure, of means for opening and closing said valve, and automatically-operated quick-opening, slow-closing means connected with said main valve, whereby the speed of opening and the speed of closing the main valve are regulated within independent limits, substantially as described.

"4. In a hydraulic elevator, the combination with a main valve, of a valve-motor, pilot-valve mechanism, and an opening and closing regulating means operated by movement of the main valve, whereby a quick opening and slow closing of the main valve are effected.

"5. The combination with the main valve for controlling the passage of fluid under pressure, of motor means for opening and closing said main valve, secondary valve mechanism for controlling the motor means, and hydraulic opening and closing regulating means for automatically regulating the velocity at which the main valve may be opened and the velocity at which the main valve may be closed at independent rates, substantially as described."

In reading these claims in connection with the specification, it is apparent that the patentee seeks to cover all means for accomplishing an automatic slow stop of the elevator by limiting the rate of speed of closing the main valve and at the same time permitting a quick start; and this is the position taken in the brief of complainant's counsel, as appears from the following extract:

"It appears, therefore, plainly from the specification of the Cole patent that his purpose was to claim broadly any mechanism which limited the rate of speed of closing the main valve automatically without affecting its rate of speed of opening, so that the elevator car might be permitted to reach full speed as quickly as desired, but limited to a gradual or slow speed in stopping, however suddenly the operative might attempt to stop such car.

"This theory thus advanced in the specification is emphasized in the claims of the Cole patent, a careful reading of which will demonstrate the plain intention of the inventor to cover broadly this principle of operation which he had found absolutely necessary in the practical utilization of a plunger elevator. A large majority of the 29 claims are broadly phrased to cover in different forms this idea. * * * There is absolutely nothing in the prior art or the testimony in this case to anticipate this broad, pioneer invention of Mr. Cole. No prior patent can be produced which will show a main valve which can be opened quickly, and yet closed slowly and automatically within a predetermined limit regardless of the way the operator manipulates the pilot valve."

Since infringement is based upon this broad construction of the Cole patent, it becomes necessary to determine the nature and scope of the Cole invention.

The valve of the Cole patent is known in the elevator art as the "pilot valve," and, as appears from the specification and drawings, it was designed for use in plunger elevators. The purpose of the pilot valve is to start and stop the elevator, and to regulate the speed of starting and stopping. The pilot valve is a two-way piston valve.

It has two sides which are duplicates, the supply side and the exhaust side. The supply side has a passage from the supply pipe to the motor cylinder, and the exhaust side has a passage from the exhaust pipe to the motor cylinder. These passages to the motor cylinder are opened or closed by the movements of the pilot valve stem. The elevator is started in its upward or downward movement by opening the supply or the exhaust passage, and it is stopped in its upward or downward passage by closing the supply or the exhaust passage. The speed with which the elevator starts or stops is governed by the quantity of water which is permitted to flow through these passages. If, therefore, these passages are what are termed "enlarged passages," the elevator will start and stop quickly. If they are what are termed "restricted passages," the elevator will start and stop slowly. If one of the passages is an enlarged passage and the other a restricted passage, the elevator will start quickly and stop slowly in one direction, and start slowly and stop quickly in the other direction. It was common in the art to restrict the pilot valve passages by means of throttling devices such as throttling screws, in order to effect a slow start and a slow stop, as distinguished from a quick start and a quick stop. It was also old in the art to accomplish a gradual start and a gradual stop by what are termed "graduated ports" in the pilot valve or in the main valve.

The purpose of the Cole invention was to secure an automatic slow stop of the elevator in both directions without affecting the rate of speed in starting.

Cole accomplished this purpose in the following way: He first constructed his pilot valve with a restricted and enlarged passage for the supply, and a restricted and enlarged passage for the exhaust. He then provided an auxiliary piston valve with a throttling plug on each end of the stem. He then provided means whereby one of the enlarged passages was automatically closed by the throttling plug when the elevator was stopped. These means consisted in connecting the auxiliary pilot valve stem with the main valve stem in such a manner that, when the main valve moved in one direction, the throttling plugs moved in the opposite direction, with the result that on the outward movement of the main valve to start the elevator the throttling plugs closed one of the enlarged passages, so that on the return movement of the main valve to stop the elevator the flow of water was confined to the restricted passage, and hence the main valve moved slowly, thereby causing the elevator to stop slowly. We have, then, in the Cole organization a pilot valve with enlarged and restricted passages, which are open to start the elevator, and with only the restricted passage open to stop the elevator.

The pilot valve mechanism and the nature and scope of the Cole improvement will be better understood by a fuller description of the plunger elevator and its mode of operation. In the plunger elevator a cylinder is sunk in the ground to the same depth as the height to which the elevator is to be raised. A plunger slides in this cylinder, and upon the upper end of the plunger is supported the elevator car. When water is introduced into the cylinder, the water pressure raises the plunger, and consequently the elevator. When water is permitted to flow out of the cylinder, the weight of the plunger and the car

causes the elevator to descend. When no water is permitted to flow into or out of the cylinder, the plunger and the car remain stationary.

The regulation of the flow of water into and out of the cylinder, and the cutting off of the water from the cylinder, are accomplished by a somewhat elaborate system of piston valves. This system comprises the main valve, the motor, the pilot valve, and their connecting mechanisms. The main valve controls the movements of the plunger, which supports the elevator car, the motor valve controls the movements of the main valve, and the pilot valve, which is connected with the operating lever in the elevator car, controls the movements of the motor valve.

The valve mechanism of the plunger elevator is shown in figures 3 and 4 of the Cole patent. These drawings also illustrate the pilot valve mechanism covered by the patent, and its mode of operation.

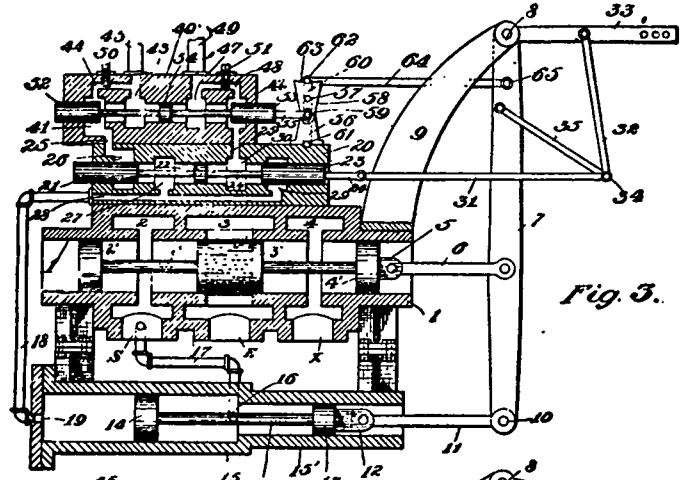


Fig. 3.

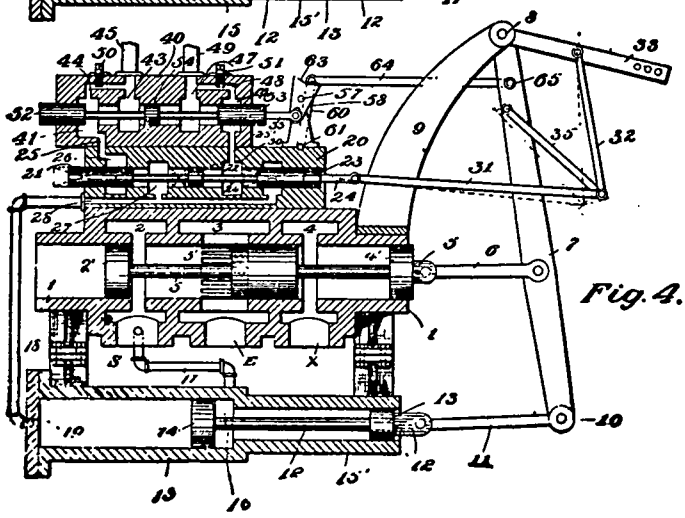


Fig. 4.

The middle part of each of these drawings shows the main valve, the lower part shows the motor, and the upper part shows the pilot valve. The main valve is a three-way piston valve. It has a passage to the source of supply, a passage to the main cylinder, and a passage to the exhaust. It opens the supply to allow the water to flow into the main cylinder to move the elevator upward, it shuts off the supply and the exhaust to stop the elevator, and it opens the exhaust to allow the water to flow out of the main cylinder to permit the elevator to descend. When the elevator is stopped, the main valve occupies its central or neutral position, which is seen in figure 3. In this position the port to the main cylinder is closed, and consequently the water cannot flow into or out of the cylinder.

The main valve is moved from its central position outward to start the elevator, and from its outward position back to center to stop the elevator. When the main valve moves from the center to the right, the main cylinder is connected with the supply, and the elevator ascends; and, when the main valve moves back to center, the supply is cut off, and the elevator stops. When the main valve moves from the center to the left, the main cylinder is connected with the exhaust, and the elevator descends, and, when the main valve moves back to center, the exhaust is cut off, and the elevator stops. If the main valve moves quickly in its outward movements and in its movements back to center, the elevator will start quickly and stop quickly. If the main valve moves slowly in its outward movements and in its movements back to center, the elevator will start slowly and stop slowly. On the other hand, if the main valve moves quickly in its outward movements and slowly in its return movements back to center, the elevator will start quickly and stop slowly.

The motor consists of a cylinder with two pistons. As the drawings show, the motor stem and the main valve stem are so connected that the movements of the motor pistons and of the main valve pistons must be the same. The movements of the motor pistons are controlled by the pilot valve. When the supply and exhaust of the pilot valve are cut off from the motor, the motor pistons are at their central or neutral position, as shown in figure 3. When the supply of the pilot valve is open, the motor pistons move from their central position to the right, as shown in figure 4, and the elevator ascends. When the supply of the pilot valve is cut off and the exhaust is open, the motor pistons move back to center, and the elevator stops. On the other hand, when the exhaust of the pilot valve is open, the motor pistons move from their central position to the left, and the elevator descends. When the exhaust of the pilot valve is cut off and the supply is open, the motor pistons move back to center, and the elevator stops. If the pilot valve has enlarged supply and exhaust passages, the outward movements and the return movements of the motor pistons, and therefore of the main valve, will be quick, and the elevator will start and stop quickly. If the pilot valve has contracted supply and exhaust passages, the outward movements and the return movements of the motor pistons, and therefore of the main valve, will be slow, and the elevator will start and stop slowly. On the other hand, if the pilot valve has a contracted passage and an enlarged pass-

age for the supply, and a contracted passage and an enlarged passage for the exhaust, and both these passages are open on the outward movements of the motor pistons, and only the contracted passage is open on the return movements of the motor pistons, the elevator will start quickly and stop slowly.

The pilot valve, as the drawings show, has two sides which are alike—the supply side, which connects with the supply pipe, and the exhaust side, which connects with the exhaust pipe. When the pilot valve is in its central or neutral position, as shown in figures 3 and 4, both the supply and the exhaust are cut off from the motor. The movement of the pilot valve to the left opens the supply to the motor cylinder, and the movement of the pilot valve to the right opens the exhaust to the motor cylinder. The pilot valve is so connected with the main valve that the movement of the main valve in either direction or back to center moves the pilot valve back to its central position. In other words, the pilot valve is automatically returned to its central position by the movement of the main valve. When the operator presses the lever down, as shown in figure 4, the pilot valve moves to the left and opens the supply, which causes the motor pistons to move to the right, and therefore the main valve, and the elevator starts in its upward movement. This outward movement of the main valve returns the pilot valve to its central position, without affecting the position of the operating lever. When the operator moves the lever back to center, the pilot valve moves to the right, and opens the pilot exhaust, which causes the motor pistons to move back to center, and therefore the main valve, and the elevator stops in its upward movement; and the reverse operation takes place in starting and stopping the elevator in its downward movement.

If we look at the upper part of each of the two drawings, we see that the pilot valve has a contracted passage and an enlarged passage for the supply, and a contracted passage and an enlarged passage for the exhaust. We also see an auxiliary piston valve, with a throttling plug on each end of its stem. We also find that the stem of this piston is so connected with the main valve stem that, when the main valve moves to the right, the throttling plugs move to the left, and vice versa. The effect of this is, as seen in figure 4, that, when the supply or exhaust of the pilot valve is open and the main valve moves to the right or to the left, the throttling plug closes the enlarged passage of the supply or the exhaust, so that the supply and exhaust passages to the motor cylinder are restricted on the return movements of the motor pistons. The result is that the return movements of the motor pistons and main valve are slow, while the outward movements are quick, and consequently the elevator starts quickly and stops slowly.

We are now prepared to determine the nature and scope of the Cole invention. At the time of his invention the plunger elevator art had already reached the practical or commercial stage. It had, in fact, reached the stage of an advanced art. The Cole invention, therefore, does not mark the line between practical success and practical failure in plunger elevators, and hence his patent cannot be said to cover a broad pioneer invention. His patent is for a pilot valve

which secures an automatic slow stop, while permitting at the same time a quick start. This at most is an improvement over prior pilot valves, which automatically insured a slow start and slow stop, or a quick start and quick stop, or which prevented a sudden start and sudden stop.

Cole started to make his pilot valve with the idea that in modern elevators of the plunger type it was very desirable to have an automatic quick starting and slow stopping elevator. His invention does not reside in the idea of quick starting and slow stopping, but in the means he devised for accomplishing this result. The patent correctly defines the invention when it declares:

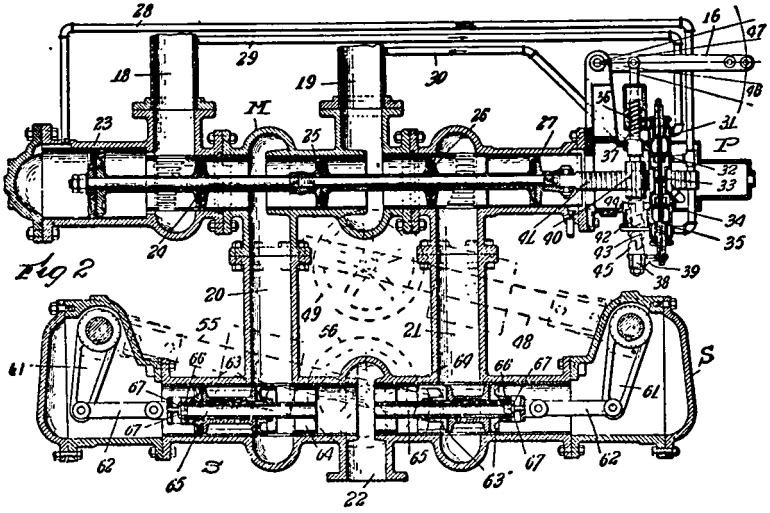
"More particularly my invention consists of means attached to the valve mechanism which limits the rate of speed of closing the main valve in either direction without affecting the rate of speed of opening."

It is these means which constitute the real invention covered by the patent. This being true, the scope of the invention cannot be extended by the broad language which may be found in the specification, nor by the broad terms of the claims. A patentee cannot cover all means for accomplishing a certain result by a statement in the specification that his invention is not limited to the particular form of device described, nor by so framing the claims as to include all means for accomplishing the result. To hold that the Cole patent embraces all means for effecting a quick start and slow stop would be to hold that the patent covers a function or result. The monopoly to which Cole is entitled under his patent lies in the means by which he solved the problem of a quick start and a slow stop, namely, the auxiliary valve mechanism described in his patent, or what may be fairly considered the equivalent of that mechanism. The range of what will be regarded as equivalents depends upon the character of the invention, and, since the Cole patent is not for a mere improvement in details of construction, but represents a new and advanced step in the art, the court should apply the doctrine of equivalents as it is commonly applied in dealing with this class of patents by giving a fairly broad construction as to what will be considered equivalent means for accomplishing the same result.

The means attached to the valve mechanism by which Cole solved the problem of a quick start and slow stop are the enlarged passages of the pilot valve, the supplementary piston, the throttling plugs, and the connecting devices by which the throttling plugs are made to close the enlarged passages by the movements of the main valve. The essence of these means may be said to reside in so connecting the throttling plugs with the main valve that a part of the pilot valve passages will be closed by the movement of the main valve. On the question of infringement, the form of the pilot valve passages is not material, nor the form of the supplementary piston with the throttling plugs on each end, nor the form of connecting devices by which the main valve moves the throttling plugs to close in part the pilot valve passages; but what is material, since it is the very essence of the invention, is the closing of a portion of the pilot valve passages by the movement of the main valve. A pilot valve in which this

feature is not found does not contain the Cole invention, and is therefore not within the Cole patent.

The defendant's elevator is constructed under the Larsson patents, Nos. 786,653 and 786,654. The following cut from the latter patent shows the valve mechanism and connections:



The upper part of this figure shows the main valve, the motor, and the pilot valve arranged in a somewhat different way from the Cole apparatus, the motor being in line with the main valve, and the pilot valve set at right angles thereto. The main purpose of the Larsson pilot valve is to prevent the sudden reversal of the elevator. To accomplish this, the mechanism is so organized that, when the operating lever is moved from its central position in either direction to start the elevator, the operator cannot move the lever back beyond its central position until the main valve has returned to its central position, which takes place when the lever is moved back to center to stop the elevator.

As is seen from the drawing, the pilot valve consists of a two-way piston valve, with a throttling plug on each end of the piston rod. The pilot valve has graduated supply and exhaust ports, consisting of six circular openings and three diagonal openings on each side; the latter openings being throttled with screw plugs. The main valve also has graduated ports.

Connected with the pilot valve is a supplementary mechanism, comprising an auxiliary pilot valve stem, rack, elongated pinion, screw, nut, and rotating and stationary cams. The auxiliary pilot valve stem is connected at its lower end with the pilot valve stem, so that both stems move together. The rack is attached to the main valve stem. The elongated pinion, the screw, and the two rotating cams are attached to the auxiliary pilot valve stem, while the two stationary cams are attached to the frame.

The auxiliary pilot valve stem, rack, pinion, screw, and nut are the means provided for automatically returning the pilot valve to center on the movement of the main valve. The rotating and stationary cams, which are normally separated a certain distance, perform a double function. They limit the outward throw in either direction of the operating lever from its central position to start the elevator. They also prevent the throw of the operating lever back beyond its central position after it has been thrown in either direction to start the elevator until it has been returned to its central position and the elevator stops.

When the operating lever is in its central position, as shown in the drawing, the pilot valve and the main valve are in their central positions, and the cams are in their central position. When the lever is moved in either direction to start the elevator, the pilot valve stem is moved up or down, thereby opening the supply or exhaust, which causes the main valve to move to the right or to the left. This movement of the main valve sets in operation the rack and pinion and screw, thereby bringing the pilot valve stem back to center, but leaving the lever in its outward position. On the return throw of the lever to center to stop the elevator, the pilot valve stem opens the supply or exhaust, which causes the main valve to return to center; and this movement of the main valve sets in operation the rack, pinion, and screw, thereby bringing the pilot valve stem back to center with the lever in its central position ready to start the elevator again in another up or down movement.

When the lever is in its central position its throw in either direction is limited by the distance between the cams. When the lever is thrown outward in either direction to start the elevator, and the pinion begins to rotate on the movement of the main valve, the rotating cams will occupy such a position with respect to the stationary cams as to prevent the throw of the lever back beyond its central position, and therefore prevent the operator from suddenly reversing the movement of the elevator. And this is true whether the pilot valve is partly or wholly opened, for in no instance, by reason of the position of the cams, can the operator after starting the elevator move the lever beyond its central position until the main valve moves back to center and the elevator stops.

This operation is described in Larsson patent No. 786,654 as follows:

"As shown in the drawings the parts are in normal position and the operator can move the pilot valve either up or down from the central position any distance up to its extreme of travel, which is the pitch of said screw, 37, or the distance said screw, 37, will move when making one revolution in nut, 36. Suppose the operator should move the lever, 16, half-way down to the position shown at 46. This will move the pilot valve half-way down and will cause the main valve to move half-way to the left. This movement of the main valve will turn the pinion, 40, a half-turn, which will restore the pilot valve to normal position, the lever, 16, remaining at position 46. This will bring the cams 44 and 45 to the vertical position, shown in the drawings; but as they have turned half-way around the distance that the cam 44 can now be moved into cam 42, or the distance the cam 45 can be moved into the cam 43 will only be one-half of a pitch. The operator can now at any time move the lever, 16, still lower to increase the speed of the car; but from position 46 the operator

can only move the lever, 16, upward to the central position, and cannot pass the central position until the high point of the cam 45 is turned back to clear the high point of the cam 43, which only takes place when the main valve reaches its closed position in its travel to the right. Thus the operator cannot move the operating lever, 16, up past the central position until the main valve reaches its closed or central position. If the operating-lever, 16, should be moved half-way up or to position 47, substantially the same action would take place, except that the cams 44 and 45 would be revolved a half-turn in the opposite direction when the main valve reaches its half-way position to the right to allow the cylinder, B, to exhaust, whereby the operating-lever, 16, can only be moved back to the central position until the high point of the cam 44 is turned back past the high point of the cam 42. The same action takes place no matter what degree the operating-lever is moved up or down, as the partial revolution of the cams, 44 and 45, is proportional to the movement of the operating-lever, 16—that is to say, if the lever, 16, is moved down to any extent up to a full movement thereof it is locked from being moved back past its central position by cams 45 and 43 until the main valve comes back to its central position, or if said lever, 16, is moved upward to any extent up to a full movement thereof it is locked from being moved back past its central position by cams 44 and 42 until the main valve comes back to its central position. This prevents a careless operator from reversing the motion of the car violently or instantaneously, as the main valve must come back easily to its central position by reason of the graduated openings in the pilot valve, it being impossible to throw the pilot valve across the center to alter the gradual centering of the main valve. Each centering movement of the main valve takes place at exactly the same rate of speed as the main valve comes to rest as it moves away from its central position to cause the car to go up and down."

The main ground upon which the complainant bases infringement is that in the defendant's elevator as actually constructed the return throw of the pilot valve stem is less than the outward throw, with the result that, while the outward throw opens all the supply or exhaust ports, the return throw only opens a portion of the supply or exhaust ports, and hence the main valve moves quickly in its outward movements and slowly in its return movements, thereby causing the elevator to start quickly and stop slowly.

Whether the return throw of the pilot valve stem is the same as the outward throw depends upon the construction of the screw and cams. If the pitch of the screw and cams is the same, as contended by the defendant, the return throw will be the same as the outward throw, because upon the outward throw the movement of the main valve will cause a complete revolution of the pinion, thereby bringing the cams back to the same position, so that the return throw will necessarily be the same. If, on the other hand, the pitch of the screw is different from the pitch of the cams, the return throw may be less than the outward throw, because on the outward throw the movement of the main valve will not cause the pinion to make a complete revolution, so that the cams will not be returned to the same position, but to a new position in which their contact will prevent the full return throw.

In support of its contention that in defendant's pilot valve the return throw of the pilot valve stem is less than the outward throw, the complainant called two witnesses, Ernest W. Marshall, an engineer of the Otis Elevator Company, and William F. Cole, the inventor of the patent in suit. Mr. Marshall examined one of the defendant's elevators which was being installed in the Wabash Terminal at Pittsburg. As a result of this examination and of sketches

taken at the time, Marshall made a drawing which is in evidence. From this drawing and from other knowledge of a somewhat general character, Mr. Cole constructed a model of defendant's structure which is also in evidence. In this model the return throw of the pilot valve stem is less than the outward throw. Mr. Cole afterwards examined the Wabash Terminal elevator, and made an amended drawing of a section of defendant's pilot valve, which is also in evidence. It is admitted that Marshall's first drawing was not free from mistakes. It is also true that it does not appear from the testimony of Mr. Marshall or Mr. Cole that either of them made any measurements of the pitch of the screw and cams or of the throw of the pilot valve stem in the Wabash Terminal elevator. It further appears that the testimony of complainant's expert McElroy, in complainant's prima facie case, is based upon the correctness of these drawings and of the Cole model.

On the other hand, the defendant has met this issue by the following evidence: The Larsson patents, which describe the pitch of the screw and the cams as the same; copies of the working drawings, or blueprints from these drawings, of defendant's elevators, including those installed at Pittsburg, which show that the pitch of the screw and cams is the same; the testimony of Mr. Larsson, the patentee, who is the chief engineer of the defendant, and of Mr. Waterman, the superintendent, who both swear that the defendant's elevators were constructed from these drawings; and, further, that the defendant never built an elevator in which the pitch of the screw was not the same as the pitch of the cams. Upon this state of proof the complainant clearly has failed to establish that the defendant has ever built an elevator in which the return throw of the pilot valve stem was less than its outward throw.

If, however, the evidence had been otherwise, and it had been shown that in defendant's pilot valve the pitch of the screw and the cams was such as to make the return throw of the pilot valve stem less than the outward throw, the complainant, in my opinion, would still have failed to make out a case of infringement, because the result is not accomplished by the same or equivalent means. The means are not the same, since this form of defendant's pilot valve does not contain the essential feature of the Cole invention, namely, the throttling of a portion of the pilot valve passages by the movement of the main valve. Nor are the means equivalent, since it cannot be said, upon any proper construction of the Cole patent, that to effect a restriction of the pilot valve passages in stopping the elevator by limiting the return throw of the pilot valve stem is the equivalent of the independent throttling mechansim of the Cole patent, which automatically closes a portion of the pilot valve passages by the movement of the main valve.

In complainant's rebuttal evidence Mr. McElroy advanced other theories of infringement. All these theories rest upon the untenable assumption that the Cole patent covers all means for permitting a quick start of the elevator, and at the same time insuring an automatic slow stop. Suppose, for example, as contended by Mr. McElroy, the defendant's structure is so organized that the main valve has an idle

travel or an unnecessary post area, with the result that the elevator starts quickly and stops slowly, it is obvious that any such solution of this problem is outside of the Cole conception, or of the means in which he embodied his conception as set forth in his patent. And the same reasoning applies to Mr. McElroy's other theories.

From a full and careful consideration of defendant's structure, I have reached the conclusion that there is no difference between the opening and closing movements of the main valve; and, therefore, if the elevator starts quickly, it must necessarily stop quickly, and, if it starts slowly, it must necessarily stop slowly, during both its ascent and descent. This conclusion is based upon the fundamental fact that the supply side and the exhaust side of the pilot valve are the same in construction and mode of operation.

A decree may be entered dismissing the bill.

GOOD FORM MFG. CO. v. WHITE.

(Circuit Court, S. D. New York. May 8, 1907.)

1. PATENTS—CONSTRUCTION OF CLAIMS—ACQUIESCENCE IN LIMITATIONS.

If a patentee acquiesces in the limitations suggested by the Patent Office, and the essential elements of the claim are alluded to by reference letters indicating that the Patent Office intended to restrict the claims to the particular device described, a claim to a broader scope cannot be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

2. SAME—INFRINGEMENT—NECKTIES.

The Davies patent, No. 605,947, for a necktie having "the connections, C, C, secured to the inner face of the band portion adjacent to each end portion, and provided at their free ends with rings adapted to fit over a collar button," conceding it to disclose patentable invention, in view of the prior art and the action of the Patent Office in suggesting the language of the claim designating the connection pieces by reference letters, which suggestion was accepted by the patentee, must be limited to a tie having connections so secured. As so limited, *held* not infringed.

In Equity.

Otto Munk (Baxter Morton, of counsel), for complainant.

J. E. Hindon Hyde, for defendant.

HAZEL, District Judge. This suit is for infringement of letters patent issued to Charles W. Tudor Davies, No. 605,947, dated June 21, 1898, for improvements in neckties. The invention "consists in the novel construction and arrangement of the parts whereby the strain which is placed upon a neckband to hold the same firmly to a collar is removed from the knot."

The single claim of the patent reads as follows:

"As an article of manufacture, a necktie consisting of a neckband and two end portions, these end portions being adapted to form a knot, and the connections, C, C, secured to the inner face of the band portion adjacent to each end portion, and provided at their free ends with rings adapted to fit over a collar button, substantially as set forth."

The object of the patentee was to provide means for securing the bow or tie to the front of the collar to prevent its slipping or dis-

placement, and to relieve the end portions of the neckband when tied into a bow of the strain required to hold the tie intact on the collar. To accomplish this result, the patentee provided connection pieces secured to the neckband and small rings or loops at their ends to fit over the collar button.

The specification states:

"The connections, C, C, consist of small pieces of elastic which are secured firmly to the neckband, A, in suitable positions and are provided in the forward end with small rings or loops, C', C', which are adapted to fit over the collar button, D."

The defenses are that the patent is invalid, and, if valid, that its scope must be limited to the precise arrangement shown, and, generally, that the defendant does not infringe. Complainant claims that the features relating to the material composing the connection pieces and the rings at their ends are nonessential; the scope of the claim being broad enough to include the substitution of inelastic bands or tabs with buttonholes at their ends. In other words, that the essential element of the combination consists of the short pieces or connecting portions which are stitched or attached to the inner portion of the neckband at the point where the free ends are looped to form a tie, which connecting pieces are provided with an eye or loop for fastening to the collar button.

The theory of the defendant is that the prior art and the action of the Patent Office, as disclosed by the file wrapper, indubitably show a patent (assuming invention) that is narrow and limited to the precise construction described in the specification and in the drawing attached thereto. This contention renders necessary an examination of the proceedings in the Patent Office upon the initial application of the patentee and also as to the prior state of the art. The original claims were repeatedly rejected by the Commissioner of Patents for indefiniteness, and upon the ground that the connection pieces were not located or sufficiently described in the proposed claims, and the suggestion by the Patent Office of the single claim in suit was finally accepted by the patentee. The record shows that at the date of the invention in suit it was old to construct a cravat in which the ends thereof were left free from strain, so that they could be tied into a bow. In the patent to Graves, No. 294,869, dated March 11, 1884, a method is shown to prevent neckties from rising over a standing collar by using a looped wire fastener, with extending arms, which fitted over the collar button and hooked into the cravat, holding it firmly in place and relieving the bow from strain. In the Gerber patent, No. 276,023, the tabs of the turndown collar described in the specification were also constructed to relieve the free ends of the tie from the strain. In the Bartlett patent, No. 460,259 another method was shown which also operated to accomplish a similar result. In that patent the neckband was divided at the back and the ends of the elastic material were provided with a hook and eye, together with a sliding buckle for fastening and adjustment. In the prior patent to Davies, No. 586,284, the connection piece of the necktie is made at the rear in precisely the same way as in the Bartlett patent, while

at the front there is sewn on the inner side of the neckband a connection piece, which according to the patent may be either elastic or inelastic, and which functionally operated to remove the strain from the free ends of the band. In the later Davies patent, No. 615,813, application filed July 12, 1897, is also shown a method to divert the strain from the knot and to adjust the connection piece which has a ring at its ends under the front collar button. To enable such adjustment a hook is attached at the inner side of the band at the point adjacent to the front collar button which engages the ring. An important reference is the Hirschfield patent, No. 507,401, dated July 23, 1889, which discloses, I think, nearly all the essential elements of the patent in suit, and, moreover, the precise function is achieved therein by equivalent means. True the article of apparel is an outing belt, yet it is analogous to the patent in suit, and practically belongs to the same art. The principle by which the free ends of the sash in the Hirschfield patent are relieved from strain is thought to be practically the same as that adopted by the patentee.

Now, what has the patentee accomplished by his improvement? It may be conceded that he has produced a better functional result, but whether, by attaching the short connections to the inner face of the neckband and by providing rings at their ends which fit over the front collar button thereby diverting the strain from the knot, he has exercised invention, is to my mind doubtful. Assuming, however, the patentability of the Davies invention, I think the scope of the claim in view of the prior art, to which attention has been directed, and the action of the Patent Office, is exceedingly narrow. The rule enunciated in the case of Lehigh Valley R. Co. v. Kearney, 158 U. S. 461, 15 Sup. Ct. 871, 39 L. Ed. 1055, is thought applicable. It was substantially held in that case that, if a patentee acquiesces in the limitations suggested by the Patent Office and the essential elements of the claim are alluded to by reference letters indicating that the Patent Office intended to restrict the claim to the particular device described, a claim to a broader scope cannot be maintained. Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

In the defendant's cravat the means for securing the same to the front collar button differ from the fastening device of the Davies patent in that the cravat has an inner or supplemental band which is integral with the outer neckband and is adapted to button to the front and back collar buttons. The cravat proper and supplemental band are cut or stamped out simultaneously from the same material and suitably folded over constituting a combination of an inner and outer band. The inner band has buttonholes at its ends for buttoning to the front collar button. It may be doubted whether making the cravat and supplemental band with buttoning arrangement in one piece would escape the charge of infringement, yet to my mind the defendant's necktie is more like the Hirschfield belt hereinabove mentioned than the construction in suit. In short, the defendant's article of manufacture is without connection pieces, unless its supplemental band with buttonholed ends would be considered an equivalent of the complainant's fastening device, but in view of the prior art, as already stated,

the patent in suit must be limited to the arrangement described in the patent; that is, to connections secured to the inner face of the tie adjacent to each end portion thereof.

The bill is dismissed.

MERRELL-SOULE CO. v. STAR CO.

(Circuit Court, S. D. New York. March 28, 1907.)

No. 8,953.

PATENTS—INFRINGEMENT—MASKS.

The Merrell patent, No. 727,173, for a mask, is limited to a mask made from a blank of "pasteboard or similar flexible material." As so construed, *held* not infringed.

In Equity. On final rehearing.

Wm. Raimond Baird and Howard P. Dennison, for complainant.

H. Albertus West, for defendant.

PLATT, District Judge. This is a bill in equity for an injunction and accounting, based upon letters patent granted to complainant, No. 727,173, dated May 5, 1903, in which claims 1 and 5 are at issue:

"1. A mask having ears and provided on the inner and outer sides of each ear with interlocking flaps whereby the top portion of the mask is held down, substantially as set forth."

"5. A mask provided at its top with ears and with interlocking top flaps holding the top portion down, and having at its lower end interlocking muzzle-flaps, substantially as set forth."

The unfair way in which the defendant treated the complainant and its patent appeals most vigorously to the conscience of a court of equity. It impels one to grant the prayer of the bill, if such action is, from any reasonable view of the matter, warranted by the facts. What in another case might smack of injustice would here be excusable. But this is a patent suit, and the scope for relief is therefore somewhat limited.

It is our duty to discover what the patentee's inventive conception was, and what he claimed under it. Having found that, it may not be so very difficult to decide whether or not the defendant has trespassed upon forbidden ground. He teaches the public how to take a flat blank of pasteboard, or some *similar flexible* substance, and to provide such material at suitable places with interlocking flaps, so that the blank can be shaped into a mask at the point where the flaps are applied. He then claims a mask (not a mask blank, it is true), but he claims *such* a mask as he has described, and that is a mask made out of a certain kind of blank, and, unless a blank of the kind specified is used, the mask made from it will not be the mask claimed in the patent. Lines 12 and 13 of the specification tell us that the blank is to be made of "pasteboard or *similar* flexible material." (All italics in this opinion are mine.)

He makes plainer what he thought he had invented by showing how a tuck-flap, *i*, can be introduced into a transverse slit, *k*, between the eye openings, so that the mask can be bent more easily into the desired shape. All through the specification one finds that he is directed to select for his blank a material with enough strength and pliability so that it can be bent into certain shapes, and, having been so bent, will be likely to stay where it has been put. With such a construction, there is probably some invention in the patent over and beyond a gauze mask, or the ordinary stiff masks to which we are accustomed. The patentee has found and explained a cheap and easy way to produce a mask, which, to a certain extent, takes the place of the more expensive kinds, and affords an agreeable pastime for children. When we construe the patent in this way, it is impossible to discover the slightest trace of infringement in the alleged infringing devices.

A moment's examination of two exhibits, viz., "complainant's exhibit, defendant's bear mask uncut," and "complainant's exhibit, defendant's bear mask made up," and a comparison of them with other exhibits, ought to settle the entire controversy. With considerable ingenuity, these two exhibits have been given substance and form by pasting the original devices upon cloth, but the original devices themselves are made of cheap newspaper stock. If the uncut device is taken as an entirety and cut out according to directions, one obtains a flimsy cap: and, if the parts which are necessary to form such a cap are removed, the remainder cannot be tortured into an infringement. Understanding the "mask" of the claims at issue to be the kind of mask which has been above suggested, the language in claim 1, "provided on the inner and outer sides of each ear with interlocking flaps," becomes intelligible and means something. The defendant has no such construction.

Counsel for complainant call attention to the fact that the patented masks were put out upon a superior quality of paper, which made it an attractive novelty, but that the defendant has prostituted the *invention* by putting *it* upon paper of the most inferior quality, which can hardly endure the necessary manipulation. It is hoped that, upon reflection, they will see that the complainant *practiced* its *invention* when it used the "superior quality of paper," and that, instead of "prostituting the invention," the defendant *avoided it in toto*, by using such paper as it did use.

Let the bill be dismissed.

BEACH v. HATCH.

(Circuit Court, D. Massachusetts. May 15, 1907.)

No. 63.

PATENTS—SUITS FOR INFRINGEMENT—ACCOUNTING.

On an accounting for infringement of a patent under Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], the defendant's profits and complainant's damages are distinct from and independent of each other and are governed

by different principles, and one is not the measure of the other, and hence both should be found, so that complainant may elect between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 569. Accounting by infringer for profits, see note to 50 C. C. A. 8.]

In Equity. On exceptions to master's report.

John Dane, Jr., for complainant.

Wetmore & Jenner and John Gilbert Hill, for defendant.

COLT, Circuit Judge. This suit was brought for infringement of the Beach patent, and a decree was entered in the usual form for an injunction and reference to a master. The case is now before the court on exceptions to the master's report. The fundamental question raised by the exceptions is whether the ruling of the master on the question of accounting under section 4921 of the Revised Statutes [U. S. Comp. St. 1901, p. 3395] was correct.

In the decree the master was directed to take and report to the court an account of the profits which the said defendant has received or which have arisen or accrued to him from the infringement of the patented invention by unlawfully making, using, or vending the same as alleged in the bill, and to ascertain and report the damages, if any, in addition to the profits which the complainant has sustained thereby since the 26th day of May, A. D. 1891, by reason of the use of the combinations set forth in the first, second, and third claims of said reissued patent.

The master found that the complainant's firm was prepared at all times during the accounting period to supply to customers the Beach machine, embodying the invention described and claimed in the patent in suit, and that the defendant could have purchased in the market two noninfringing Beach machines in place of the two infringing machines used by him during the accounting period. The master further found that the manufacturer's profit which the complainant's firm would have made upon two such machines, if they had been purchased and used by the defendant in place of the two infringing machines, amounted to $529.20. The master then ruled that the complainant was entitled to recover from the defendant this amount. In support of this ruling the master says:

"Where an inventor embodies his invention in working machines and supplies the market with such machines, he is limited in an accounting for profits to an amount equal to the profits which he would have made if the infringer had purchased such machines from him and used them in place of infringing machines. Such use of an invention by an inventor establishes its money value in an accounting for profits and limits a recovery of profits as effectually as an established license fee does. The profits being so limited, and the damages being determined, it is unnecessary to consider the details of profits or their amount, as they can, in no event, exceed the damages which are recoverable."

Under section 4921 and the decree entered in this case the master should have proceeded, first, to ascertain defendant's profits; and, second, complainant's damages. The complainant could then elect to have a decree entered for either profits or damages. Tilghman v. Proctor, 125 U. S. 136, 142–150, 8 Sup. Ct. 894, 31 L. Ed. 664.

As appears from his report, the master ascertained the profits which the complainant would have made on the sale of the two infringing machines, and declined to proceed further, holding that the right of recovery must be limited to these profits. What the master has termed profits are in fact the loss or damages sustained by the complainant. In other words, the master has ascertained the complainant's damages, and has failed to take and report the profits which have accrued to the defendant from the use of the two infringing machines.

The master's finding was correct so far as it proceeded on the theory that the profits the complainant would have made on the sale of the infringing machines was the measure of complainant's damages, in analogy to established royalties or established license fees, which have commonly been held to be the measure of such damages. But the master went further, and ruled that these profits were not only the measure of complainant's damages, but of defendant's profits. In so ruling I think the master lost sight of the fundamental distinction between defendant's profits and complainant's damages. The former are "the profits, gains, savings, and advantages" which have accrued to the defendant by the use of the infringing machines, and which are recoverable on the principle that equity will not permit a wrongdoer to profit by his own wrong, while the latter are the actual damages sustained by the complainant, which are recoverable on the principle of compensation for the loss he has suffered by the wrongful act of the defendant.

It is clear, therefore, that defendant's profits and complainant's damages are distinct from and independent of each other, that they are governed by different principles, and that one cannot be said to be the measure of the other in an accounting under section 4921.

The exceptions, so far as they relate to this ruling of the master, are sustained; and the case is referred back to the master for further proceedings in accordance with this opinion.

NATIONAL CASKET CO. v. STOLTZ.

(Circuit Court, S. D. New York. May 22, 1907.)

PATENTS—INVENTION—FACE PLATE FOR CASKETS.

The Hamilton patent, No. 619,567, for a face plate for burial caskets, consisting of a stretched sheet of transparent nonbrittle gauze fabric, involves much more than the substitution of such fabric for glass, and, in view of the novelty, great utility, and commercial success of the device, must be held to disclose invention; also *held* infringed.

[Ed. Note.—Utility, extent of use, and commercial success as evidence of invention, see note to Doig v. Morgan Mach. Co., 59 C. C. A. 620.]

In Equity. Suit to restrain alleged infringement of United States letters patent No. 619,567, dated February 14, 1899, to William Hamilton for "face-plate for burial-caskets."

See 127 Fed. 158.

Warfield & Duell (C. H. Duell, Frederic P. Warfield, and Holland S. Duell, of counsel), for complainant.

Briesen & Knauth (Hans v. Briesen, of counsel), for defendant.

RAY, District Judge. The claim of the patent in suit reads as follows:

"The combination with a burial-casket, of a face-plate comprising a stretched sheet of transparent nonbrittle gauze fabric."

In the specifications the patentee says:

"My invention relates to face-plates for burial-caskets and is designed to do away with the difficulties arising from the use of glass plates or panels commonly used therein. Where these glass panels are employed they are liable to become broken in the course of transportation of the casket and in falling deface the features of the corpse. Moreover, when such caskets are exhumed, it is often found that the swelling of the wood of which the cover is composed has broken the glass panel. My invention overcomes these difficulties; and it consists in providing the casket with a frame over which is stretched a strip of a transparent fabric—such, for instance, as silk or wire gauze. This nonbrittle fabric takes the place of the glass now ordinarily used. In the drawings, 2 represents the cover of a burial-casket, which may be of any ordinary form and preferably provided with two removable panels, 3 and 4, which are held in place by the usual catches, 5, securing them removably to the cover. Beneath the panel at the head end of the cover I provide a sliding frame, 6, which may be formed of metal or wood and is guided in suitable slots at the sides of the opening. Over this frame is stretched a layer, 7, of some comparatively transparent yielding nonbrittle fabric, such as silk or wire gauze. The frame may be slid back when desired by means of a cord, 8, secured at one end of the sliding frame. It will be understood that the face-plate may be otherwise attached to the cover than by a sliding connection. The advantages of my invention will be apparent to those skilled in the art, since the disadvantages consequent upon the use of a brittle panel, such as glass, are done away with and a transparent panel obtained, which is not liable to breakage due to jars upon the coffin or consequent upon swelling of the wood."

Other advantages flow from the use of this face plate. It admits air, permits the escape of gas, and is light and easily and safely handled. It involves much more than the substitution of a stretched sheet of transparent nonbrittle gauze fabric (of which many kinds may be used) for glass.

Within the case of George Frost Co. et al. v. Cohn et al., 119 Fed. 505, 56 C. C. A. 185, I must hold the patent valid. In my judgment what was done here involved much more of the exercise of the inventive faculty as distinguished from the ordinary skill of the calling than did what was done by the patentee of the Gorton patent, No. 552,470, held valid in the case referred to. In that case Wallace, J., said:

"It is not necessary to the patentable novelty of a device, which consists in employing a new material for an old one in constructing one of its parts, that the substitution should involve the discovery or utilization of an unknown or unexpected property of the material. This is one of the tests of patentable novelty; but it is not the only one. Whether the feature of novelty is the employment of a new material, or a change of adaptation in other respects, the inquiry always is whether what was done involved the exercise of inventive faculty as distinguished from the ordinary skill of the calling. When the substitution has accomplished a result which those skilled in the art had long and vainly sought to effect, the evidence that it involved something beyond the skill of the calling is so persuasive that it generally resolves the inquiry in favor of patentable novelty. Applying that rule to the present case, we conclude that the patent in suit, as regards the claim in controversy, is not invalid for want of patentable novelty."

Gauze fabric had been used prior to the granting of the patent in suit by tacking it to the sides of the opening in the casket to keep out

flies, dust, etc., but it had not occurred to any one to do what the patentee did, stretch a sheet of transparent nonbrittle gauze fabric on a frame and fit this to the casket in the manner described, and thus do away entirely with the heavy, comparatively expensive, and breakable glass face plate. I will not go extensively into the evidence. The patent combines novelty with great utility and commercial success. In a close case these are important and frequently decisive considerations. We have much more than the skill of the mechanic versed in the art. The case is different and stronger for the complainant than when before Judge Hazel.

Infringement is clearly made out, and on the authority cited there will be a decree for the complainant, with costs.

DYER et al. v. CRYDER et al.

(Circuit Court, S. D. New York. April 8, 1907.)

PATENTS—SUIT FOR INFRINGEMENT—PLEADING.

Where a bill for infringement of a patent, in which the patentee and an alleged licensee join as complainants, is challenged by demurrer for misjoinder of complainants, and the bill does not set out the instrument of license nor allege that it is recorded, it should be produced, that the court may determine its legal effect.

In Equity. On demurrer to bill.

Redding, Kiddle & Greeley, Albert M. Austin, and William A. Redding, for complainants.

Morgan & Seabury and Joseph L. Levy, for defendants.

HAZEL, District Judge. The bill alleges that the complainant Leonard H. Dyer, by an instrument in writing, "did give and grant unto your orator, Association Patents Company, its successors and assigns, the exclusive right and license to make, import, sell, and use throughout the United States" automobiles embodying the invention in suit. Defendants have demurred on the ground that there is a misjoinder of parties complainant, and they urge that the license specified in the bill is in effect an absolute conveyance or assignment of the patents. Complainants contend that the written instrument reserves to the patentee, Leonard H. Dyer, the ownership of the patent, and gives to the Association Patents Company merely the right to make, sell, and use the patented article, including an interest in certain profits and damages that may be recovered for past infringements. The assignment or license is not produced for the examination and inspection of the court. The bill contains no averment that the instrument is recorded, but makes alleged profert thereof in these words:

"As in and by said license or a duly authenticated copy thereof here in court to be produced will more fully and at large appear."

In the absence of an allegation that the license or assignment is recorded, it is thought that such instrument should be presented to the court either as a part of the bill or by an equivalent method which

will result in its inspection to enable judicial notice thereof. The authorities cited upon this point by counsel for the complainants (Bogart v. Hinds [C. C.] 25 Fed. 484; American Bell Telephone Co. v. Southern Telephone Co. [C. C.] 34 Fed. 803) refer to a profert of the record of an instrument as being equivalent to annexing a copy thereof to the bill. I am unable to determine from the face of the bill that the written instrument was a mere license, as claimed by complainants. Manifestly the question should not be determined simply upon excerpts from the instrument contained in counsels' brief. If it is important to consider its effect, the entire instrument should be produced for inspection or examination by the court.

The demurrer on the ground of misjoinder of parties complainant is sustained, with costs, and leave to the complainants to amend within 20 days is granted.

In re HUNTENBERG.

(District Court, E. D. New York. May 4, 1907.)

1. INFANTS—CONTRACTS—AVOIDANCE.
   A contract of an infant is voidable only; the infant being entitled to elect whether or not he will avoid the contract, either during minority or within a reasonable time after he reaches majority.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 151.]

2. SAME—CONSIDERATION—RETURN.
   On avoiding a contract, an infant must return the consideration, so far as it may be in his possession.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 157.]

3. BANKRUPTCY—PREFERRED CLAIMS.
   Where an infant obtained a bill of sale from a bankrupt to secure advances, and after his claim of preference by virtue of such bill of sale had been disallowed he elected to disaffirm the same because of his infancy, he was then only entitled to prove his claim for advances as a general creditor.

4. SAME—WAGES.
   A claimant against a bankrupt's estate is not entitled to a preference for wages earned more than three months prior to the commencement of the bankruptcy proceedings, as provided by Bankr. Act July 1, 1898, c. 541, § 64, subd. 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

In Bankruptcy.

Isidor Buxbaum, for claimant.
Richard P. Aldcroftt, Jr., for trustee.

CHATFIELD, District Judge. In this proceeding one Henry Batter filed a claim for $1,020 cash advances made to the bankrupt between the 8th of April, 1905, and the 20th day of July, 1906, and a claim for wages for eight weeks, amounting to $104, for services rendered to the bankrupt. The advances of cash were loans made to the bankrupt while he was conducting a grocery store. On or about August 20, 1906, the bankrupt executed and delivered a bill of sale to the said Henry Batter, which was duly filed August 20, 1906, and covered the stock, chattels, fixtures, horse, wagon, etc., of the grocery business above referred to. On the 13th day of September, 1906,

Christian Huntenberg was adjudicated a bankrupt, and thereafter a receiver was appointed, who took possession of the property. A sale was had, and the proceeds retained by the receiver pending the determination of the rights of the said Henry Batter to the proceeds of the sale in place of the said store.

The record shows that the said Henry Batter filed a claim with the referee as a preferred creditor because of his bill of sale, and this claim for priority was disallowed, inasmuch as possession of the property was not given at any time prior to the bankruptcy. The claimant, Batter, was not in possession when the receiver took the property into his charge. The claimant has now obtained an order directing the trustee to show cause why the various amounts claimed by him should not be paid by the trustee, and sets up the proposition that he was and has been at all times an infant; that as such his contract, evidenced by the bill of sale, was voidable; and that he desires to exercise the privilege of an infant and to rescind the contract. This he claims renders the transaction absolutely void, and entitles him to the return of the money advanced and the amount due as wages.

Upon the return of the order to show cause the matter was referred to the referee in bankruptcy as special master, and he has reported that, of $104 claimed as wages, $96 was for a period some three months before the bankruptcy, and that for this the claimant is not entitled to a preference; that as to the advances made the infant, Batter, having abandoned his claim of title under the bill of sale, should be treated on the same basis as the other creditors. The special master reports that the claimant testified that he had been working at the store at various periods before the bankruptcy, that he made the advances above referred to to help the bankrupt out when he was "way behind" and had to do something to "keep up," and that therefore the said Henry Batter knew of the insolvency at the time of the bill of sale, and that the said bill of sale was given to Batter for the purpose of creating an unlawful preference. The special master reports that under the bankruptcy act he finds no authority allowing an infant the right to rescind a contract and obtain priority thereby, and therefore recommends that the claimant, Batter, receive the sum of $8 wages, and that as to the other amounts he should be treated as a general creditor.

The report of the special commissioner should be confirmed, and the matter disposed of as found by him, on all of the grounds, unless the infancy of the claimant allows him to obtain different treatment from that which an adult would receive. It is undoubtedly true that an infant's contract at one time was considered absolutely void; but the tendency of the law has been to regard contracts and transactions of infants as voidable only, and at the present time the infant has no more than a right to elect whether or not he will avoid the contract, either during minority or within a reasonable time after he reaches majority. Tucker v. Moreland, 10 Pet. 58, 9 L. Ed. 345; MacGreal v. Taylor, 167 U. S. 688, at page 696, 17 Sup. Ct. 961, at page 963 (42 L. Ed. 326). On avoiding the contract, the infant must

return consideration, so far as it may be in his possession. MacGreal v. Taylor, supra.

The reason for this doctrine is that courts of law, in giving an infant the right to avoid his contract, have acted as if exercising the original chancery jurisdiction relating to infants' estates. In trying to do equity, and in determining what relief can be granted, the court considers whether the parties can be restored to their original positions, or whether innocent third parties have acquired rights to the property. In doing this the court aims to protect the infant, and not allow him to be taken advantage of before he reaches the age at which he becomes responsible for all of his conscious transactions. But the bankruptcy law is intended for the relief of an honest bankrupt, and at the same time for the protection of his creditors, and equal distribution of whatever assets he had within the times covered by the provisions of the statute. As between the bankrupt and the infant, the contract certainly could be avoided, and the infant restored as far as possible to his original position. A conveyance showing the giving of title by an infant, or a transfer subject to equities, could be avoided, and the property followed in the hands of third parties; but it is considered never to have been the law that if the property cannot be traced, or if the person with whom the voidable contract was made did not have it in his power to make restitution, transactions with innocent third parties could be opened in order to find property with which to reimburse the infant. And so in the present case, the creditors' rights having intervened, and the status of all the parties having been established by the filing of a petition in bankruptcy, the infant's contract can be avoided only to the extent of allowing him to prove a claim to the amount of his advances, for money had and received.

An infant may avoid a usurious contract, and sue for a loan under a contract for money had and received. Millard v. Hewlett, 19 Wend. (N. Y.) 301. Upon such a claim he would share with the other general creditors. This is in effect giving him his privilege as an infant to revoke his contract. Without such privilege he would be compelled to stand upon what he received from the bill of sale; and this being fraudulent, and he apparently having knowledge of the transaction, he might have no claim which could be proved as against the other creditors for his advances. It would seem that all the right which could be claimed by him is to be protected from the consequences of his knowledge of the bankrupt's situation, and to be allowed to put in his claim for the money he paid in return for the bill of sale.

As to the wages, also, it is evident that the amount of $96 thereof is outside the provisions of subdivision 4 of section 64 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), and therefore not a preferred claim.

SPECKMAN v. SMEDLEY BROS.

(District Court, E. D. Pennsylvania. May 27, 1907.)

No. 1, September Session, 1905.

1. ASSIGNMENTS—EQUITABLE ASSIGNMENTS—EVIDENCE.
   Defendants testified that P., before becoming a bankrupt, arranged to pay defendants their full claim of $5,400 when the United States paid P. the final balance due to him on a claim then pending; but no definite amount was agreed on to be paid to defendants, nor was the "arrangement" recognized by the government—the disbursing officer only promising to notify defendants when settlement was to be made, so that they might be present. At the settlement a check for $5,000 was made payable to the bankrupt, which was turned over to defendants; the bankrupt refusing to pay more. *Held*, that such facts were insufficient to constitute an enforceable equitable assignment.

2. JUDGMENT—NON OBSTANTE VEREDICTO.
   Where, in a suit by a bankrupt's trustee to recover an alleged preferential payment, defendants filed no plea in abatement raising the point that a partnership existed between the bankrupt and another who was interested in the fund, and such point was not made by affidavit of defense or notice of special matter accompanying the general issue pleas, it could not be raised for the first time on motion for judgment non obstante.

In Bankruptcy. Motion for new trial, and motion by defendant for judgment notwithstanding the verdict.

Edmund W. Kirby, for plaintiff.
Henry K. Fries, for defendants.

J. B. McPHERSON, District Judge. This suit is brought by the trustee in bankruptcy of George W. Pierson to recover from the defendants an alleged preferential payment of $5,000, which was admittedly made in September, 1903, less than one month before the petition was filed. The verdict was for the plaintiff, and establishes the facts that the bankrupt was insolvent when the payment was made, and that the defendants had reasonable cause to believe that a preference was thereby intended. A question of law is now to be decided under the reserved point, namely, whether the payment in September was made to carry out an equitable parol assignment of $5,000, which is said to have been made early in 1903 out of a fund which the bankrupt then claimed to be due him from the United States. This fund was paid to the bankrupt in the following September, and out of it the defendants received the $5,000 that is now in dispute. Upon this question I have only to say that I have considered all the testimony that bears upon it, and am clearly of opinion that it is much too vague and uncertain to be submitted to a jury. If they had been allowed to take it into account, and had found in favor of the defendants on this issue, I should think it my duty to set the verdict aside. There was some loose testimony about an "arrangement" by which the defendants were to be paid their full claim of $5,400 when the United States paid the final balance due to the bankrupt; but it is clear that no definite amount was agreed upon, that the "arrangement" was not recognized by the United States, and that the bankrupt never lost his control over the fund. Evidently the bankrupt merely prom-

ised to pay the defendants when he received this balance, and the disbursing officer of the government merely promised to notify the defendants when the settlement was to be made, so that they might be present at that time. A check for $5,000 was made payable to the bankrupt, who refused to pay more; and it is, I think, quite clear that the "arrangement" was nothing more than the usual promise of a debtor to pay when he shall be in funds, followed by the creditor's effort to hold him up to his promise, and by the debtor's effort to get off with as small a payment as possible. Such an "arrangement" falls short of being an enforceable equitable assignment. When the defendants really set out to obtain a valid assignment, the testimony in reference to another claim against the bankrupt shows that they knew what they needed.

The defendants seek to raise another question of law upon the motion for judgment, based upon the meager testimony concerning a partnership of one kind or another, which is said to have existed between the bankrupt and a man named Stewart. It is argued that the preferential payment was made out of a fund that belonged to Stewart and the bankrupt as a firm, and therefore that the plaintiff—who is the trustee of Pierson alone, no petition having been filed against the firm—has no right to recover in this action. In my opinion, however, this defense is made too late. It concerns the character in which the plaintiff sued, and in correct practice should have been made earlier in the cause, probably by plea in abatement. But no such plea was filed, and even under the liberal practice in Pennsylvania it is impossible to overlook the fact that this defense was not referred to in the affidavit of defense, or in the notice of special matter which accompanied the general issue pleas. In consequence, the plaintiff had no notice of this point until the trial, and even then, as the record shows, the defendants' chief reliance was upon the making of an equitable parol assignment early in 1903. I do not think, therefore, that the defendants should be allowed to take their chance of a verdict on the principal issue, and practically to reserve the question of partnership, in order to use it in case of failure to maintain their principal contention successfully. It is to be considered, also, that the money recovered by the plaintiff will be under the control of the District Court, which may be relied upon to see that it goes to the creditors that are justly entitled to receive it. At all events, the defendants, having obtained the money in violation of the act of Congress, and having waived whatever technical objection to the suit they may have had, by failing to put such objection forward at the proper time, should not be allowed to retain the money.

The motions for a new trial and for judgment notwithstanding the verdict are refused. To the refusal of judgment in favor of the defendants upon the reserved point an exception is sealed.

EARLE BROS. v. UNITED STATES.

(Circuit Court, S. D. New York. February 27, 1907.)

No. 4,313.

1. CUSTOMS DUTIES—CLASSIFICATION—BALATA—INDIA RUBBER.
   Crude balata is "india rubber, crude," within the meaning of Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 579, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684].
2. SAME—"INDIA RUBBER"—COMMERCIAL DESIGNATION.
   The term "india rubber," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 579, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684], has a commercial meaning that includes nearly a hundred varieties of inspissated vegetable gums, among them balata, which are used in the manufacture of what are commonly known as "rubber goods."

   [Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

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

Henry W. Rudd, for importers.
D. Frank Lloyd, Asst. U. S. Atty.

HOUGH, District Judge. The subject of this appeal is the gum or juice of the balata or "bully" tree. Its nature and dictionary definitions have been fully set forth in T. D. 23,599 and 26,751. The collector assessed duty upon this substance as a nonenumerated unmanufactured article under paragraph 6 of the tariff act of 1897 (Act July 24, 1897, c. 11, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]), and his assessment has been affirmed.

The importers claim that it is entitled to free entry as "india rubber crude," under paragraph 579, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]. It is abundantly shown by the treasury decisions cited, and indeed is not denied, that botanically the balata or "bully" tree is different in species, if not in genus, from that to the gum of which the term "india rubber" was first applied upwards of 130 years ago. But under the rule that in laws relating to the revenues words are to be taken in their commonly received and popular sense, or according to their commercial designation, if that differs from the ordinary understanding of the word (United States v. Buffalo Gas Fuel Co., 172 U. S. 341, 19 Sup. Ct. 200, 43 L. Ed. 469), the importers contend that the trade and commerce of the United States did not know, nor was there indeed anywhere known at the time of the passage of the present tariff act, any one kind or variety of vegetable gum or juice identified or described or actually designated by the words "india rubber crude." It is further asserted that "india rubber" was in 1897, and still is, a term used to designate nearly an hundred varieties of "inspissated vegetable gums" capable of use and actually used in the manufacture of what are commonly known, and in 1897 were commonly known, as "rubber goods." This particular gum is, and long has been, used for making dress shields and machinery belting, both of which articles are commonly described as "rubber shields" and "rubber beltings."

In my opinion these contentions of the importers have been abundantly sustained by the testimony introduced in this court. I think it must be assumed that the framers of the tariff act knew that there was a great variety of gums generically and commercially described as "india rubber," and within that category balata is fairly included.

The decision of the Board of Appraisers is reversed.

SVEA INS. CO. et al. v. VICKSBURG, S. & P. RY. CO.

(Circuit Court, W D. Louisiana. February Term, 1907.)

1. INSURANCE—PAYMENT OF LOSS—SUBROGATION OF INSURER.

An insurance company, which paid a loss to the owners of cotton destroyed by fire, is subrogated to the right of such owners to maintain an action against a railroad company to recover damages, on the ground that the fire was caused by its negligence; such action being subject to the same defenses that might be invoked against the owners of the cotton had it been brought by them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1506.]

2. NEGLIGENCE—ACTIONS FOR DAMAGES—DEFENSE OF CONTRIBUTORY NEGLIGENCE.

In such an action, contributory negligence of a compress company, which had possession of the cotton as bailee at the time it was destroyed, is imputable to the plaintiff, and constitutes a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 130, 140.]

3. RAILROADS—FIRES—SUFFICIENCY OF EVIDENCE OF NEGLIGENCE.

A verdict holding a railroad company liable for the value of cotton destroyed by fire, on the ground that the fire was negligently caused by one of its engines, *held* not supported by the evidence, on the ground that, while it warranted a finding that the fire was caused by sparks from the engine, it did not support a finding either that the engine was improperly constructed or defective, or that it was negligently operated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1733, 1735.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover damages for negligently setting fire to and destroying a quantity of cotton in the operation of one of its engines, it was shown that, however well constructed an engine might be, or however carefully it might be operated, sparks would be thrown from its smokestack which would endanger inflammable material within a distance of 30 or 40 feet; that the cotton was at the time in the possession of a compress company as bailee of the owners, which company, with the consent of defendant, had extended the platform next its building over defendant's right of way to within less than 10 feet of a yard track on which the engine alleged to have set the fire was engaged in switching cars; and that the cotton in bales was piled on such platform. It was, also, shown that the compress company kept barrels of water at hand, and employed a watchman, whose duty it was to keep the barrels filled, and to keep watch and guard against fire. At the time of the fire, the watchman had gone away in violation of his duty, although both he and the manager of the compress who was in the building knew that the engine was being operated on the track. If he had been present, it appeared probable that he would have discovered and extinguished the fire before damage was done. *Held*, that the compress company, in so constructing its platform and placing the cotton thereon, assumed such risk as arose from the operation upon defendant's track of a properly equipped engine operated with due care and regard for the exposed cotton, and it

was its duty to guard against such risk; that its failure to have a watchman on duty, as it had undertaken to do, tended strongly, if not conclusively, to establish the defense of contributory negligence and preclude a recovery against the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1681.]

At Law. On motion for new trial.

The following is the charge to the jury:

The plaintiff, a fire insurance company, having paid $4,375, the sum for which it insured the compress building, and having paid $55,506.92, its loss on 1,150 bales of cotton which were destroyed by fire while in possession of and on the platform of the compress company, is now entitled, as the subrogee of the several persons to whom the losses were paid, to sue defendant company for damages on the cause of action declared on in the petition. The plaintiff company is seeking to recover as damages against defendant railway company the sum of money which it paid its several assignors. The allegations of the petition show that through or by defendant's negligence flying fire sparks from defendant company's engine caused the fire which fell upon and destroyed the cotton. Under the view of the court the plaintiff company, as the subrogee, is entitled to sue the defendant company for damages under the same rules of law, substantially, that would have or could have rightfully been invoked by or against the owners of the destroyed cotton on the trial of a suit instituted by themselves charging the railway company with negligence. The court, now considering and disposing of the issue as to the liability of the defendant company for the amount paid by the insurance company to the compress company for its fire loss on its building, charges you that no recovery on that demand can be had against the defendant company. The court is of the opinion that the terms of the contract exhibited to you between the compress company and the railway company in relation to it, the compress company being permitted to extend its platform on and over the railway's right of way, forbids the compress company to claim damages in this case.

There are several issues of fact suggested in the evidence, upon which are founded the contradictory contentions of counsel on either side of this case. The burden of proof is on the plaintiff to establish by a preponderance of proof its contentions on the material issues.

The plaintiff contends that the preponderance of evidence shows that flying sparks, thrown from the smokestack of defendant's engine, fell upon and set fire to the cotton in question. It contends that the defendant railway company was guilty of actionable negligence in carelessly operating its engine at the time such fire sparks fell upon and set fire to the cotton. It contends that, considering the character of the work the switching engine was engaged in and the environmental surroundings in the midst of which the engine was switching cars, the defendant was guilty of negligence, because the engine operated by the railway company, at the time the flying fire sparks fell upon the cotton, was not such a reasonably safe engine in its equipments as the railway company should have used in doing such work as they were doing at the time and place in question. It contends that the spark arrester then being used in the engine was so defective or faulty in its construction, or damaged by use, that such large and dangerous inflammatory flying fire sparks were thrown from its smokestack, as would not or should not have been thrown from the smokestack of an engine with a spark arrester in a reasonably safe condition. Plaintiff contends that the unusually large, dangerous, flying sparks were thrown from the smokestack onto the cotton because of the defendant's negligence in using a spark arrester which was in a bad and damaged condition. It contends that, considering the situation and surroundings present and known to the engineer, the engineer, at the time the flying sparks from his engine fell upon and destroyed the cotton, was operating his engine carelessly, and in so doing he was then guilty of negligence, which was the proximate cause of the fire. It contends that the careless operation of the switching engine is shown by the rapid speed at which it was running

and by the excessively hard exhaust of its engine, when close, alongside of, or near to the compress platform.

On the other hand, the defendant denies all the plaintiff's contentions on such material issues, and says its engine in use at the time of the fire was well constructed and all its equipments were in good condition and reasonably safe for any work it might be engaged in, and that its spark arrester was of the best approved construction, and an inspection made by witnesses in court, a few hours after the fire, showed that it was in good condition and repair. The defendant railway company contends that there was no actionable negligence in the operation of the engine at or near the compress building platform. It says that the undisputed evidence in the case shows that, however carefully an engine may be operated, or however perfect the spark arrester may be, or however good its condition may be, fire sparks will fly from a running engine's smokestack, and may endanger inflammable material within the range of these flying sparks. It shows that such facts were well known to the compress company when it constructed its platform several feet on and over the railroad's right of way, as well as they were to the engineer, who frequently or daily had to run his switching engine close alongside of the compress platform, where more or less cotton bales were often lying on the platform. The defendant company says that the engineer then running the engine is shown to be a careful, skillful engineer, and that he swears that, with a full knowledge of such conditions, he, on that day and at that time, as on other days, ran his engine, when near the compress building, carefully, to avoid and lessen the danger, as far as practicable, of setting fire to the inflammable things in the midst of which he had to do his daily switching work in the railway yards. The defendant company contends that, if flying sparks from its engine set fire to the cotton, such sparks were only of such character as in the nature of things might fly from the best-equipped engine, and it was not in any way guilty of the negligence which was the proximate cause of the fire and loss therefrom.

The defendant, for its further defense, says the plaintiff company, chargeable in this action, as it should be, with the carelessness of the compress company, was guilty of contributory negligence, which was the proximate cause of the loss, by the cotton exposed and unprotected, as it was, on the compress platform. It contends that Miller, who was the superintendent of the compress company, knew of the place and inflammatory condition of the cotton at the particular time the engine was switching close, within a few feet, along the side of the compress platform, and he knew of the danger to the exposed cotton from the fire sparks thrown from the engine. The defendant says that Miller, a witness, says he heard flying fire sparks falling on the compress roof, and that he had been, only a few minutes before the fire, on the platform, tagging the cotton bales on which the fire began. The defendant contends, on this view of Miller's evidence, that the compress company was guilty of contributory negligence in not being more vigilant in protecting the cotton from flying fire sparks. The defendant contends that the plaintiff company, knowing, as it did, the danger of fire from its own machinery, as well as from flying fire sparks thrown from passing engines, even where such engines may be free from actionable negligence in throwing fire sparks from its smokestack, was chargeable with the duty of exercising prudential or reasonable care in caring for and protecting its patrons' cotton, left on the platform, from such dangers of fire as were in the nature of things inherent in or incidental to the operation of the railway company's engines, and manifestly incidental to the physical environments of the place. The defendant contends that this failure of the compress company, under such circumstances, to exercise reasonable care in so protecting the cotton left on its platform, makes plaintiff company guilty of contributory negligence.

The railway company shows that the plaintiff company, having projected its platform over the railroad's right of way, which platform it daily used for receiving and shipping its cotton over the railway, in or from its own view of the constant danger in the environments, and from its own proper sense of duty to its patrons, whose cotton bales were left exposed on the platform, had at the moment of the fire for its use, as it had during the working season, a number of water barrels filled with water ready to use in ex-

tinguishing fire sparks that might fall in or about the cotton, and the plaintiff company, to promptly meet emergencies, had in its employment, and had on the day of the fire, a man by the name of Butler, whose only duty, it seems, was to keep the water barrels filled and put out flying sparks from passing engines that might endanger the cotton. Butler's own evidence shows that he was in the building 15 or 20 minutes before the fire. He had filled some barrels with water. His duty was to keep barrels filled and look after fire—to notice sparks and cinders. He says he happened to slip off from Capt. Miller that day, and "the train came in on me. I knowed it was my duty to stop then, for it was my business to look out for sparks." He says the captain always told him to keep a lookout for sparks when the engine was running on the compress track. He says he was some distance away from the compress when the fire occurred, and couldn't get back. Just before the fire he slipped away. He says, if he had been up there with a bucket of water, he could have done something to put the fire out. He says it was a matter of general talk and notoriety that there was danger when there was switching in there, on account of cotton being close to the track, and he was there especially to watch the cotton.

The argument of defendant company's counsel suggests that Butler's evidence, offered by counsel for plaintiff company, shows that the compress company, in employing Butler and assigning such special service to him, was manifestly giving expression to its interpretation and appreciation or understanding of the dangers inherent in the mutual relations of the two litigant companies; that in so using its employé, Butler, it showed its knowledge of and assumption of such dangers and risks as would menace its cotton, even when the railway company was running its engines over the compress track with all reasonable care for the situation. The defendant contends that, if flying sparks from its engine were thrown on the cotton, whether such sparks were large or small, and Butler had been present, as it was his duty to be present, to perform the work assigned to him by his employer, the compress company, all danger from such flying sparks would have been avoided. It contends that he would and could have extinguished the spark, or several sparks, which by his negligence ignited the cotton. The evidence seems to show that the fire occurred just after Miller heard the sound of falling cinders on the metal roof, and at the time when Butler, as he says himself, was away from the place or his post of duty.

Taking up the material issues of fact, I suggest to you that you determine first whether or not sparks from the defendant's engine set fire to the cotton. Of course, you will go no further, if you find adversely to the plaintiff company on that issue. Next take up the issue of contributory negligence on the part of the plaintiff company. I suggest that you, secondly, consider that issue, because, if you find adversely to the plaintiff—that is, if the plaintiff was guilty of such contributory negligence as was the proximate cause of the fire loss—the plaintiff cannot recover. In any view you may take of the facts, there can be, for our purposes, but one proximate cause of the damage or injury in this case. The proximate cause of the fire may not under the evidence be chargeable to either party in this suit. The fire may have occurred without actionable negligence of defendant company, or it may be of either party to the suit. The plaintiff company, in order to hold the defendant liable, must show you by satisfactory proof that the proximate cause of the loss or damage sued for was in the negligence of the defendant company. The defendant company may, in your view of the evidence, be guilty of some negligence; but, to charge and hold it liable for damages, the evidence must show that its negligence was the proximate cause of the loss.

Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant, by implication of law or in the nature of things, owes the duty of observing ordinary care and skill, by which neglect plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The proximate cause, in the law of negligence, is such a cause that approximately produces the particular consequence without the intervention of any independent, unforeseen cause, without which the injury would not have occurred.

So much has been said by counsel as to the spark arrester not being ex-

hibited in court that it may be well for me to say that the presence or absence of the spark arrester may be a circumstance more or less suggestive of flying fire sparks from zealous, heated, contentions of learned counsel; but it is hardly a material issue for you, gentlemen, to worry about. The defendant company has shown you by several eyewitnesses its condition a few hours after the fire, when it was inspected by them. If the spark arrester was in the court, its identity would have to be shown by oral evidence—possibly by the same eyewitnesses. The defendant has shown you its condition by oral evidence. You may believe such witnesses, if you choose, just as you might or might not believe eyewitnesses to its identification.

Now, reverting to the conflicting disputes of counsel, I charge you, if you find from the evidence that the defendant railway company was guilty of negligence in using a spark arrester which was not a reasonably good implement for its uses at the time and place, to wit, at the time of the fire, and because of its faulty condition of construction or want of repair inflammable fire sparks of an unusually large and dangerous kind were thrown out of the smokestack, so as to set fire in the cotton, and you believe that the defendant railway company, in using such a faulty spark arrester, was guilty of negligence, which the evidence shows was the proximate cause of the fire, you should find for the plaintiff company. I charge you it is the duty of the railway company, in the equipment of its engines and operation of its engines, to use ordinary care and diligence to prevent fire from being communicated from such engine to the property of other persons. By ordinary proper care and diligence is meant such a degree of care and diligence as careful railroad men, such as trained engineers, should, from a proper, reasonable sense of duty, exercise under the conditions or circumstances where or in which they may be operating.

The degree of care and diligence required in a case like this should be commensurate to or proportionate to the amount of danger probably consequent in a failure to exercise such care. A failure to exercise reasonable care in the discharge of a duty implied in or by the pending conditions is negligence, and, if such failure to exercise reasonable care was the proximate cause of the fire, the defendant would be liable. If you find that the engineer, at the time flying sparks are said to have fallen on the cotton, was guilty of negligence in carelessly operating his engine, and you believe that to said negligence is chargeable the proximate cause of the fire, you should find for the plaintiff. If you believe the spark arrester in the engine was reasonably well constructed and was in good condition of repair, even though some flying sparks may have fallen in the cotton, you should not find defendant guilty of negligence.

You will observe that I say, even though some flying sparks from the engine may have fallen on the cotton, defendant may not be liable. I say that because it is conceded substantially by counsel that flying sparks may be thrown from a running engine, however well constructed it may be, or however good its equipment may be. In view of the environmental conditions or surroundings at the place and time of the fire, if you find that the engineer, in operating the engine reasonably safe in its equipment, was running it carefully and with reasonable care for the conditions about him, even though some sparks may have been thrown from the smokestack of the engine, you should not find the defendant liable for damages. You will note that I say this to you because the defendant company, when or while it may be carefully or skillfully using a well-equipped engine, is or was engaged in the lawful exercise of its railway work, and in so running its engine it was minimizing, as far as practicable, the dangers of the situation. I say this, too, because it was not the legal duty of the defendant company, in using its implements of industry in its own railway yards, to eliminate all elements of possible danger in or to the things in or of the situation. To require such an elimination of danger would be tantamount to prohibiting the use of its engines in railway yards, in or near which men may erect or carry on a cotton compress plant. In addition, I say this to you because, even under the most careful and skillful operations of a well-equipped engine, running within a few feet of such a number of cotton bales, exposed as that cotton was on the compress platform, all elements or degrees of danger from flying sparks cannot be eliminat-

ed, and in the nature of things there will, even under such favorable conditions, or may be at any time some remaining degree of danger of flying fire sparks falling on inflammable material. To state it differently: After such danger as seems to be inherent in operating an engine, under such conditions as were in the situation when fire was set to the cotton, has been or is diminished as far as may be practicable by careful equipment and management of the engine, it appears from the evidence there may remain or be left some degree of possible, or maybe probable, danger. In such a state of case the risk of such danger as may so remain, whatever it may be, is or was assumed by the compress company, when it built its platform over the railroad's right of way.

As between the parties to this suit, the contributory negligence of a bailee of cotton, whereby it was consumed by fire proceeding from a railway engine, is imputable to the owners of the cotton. If you find that the plaintiff company, through the fault of the compress company, for which it is chargeable, was guilty of contributory negligence, in not with reasonable care looking after and protecting the cotton from such dangers as were known by or to the compress company's servants to be inherent in the physical conditions of the time and place, and you believe such contributory negligence was the proximate cause of the fire loss, you should find for defendant company. In considering the matter as to the contributory negligence of the plaintiff company being the proximate cause of the fire sparks igniting and consuming the cotton in question, you will see that counsel for defendant company says that plaintiff company was guilty of contributory negligence, after the fire sparks fell on the cotton, in not extinguishing the fire sparks that fell upon and ignited the cotton. It contends that the engine was of good construction and repair, and was, in fact, being operated with reasonable care, and, if flying sparks from the engine did fall on the cotton, there was no actionable negligence chargeable to the conditions of or the operation of the engine; but the compress company was guilty of negligence in not meeting that danger, it being one of its assumed dangers, and extinguishing the fire sparks before they ignited the cotton. If you believe this contention established by the proof in the case, you should find for the defendant company.

In the nature and reason of things, both litigant parties knew they were charged with mutual duties towards each other. Your knowledge of the evidence may or should enable you to see how or in what manner the parties respectively understood and construed the relations to each other, when engaged in the exercise of their lawful industrial activities. Such knowledge should have a persuasive value in enabling you to determine one way or the other the issue of negligence. Such duties as I speak of are not of a statutory nature. They are formulated in the reasonable relation of things, and inhere, if they exist at all, in the implications of law regulating the conduct and duties of men towards each other. Such duties are implied in the thought, common to all of us, that a man engaged in the pursuit of lawful industries should use all the means at hand, reasonably necessary, under the circumstances, to avoid injuring another.

In my purpose to consider and advise you on some matters suggested in some of the requests for instructions submitted by counsel, I want to add that the undisputed evidence, illustrated as it is by the argument of counsel on either side, seems to show that the compress company, in the nature of things, or in its relations to the defendant railway company's daily operation of its engines over the tracks of its own yard, assumed more or less of the risks manifest in or inherent in the dangers from flying sparks to which its cotton was exposed when stored or lying on the compress platform. The evidence shows, too, as we have seen, that there was some degree of danger manifest in or inherent in the situation which threatened the compress company's cotton every time a passing engine ran over or near to the compress switch track, which could not be eliminated or entirely avoided, even though such engine was free from fault in its construction or equipment and operation. The evidence, as I have said to you, shows that there were some risks, manifest in or inherent in the dangers of the situation, which could not be eliminated from the activities of a well-equipped passing engine, operated with due regard to the inflammable cotton on the platform. Such

risks as are suggested in this view of the evidence were assumed by the compress company, and, if you find that flying fire sparks fell upon the cotton from defendant's engine at a time when it was being operated with such reasonable care as I have mentioned, the defendant railway company cannot be held liable for the fire loss.

On the other hand, if you believe the passing engine was not of reasonably good construction and equipment, and such fire sparks were thrown from its smokestack on the cotton as should not or would not have been thrown upon the cotton from a well constructed and equipped engine, the defendant company is liable for the fire loss. Again, if you believe the passing engine, though reasonably well constructed and equipped, was not at the time and place carefully operated, and the defendant company's negligence was the proximate cause of the fire loss, the defendant company is liable for the sums paid by the Svea Insurance Company to the several owners of the cotton.

A. A. Armistead, M. C. Elstner, John Land, and E. T. Lamkin, for plaintiffs.

Wise, Randolph & Rendall, for defendant.

BOARMAN, District Judge. The plaintiff, a fire insurance company, having paid fire losses to the several owners of 1,150 bales of cotton amounting to $55,506.92, which was stored and destroyed in a compress building, now, as subrogee of the several owners of the cotton, sues the defendant railway company in action or tort for damages. The plaintiff company, also, in this action, sues to recover $4,375 paid by it on a fire loss to the owners of the compress building.

Under the view of the court, the plaintiff company, as subrogee, is entitled in this cause of action, to sue the defendant company for damages under the same rules of law, substantially, that would have or could have been rightfully invoked by or against the owners of the destroyed cotton on the trial of a suit instituted by the said owners for themselves, charging the defendant railway company with such actionable negligence as was the proximate cause of the fire loss. The court now, considering and disposing of the issue as to the liability of the defendant company for the amount paid by the plaintiff company to the compress company for its fire loss on its building, is of the opinion that no recovery on that demand can be had against the defendant company.

The terms or conditions of the contract between the compress company and the railway company, in relation to the compress company being permitted to extend its platform on and over the railway's right of way, forbids the plaintiff company to recover damages in this case against the defendant railway company. The owners of the cotton in question consigned the same to the compress company for the purpose of having it compressed. As soon as the cotton came into its possession, and as long as it so remained, I think the compress company occupied the relation of bailee for, or to, the owners of the cotton which was destroyed by fire while in the possession of the compress company. For the purposes of disposing of this matter, the plaintiff insurance company will be treated as if, in law and fact, it stood at the time of the fire, as the compress company did, in the relation of the bailee of the owners of the cotton in question.

Considering, for the purposes of the pending matter, the legal relations of the parties to this suit to be as I have just suggested, it fol-

lows that the plaintiff company was charged, as between itself and the defendant company, with more or less of the duties which are by law or in the nature of things imposed on a bailee.

On the trial of the merits of this case, the burden of proof was on the plaintiff company to show, by a preponderance of evidence: First, that the cotton which was destroyed in the fire was set on fire by flying sparks thrown from the defendant company's engine, which at the time was being operated in its railroad yard on tracks near to or running lengthwise alongside of the compress company's platform. Second, that considering the nature of the physical conditions and environments of the immediate place and locality in which the engine was engaged in switching work, and considering the degree of reasonable care with which the law, under the conditions and circumstances of the moment, charged the defendant company, the spark arrester of the engine was not such an instrumentality as the defendant company, in response to its legal duty, should have had in its use, and the railway company in using such a defective engine at the time and place was guilty of actionable negligence. Third, that the engineer, in operating the engine, was guilty of such negligence as was the proximate cause of the fire loss of the cotton on the compress platform.

On the trial of the case, it appears that the weight of the evidence fairly supported the first proposition; that is, that the fire was caused by flying sparks thrown from the engine falling on the exposed cotton lying or stored on the compress platform. I think it was equally as clear from the evidence that the spark arrester of the engine from which the flying sparks were thrown, so as to ignite the cotton, was reasonably well constructed, and was then in a reasonably safe condition for the company's use.

It seems that all the witnesses having any personal knowledge of the conditions of the spark arrester or of the engine being operated, at the time of the fire, uniformly state in their evidence that the spark arrester was well constructed and was kept in, and was at the time in, good repair. It appears, too, that all the witnesses connected with the operations of the engine, contemporaneously with the fire, uniformly stated that the engine was being operated by the engineer on that occasion, with reasonable care and consideration for the conditions and environments of the situation and locality. These expressions of the court's opinion, on the law and issues of fact involved in the three propositions named, seem sufficient to authorize the granting of a new trial; but I desire in determining the pending matter to give expression to the court's view as to the special contention of counsel for the defendant company, that the compress company, as bailee of the cotton in question, was guilty of contributory negligence, which was the proximate cause of the fire loss, and which should, in passing upon this matter, be charged to the plaintiff company.

As between the parties to this suit, I think the contributory negligence of a bailee of cotton, whereby it was consumed by fire proceeding from a railroad engine, is imputable to the owners of the cotton.

The insurance company readily paid the losses to the owners of the cotton. As between the insurance company and such owners, it may be that no legal defense against paying them could have been success-

fully grounded on the negligence of the compress company in not avoiding or extinguishing fire sparks which set fire to the cotton while the compress company, as bailee, was handling the same. Let that be as it may, it does not follow that if the owners of the cotton, being without insurance on this cotton, were now suing the defendant railway company for damages because the cotton was set fire to by flying sparks from the defendant's passing engine, such a litigant should recover against the railway company under the evidence in this case and under the rules of law applicable thereto.

The relations and mutual obligations of the litigants in a suit by the owners of cotton to recover a fire loss on an insurance policy would be shown in the obligations and warranties of the insurance contract. As such contracts are usually written, an insurance company could not resist payment to the owner of cotton on a fire loss because their bailee was guilty of contributory negligence. Notwithstanding the evidence should show such contributory negligence of a bailee, as appears in this case, the insurance company would have to pay the fire loss to the owners of the cotton. If the men appearing as the owners of the cotton in this case were now suing the defendant railway company for damages because of its negligence in setting fire to the cotton in question, the cause of action would be on a tort. It is clear that the rules of law applicable in such a suit—the evidence being the same as in this case—would be essentially different from legal rules applicable at the trial of a suit on a contract of insurance.

Treating the insurance company as if it stood in the shoes of the compress company at the time of the fire and imputing to the insurance company the contributory negligence charged against the compress company, the bailee of the several owners of the cotton, and applying such rules of law as should be applied if the several owners of the cotton, instead of the insurance company, were now suing the defendant railway company for damages, it is clear that there were mutual or reciprocal duties which the law imposed on either litigant in this case, engaged, as they were, at the time of the fire, in the activities of their legitimate business. Such duties as are suggested here are not of a statutory nature. They are formulated in the reasonable relation of things, and they inhere, if they exist at all, in the implications of law regulating the conduct of men who may be engaged in such business as the litigants (the compress company and the railway company) were at the time of the fire. Such duties are implied in a rule of conduct, approved by the common thought that men engaged in lawful industries should be mindful of the rights of others and carefully use all means at hand, reasonably necessary under the circumstances, to avoid injury to the property of others.

Counsel in argument conceded substantially that, however well constructed an engine may be, or however carefully it may be operated, some flying sparks will be thrown from the smokestack which will carry danger to inflammatory material situated within 30 or 40 feet of a passing engine. The evidence shows that the compress platform was projected over the railway's right of way within less than 10 feet of the company's track. It follows that all damages from such a cause —that is, from a passing engine so equipped and operated—cannot be

entirely eliminated; to require such an elimination of the dangers would be to forbid a railway company to use its engines near to or by a compress plant. Under the suggestions just made, it is clear that the compress company, in the nature of things, knew of and assumed some of the risks which inhered in the physical conditions of the situation. The compress company, bailee of the several owners of the cotton, should be charged with assuming all such risks as at any time might be present when or where a reasonably safe engine, being operated with the due care and consideration for the exposed cotton, was running over the tracks near by the compress platform.

The compress company was, at the time of the fire, not actually engaged in compressing cotton bales. Its machinery was idle. Its crew were engaged in handing cotton on the platform, presumably its employés had sufficient time to look after dangers to the cotton. There were a large number of bales of cotton stored, apparently for the moment, on the platform, which, in the nature of things, were more or less exposed to damage by fire sparks from a running engine. It may be that there was no negligence chargeable to the compress company in having such a number of bales of cotton stored, uncovered or unprotected, as they were, on its platform. It may be that the cotton bales were so kept or placed on its platform in the ordinary and necessary daily operations of its compressing business. A few minutes before the fire occurred, Miller, the manager of the compress company, was engaged in inspecting or tagging the cotton bales. At the time of the fire, the railway company was operating its engine over the yard track for the purpose of switching its cars from place to place over its tracks in the railway yard.

The compress company knew of the railway's daily use of its yard tracks, and of the conditions and dangers which necessarily attended the railway's daily operations. Both the litigant companies had full knowledge of the inflammable character and conditions of the several hundred bales of cotton that were often exposed, uncovered, and unprotected from fire on the compress platform. Such facts, being known to the engineer, should have made him (as he swears it did make him) careful in operating his engine on the track running near to or close by the compress company's platform, on which he says he knew there were often, more or less, exposed cotton bales. The engineer says he had in mind and knew of such dangers, and he, under such circumstances, always carefully operated his engine; that he knows he was operating his engine carefully that day. The physical environments and conditions fully known, as they were, to either of the litigant companies (considering the compress and railway company as such parties), suggested the nature of the reciprocal duties with which the law charged either of the parties, inter sese, to this suit.

There was much conflicting evidence relating to the second and third proposition; that is, as to how or in what manner, whether carelessly or carefully, as to the immediate conditions, the engineer, when running his engine close to the compress platform, operated his engine. Several of the plaintiff's witnesses point out, in detail, how negligent and indifferent, as to the things in the locality, the en-

gineer operated his engine at the time in question. Some of the plaintiff's witnesses said that on other occasions similar to the one in question, unusually large sparks were thrown from the smokestack of the engine. Other witnesses for plaintiff said, substantially, that the engineer, at or about the time of the fire, ran very fast over the track near to the platform, and the engine's violent exhaust caused large fire sparks to fly from the engine, and that such acts showed negligence and carelessness in the operation of the engine.

It is not necessary, for my purposes now, to recite in detail either plaintiff's or defendant's evidence on these issues of fact. Much, if not all, the evidence of a direct nature tending to show the engineer's negligence, was given by witnesses for plaintiff who were more or less at some distance from the engine or compress building, and not in any way engaged in the operations of the switching work. They were mostly casual lookers-on at the switching movements of the engine in the yard. The engineer, fireman, and conductor, and other witnesses who were engaged actively in operating the switch engine state that all the operations of the engineer and engine were characterized by reasonable care and consideration for the conditions and environments of the situation.

I am not disposed to agree with the strenuous contention of plaintiff's learned counsel that the defendant's witnesses—mostly railway employés—as to material incidents at the time of the fire, were not credible witnesses because they were prejudiced in favor of the defendant railway company. Of course, their relation to the railroad company may have given some favorable coloring to their statements in favor of the railway company. It was equally apparent during the trial that local surroundings and circumstances may have, in some degree favorably, for plaintiff's contentions, colored the views of some of the plaintiff's witnesses. One familiar with such trials cannot be unmindful of such influences on either side of an issue like this. One learns from experience in such trials to scrutinize the weight of contradictory testimony. If the witnesses of either side were disposed to give false evidence, their opportunities respectively for indulging in perjury were possibly equal; but, conceding that the several witnesses, on either side, who gave testimony as to such material issues as relate to the carelessness and negligence displayed in the activities of the engineer and engine, were possessed of equally good motives and purposes to tell the truth as to such instances, it is clear that the employés of the railroad company who were at the time of the fire actively engaged in operating the engine, and engaged in the switching work over the railway's yard tracks, had much better opportunities for seeing, noting, and observing the movements of the engineer and engine than the several witnesses for plaintiff company, whose evidence was more or less of a circumstantial nature. The engineer, fireman, conductor, and other employés engaged in all the activities of the moment, in their testimony, spoke of incidents and things which were within their own knowledge. All the direct evidence, as to the construction and condition of the spark arrester, was given by the defendant's witnesses who saw and examined the spark arrester, and who, in the nature of things, would be or would

have been the only eyewitnesses to the character or condition of the spark arrester. No one of the plaintiff's witnesses gave any evidence founded in their own knowledge as to the construction or condition of the spark arrester. There was no conflicting evidence as to the spark arrester's condition, except such as may be said to be circumstantial or inferential from the defendant's testimony. There was nothing in the evidence to show that the spark arrester was not of the most improved plan, and that it was not at the time in good repair and working condition. Much of the adverse testimony as to the defective condition of the spark arrester appeared on the trial in the suggestions and contentions in argument of zealous counsel for the plaintiff.

On the trial the evidence showed that some of the bagging on some of the cotton bales had been cut open on top of the exposed end of the cotton bales by cotton samplers, and more or less cotton protruded from the open space cut in the bagging and made the bales so cut more liable to catch fire if sparks from the engine fell upon the exposed places. Such evidence was only suggestive of a condition or incident which might show contributory negligence. The evidence, which seemed to be strongly persuasive, if not conclusive, on the issue of contributory negligence, shows that the compress company, recognizing the danger to which the cotton bales, remaining exposed and uncovered on the platform, were exposed from falling sparks of passing engines, took upon, or imposed upon, itself the duty of employing a servant, whose only duty seems to have been to keep water in the barrels on the platform for use in extinguishing fire and looking out, as the plaintiff's witness himself says, "for falling fire sparks." The testimony of Butler Napoleon, a witness for the plaintiff company, was as follows:

"Q. Had you been at the compress that day before the fire? A. Just about 15 or 20 minutes before. Q. Had you done any work in the compress building that morning? A. I had filled some barrels with water. Q. What was your duty about the compress? A. To keep the barrels filled up and keep a lookout for fire, and clean up. Well, yes, sir; those were my duties, to notice for sparks and cinders. And I happened to slip off from the captain and go to dinner that day, and the train came in there on me, and I know it was my place to stop, and that is the reason I stopped, because it is my business to look out for sparks and watch them. But I did get back to the burning. I couldn't get back to the compress before the fire was all over everything. Q. You say you were some distance from the compress when the fire occurred? A. Yes, sir. Q. You had gone out to dinner? A. No, sir; I had done eat my dinner, I had started home. Q. You say that was your business to look out for fire, but you didn't see Capt. Miller, and you were slipping away? A. Yes, sir. Q. And you passed the engine on the track about 200 yards away from the compress? A. Yes, sir. Q. You were slipping off home were you? A. Yes, sir.

Further on in his testimony, Butler says: "The captain always told me to keep a lookout for sparks when the engine was running on the compress track." Before this fire (or the fire in question) he had several times put out fire sparks that flew on the cotton. He says, if he had been up there with a bucket of water, that he could have done something to put the fire out. He says it was a matter of general talk and notoriety that there was danger from flying sparks, when there

was switching in there, on account of cotton being close to the track, and it was his special duty to watch the cotton.

The evidence shows that Napoleon Butler was specially employed to use his activities on the platform in protecting the cotton from the very falling sparks which seem to have set fire to the cotton, and he had slipped away and was quite a distance from the compress building when he first saw the fire consuming the cotton. Butler's testimony shows that the compress company, in recognition and appreciation of such duty—of a reciprocal nature, as I have mentioned—as was suggested and imposed on it by or in the compress company's knowledge of and consideration for the conditions and environments which were apparent to the compress company, and which, necessarily, attended the business activities of the company's management in handling its patrons cotton on the platform.

The evidence shows that the management of the compress company in responding to an estimate of its sense of duty, to itself and the owner of the compress building, as well as to its duties as the bailee of the several owners of the cotton which was destroyed by fire, kept a man especially appointed to discharge a service which it seems, in its own estimate of things, it fairly owed to all persons concerned. Treating the compress company as such a bailee, it seems that a failure to have had such a service or duty, as was assigned to Butler, performed by some of its servants, would have been, under the circumstances, a signal omission of the bailee's obligations. If the compress company had been the actual owner of the cotton, and it was now suing the defendant railway company for damages, because of its negligence in setting the cotton on fire, I think the facts relating to Butler's neglect of the special duties assigned to him would show a damaging state of facts against the legal right of the compress company to recover damages for negligence of the railway company. The service or duty which the compress company assigned to Butler seems to show or illustrate that company's view and interpretation of the nature of its obligations, under all the circumstances, as a bailee. It may be that the defendant railway company did not know of the presence of Butler, or of the special duties which had been assigned to Butler by the compress company; but the assumption by the compress company of such a duty as was assigned to Butler is very persuasive to show that it rightfully assumed some of the risks in the dangers of the situation. It is persuasive, too, to show that the compress company recognized, and was responding fairly for itself to, the nature of the reciprocal relations and obligations imposed on either of the litigant companies (treating the compress and railway companies as the litigants herein) by the apparent dangers inherent in the environments of the situation.

A new trial is granted.

In re WYOMING VALLEY ICE CO.

(District Court, M. D. Pennsylvania. May 3, 1907.)

No. 559.

1. CORPORATIONS—REORGANIZATION—CONSOLIDATION OF COMPETING COMPANIES—BONDS AND STOCK ISSUED TO PROMOTER—CONSIDERATION—VALIDITY.

Upon the reorganization of an ice company, the promoter took an option on the capital stock, amounting to $25,000, for which he agreed to pay $75,000, and at the same time secured an agreement from the owner, who controlled another ice company, that the latter company would not engage in the wholesale or retail ice business in the same territory; he on his part agreeing that the ice company, upon being reorganized, would take a certain quantity of ice at certain prices annually. He also secured similar options upon the business and property of two other ice companies, for which he was to pay cash and assume debts to the amount of $15,000. Armed with these options and agreements, he proceeded to enlist others in the enterprise, securing from them $90,000 in money, of which $75,000 was to be used to buy the $25,000 of stock bargained for, and the balance to pay the other obligations incurred; the understanding with these parties being that, when the reorganization of the company was effected, the stock of the company should be increased to $225,000, and bonds to the extent of $90,000 be issued, the bonds to be distributed among the parties according to the amounts which they had severally contributed and a certain percentage of the stock be given them as a bonus. This arrangement was carried out, and the reorganization proceeded with; the original stock being assigned and transferred to the promoter and his associates for the purpose. New directors having been selected from among their number, the options and agreements were then purchased from the promoter, $90,000 of bonds and $200,000 of increase stock being voted to him therefor, which bonds and increase of capital they at the same time authorized as stockholders. The value of the property and business of the ice company at the time of the reorganization was approximately $75,000, the price paid for the stock to the original holders, and that of the other companies, which were bought out, about $27,500, subject, however, to some $10,000 of indebtedness which was assumed and paid; these values being somewhat augmented by the freedom from competition secured by the consolidation and the economies made possible thereby. The company having become bankrupt, upon the sale of its real estate by the trustee and the distribution of the proceeds to lien creditors:

(1) *Held*, that in determining what the promoter contributed to the company in return for the stock and bonds turned over to him, as affecting the validity of the bonds, the property of the company itself had necessarily to be left out of consideration, belonging as it already did to the company, together with the good will and business, which could not be optioned away by the original stockholders if they had undertaken to do so, as they did not, nor sold back again to the company by the assignment of the option agreement. Nor was this to be saved by the suggestion that by the assignment of the agreement the stock secured by it was transferred to the company, which thus became the beneficial owner, the stock so acquired having been paid for by the money contributed for the purpose by the parties to whom it was distributed, by whom such money was advanced with the understanding that the stock was to be so disposed of; and the option, as so exercised by the promoter having performed its functions, there was nothing left to this feature of the agreement when turned over to the company.

(2) *Held*, further, that the consideration to the company for the $90,000 bonds and $200,000 of stock, which were voted to the promoter by himself and his fellow directors, was thus brought down to the property secured by the agreements with the other two companies, amounting all told to

$27,500, incumbered with $10,000 of debts, and to the advantages to result by the removal of competition, which were altogether prospective and problematical.

2. SAME—CHARTER AUTHORITY—RIGHT TO BOND FOR BORROWED MONEY.

Held, also, upon the showing so made, that as against excepting creditors the bonds were not valid obligations of the company under the authority given by the charter to borrow money and bind the property and franchises of the company by mortgage not exceeding one-half the capital stock at the time the loan should be made; the transaction with the promoter, by which bonds and stock were voted to him in return for the agreements which he was to turn over, by no liberality of construction being able to assume the character of a loan.

3. SAME — CONSTITUTIONAL AND STATUTORY RESTRICTIONS — FICTITIOUS INCREASE OF INDEBTEDNESS.

It being provided by the state Constitution (article 16, § 7), as well as by the general corporation act of April 29, 1874 (P. L. 81), that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and that all fictitious increase of stock or indebtedness shall be void, the bonds and stock in the present case, being issued in disregard of this, were invalid; not that the agreements turned over by the promoter and the property and business thereby secured were devoid of all value, but the present actual value of that which they represented was comparatively so slight, and the prospective value, upon which alone the transaction could be justified, was so speculative, that the obligations given in return must be regarded as colorable and fictitious within the meaning of the Constitution, and therefore void.

4. SAME—PRESENT VALUES TO GOVERN.

Even though the parties participating may have hoped that some day the securities would approximate the figures given to them, they could not fail to know that this was not the case at the time, and it is by this that the validity of the transaction is to be determined.

5. SAME—RIGHT OF CREDITORS TO QUESTION—EXISTING CREDITORS—INNOCENT PURCHASERS.

The bonds being void by the Constitution, the right of creditors to question them cannot be doubted; not, of course, in the hands of innocent purchasers, but that is not the case where, as here, both stock and bonds were held by parties who participated in their issue. Nor can the excepting creditors be said to have come in after the bonded indebtedness had been contracted, and so not be in a position to question it, being affected by conditions as then established; the obligation which was the basis of the judgments due them having arisen out of the agreement to take a certain yearly quantity of ice, made with the promoter and confirmed by the company, whereby it anticipated the bonded indebtedness, if that was material.

6. SAME—UNEXECUTED GIFT—NOTE OR BOND OF MAKER.

But, in addition to this, the bonds, being mere promises to pay in the hands of the original parties, were no more at best than voluntary obligations, not enforceable as against the claims of those to whom the company was actually indebted; the gift of a note or bond by the maker not being executed except by payment.

7. SAME—SATISFACTION OF BID BY BONDS—EXCEPTIONS TO SALE.

While, then, as to all over and above the value actually contributed, the bonds were a gift—although to the extent of such value this may not have been the case, and, as representing advances made to the company, upon general distribution, the holders might to that extent have a right to come in—as bonds, secured by a mortgage lien on the property and franchises of the company, made void by the Constitution, they could not be used to satisfy the bid of a purchaser at a trustee's sale, according to the local practice, and the sale, unless otherwise complied with, must therefore be set aside.

On Exceptions to Report of Referee.

George R. Bedford, for exceptions.
W. S. McLean, opposed.

ARCHBALD, District Judge. At the sale by the trustee of the real estate of the bankrupt corporation the property was purchased by George R. McLean, as attorney for bondholders, for $40,000, who, after paying $1,650 in cash to recover the costs, was permitted, in conformity with the state practice in cases of judicial sales, to receipt for the balance of his bid in bonds of the company, secured by a first mortgage on the property, the lien of which was divested by the sale. A return of sale to this effect having been made by the trustee, exceptions were taken by the Bear Creek Ice Company and the Albert Lewis Lumber Company, judgment creditors, which were dismissed by the referee and the sale confirmed, the proceeds as the result being appropriated pro rata to the payment of the bonds, and it is the propriety of this disposition that is now in question. The exceptants claim that the bonds are invalid, not having been issued for value, but having been given to the parties, by whom they are now held for money advanced with which to buy up the capital stock of the company, and to a small extent also to secure the business and property of certain other companies, altogether inadequate to meet the requirements of the law.

The facts are not in dispute, and are in substance as follows: The Wyoming Valley Ice Company was incorporated by act of assembly of April 15, 1869 (P. L. 1870, p. 1415), with a capital stock of $25,000, divided into 1,000 shares of $25 each, and an authorized capital of ten times that amount. And on February 12, 1901, Albert Lewis, being the owner of 690 of such shares, gave an option in writing to Dr. H. N. Young to sell him the same at $75 a share; Dr. Young undertaking to buy the shares of other stockholders at the same figure. It was at the same time further agreed by Mr. Lewis, acting on behalf of the Bear Creek Ice Company and the Albert Lewis Lumber Company, both of which he controlled, that these companies would abstain from engaging in the wholesale or retail ice business in the Wyoming Valley as they had been doing theretofore, or from selling to other parties there, Dr. Young on his part undertaking that the Wyoming Valley Ice Company which was thus turned over to him and to which the Bear Creek Ice Company had previously been furnishing ice, should take from the said company, for a period of ten years, 12,000 tons of ice annually at certain prices; a contract to this effect being subsequently executed with these companies.

The purpose of Dr. Young was to consolidate and control the ice business in the section designated, and, following upon the option obtained from Mr. Lewis, he secured another from Isaac Stauffer and Daniel G. Callahan, doing business as the Pocono Ice Company, by which they were to sell him the property of that company for $50,000—that is to say, $5,000 in cash and $45,000 in stock of the Wyoming Valley Ice Company, part of an increase of it to $225,000, which was contemplated—Stauffer and Callahan at the same time agreeing that they would not, directly or indirectly, engage or become interested in the ice

business within the territory sought to be monopolized, and Stauffer further undertaking individually to deliver 10,000 tons of ice annually, which Dr. Young was to pay for at certain designated prices. Actuated by the same idea, Dr. Young a few days later also secured from E. D. Cramer, president of the Summit Lake Ice Company, an option on the capital stock and property of that company for the sum of $28,000, payable in the stock of the Wyoming Valley Ice Company as so to be increased, Mr. Cramer engaging not to enter into the ice business within the territory named, and Dr. Young agreeing to pay off the indebtedness of the company, which amounted to $10,000.

Armed with these several options and agreements, Dr. Young then proceeded to enlist other parties in the enterprise, securing from them an advance of $90,000, of which $75,000 was to be used to pay Mr. Lewis and the other holders of the existing stock of the Wyoming Valley Ice Company—1,000 shares at the agreed price of $75 a share; and the balance, $15,000, was to pay the $5,000 cash to Stauffer and Callahan, and to take care of the $10,000 of obligations of the Summit Lake Ice Company. This money was advanced by the parties who went into the arrangement, upon the understanding that, when the reorganization of the company was effected and the proposed increase of stock had been authorized, they should receive bonds of the company to the amount which they had severally contributed, and a certain per cent. of the increase stock as a bonus.

The so-called reorganization of the company was then proceeded with. The original $25,000 of capital stock was assigned and turned over by Mr. Lewis and the other holders of it to the parties whom Dr. Young designated; and on March 15, 1901, the old directors having resigned, new directors and officers were chosen, Dr. Young being one of them and the others being taken from those who were associated with him. Immediately following this the new board met —only four, however, of the six being present, with Dr. Young among them—and a resolution was passed that the agreements and options which he held with Lewis, Stauffer, and Cramer, and the companies which they severally represented, should be purchased of him by the Wyoming Valley Ice Company for $90,000 of the bonds of the company and $200,000 of its capital stock, when the stockholders should have authorized the issuing of the bonds and the increase of the capital; a meeting of the stockholders for that purpose being called for the next day. The agreement of Dr. Young with the Bear Creek Ice Company and the Albert Lewis Lumber Company to take a certain quantity of ice yearly was also accepted, and the officers of the company were directed to execute a contract to this effect with them, which was done the same day. On March 16th the stockholders took action on the proposed issue of bonds and increase of stock, further notice being waived, and the whole 1,000 of existing shares were voted in favor of it. This was followed on April 1st, by a meeting of the directors, at which by formal action it was resolved that, in consideration of the options and agreements held by Dr. Young and the property and business thereby acquired and controlled which he undertook to sell, the company should issue to him in payment thereof $200,000 of the capital stock (the increase voted), and make and issue coupon bonds

to the amount of $90,000, to be secured by a first mortgage on the franchises property and contracts of the company. Dr. Young thereupon duly executed and delivered assignments to the company of the agreements referred to, receiving in return the stock and bonds which he was to get, and the transaction was complete. The stock and bonds so received were subsequently distributed by him among his associates according to the preceding arrangement with them, and it is the validity of the bonds in his and their hands, as stated above, that is now in controversy. The value of the property and business of the Wyoming Valley Ice Company at the time of the transfer was approximately $75,000, the price paid to Mr. Lewis and the others for the stock which represented it; that of the Pocono Ice Company was about $15,000; and that of the Summit Lake Ice Company some $12,500, subject, however, to the $10,000 indebtedness which was assumed and paid. The freedom from competition secured by the consolidation of these companies, and the economies made possible thereby, no doubt somewhat augmented these values, but certainly not to the extent which is claimed, of which the subsequent bankruptcy of the company is proof, if there were nothing more.

In determining just what Dr. Young contributed to the company in return for the stock and bonds turned over to him, the property of the company itself has, of course, to be left out of the consideration. That already belonged to the company together with the good will and business, and could neither be optioned away by Mr. Lewis, if he had undertaken to do so, as he did not, nor sold back again to the company by the assignment of the agreement with him. The $75,000, therefore, which represents its value drops out of the case. Nor is it saved by the suggestion that the original $25,000 of stock was embraced in the agreement with Mr. Lewis, and that by the assignment of that agreement it was transferred to the company, which thus became the beneficial owner. This agreement only covered in reality Mr. Lewis' 690 shares. But that is not material. The point is that the 1,000 shares of stock acquired of him and the others in the transaction were paid for out of the money contributed by the parties associated with Dr. Young, by whom it was advanced with the distinct understanding that it was to be so used; and it was distributed to them in order that the reorganization of the company on March 15th might be effected. The option with Mr. Lewis, having been exercised in this way, had no further purpose, and on March 27th when Dr. Young assigned over the agreement to the company of which it formed a part, there was nothing left to this feature of it. This is not to deny that the company could buy and hold or retire its own stock if that was what was actually intended. But far from this the capital stock was increased, not to $200,000, but to $225,000, which left the original $25,000 unaffected in the hands of the parties to whom the certificates had been severally assigned, and by whom, so far as appears, it is still held and claimed. It will hardly be contended, in the face of this, that the company paid in bonds and stock for stock that it did not, and that there was no pretense that it should acquire, whatever its power to do so. It may also be further observed that, even if this were not so and the original $25,000 of stock could be made to stand as a part of the con-

sideration for the bonds, it would not have a value of $75,000, the price paid for it, but, at the most, a bare one-third of that, after it had been "watered" and made to share with the $200,000 more which was issued, to say nothing of the $90,000 for which the property of the company was bonded.

The consideration to the company, therefore, for the $90,000 of bonds and the $200,000 of stock which were voted to Dr. Young by himself and his fellow directors, comes down to the property secured by the agreements with the Pocono and the Summit Lake Ice Companies, amounting all told to $27,500, incumbered with $10,000 of debts of the latter; and the advantages to result by the removal of competition with these and the Bear Creek Ice Company which was, of course, altogether prospective and problematical. As was to be expected, the bargain, as so made, being made with themselves, was a wholly one-sided one; the obligations of the company being voted without regard to anything but the most extravagant estimate of benefits to come. All who were interested at the time having assented, it may be that the validity of the transaction is not open to question by the company or succeeding stockholders. But the exceptants are creditors, which is quite another matter, and are not to be disposed of by the suggestion that they became such after the reorganization of the company, and so are affected by its condition as they found it; of which more presently. Neither is it of any moment that the parties who hold the bonds advanced their money on the strength of getting them. They understood, as we have seen, how this was to be brought about; $75,000 of the money put in Dr. Young's hands being to buy the stock of Mr. Lewis and the others, which they got; $5,000 going to Stauffer and Callahan on the agreement made with them; and $10,000 being required to pay off the indebtedness of the Summit Lake Ice Company. All this was in the direct interest of Dr. Young and themselves, and not of the company, and affords them nothing to rely upon.

It is difficult to see upon this showing how the bonds in controversy, as against the exceptants, can be regarded as valid obligations of the company. By the act of assembly cited above, by which it was incorporated, the company was given power to borrow money not exceeding in amount one-half of the capital stock at the time the loan was made, and to secure the same by a bond and mortgage on its real and personal property, as well as its corporate rights and franchises. This was a restricted privilege, and, unless enlarged by subsequent legislation, its terms must be observed; the power being only exercisable in accordance with the conditions upon which it was given. No doubt there was an attempt to comply in the present instance by an increase of the capital to $225,000 which thus apparently justified the $90,000 bond issue which was voted on the strength of it. But the charter authority given to bond the property and franchises of the company in this way is for money borrowed, and nothing else, and by no liberality of construction can the transaction with Dr. Young be made to assume that character. Nor was there indeed any pretense of doing so; the bonds and stock being voted to him in return for the agreements which he was to turn over. That this was in any respect a legitimate exercise of the power given by the charter will hardly be argued. It

did not even meet the forms of the law, to say nothing of the substance.

But this, after all, is not material; the case turning on that which is much more serious. It is provided by article 16, § 7, of the state Constitution that:

"No corporation shall issue stock or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

The same prohibition appears in the general corporation act of 1874 (Act April 29, 1874, § 17; P. L. 81), where the right to borrow money upon bond and mortgage is also restricted (section 13) to one-half the amount of the capital stock paid in, a provision which is retained in the amendment of May 21, 1889 (P. L. 257). By act of February 9, 1901 (P. L. 3), however, the capital stock or indebtedness of any corporation, one or both, may be increased with the consent of a majority in value of the stockholders to such an amount in the aggregate as shall be deemed necessary to carry on or enlarge its business and corporate purposes. This is said to have broken down the dividing wall between capital stock and corporate indebtedness previously existing. Commonwealth v. Railroad, 25 Pa. Co. Ct. Rep. 274; Id., 207 Pa. 154, 56 Atl. 409. And, as it is made in terms to apply to a corporation created by special as well as by general law, the present company would seem to be within its purview, and the bonds and stock in controversy to be valid without regard to whether the conditions prescribed by the charter were complied with, if otherwise authorized.

But the provisions of the Constitution which have been quoted, and the statute passed to enforce them, are not so easily disposed of. Their evident purpose was to prevent the creation of corporate securities which were not representative of actual value, an altogether too prevalent if not growing evil. The prohibition is comprehensive and emphatic, and, having been regarded as of sufficient importance to be made a part of the fundamental law, such a construction should be given to it as will make it effective, and no evasion is to be countenanced. But, if the transaction which is here in question will pass muster, the law might as well be abrogated. The fact is that, disguise it as we may, in no just sense were the bonds and stock which were voted to Dr. Young issued for money or property, as is so required. Not that the agreements turned over by him and the property and business thereby secured were devoid of all value. Rarely, indeed, is this the case. But the present actual value of that which they represented was comparatively so slight—there being but $27,500 of visible property for $90,000 of bonds, to say nothing of the $200,000 of stock—and the prospective value, upon which alone the transaction could be justified, was so speculative, not to say fanciful, that the obligations given in return must be regarded as colorable, and so fictitious, within the meaning of the Constitution, and therefore void. The case differs only in degree from Commonwealth v. Reading Traction Co., 204 Pa. 151, 53 Atl. 755, where the court did not hesitate to so characterize the corporate securities there involved, on the authority of which the decision here may well be made to rest. See, also,

Reed's Appeal, 122 Pa. 565, 16 Atl. 100, and Fidelity Co. v. West Penn. R. R., 138 Pa. 494, 21 Atl. 21, 21 Am. St. Rep. 911. And generally 10 Cyc. 474, 1170, and 7 Am. & Eng. Encycl. Law (2d Ed.) 786. The parties participating may have hoped that some day their securities would approximate the figures given to them, or even have honestly believed that this would be the case. But they could not fail to have known that it was not so at the time, and it is by this that the validity of the transaction is now to be judged. Finletter v. Acetylene Light Co., 215 Pa. 86, 64 Atl. 429. Two bad ice years and other competitors coming into the field, from which they could not be kept out, pricked the bubble, and bankruptcy was all that was left. This was after the fact, of course, but it served to show how absolutely unwarranted any such expectation was, and how dangerous it would be to make mere expectation the basis of accepted value.

The bonds of the company being void by the Constitution, the right of the excepting creditors to question them cannot be doubted. Not, of course, in the hands of innocent purchasers for value. Commonwealth v. Reading Traction Co., 204 Pa. 151, 53 Atl. 755. But that is not the situation here; both bonds and stock, so far as is shown, being held by the parties who participated in their issue. Nor, as already intimated, can it be said that the exceptants came in after the bonded indebtedness of the company had been contracted, and so are not in a position to question it, being affected by conditions as so established, if that is material. The judgment of the Bear Creek Ice Company, if not that of the Albert Lewis Lumber Company, is for ice which was delivered in accordance with the agreement made by Dr. Young and adopted by the company to take a certain yearly quantity; the agreement with the company being executed March 15, 1901, the day the bond issue was voted by the directors, but before it had been finally authorized by the stockholders. The obligation, therefore, which is the basis of the indebtedness to the excepting creditors, anticipates the bonds, and is not to be postponed to them upon any supposed idea of their priority. But, aside from this, having regard to the conditions which obtain here, the rights of creditors are superior whether existing or subsequent. The bonds are mere promises to pay, and in the hands of the present holders are no more at best than voluntary obligations which cannot be enforced as against the claims of those to whom the company is actually indebted. The gift of a note or bond by the maker is not executed except by payment. Kern's Estate, 171 Pa. 55, 33 Atl. 129. And, as to all over and above the value contributed for them, the bonds of the company were a gift here. To the extent of such value, this may not be the case; and, having regard to this, and treating them not as bonds, but as representing advances made to the company by the holders—if that can be said of them—it may be that, upon general distribution, they would have the right to come in pro rata with other creditors. But, as bonds secured by a mortgage lien upon the property of the company, they are made void by the Constitution, and, being sought to be used in that capacity to satisfy the bid of the purchaser at the trustee's sale, they cannot be recognized; and, unless otherwise com-

plied with, the sale must be set aside. The referee in reaching the opposite conclusion dealt with the case as though it involved merely a question of the inadequacy or illegality of the consideration. But this is beside the mark. He also seems to have been impressed with the idea that to invalidate the bonds would be to discredit numerous other similar transactions countenanced by the business world. But this is a consideration which cannot obtain. Whatever the result, the law must be declared as it is. I venture, however, to observe that the sooner people are brought to realize and accept that neither in law nor in legitimate finance can nothing be made to stand for something the better we shall all be off.

The referee is reversed, the exceptions to the return of sale are sustained, and the sale set aside and the property directed to be resold unless the purchaser shall pay to the trustee within 10 days the sum of $38,350 remaining unpaid upon his bid. Act April 20, 1846, § 2 (P. L. 411); Bedell's Appeal, 87 Pa. 510; Fry v. Specht (Pa.) 1 Atl. 441.

PHILLIPS v. LOUISVILLE & N. R. CO.

(Circuit Court, N. D. Alabama, E. D. May 18, 1907.)

1. COSTS—SUITS IN FORMA PAUPERIS—INTEREST OF ATTORNEY.

Where plaintiff's attorney was financially interested in the result of an action brought in the federal court, plaintiff could not obtain an order permitting him to sue in forma pauperis, as authorized by Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S Comp. St. 1901, p. 706], without a showing that plaintiff's attorney was also unable because of poverty to give security.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 502, 508.]

2. ATTORNEY AND CLIENT—CONTRACT FOR SERVICES—CONSTRUCTION.

A contract between plaintiff and his attorney provided that plaintiff agreed to pay the attorney in full settlement of his fee an amount of money equal to one-third of any amount recovered in the cause by settlement or otherwise. The contract also stipulated that the attorney should not settle the suit without plaintiff's consent for less than the total amount sued for, and that the attorney should have full authority to do all such acts as he might deem necessary and proper in the premises, with power to associate or substitute other attorneys with him at his option. *Held*, that the contract provided for a contingent fee, and vested in the attorney a pecuniary interest in the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 353.]

3. COSTS—SUITS IN FORMA PAUPERIS—APPOINTMENT OF ATTORNEY.

Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], authorizes impecunious persons to prosecute suits in the federal courts without giving security for costs, and section 4 authorizes the court to assign counsel to prosecute the suit on behalf of such plaintiff. *Held*, that where plaintiff had secured counsel under a contract for a contingent fee, who had commenced the suit, filed pleadings, and prosecuted the case through two mistrials, plaintiff was not thereafter entitled, on the making of an application for security for costs, to an order rescinding his contract with his attorney and permitting him to sue in forma pauperis and to the assignment of counsel by the court.

Petition and Motion to Vacate Order Requiring Security for Costs.

Stallings & Drennen, for petitioner.
Knox, Acker & Blackmon, for defendant.

HUNDLEY, District Judge (orally). This is a petition filed by the plaintiff in this cause praying this court to vacate and set aside a former order requiring the plaintiff to give security for costs, and is predicated upon the following statement of facts, which are not questioned:

The plaintiff filed a suit in this court against the Louisville & Nashville Railroad Company, and at the time of filing said suit filed an affidavit, as required by Act Cong. July 20, 1892, c. 209, § 1, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], stating his inability to pay the costs or secure the same. After the filing of this affidavit, and before the trial of this cause, the defendant, Louisville & Nashville Railroad Company, filed a motion at a prior term of this court to require the plaintiff to give security for costs upon the following grounds, to wit: First. That it does not appear from the affidavit filed by the plaintiff in this cause that no other person having interest in the result of this suit is unable to give security for costs. Second. That it does not appear that those pecuniarly interested in the result of this suit are by reason of their poverty unable to secure the costs of this proceeding. Third. Because such affidavit fails to aver that the distributees or those having pecuniary and contingent interest in the result of this suit are, by reason of their poverty, unable to give security for the costs of this suit.

At the prior term of this court, at which said motion was heard, the facts stated in the motion being confessed, and it further being admitted in open court that the attorneys for the plaintiff were interested to the extent of one-third of any amount that the plaintiff might recover, Judge Harry T. Toulmin, of the Southern district of Alabama, sitting by assignment as judge of this court, granted the motion of the defendant railroad company and required the plaintiff to give security for costs.

The plaintiff now files his petition, setting forth the facts as herein stated, and moves the court to vacate and set aside the order heretofore granted as being improvidently made, and asks that he be entitled to the process of this court in his said cause without any security or deposit for costs, and that his attorneys be relieved from further payment of said costs in court. As an exhibit to said petition, and as a part thereof, there is attached the written contract of employment the plaintiff has with his attorneys in this cause; said contract being in words and figures as follows, to wit:

"State of Alabama, Jefferson County.

"Know all Men by These Presents, that I, Joe Phillips, have and do hereby employ J. F. Stallings, to represent me and to bring suit against the Louisville & Nashville Railroad Company, for personal injuries received by me, December 22, 1905, while a passenger, giving and granting unto him, full power and authority to do all such acts as he may deem necessary and proper in the premises, and to that end, with full power to associate or substitute other attorneys with him, at his option. In consideration of said attorney accepting said employment I hereby agree to pay to him in full settlement of his fee an amount of money equal to one-third of any amount recovered by him in said

case, by settlement or otherwise. Said attorney not to settle said suit, without my consent, for less than the amount sued for.

"[Signed] Joe Phillips.

"Witness: Jim Phillips."

The plaintiff further prayed, in his petition, that, in the event this court should decide and determine that he is not entitled to proceed in said cause without deposit or security of costs of further proceedings in said cause, so long as the employment of his attorneys is based upon this agreement, then, in that event, this court will appoint said attorneys who are familiar with the cause to represent him in the trial of said cause, and that said attorneys have such compensation for their services in this matter as may be fixed or determined as reasonable by this court. The petition concluded with the usual general prayer for relief.

The first question to be considered in this matter is: Was the order made by Judge Toulmin correct as a matter of law, based upon the admission made by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered?

By the Act of Congress approved July 20, 1892, any citizen of the United States entitled to commence any suit or action in any court of the United States, who is unable, by reason of poverty, to prepay fees or give security for costs, may have process and all the rights of other litigants and may have counsel assigned to represent him free of charge, by making a sworn statement in writing showing the above facts, and that he believes himself to be entitled to redress by such suit or action. 27 Stat. 252, c. 209. This statute is of a charitable and beneficent nature. Its sole purpose is to enable persons, who, in good faith, are unable, on account of poverty, to prosecute any suit or action in the courts of the United States, to obtain a fair chance to have their rights adjudicated. It is not intended that the statute should be used directly or indirectly to benefit those who are able to prosecute their suits. The citizen seeking the benefit of the statute, and making the affidavit of poverty required thereby, must of necessity be the only person benefited by his cause of action. It surely was never intended by the statute that two or more persons should be interested financially in the result of a suit or action brought, and that, if one of them happens to be without means, this one can be permitted to make an affidavit of poverty and secure the benefits of the statute for the other parties to the suit who are able to prosecute same, even though they may not appear by name as parties. The admission by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered made them financially interested in the result of the lawsuit, and, unless they too could make and file an affidavit as to their poverty, the plaintiff in this cause could not obtain the benefit of the statute.

As was said in the case of Boyle v. Great Northern Railway et al. (C. C.) 63 Fed. 539:

"There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes.

This is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue in forma pauperis, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: That, after a contract has been made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is unjust for the court to allow the litigation to go on for their benefit without expense, on the pretense that the plaintiff is unable to pay. I shall require a showing that the plaintiff is unable to pay or secure the costs, and that there is no person interested, by contract or otherwise, in the cause of action, or entitled to share in the recovery, who is able to pay or secure costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason."

This same question is also decided in the case of Feil v. Wabash Railroad Company (C. C.) 119 Fed. 490. That case was decided upon a motion to secure costs, based upon the same facts as the case at bar. In that case the court says:

"In such cases a plaintiff represents not only her own interest, but also that of attorneys in the case. She sues for herself and as trustee for others. She may be poor, and, standing alone, might be entitled to the beneficient provisions of the act of 1892; but in her representative capacity she cannot be poor within the meaning of that act, unless the beneficiaries whom she represents are also. In my opinion, no petition to sue as a poor person can avail unless it discloses that all the beneficiaries, as well as the nominal plaintiff, come within the purview of the act."

In the case of The Bella (D. C.) 91 Fed. 540, it was stated by the court, in rendering the opinion, that:

"Permission to prosecute this suit in forma pauperis, in behalf of the intervener, would not have been granted if the court had been informed that the attorneys claimed any interest in the suit or a right to share in the proceeds of a recovery."

The case of Reed v. Pennsylvania Company, 111 Fed. 714, 49 C. C. A. 572, was an action by the widow and administratrix of a deceased person to recover for the tortious killing of her intestate and husband. In that case Judge Lurton, in delivering the opinion of the court, quoted approvingly the case of Boyle v. Railroad Company (C. C.) 63 Fed. 539, and held that, under the Ohio statute, authorizing such an action in the name of the widow and administratrix, wherein damages recoverable are for the benefit of the widow and children of the deceased, they are the real parties in interest, and that, although the affidavit showed sufficiently the poverty of the widow, it was defective in not making a like showing in behalf of the children of the deceased.

Now we come to the consideration of another question presented by the petition. It is insisted that the written contract between counsel and the plaintiff in this cause in reference to the payment of their fees, which written contract is made a part of petition, shows upon its face that the fee provided therein is not in fact a contingent fee, but merely a contract setting forth the basis upon which the amount of

the fee to be paid is to be determined, and it is insisted that therefore the security of costs should not be required of the plaintiff. I confess that I am unable to discover a material distinction between the written contract and the admission made in open court. It will be noted that the agreement stating the payment of the fee is in the following words:

"I hereby agree to pay him in full settlement of his fee an amount of money equal to one-third of any amount recovered by him in said cause by settlement or otherwise."

Now, does the mere statement in writing that the fee to be paid is an amount of money equal to one-third of any amount recovered change in fact the contingent nature of the contract? Clearly not. To hold otherwise would be but a mere juggle of words. It will be noted in the written contract that there is no provision whatever for the payment of the fee in case nothing is recovered of the defendant in the suit. The plaintiff is admitted to be a pauper and unable to pay any fee in any event, save alone in the happening of the event of his recovery in this suit. Then from what source is the fee to be recovered? The conclusion is inevitable, from the amount of the recovery alone.

Again, the basis of the fee charged is not gaged, nor attempted to be gaged, by the amount of skill, time, or trouble required of counsel in the case, but is gaged and fixed alone upon the basis of the amount of recovery. To show further that the written contract is clearly contingent in its nature, it contains the further stipulation that the attorney is not to settle the suit without the consent of the plaintiff for less than the total amount sued for. This is an unusual and extraordinary provision in a contract of employment and was evidently inserted for the purpose of protecting both the attorney in securing his fee, as well as the plaintiff in securing the largest amount possible under the action.

Furthermore, it must be noted that no effort is made to protect either the attorney or the plaintiff, except in the case of recovery from the defendant. There is also another extraordinary provision in this contract not usual or customary between attorney and client in this. Full power and authority is given to counsel to "do all such acts as he may deem necessary and proper in the premises, and to that end, with full power to associate or substitute other attorneys with him at his option." The relation of attorney and client is an intimate and confidential relation. If the fee of one-third of the amount of the recovery was not in fact the chief desideratum in the contract under consideration, then what in fact was the moving cause, which induced the plaintiff to agree that other attorneys, mere strangers to the plaintiff for aught he knows, might be "substituted" or associated in the case? What compensation is provided for these other attorneys who are to be substituted for the attorney who is a party to the contract? Is that a usual or reasonable provision in a contract of employment between counsel and client? And, even if it is a usual and customary provision, it is clear from the reading of the whole contract that any and all attorneys who may be employed in the case are to obtain their fees wholly and solely from the amount that may be re-

covered of the defendant in this case; the extent of that amount to be fixed solely upon a sum of money equal to one-third of such recovery. I fail to see that the written contract changes in any manner the admission in open court heretofore made by counsel that their fee is contingent upon the amount of recovery in this cause. Therefore, not only in view of the written contract alone, but also in view of the admission made in open court with reference to the basis of the fee agreed upon between plaintiff and his counsel, the motion of the plaintiff to vacate and set aside the order of Judge Toulmin heretofore made in this cause is denied and overruled.

I now come to the consideration of a further prayer in the petition filed by the plaintiff; and that is, in case this court should decide and determine that under the facts of this petition the plaintiff is not entitled to proceed without deposit or security of costs so long as the employment of his attorneys is based upon the terms of their contract, then that this court appoint the said attorneys who are familiar with this cause to represent him in this trial, and that said attorneys have such compensation for their services as may be fixed or determined by the court as reasonable. Section 4 of the act of July 20, 1892 (chapter 209), is cited as authority under which the court could take such action. As I have already said, the law under discussion is a charitable act, and is intended to give "any citizen of the United States entitled to commence any suit or action in any court of the United States" the right to do so by filing his statement under oath that because of his poverty he is not able to pay the costs of the suit or action.

By the undisputed facts of this case, the plaintiff's credit was sufficient to enable him to employ counsel to commence action in this cause, file pleadings, and actually prosecute this case in two trials, which have already been held, resulting in mistrials. It will be noted that the reading of the statute refers to the right of any citizen to "commence and prosecute to conclusion" his suit. Being able, therefore, without resorting to the affidavit of poverty, to secure counsel to commence his cause, such counsel could by proper proceedings in the absence of their contract, secure a lien upon the amount of recovery in this case for a reasonable attorney's fee. The section of the act under which this court is requested to make an order of assignment of counsel is a part of the same act of July 20, 1892, providing for the manner in which suits shall be commenced and prosecuted in forma pauperis. The title of the act is as follows: "An act providing when the plaintiff may sue as a poor person, and when counsel may be assigned by the court." It will thus be seen that the matter of assigning counsel is part and parcel of the same act providing for the manner in which such suits may be commenced and prosecuted. Therefore section 4 of said act must be construed together with section 1 of the act; the latter section being the section providing for permitting suits in forma pauperis.

Construing these two sections of the act together, and applying the facts in this case, I cannot say that this is a case in which the court is called upon to assign counsel for the plaintiff. Lawyers are, to some extent, a part of the court itself. They are, at any rate, officers

of the court. It is a part of the ethics of the legal profession, to say nothing of what is right, just, and proper, that they will not permit the rights of any litigant to suffer because of his inability, through poverty, to pay counsel to represent him. Plaintiff has already secured counsel by contract satisfactory alike to both counsel and client. To permit counsel now to repudiate this contract and be assigned by this court would be to permit by indirection that which this court has decided could not be done directly. Furthermore, section 5 of the act provided that, at the conclusion of the suit, judgment for costs may be rendered as in other cases, "provided, that the United States shall not be liable for any costs thus incurred." It will thus be seen that whatever service is rendered by officers of the court in civil suits in forma pauperis would be at the expense of the officers of the court, as being a part of the burthen of the office which they hold, should judgment for costs be adverse to the plaintiff. The clerk and marshal, therefore, are entitled in their right to collect all fees they have earned for service at the instance of the plaintiff in this cause, should he cast in the suit, and if not unwarranted by law it would at least be unwarranted in all fairness to these officers, and if not in contravention of the letter of the law, at least of the spirit of the act of July 20, 1892, did I now at this late stage in these proceedings permit the order heretofore made in this cause to be set aside, and now enter an order to permit the plaintiff to take advantage of the statute. The Bella (D. C.) 91 Fed. 540.

The prayer of the plaintiff, therefore, that this court appoint counsel to represent him in this cause, and that he be entitled to proceed without deposit or security of costs is denied and overruled.

UNITED STATES v. COLE et al.

(District Court, W. D. Texas, San Antonio Division. May 17, 1907.)

No. 1,956.

1. CONSPIRACY—WHAT CONSTITUTES.

A conspiracy is formed when two or more persons in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a crime or unlawful purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 30–39.]

2. SAME—ELEMENTS—OVERT ACT.

In order to establish a conspiracy to commit an offense against the United States in violation of 1 Rev. St. Supp. (2d Ed.) p. 264, c. 8 [U. S. Comp. St. 1901, p. 3676], there must not only be an agreement or combination to commit a crime or unlawful purpose, but also an overt act apart from the conspiracy, done to carry into effect the object of the original combination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 38, 39.]

3. SAME—KNOWLEDGE OF GUILT—EVIDENCE.

Guilty connection of a conspirator may be established by showing association by the persons accused in and for the purpose of procuring the illegal object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 100–104.]

4. SLAVES—PEONAGE—DEFINITION.
Peonage is the status or condition of compulsory service in payment of an alleged indebtedness by the peon to his master.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Slaves, §§ 1, 2.]

5. CRIMINAL LAW—CREDIBILITY OF WITNESSES—PROVINCE OF JURY.
The jury, being the exclusive judges of the credibility of the witnesses, are entitled to determine for themselves what portion of conflicting testimony is most worthy of belief, though they should endeavor to reconcile and harmonize it, if possible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1714.]

6. SAME.
In determining the weight to be given to the testimony of a witness, the jury should consider his relationship to the parties, his means of information, and opportunity of knowing the facts to which he testifies, his manner and bearing in testifying, together with his interest in the controversy.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1252.]

7. SAME—INNOCENCE OF ACCUSED—PRESUMPTIONS.
In a criminal case the presumption of law is in favor of the innocence of the accused until his guilt has been established to the satisfaction of the jury beyond a reasonable doubt.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 731–737.]

Charles A. Boynton, U. S. Atty., and Charles C. Cresson, Jr., Asst. U. S. Atty.

A. W. Houston, Jake Wolters, Frank Stubbs, Robt. T. Neill, and Geo. B. Taliaferro, for defendants.

MAXEY, District Judge (charging jury). The indictment against the defendants contains two counts. Both counts charge a conspiracy; the first to hold in a condition of peonage one Judge Johnson, and the second to hold in a condition of peonage Hagar Johnson. In the first count it is charged that the defendants conspired and agreed to hold the said Judge Johnson in a condition of peonage by, deceitfully and against his will, carrying him from Seguin, Tex., to the parish of Ouachita, in the state of Louisiana, and there to compel the said Judge Johnson against his will to work for J. T. Cole in payment of a debt claimed by Cole as due and owing him by Judge Johnson. It is further charged that, afterwards, on the same day, in pursuance of the conspiracy, and to effect the object of the same, the said J. T. Cole unlawfully and against Johnson's will carried him from Seguin, Tex., to the parish of Ouachita, in the state of Louisiana, and there forcibly and against Johnson's will compelled him to perform labor and service for him (Cole) in payment of a debt claimed by Cole as due and owing him by Johnson. The second count, as before observed, is practically the same as the first, except that the defendants are charged with a conspiracy to hold in a condition of peonage Hagar Johnson.

The statute upon which the indictment is based provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any pur-

pose, 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," etc.

See 1 Supp. Rev. St. (2d Ed.) p. 264, c. 8 [U. S. Comp. St. 1901, p. 3676].

In this case it becomes your duty to inquire: (1) Was there such a conspiracy formed as the indictment alleges against the defendants? And (2) if such a conspiracy was formed and existed, were the acts charged in the indictment, to effect the object of the conspiracy, committed as alleged? To arrive at a satisfactory conclusion upon these questions, it is necessary to understand what constitutes conspiracy.

"A conspiracy is formed when two or more persons agree together to do an unlawful act—in other words, when they combine to accomplish, by their united action, a crime or unlawful purpose—and the statutory offense is consummated when such agreement is made and such combination is entered into and one or more of the parties do any act to effect the object of such conspiracy. * * * It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit or formal agreement for the unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme is to be and the details of the plans or means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design. Of course, a mere discussion between parties about entering into a conspiracy, or as to the means to be adopted, for the performance of an unlawful act, does not constitute a conspiracy, unless the scheme, or some proposed scheme, is in fact assented to—concurred in by the parties in some manner, so that their minds meet for the accomplishment of the proposed unlawful act." United States v. Goldberg, 12 Meyer, Fed. Dec. 41, 42, Fed. Cas. No. 15,233.

"A mere agreement or combination to effect an unlawful purpose, not followed by any acts done by either of the parties to carry into execution the object of the conspiracy, does not constitute the offense. There must be both the unlawful agreement or combination, and an act or acts done by one or more of the parties to effect the illegal object or design agreed upon, to make the punishable offense under the statute. Where there is an attempted attainment of an unlawful end by two or more persons, who are actuated by a common design of accomplishing that end, and who in any way, and from any motive, or upon any consideration, work together in furtherance of the unlawful scheme, each one of the persons becomes a member of the conspiracy." Id.

To establish the guilt of the defendants on trial, you must be satisfied from the testimony that a conspiracy was formed and entered into by them, as alleged, to hold in a condition of peonage Judge Johnson and Hagar Johnson, as charged in the indictment; and that to effect the object of the conspiracy the defendant Cole carried them against their will from Seguin, Tex., to Ouachita parish, La., and there forcibly and against their will compelled them to perform labor

and service for him in payment of a debt claimed by Cole to be due and owing him by Judge Johnson and Hagar Johnson.

"To establish a conspiracy, it is not, as has been said, necessary that there should be an explicit and formal agreement for an unlawful scheme between the parties; nor is it essential that direct proof be made of an express agreement to do the act forbidden by the law. It is as competent to prove an alleged conspiracy by circumstances as by direct evidence. In prosecutions for criminal conspiracies, the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. * * * The acts of the parties in the particular case, the nature of those acts, * * * and the character of the transactions or series of transactions, with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered as sources from which evidence may be derived of the existence or nonexistence of an agreement, which may be express or implied, to do the alleged unlawful act."

The crime charged against the defendants is a statutory offense, and all the essentials required by the statute to constitute the offense must be proved before a conviction can be had, and under the statute there must be not only a conspiring together by the parties to commit the offense, but to complete the offense denounced by the statute, the formation of the conspiracy must be followed by the act charged in the indictment to have been done to effect its object, for otherwise the offense would not be made out. "But the moment any act is done to effect the object of the conspiracy, that moment criminal liability is fixed; and this act to effect the object, though it be done by only one of the parties, binds each and all the parties to the conspiracy, and completes the offense as to all, for in that case the act of one becomes the act of both or all."

"This act, to effect the object of the conspiracy, must not be an act which is a part of the conspiracy. It must not be one of a series of acts, constituting the agreement or conspiring together, but it must be a subsequent, independent act, following a completed conspiracy, and done to carry into effect the object of the original combination." And under the law a person, who was not a party to the previous conspiracy, cannot be convicted on the overt act. Employing the language of the Supreme Court: "The gravamen of the offense here is the conspiracy. For this there must be more than one person engaged. Although by the statute something more than the common-law definition of a conspiracy is necessary to complete the offense, to wit, some act done to effect the object of the conspiracy, it remains true that the combination of minds in an unlawful purpose is the foundation of the offense, and that a party who did not join in the previous conspiracy cannot, under this section, be convicted on the overt act." United States v. Hirsch, 100 U. S. 34, 25 L. Ed. 539.

"Guilty connection with a conspiracy may be established by showing association by the persons accused, in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform sepa-

rate acts or hold distinct relations in forwarding that design. If two persons pursue by their acts the same object, one performing one act, or part of an act, and the other another act, or another part of the same act, so as to complete it, with a view to the attainment of the object they are pursuing, the jury are at liberty to draw the conclusion that they have been engaged in a conspiracy to effect the object. Co-operation in some form must be shown. There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose. If parties in any manner work together to advance the unlawful scheme, having its promotion in view, and actuated by the common purpose of accomplishing the unlawful end, they are conspirators. If a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a view to forwarding the enterprise or scheme, assists in its prosecution, he becomes a conspirator." United States v. Goldberg, supra.

As the court has already stated to you, the charge in the indictment is that the defendants conspired to hold Judge Johnson and Hagar Johnson in a condition of peonage by, deceitfully and against their will, carrying them to the parish of Ouachita, La., and compelling them to work for the defendant Cole in payment of a debt claimed by Cole as due and owing from them. In view, then, of the charge contained in the indictment, it becomes necessary to ascertain the meaning of peonage. What is "peonage"? It is said by the Supreme Court, in the case of Clyatt v. United States, 197 U. S. 215, 216, 25 Sup. Ct. 429, 49 L. Ed. 726, and you are so instructed in this case, that peonage "may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. * * * Peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of service in payment of the debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. * * * That which is contemplated by the statute is compulsory service to secure the payment of a debt." Peonage, then, is the status or condition of compulsory service; the basal fact being indebtedness.

In the ordinary affairs of life, a man may contract for the payment of a debt by the performance of personal service. This, when voluntarily done, when force or compulsion is not exercised on the part of the creditor to compel the performance of the service, is lawful; but compulsory service—that is, service performed by one person under force exerted by another to pay a debt—is unlawful and denounced by the law. You thus perceive the meaning of the term "peonage" as used in the statute. The theory of counsel for the government is that Judge Johnson and Hagar Johnson entered into a contract at Seguin, Tex., to perform labor on a farm at Wilmot, Ark.,

and that, instead of being carried to Wilmot, Ark., they were deceived by the defendants and transported to Monroe, La., which is located in the parish of Ouachita, and there compelled to labor on the farm or plantation of the defendant Cole. It is further insisted by counsel for the government that, after Judge and Hagar Johnson arrived at the plantation of the defendant Cole, they were required by Cole to remain on the plantation and perform service for him to pay a certain indebtedness claimed by Cole as due and owing by Judge and Hagar Johnson, amounting to a sum between $60 and $100. The exact amount it is not necessary to determine, but the items consisted of railroad fare paid by Cole from Texas to Monroe, La., together with freight paid by him for transporting household and kitchen furniture and other articles, and also a few items of indebtedness paid by Cole for Judge Johnson at Seguin, Tex. The defendants, on the other hand, deny the charge of conspiracy, and deny that Judge and Hagar Johnson were held in a condition of peonage by Cole after their arrival at Cole's plantation in Louisiana.

If you find from the evidence that a conspiracy did not exist, as charged in the indictment, between Cook and Cole, for the purpose in the indictment specified, then your verdict should be in favor of the defendants. In determining the question of the existence or nonexistence of a conspiracy, you will carefully consider all the facts and circumstances in evidence, and from a consideration of them all you will reach such a conclusion as is just, right, and proper in the premises. In this connection you are further instructed that, if you find from the testimony that there was such a conspiracy between the defendants as charged in the indictment, and that in pursuance, and to effect the object, of the conspiracy, Cole carried Judge Johnson and Hagar Johnson from Seguin, Tex., to the parish of Ouachita, La., and there forcibly and against their will compelled them to perform labor and service for him in payment of a debt claimed by Cole as due and owing by them, then you should return a verdict against the defendants. As before intimated by the court, peonage is involuntary service; that is, service performed against the will of the party who performs it, and as a result of force or compulsion exerted by the party who requires the service. If, then, the service performed by Judge and Hagar Johnson on the plantation of Cole was purely voluntary on their part, and was not the result of force exerted by Cole, your verdict should be in favor of the defendants, for in such case there would be no violation of the statute. Look, then, to and consider all the facts and circumstances in evidence before you, and determine: (1) Whether the defendants conspired together to hold in a condition of peonage Judge and Hagar Johnson, as in the indictment charged; and (2) did Cole, in furtherance, and to effect the object, of the conspiracy, carry Judge and Hagar Johnson to Monroe, La., and compel them against their will to perform labor and service for him in payment of a debt as charged in the indictment? If you are satisfied, from a consideration of the testimony, beyond a reasonable doubt, that the defendants are guilty of conspiracy as specifically alleged in the indictment, it is your duty to so find. If, however, you

entertain a reasonable, well-founded doubt of their guilt, you should give them the benefit of it and acquit them.

You are further instructed that you are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and, in weighing and considering the testimony before you, you should endeavor to reconcile and harmonize it, if you can. When this cannot be done, you may determine for yourselves what portion of the conflicting testimony is most worthy of belief. "The court can only give you a few general rules as guides for weighing and deciding between testimony that cannot be reconciled. You should look to the circumstances surrounding the respective witnesses and to the way in which they testify, in considering the weight to be given their testimony; to their relationship to the parties on trial and their means of information and opportunity of knowing the facts whereof they speak. You should also consider the manner and bearing of the witnesses in testifying. Do they show a zeal in stating facts favorable to one side, and reluctance in disclosing facts that would benefit the other? Do they testify in that frank, candid, and straight forward way which a witness should do under the solemnity of an oath; or do they evade and equivocate? You should also look to the consistency of their testimony. You should especially look to the interest which the witnesses have in the suit or in its result. Where the witness has a direct, personal interest in the result of the suit, the temptation is strong to color, pervert, or withhold the facts. The law permits a defendant at his own request to testify in his own behalf. The defendant Cole has availed himself of this privilege. His testimony is before you, and you must determine how far it is credible. The deep personal interest which a defendant has in the result of the suit should be considered by the jury in weighing his evidence, and in determining how far, or to what extent, if at all, he is worthy of credit." See Reagan v. United States, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709.

You are further instructed that in criminal cases the presumption of law is in favor of the innocence of the defendant until his guilt shall have been established to the satisfaction of the jury beyond a reasonable doubt; and if, from an examination and consideration of all the facts and circumstances in evidence, taken in connection with the charge of the court, you are satisfied beyond a reasonable doubt that the defendants are guilty as charged in both counts of the indictment, then you should find them guilty accordingly, in which event your verdict will be in the following form: "We, the jury, find the defendants, J. T. Cole and M. Z. Cook, guilty as charged in the indictment." If you find the defendants guilty under one count, and not guilty as to the other, you will frame your verdict accordingly, specifying under which count you find them guilty, and under which count not guilty. If, on the other hand, your verdict be in favor of the defendants on both counts, you will simply say: "We, the jury, find the defendants not guilty."

It is needless for me to say to you, gentlemen of the jury, that the case on trial is of importance both to the government and to the defendants. In no case can a jury perform a higher or nobler duty

than a true verdict render, according to the law and the evidence. When that is done, your whole duty is accomplished; and in this case the court feels assured that you will perform that duty with fairness and impartiality. Consider it calmly and dispassionately, with an eye single to reaching a just conclusion in view of the evidence and these instructions.

Application for Special Instruction.

"Before you can convict the defendants, J. T. Cole and M. Z. Cook, you must believe beyond a reasonable doubt that the defendants entered into a conspiracy in Seguin, in Guadalupe county, in the Western district of Texas, and unless you believe beyond a reasonable doubt, not only that a conspiracy was formed, but that it was formed at Seguin, in Guadalupe county, in the Western district of Texas, you must find the defendants not guilty.

"The defendants J. T. Cole and M. Z. Cook request that the above special charge No. 1 be given.

"J. T. Cole and M. Z. Cook, by Their Attorneys."

The foregoing special instruction is given, with this explanation: It is true that, before you can convict the defendants, you must believe, beyond a reasonable doubt, that they entered into a conspiracy, as charged in the indictment, in Seguin, Guadalupe county, Tex.; but it is not necessary that the overt act—that is, the act to effect the object of the conspiracy—as charged in the indictment, should have been committed in Seguin, Guadalupe county, for if the proof shows that the overt act was committed there, or in the state of Louisiana, it would be sufficient. See, Hyde v. Shine, 199 U. S. 76, 77, 25 Sup. Ct. 760, 50 L. Ed. 90.

You will consider this special instruction in connection with the general charge of the court.

NOTE.—Upon the first trial the jury failed to agree upon a verdict. The second trial resulted in a verdict of not guilty.

UNITED STATES v. CHISHOLM.

(Circuit Court, S. D. Alabama, N. D. May 6, 1907.)

1. CRIMINAL LAW—TRIAL—DEFENSE OF INSANITY.

In a criminal prosecution, where the defendant admits the doing of the act charged, but relies on the defense of insanity, such defense has exclusive reference to the act charged and to the time of its commission. The legal presumption is that defendant was sane, and it is the duty of the jury to convict unless on the whole evidence they have a reasonable doubt as to whether defendant when he committed the act was of sufficiently sound mind to know right from wrong and to form a criminal intent, or to resist the impulse to do the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 53–64, 742–744.]

2. SAME—EVIDENCE—EXPERT TESTIMONY.

While, on the issue as to the sanity or insanity of a defendant charged with crime, the opinions of experts are admissible, and it is the duty of the jury to give the same due consideration, such opinions constitute only

a part of the evidence and are not controlling, but the jury should form their own judgment on the issue from all the proof in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1045, 1081.]

3. SAME.

Although a defendant admits the acts charged as a crime and relies wholly on the defense of insanity, it is competent for the prosecution to prove such acts, the conduct of the defendant previously, at the time of, and after, the acts, and subsequent statements or confessions made by him, as evidence which may be considered by the jury in connection with the other evidence on the question of insanity, as well as affording a basis for hypothetical questions to be propounded to medical witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 760.]

4. SAME—OPINION EVIDENCE—NONEXPERTS.

The opinion alone of a nonexpert upon a question of insanity is not evidence unless accompanied with a statement of the facts and circumstances within the personal knowledge of the witness upon which that opinion is based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1045, 1057.]

Indictment for Embezzlement of Funds of a National Bank.

See 149 Fed. 284.

Thomas R. Rhoulhac, U. S. Dist. Atty., W. L. Steele, Asst. U. S. Dist. Atty., and Lee Bradley, Special Counsel.

Frank S. White, for defendant.

HUNDLEY, District Judge (charging the jury). This defendant is indicted for the violation of a federal statute (section 5209, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3497]). The offense charged in the indictment, stated in forms varying in the different counts thereof from 22 to 42, inclusive, is that of embezzlement of funds belonging to a banking association; in this case said association being the First National Bank of Birmingham. The first 21 counts of the indictment are not insisted by the government.

The defendant by his counsel has admitted the taking of the funds, but says he is not guilty as charged, because at the time of the taking of said funds he was suffering from insanity, in this: That the act was done while acting under an insane delusion that he could control the cotton market, and that this insane delusion was of such a nature that it unbalanced his mind and rendered him irresponsible for the act committed. The effect and purpose of these admissions are to support all the charges in the indictment, as to the taking of the money, and require at your hands a verdict of guilty on those charges, unless the proof offered in this case of the mental condition of the defendant at the time he took the money raises in your minds a reasonable doubt of his legal responsibility for his said act. Since, in the absence of the defendant's admissions, he would be presumed to be innocent until the contrary was shown beyond a reasonable doubt, so now, although the law presumes him to be legally responsible, this presumption and his admission would, in the absence of proof as to his mental condition, authorize and require his conviction, still, this proof being made as to his mental condition, you are required to consider it, and if upon

consideration of the whole proof you are fully satisfied that he did the acts charged (which are fully admitted), but are also satisfied beyond a reasonable doubt that at the time he did the acts charged he was legally responsible, you should convict him on the counts in the indictment, but otherwise you should acquit him on said counts.

Every person charged with crime is presumed to be sane—that is, of sound memory and discretion—until the contrary is shown by proof. No act done in a state of insanity can be punished as an offense. The question of the insanity of the defendant has exclusive reference to the act of which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking in the consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Here, whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind, proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases, and accountability to the law for the purpose of punishment no longer exists.

The real test, as I understand it, of liability or nonliability, rests upon the proposition whether at the time the defendant took the money he had a diseased brain, and it was not partially diseased, or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and so impelled it that at the time his will power, judgment, reflection, and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he cannot be punished; but, if his brain was not in this condition, he can be punished by the law, remembering that the burden is upon the government to establish that he was of sound mind, and by that term it is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and, knowing that the act he was committing at the time he was performing it, was a wrongful act in violation of human law, and he could be punished therefor, and that he did not perform the act because he was controlled by irresistible and uncontrollable impulses. In that state of the case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him. But, if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease and the embezzlement was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control over his mental faculties and the will power to control his actions, but simply took the money from the First National Bank of Birmingham while he was laboring under a delusion which absolutely

controlled him, and that his act was one of irresistible impulse, and not of judgment, in that event he would be entitled to your acquittal. However, in the consideration of this question, you must bear in mind, gentlemen, as I have said, that it is a presumption of the law, justified by the general experience of mankind, as well as of considerations of public safety, that a man is presumed to be sane until he is proved to be insane. If this presumption was not indulged, the government would always be under the necessity of adducing affirmative evidence of the sanity of the accused at the outset. And a requirement of that character would seriously delay and embarrass the enforcement of law against crime, and in most cases be unnecessary. Consequently the law assumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts, but that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof.

It is a disputable, or often designated a rebuttable, presumption, resulting from the connection ordinarily existing between certain facts —such connection, as said by Greenleaf, in his work on Evidence, not being "so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all the evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence."

The defense attempted to be made by the proof is that as a result of certain mental delusions the defendant's mind became so diseased as to render him incompetent or unable to discern the wrong in these acts done by him, or to resist the impulse to do them. It is not every suspicion, or degree of unsoundness of mind, that makes a man irresponsible. It need not be violent, or be manifestly alike on all subjects, but it must be such on the particular subject out of which the acts charged as an offense are claimed to have sprung as to render him incapable by reason of such mental unsoundness to discern the wrong in committing such acts, and it must be shown that the acts resulted from such unsoundness of mind. As was said in the Guiteau Case (D. C.) 10 Fed. 168:

"A jury is not warranted in inferring that a man is insane from the mere facts of his committing a crime, or from the enormity of the crime, or from the mere apparent absence of adequate motive for it, for the law assumes that there is a bad motive, if nothing else appears."

In order to enable you to exercise a safe judgment on the question of the defendant's responsibility at the time of the commission of the acts complained of in the indictment, you have been permitted to hear proof of his habits and conduct for a period of time prior to, during, and since the time of the taking of the money, and as to his health and physical condition prior to the commission of said acts. Ordinarily witnesses are not permitted to give their opinions to the jury, but must state only facts within their knowledge, and leave the jury to draw their own conclusions (under proper instruc-

tions) from the facts. However, upon questions of mental diseases, the jury are given the benefit of the professional opinion of skilled witnesses who have peculiar knowledge of such diseases and of the effect on the faculties of the mind, and of symptoms indicating the presence, species, and degree of mental disorder; but, of course, you must understand that these opinions of these physicians, both for the government and for the defense, are only a part of the proof. And while you are to consider this part of the proof, as every other part of it, carefully, the opinions of these witnesses do not control you in your verdict. You do not and cannot surrender your right to pass upon the whole proof yourselves, nor can you avoid the duty of judging for yourselves on this question of the responsibility of the defendant on the whole proof in this case. Here, as is always the case in jury trials, you are required to judge of the weight of the testimony and find your conclusions of guilt or not from your own view of the whole proof under the instructions given you by the court.

During the progress of this trial it has been my province to decide what of the testimony it was proper should be offered you for consideration, and by the whole testimony in this case I mean that you must consider only that testimony which I have permitted to go to you, and none of that which I have withdrawn from your consideration. It was my province to decide what testimony should be presented to you tending to prove the issues here submitted, and it is your province exclusively to decide whether any given part of the testimony is true, how far it is true, what it does in fact prove, as well as to decide what the whole testimony proves. It is my province, too, to sum up the testimony to you whenever and as far as I may deem it necessary or proper, but this does not exclude or relieve you from bearing in mind every part of the testimony that your own recollection retains, nor does any view of the weight or value of the testimony which my summary may seem to imply in any manner bind you, or qualify your right and duty to judge for yourselves of the value of the testimony which has been admitted.

The testimony in this case tends to show that the defendant was paying teller in the First National Bank of Birmingham at the time he took the money; that he was a young man of fine character, industrious, and efficient in his particular line of employment; that he became engaged in speculating in cotton futures and stocks; that, in order to carry on his speculations in this regard, he abstracted from the vault of the bank various sums at various times, aggregating over $230,000, and that he recouped of his losses during the period of his speculations the sum of about $130,000, thus practically leaving his total shortages in round numbers the sum of $100,000; that after he took this money he left on a vacation, going to Atlantic City, where he remained for a period of time, and during his absence the taking of the money was discovered by the bank officials, who awaited his return, and on his arrival in this city he was met by a private detective and some of the bank officials, and, going to a room, he was first confronted with the fact of the missing money. At first he strenuously denied all knowledge of it, but after a time, when

confronted with certain facts connected with his relation with the bank and the relations of others thereto, he confessed that he had taken the money, which he had used in speculation and also expressed contrition for his conduct in the premises. Although the defendant admitted the taking of the money, I permitted the government to produce witnesses on the stand to prove all the facts within its possession in relation to the acts of the defendant in taking this money. I permitted this proof on the part of the government for a twofold reason: First, in the absence of a general plea of guilty by the defendant, the government had a right to present its case in its own manner in keeping, of course, with the proper rules of evidence; second, this evidence was relevant and proper upon which to base a hypothetical question to be presented to the medical experts whom I knew were to be examined in this case, upon the question of insanity vel non. Again, the conduct of the defendant during the time he took the money, his statements made on his arrival from his vacation, his confession, and the manner of his confession, are all evidence to be taken into consideration by the jury in connection with the other evidence in the case in assisting them in determining the question of the defendant's sanity at the time of the commission of the offence.

When the experts were placed upon the stand, they were interrogated by hypothetical questions, detailing in substance certain facts in the case in relation to the mental condition of the defendant. This was competent testimony, and is the usual way of presenting evidence by experts, but the value of testimony based upon hypothetical questions depends upon whether the statements in the hypothetical questions are sustained by proof in the case. You must in this connection take and consider the testimony of these experts, in connection with the other testimony in the case, as bearing upon the question of the sanity or insanity of this defendant at the time he took the money. But the testimony of these experts is not all the evidence by any means upon the question of the defendant's sanity or insanity, but there is other evidence presented to the jury on this question, which they must consider—evidence of witnesses as to facts in reference to the conduct of the defendant at the time of the taking of the money, prior thereto, and since the taking, which must be considered by the jury in connection with all the other testimony in the case.

I permitted witnesses who were not experts to state in a way their opinion in reference to the defendant's sanity, but the jury must not forget in the consideration of the opinion of these witnesses, whom I may call nonexperts, that they must not consider their opinions alone, and place them in opposition to the opinions of the medical experts who have been placed on the stand, and who have been proven to be men particularly skilled within the line of their professional training. The opinion of a proven expert may be given in evidence upon facts within his knowledge, or it may be given upon a hypothetical question put to the expert and based upon the particular facts which have been given in evidence upon the trial of the case at issue. The opinion alone of a nonexpert upon a question of insanity is not evidence, unless that opinion is accompanied with a statement of the facts

and circumstances within the personal knowledge of the nonexpert upon which that opinion is based. The jury being informed as to the witness' opportunities to know all the circumstances, and of the reasons upon which he rests his statement as to the ultimate general fact of sanity or insanity, are permitted to test the accuracy or soundness of the opinion expressed; and thus, by using the ordinary means for the ascertainment of truth, reach the ends of substantial justice.

In this connection, you must consider the testimony of the witnesses in reference to the conduct of the defendant before and since the commission of the offense charged, consider the opportunities the witnesses had for observing the defendant's actions and his manner, consider the fact, if it be a fact, that his manner towards his family changed about the time of the commission of this offense, and in that connection it is within your peculiar province under the testimony in this case to determine whether this change in the actions and conduct of the defendant was superinduced by a giving away of his mental condition, or by his depression and perplexity of mind, superinduced by the knowledge of his shortage in the bank and the probability of detection. You must consider the fact, if it be a fact, that he had an attack of fever before the taking of the money, and further consider under all the evidence what effect, if any, this fever had upon his mental condition, or whether it only affected him physically and not mentally or both. You must consider the evidence introduced in this case of the family history of the defendant in relation to insanity, and in considering this evidence you must consider it in connection with the testimony of the experts upon this subject. Is ancestral insanity in fact transmitted, and is the fact of this insanity a fact which can bear upon the question of the defendant's insanity? Or is it a fact to be deduced from the testimony of the experts in this case that the insanity of the ancestors of this defendant is not a proper basis upon which to predicate the defendant's sanity or insanity, but that in such cases, after insanity is first proven, the insanity of one's ancestors may be looked to to find the cause.

In the further consideration of the defendant's conduct in relation to his speculations in cotton, and his delusions that he had received some supernatural power by which he was enabled to control the cotton market, you must consider all the evidence bearing upon this question, including that of the experts. This peculiar kind of mental aberration, if you find from the evidence that it was a mental aberration, has been referred to in the testimony in this case as "grandiose delusions."

Now, gentlemen, in considering the question as to whether the defendant's mind was afflicted by such delusions, consider the fact, if it be a fact, whether or not persons so afflicted are inclined to be cheerful, buoyant, and boastful; consider the fact, if it be a fact in this case, in this connection, whether or not the defendant was depressed, morose, and changed in his feelings towards the members of his family. In considering the question of his being afflicted with such delusion, you must also consider the fact, if it be a fact, whether or not persons so afflicted generally act solely upon their own ideas, or whether they act upon the ideas or suggestions of others, and in this connection you

must consider the further fact, if it be a fact, whether or not the defendant in fact acted upon suggestions made him by others verbally or in writing, or on his own ideas.

In this connection you must consider the further fact, if it be a fact, whether or not the defendant, in addition to speculating in cotton, speculated in stocks as well. Take into consideration all of his acts and conduct prior to, at the time, and since the commission of the offense charged; consider the fact, if it be a fact, that, in order to cover up his transactions with the bank and prevent detection, he used the name of S. M. Webster; consider the fact, if it be a fact, of the manner in which he entered charges and credits to various concerns who had dealings with the bank in which he was an officer; consider his manner and method adopted to cover up his act, if you believe from the evidence that such was his conduct; consider his confessions, his manner in making said confessions, and his statements as detailed by witnesses from the witness stand; consider all these facts and circumstances, I say, in connection with all the testimony in the case, in order that you may determine whether or not the defendant was sane at the time of the commission of the offense, remembering that the test of responsibility, where insanity is asserted, is the capacity to distinguish between right and wrong with respect to the act, and the absence of insane delusions respecting the same.

There is evidence in this case tending to show that Chisholm believed he could control the cotton market. Upon this phase of the case, you are instructed that if the evidence shows that the defendant had such belief and that it was the result of his belief that he could control the cotton market and not an insane delusion, and that he acted upon that belief, thinking that he had the right to take the money from the bank in order to carry out his belief, but at the same time he knew it was a violation of human law, and he would be punished therefor, in that event, it would not be an insane delusion upon the part of Chisholm, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act. And also if you further believe from the evidence that he came to the conclusion that he could control the cotton market, and this conclusion of his that he could control the cotton market was the sole inducement that caused him to take the money, he would not be guiltless, and would be responsible therefor. Upon the other hand, I charge you that if you should find from the evidence in this case that Alexander R. Chisholm, the defendant, was possessed of a delusion that he believed that he could control the cotton market, and if you further find that such delusion and belief on the part of Alexander R. Chisholm was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the taking of the money, and that his act was at that time the result of such diseased brain, you will acquit him.

As I have already said, if you have a reasonable doubt of the guilt of the defendant, or a reasonable doubt of the defendant's sanity at the time of the commission of the offense, you must give him the benefit of the doubt and acquit him. The doctrine of the reasonable doubt is a legal right almost as old as law itself. Its purpose is to shield the

innocent; and not a cloak for the guilty. A reasonable doubt is a doubt which a reasonable man may have. You must not go out into the field of speculation to discover a doubt as to this defendant's guilt or innocence, nor must you go beyond the domain of the testimony in this case, but such a doubt must be a doubt only that may be engendered in the mind of a reasonable man from the evidence produced in the trial of this cause. It must not be merely a possible or speculative doubt, but an actual and substantial doubt, arising out of the evidence which is consistent with sound reason. The question you must decide is, did the defendant have the mental ability at the time of the commission of the crime to discriminate between right and wrong with respect to the offense charged in the indictment? Did he know the nature and quality of his act when he committed it, and that it was wrong, and a violation of the law of the land for which he would be punished? You must find the answer to these questions in the testimony alone.

In conclusion, gentlemen, and in addition to what I have said to you in reference to the facts in this case, you are to determine the following questions: First. Was the defendant, Chisholm, at the time he committed the act, or acts, of taking the money, laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason, and judgment, and was the act committed by reason of such insane delusions? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but, if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant and acquit him. Second. Did Chisholm commit the act, or acts, of taking the money not laboring under an insane delusion, but believing that he could control the cotton market, and at the time of taking the money he took the same solely upon such belief, and for the purpose of carrying out his belief that he could control the cotton market, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment.

Upon the whole case, therefore, if you are satisfied beyond a reasonable doubt that at the time he took this money he knew what he was doing, and knew it was wrong to do it, and he was not subject to an irresistible impulse springing from a diseased mind, you should render a verdict of guilty as charged in the indictment. If you are not so satisfied, you should return a verdict of not guilty.

D. A. TOMPKINS CO. v. MONTICELLO COTTON OIL CO.

(Circuit Court, W. D. Georgia, S. D. May 16, 1907.)

1. DAMAGES—BREACH OF CONTRACT—COMPENSATION — CONTEMPLATION OF PARTIES.

In an action for breach of contract, the party committing the breach is liable only for such losses as would naturally and probably be in the contemplation of the parties at the time of making the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 58.]

2. SALES—BREACH OF CONTRACT—DAMAGES—CONTINGENT PROFITS.

Where defendant purchased certain cotton-seed milling machinery of plaintiff, to be installed at a specified time, and in contemplation thereof purchased large quantities of cotton seed, which deteriorated in value by reason of plaintiff's delay in installing the machinery, defendant was not entitled to recover on a counterclaim losses resulting from the manufacture and sale of the seed products which might not have occurred if the machinery had been installed in time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1198; vol. 15, Damages, §§ 72–88.]

3. DAMAGES—REDUCTION OF DAMAGES.

Where plaintiff contracted to install certain cotton-seed machinery in defendant's factory within a specified time, and foreseeing that it would be unable to deliver the machinery in time, notified defendant, urging him not to accumulate seed, it was defendant's duty to reduce its damages to a minimum, and it was not justified in purchasing such improvident quantities of seed that it was necessary to store same on the ground, exposed to the elements, and charge the damage to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 128–131.]

4. SALES—BREACH OF CONTRACT—DAMAGES—SUBSEQUENT CONTRACT.

Where defendant made certain contracts for the sale of cotton-seed products, after the execution of plaintiff's contract to install certain machinery in defendant's factory at a specified time, plaintiff was not chargeable with defendant's losses on such contracts because of plaintiff's failure to install the machinery within the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1198; vol. 15, Damages, §§ 72–88.]

5. SAME—MEASURE OF DAMAGES.

Where plaintiff failed to perform a contract to install certain cotton-seed machinery in defendant's factory within a specified time, and defendant purchased cotton seed in large quantities, relying on the performance of the contract, the measure of defendant's damages was the difference between the value of the seed at the time the machinery should have been ready and when it was actually installed.

6. SAME—CONTRACT—BREACH—DELAY—RECOUPMENT.

Where defendant suffered damage because of plaintiff's delay in performing contract to install certain cotton-seed machinery in defendant's mill within a specified time, but there was no proof as to the difference in value of defendant's cotton seed at the time the machinery should have been installed and when it was actually ready, defendant was only entitled to recoup against the purchase price the necessary expense incurred in stirring and airing the seed during the delay, the cost of insurance necessitated thereby, the loss in value of seed damaged by the delay and sold for fertilizer, and the expense of replacing a shaft broken on account of improper adjustment by plaintiff's servants.

In Equity.

See 137 Fed. 625.

Merrill P. Callaway and Eugene Black, for complainant.
John R. L. Smith, for defendant.

SPEER, District Judge. The complainant, the D. A. Tompkins Company, entered into a contract to furnish the machinery for the mill of the defendant, the Monticello Cotton Oil Company. It was expressly agreed that the machinery should be installed by September 15, 1902. The defendant was about to engage in what to it was a new enterprise, namely, the manufacture of the products of cotton seed. Because it was necessary to buy seed for the purpose of manufacture at the time when the gathering of the cotton crop made such seed available, the date of installation of the machinery was an essential part of the contract. The machinery, however, was not placed in position until the 8th day of December, nearly three months after that date. The controversy followed.

The complainant, having been paid in part for the machinery, insists that it should recover the full balance of the contract price. This, it is alleged, is $10,010.87. Added to this is an item for extra machinery, making a total of $10,306.66. The defendant resists this claim, and seeks by an answer, setting forth what may be termed a demand for recoupment, to reduce the complainant's demand by alleged damages resulting from the delay, amounting to $8,313.11. This claim for damages, is, in the main, based on alleged losses from the heating of cotton seed, which the defendant had purchased in anticipation of its manufacture into its several products. The controversy has been presented at several times, and on a previous hearing the court found that "appreciable" and "considerable loss" had resulted to the defendant. This was expressed as follows:

"Finding the defense in part at least meritorious, the court feels obliged to disallow the claim for attorney's fees, traveling expenses, and other fees connected with collection. Nothing then remains to be done save to ascertain by how much the complainant's demand shall be reduced because of the failure on its part to complete the contract by the time and in the manner it engaged to do. This task will be referred to a master, with direction to compute such damages."

A reference was accordingly made. After considering all of the evidence, the master, W. F. Grace, Esq., in a very clear and valuable report, makes alternative findings of fact to depend for adoption by the court upon the true rule of ascertainment or measure of damages. There being no doubt as to the breach of contract, the master first finds that, if the damages are to be estimated on the difference between the value of the cotton seed of the defendant company at the time the machinery should have been installed and its depreciated value when the installation was effected, the damages sustained by the defendant were $995.97. The alternative finding is that, if damages are to be estimated in view of subsequent losses alleged to have been sustained by the defendant company from the manufacture and sale of the mill products, the claim of the plaintiff should be reduced in the sum of $6,428.71. The finding of the court must depend upon what seem the proper rule of estimating damages resulting from the breach of a contract of this character.

Now, the object of damages is compensation, and it is a general rule that the party committing the breach is liable only for such losses as would naturally and probably be in the contemplation of the parties at the time of making the contract. In other words, the parties will not be held liable for contingent damages which they could not anticipate as reasonably and probably resulting for the breach at the time they made the contract, after weighing its facts and conditions. The rule established by section 3798 of the Code of Georgia of 1895, which is but a statement of the general law, is as follows:

"Remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, or unless they are capable of exact computation, such as are the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract."

This rule is not gathered from any special state enactment on the subject, but was placed in the Code by the profound lawyers who made the codification of 1861. It has remained unchanged by the numerous revisions since then. Indeed, it is stated in the case of Willingham v. Hooven, 74 Ga. 234, 58 Am. Rep. 435, that the rule was condensed by the first codifiers, from the following early decisions of the Supreme Court of Georgia: Coweta Falls Mfg. Co. v. Rogers, 19 Ga. 417, 65 Am. Dec. 602; Cooper v. Young, 22 Ga. 269, 68 Am. Dec. 502; Red v. City of Augusta, 25 Ga. 386.

Now, the defendant's claim is based upon its theory of the amount of prime oil, prime cotton-seed meal, and prime hulls which woud have been produced by the 2,876 tons of cotton seed, purchased by it, had the machinery been installed in time, and upon the further theory that these products would have brought the highest prices existing at the date of sale, or at such times as the defendant might have chosen to put such products upon the market. It is vital to the rights of the parties to inquire: Would not this contention embrace contingent profits, involving the character of the seed, the skill in handling and manufacture, the business sagacity of the defendant's management, the activity of its agents or salesmen, the excellence of its product, and other contingencies, about which the manufacturers of machinery could have had no information whatever when the contract was made. In reply to this inquiry, the defendant would rely on the case of Van Winkle v. Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. The case related to cotton-seed oil machinery, involved a breach caused by dely, and is generally similar to the case at bar; but the conclusion of the court on the measure of damages is inimical to the defendant's contention, and is as follows:

"If the loss be on cotton seed which are deteriorated by keeping, the difference in value," the court declares, "in the seed as they were when the machinery ought to have been ready and as they were when it was actually ready for their manufacture is the measure."

No weight is accorded in that case to the contention that the resulting profits or losses from the operation of the mill, after the manufacturer who made its machinery had lost all connection with it, should enter into the calculation of damages. This rule expressed by the Supreme Court of Georgia seems entirely just. Let us place ourselves

for a moment in the attitude of the contracting parties when the written contract for purchase and sale was signed. The Tompkins Company knew that time was of the essence of the contract; that the 15th of September was the date when abundant quantities of cotton seed could be obtained and in the locality where the material was to be placed. It knew that to accumulate the seed at about that time was indispensable, that unreasonable delay would cause deterioration in its value; but it did not and could not know whether the newly organized company would make prime meal, oil, or hulls. It could not know the skill of its operatives, the sagacity of its business management, its attentiveness to business, or the market prices of the cotton-seed products. The Monticello Company knew as much, and no more. How can it be reasonably urged, then, that the losses resulting from the manufacture and sale of the seed products could have entered into the contemplation of the contracting parties. It is true that the rule contended for by the defendant has been ingeniously presented, and has the element and interest of novelty. It is, however, in our judgment supported neither by sound reason nor convincing authority.

In the case of the Ship Sabioncello, Fed. Cas. No. 12,199, where the cargo had been damaged by bad storage, it was held:

"That the amount of damages was properly arrived at by ascertaining the difference between the market value of the goods in their damaged state and what would have been their market value if they had been sound."

The cargo consisted of rags intended for the manufacture of paper. The rags had been injured by oil. The owner of the goods was a paper manufacturer, and, when the damaged goods were sold at auction, he bought them in, and manufactured them into paper, and sold the paper at the same price of that made from undamaged stock. This, however, did not change the rule. It follows, then, that the skill or want of skill, the success or want of success, of the manufacturer in making up the material, or in disposing of its product, can have no legal relation to the measure of damages resulting from a failure to deliver in time the machinery with which the manufacture is done.

Among the specification of damages alleged by the defendant are losses upon two subsequent contracts, on account of inferior oil, and losses upon tanks of oil, sold at various times, and as late as six months after the completion of the mill. This inferiority is ascribed to the heating of the seed. The sales of the oil in tanks were generally made upon samples; but, if the measure of damages for which the defendant contends should be adopted, the evidence relating to that season would not show loss by the company. It appears that, at the time of the completion of the mill, the market price of prime oil was 28 cents a gallon. The price then advanced as high as 36½ cents, and the defendant company now seeks to hold the complainant liable for all differences between the amounts realized from certain sales and the highest market value at the time; but, on this contention, if it should be considered at all, the complainant has the right to insist that the profits for the entire season should be considered. When this is done, it is seen that, owing to the rapid increase in the market value of oil, the defendant made large profits. It actually made sales as high as

35½ cents a gallon, a profit of 7½ cents above the cost of oil per gallon at the time the contract was broken. But, if it were otherwise, the Tompkins Company could not be held responsible for fluctuations in market value, or differences in sales, long after the completion of their contract. To recover profits, they must have been in the contemplation of the parties at the time the contract was made. 13 Cyc. 36. The case of Pennypacker v. Jones, 106 Pa. 242, was not unlike the case at bar. There the defendants engaged to place in the plaintiff's mill machinery of a certain capacity to produce a high grade of flour. The machines proved incapable of meeting the requirements, and the court held that the loss of possible profits was not a proper subject of damages. The language is as follows:

"It was no part of this contract that the plaintiff should make profits, or even have the opportunity of doing so by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract, and is necessarily in the contemplation of the parties; but, when a machinist furnishes machinery to a mill owner, it is no part of his engagements that a profitable business shall be carried on with the machinery furnished. Of course, if it is defective, he is responsible for the damage resulting directly from such defect."

This language is quoted with approval by the Supreme Court in Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 208, 11 Sup. Ct. 500, 35 L. Ed. 147. That was a case where anticipated profits, which were lost by delay in installing machinery for a wheat mill, were sought to be recovered. The recovery was denied, and said Justice Lamar, for the court:

"There was no stipulation in the contract that the defendant should make profits on flour from the wheat ground up by the machinery which the plaintiff contracted to furnish and erect in the mill. Nor were there any special circumstances attending the transaction from which an understanding between the parties could be inferred that the plaintiff was to make good any loss of profits incurred by a delay in furnishing and putting up such machinery according to the terms of the contract."

In Freeman v. Clute, 3 Barb. (N. Y.) 427, the court observed:

"I cannot agree with the counsel for the plaintiff that the estimated profits upon the manufacture of a specified quantity of flax seed into linseed oil constitutes a legitimate item of damages against the defendant. Such profits are entirely too speculative and uncertain to make them the measure of damages."

It is further true that the law requires the injured party to use all reasonable means to reduce his damages to a minimum. Warren v. Stoddart, 105 U. S. 229, 26 L. Ed. 1117. The Tompkins Company in the progress of the work foresaw that it would not be able to deliver the machinery on time. It wrote to the defendant, urging it not to accumulate seed. The oil company, however, not only continued to buy seed, but purchased in such improvident quantities that it became necessary to place a considerable part of it on the ground without cover, and exposed to the injurious action of the rain and storms which are prevalent at that season. This is mentioned as illustrative

of the dangers to justice, of contingent demands if we depart from the settled and well-ascertained measure of damages.

The defendant, besides, claims damages upon special contracts, made with the American Cotton Oil Company, and with the McCaw Manufacturing Company. The first was made on September 4, and the latter on September 22 and 27, 1902. These were entered into after the original contract, and, in the case of the McCaw Company, after its breach. The Tompkins Company, of course, could not have foreseen these contracts, and is not chargeable with losses resulting therefrom. In Sanderlin v. Willis, 94 Ga. 171, 21 S. E. 291, it was held that a grantee could not recover profits which he would have made on a contract of sale with a third person, unless the grantor had notice of such contract when he made the bond for titles. The same principle was announced in Stewart v. Lanier House Co., 75 Ga. 582. There the lessee of a hotel sought damages against the lessor for the loss of a contract of subleasing. The damages, however, were denied by the court, on the ground that the parties could not have reasonably contemplated the sublease or its loss when they made the contract. See, also, Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; Williams v. Wood, 55 Minn. 323, 56 N. W. 1066.

The same considerations would apply to the claim for damages based upon the output of inferior meal and hulls. Nor is the claim for damages, resulting from a deficient output for the entire season, based in any sense upon the true measure, or upon sufficient evidence. Indeed, it appears from the testimony of the defendant's witnesses that there was not more than 10 per cent. of prime oil made that season by any of the mills. The proper measure of damages, as we have stated, is not the market value of the manufactured products sold months after the breach of the contract, but the difference between the value of the seed at the time the machinery should have been ready, and when it was actually installed. The defendant company has introduced no evidence as to such values. The proof is silent as to the quantity of seed heated, and as to the extent of its consequent depreciation in market value. Nor is it sufficiently made to appear whether the seed was heated before or after the breach of the contract. Indeed, much of the damage may have ensued because the defendant crowded the seed into small houses, and again left it unprotected upon the ground. There is such a multiplicity of uncertain and speculative elements involved in the contention of the defendant that the impropriety of the rule invoked by it is obvious. But there is the great salient indisputable fact that the complainant constructed and furnished machinery of the highest class for a modern cotton oil mill, for which the defendant has paid little more than one-half of the purchase price it expressly agreed to pay. There is nothing speculative or contingent about that.

In view of these considerations, the court is unable to approve the large claim for damages presented by the defendant. The losses which are ascertainable as a result of the breach are in our judgment correctly computed by the master. As the defendant has proved no definite damages as to the seed, its claims for problematical losses in value will be denied. The other items which will be allowed are

found as follows: Reasonable necessary expense incurred in proper efforts to lessen the damage by stirring and airing the seed, pending the delay in the completion of the mill, $200; insurance on the seed, necessitated by the delay, $250; necessary expense incurred in replacing a certain shaft broken on account of improper adjustment by the complainant's agents, $135.97; loss in value on 61 tons of the damaged seed, sold and only fit for fertilizer purposes, $410. These claims amount to $995.97.

The rule we have adopted on the measure of damages, and the finding of the amount for which each of the parties are held properly liable, is not only deducible from the master's report, but, after repeated hearings upon every issue involved, is attained by the independent investigation made by the court of the law and the facts.

A decree will be accordingly rendered for the complainant against the defendant for the sum of $9,310.69, with interest from December 8, 1902—in the aggregate $12,868.15. At that date, the machinery had been installed, and the mill was turned over and received by the defendant. The decree will also provide that the costs and expenses shall be ascertained, and that each party shall pay a share thereof ratably proportioned to the amount for which it is adjudged liable.

In re KOSLOWSKI.

(District Court, M. D. Pennsylvania. May 22, 1907.)

No. 844.

BANKRUPTCY — AWARD OF ARBITRATORS — LIEN ACQUIRED BY — SUBSEQUENT JUDGMENT CONFIRMING IT WITHIN FOUR MONTHS OF BANKRUPTCY—COLLUSION—COSTS.

A creditor of a bankrupt, some nine months prior to the bankruptcy of the defendant, obtained an award of arbitrators in a pending suit, which under the law of the state became a lien from its entry on the defendant's real estate. The defendant moved to have it stricken off because of irregularities, and later took an appeal within the time limited by law, by which the case was brought back into court, and upon trial before a jury succeeded in materially reducing the amount recovered. Thereupon the plaintiff moved for a new trial, but before it was disposed of the parties got together and agreed that the verdict should be amended so as to stand for the amount of the award, without interest, and that judgment should be entered thereon, which was done. Six days later the defendant became a voluntary bankrupt. *Held* that, the lien of the award having attached more than four months prior to bankruptcy, it was entitled to be paid out of the proceeds of the bankrupt's real estate, notwithstanding that the judgment confirming it was obtained within that period and that the award was ineffectual without it, the judgment for this purpose not being one that is denounced by the bankruptcy act or in conflict with it; nor was this affected by the fact that the judgment was by confession, the remedy, if there was collusion, being by rule to open, or by bill directly attacking it. *Held*, further, however, that payment should be limited to the amount as settled by the judgment, without costs, except such as were made in obtaining the award.

In Bankruptcy. On certificate from H. A. Fuller, referee.

John R. Sharpless, for contesting creditors.
W. W. Watson, for trustee.
John McGahren, for claimant.

ARCHBALD, District Judge. This case arises out of the distribution of the proceeds derived from a sale of the bankrupt's real estate. On August 17, 1905, in a suit brought by Felix Yodgis, who is the claimant here, against the present bankrupt, in the court of common pleas of Luzerne county, where the land lay, to June term, 1905, an award of arbitrators was rendered in favor of the claimant for $3,313.95, which, according to the state law, became a lien upon the defendant's real estate from the date of its entry. Act Pa. June 16, 1836, § 24 (P. L. 722). Charging that the board of arbitrators had not been legally organized, and had proceeded in his absence, after he was notified that there would be no hearing, the defendant obtained a rule to show cause why the award should not be stricken off. It is claimed by the plaintiff that this was afterwards discharged by the court, upon argument, although the record does not show it. But it is not material. Subsequently, and before the time had expired which is allowed by the statute, the defendant appealed from the award, and the case was thus brought back into court; any irregularity in the proceedings leading up to the award being thereby waived. Evans v. Duncan, 4 Watts (Pa.) 24.

Issue being thereupon duly joined, the case came on for trial before a jury March 22, 1906, and a verdict was rendered for the plaintiff, but for the reduced amount of $421.35. This did not suit the plaintiff, and he accordingly moved for a new trial; but on June 1, 1906, without waiting for the disposition of the motion, the parties got together, and by a written stipulation, signed by their respective counsel, it was agreed that the verdict should be amended so as to stand for $3,313.95, the amount of the award without interest, and that judgment should be entered thereon; the rule for a new trial to be discharged. This was presented to the court and allowed June 2, 1906, as of which date judgment for the amount specified was given. Six days later, on June 8th, the defendant became a voluntary bankrupt, and, this being within the four months period, the judgment, as it is claimed, is made void by the bankruptcy law, and, if so, being necessary to give effect to the lien of the award, the plaintiff takes nothing by reason of it.

The award of the arbitrators, as already stated, became a lien from its entry on the real estate of the bankrupt, which the appeal did not disturb, and which, pending a final disposition of the action, was capable of indefinite extension by a writ of scire facias to revive, the same as in the case of a judgment. Act Pa. April 21, 1840, § 1 (P. L. 449). Where an award has been so obtained, and the defendant on appeal secures a judgment in his favor, the lien of the award of course falls; or, if the judgment is for a reduced amount, all over and above that is similarly disposed of. But, on the other hand, to the extent that the action is sustained and a judgment recovered within the amount of the award, the lien is carried back to the date of its entry, and takes rank accordingly. First National Bank's Appeal, 100 Pa. 418. This is familiar law, which hardly needs the citation of authorities. The only question is as to how to apply it.

It is contended by the trustee and the contesting creditors, as already intimated, that, as the judgment which was secured by the claimant was essential to give effect to the award, and was obtained within

four months of bankruptcy, the lien of the award is incapable of enforcement, the judgment being nullified either by those provisions of the bankruptcy act (Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]), which make void "all levies, judgments, attachments, or other liens, obtained through legal proceedings, against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him," or by those (sections 60a, 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]) which prohibit and make voidable a preference of one creditor over another which has been similarly secured. It does not matter in this view that the judgment as here was the voluntary act of the bankrupt. The result would be the same, if it were at the end of adverse proceedings. It is, for instance, made just as much a preference within the one section, if a judgment is suffered to be entered against him by the bankrupt while insolvent, as it is if procured by his direct agency; and it is apparently of no concern, according to the other, how the judgment is brought about; all levies, judgments, etc., obtained under the circumstances specified being declared null and void, if bankruptcy follows. The present claim is therefore to be disallowed, if at all, not because of the character of the judgment, but simply the time of it. And if it was based on the judgment, independent of any other consideration, it undoubtedly would have to be so disposed of. But this is not the case, and it is just here that the contention made against it falls. The right of the claimant to be paid depends primarily and essentially upon the lien of the award, which attached some nine months before the proceedings in bankruptcy were instituted, and except by the failure of the claimant to maintain his action to the amount of it, nothing thereafter could relieve the real estate of the bankrupt from its payment. It is true that a final disposition of the case, one way or the other, was necessary to determine this; but a judgment confirming the award merely enabled the plaintiff to get the benefit of it, and if secured by the confession of the defendant, without collusion, it was just as effective for that purpose, as it would have been after a contest, with the defendant denying his liability to the end. In fact, had bankruptcy intervened while the controversy was still open, there can be no doubt that permission would have been given to the claimant to prosecute his action, the trustee being first made a party, in order that the status of the award might be settled.

The case in its essential features is not to be distinguished from Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. The plaintiffs there, by a creditors' bill, secured an equitable lien on the personal property of the debtor, who became bankrupt within four months after a final judgment was rendered. The District Court, being appealed to, thereupon stayed the proceedings, holding, the same as it is contended here, that the lien secured by the bill was contingent upon the recovery of a final judgment, and liable to be defeated by anything by which it was affected; and that, being dependent in this way upon the judgment which was avoided by the bankruptcy of the defendant, it fell with the judgment, and could not be enforced. But this, upon being carried up, was reversed, and it was held that it is only the lien created by a levy, judgment, or attachment, within four months

of bankruptcy, that is defeated by an adjudication, and that, while the lien secured by a creditors' bill is contingent, in the sense that it depends on the event of the suit, yet in itself, and so long as it exists, it is a specific charge on the assets of the debtor which can only be divested by payment, and that a judgment or decree, by which it is enforced, is not one that is denounced by the bankruptcy act, and is valid. So in Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, upon a similar bill, also begun more than four months before proceedings in bankruptcy, which was pending when such proceedings were instituted, it was held that the creditors were entitled to prosecute the case to a final decree, notwithstanding the intervention of bankruptcy within the statutory period. And in Re Snell, 11 Am. Bankr. Rep. 35, 125 Fed. 154, also, following these authorities, it was similarly held that where, by attachment proceedings, a lien had been obtained more than four months before the filing of a petition in bankruptcy, the plaintiff should be permitted to pursue the action to judgment, and satisfy it by a sale of the attached property on execution. There are other cases to the same effect, but it is not necessary to refer to them. They all recognize, what must indeed be evident, that, where a valid lien has been secured more than four months prior to bankruptcy, proceedings to enforce the same do not conflict with the bankruptcy law, and may be instituted and prosecuted to the end, if that is requisite. Loveland on Bankruptcy (3d Ed.) 545, 546, 608. In the present instance, therefore, the applicant was entirely within his rights in taking judgment as he did by agreement with the bankrupt, and it is immaterial that this was within a few days of the filing of the petition; and the merits having been thereby concluded in his favor, the lien of the judgment is carried back to the award, which being sustained to its full amount, excepting interest, is binding as of the date of its entry, and must be paid.

It is said, however, that the confession of judgment was collusive; the parties having evidently got together and entered into an arrangement to defeat creditors. The suit, as it is pointed out, was upon an agreement in May, 1904, by which a settlement of the accounts between the parties was effected, the amount found due being made payable in installments of $300 annually, but one of which had accrued at the time suit was brought, to which a recovery was thus necessarily limited. And the sudden change of heart, by which, after contesting the case at every point, the defendant on the eve of bankruptcy gave everything away, it is claimed, was manifestly induced by something besides the interest of creditors. The merits of the plaintiff's claim, on the other hand, are defended, and the action of the bankrupt vigorously justified. But the question which is thus sought to be raised is not here, and will not be passed upon. We are only concerned at this time with the effect to be given to the judgment, and not with considerations upon which it could possibly be overturned. If it was given collusively, the trustee should have moved to open it in the common pleas, or attacked it by bill either there or here. So long as it stands, it operates in favor of the claimant confirming and establishing the validity of the award and enforcing its lien; it being immaterial, as we have seen, whether the merits of the action are foreclosed by

the confession of the defendant or by adverse proceedings. Even if this were not so, and the question of collusion could be gone into, the circumstances which have been alluded to, while possibly exciting suspicion, are not enough to justify disturbing the judgment, particularly in view of the original meritorious consideration upon which it is founded. The referee will therefore distribute to the claimant the amount of the award with interest from June 1, 1906, but without costs except such as were made in obtaining it. Christy v. Crawford, 8 Watts & S. (Pa.) 99.

And it is so ordered.

GUERNSEY v. CROSS.

(Circuit Court, D. Maine. May 20, 1907.)

No. 48.

REMOVAL OF CAUSES—PROCEDURE AFTER REMOVAL—MATTERS DETERMINED BY STATE COURT.

On removal of a cause into a federal court, that court takes it precisely as it finds it, accepting all decrees and orders of the state court as adjudications, and will not entertain a motion which had been fully presented to and finally decided by the state court before removal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 241.

Legal and equitable remedies and proceedings on removal from state court, see note to Utah-Nevada Co. v. De Lamar, 75 C. C. A. 4.]

John S. Williams, for plaintiff.
Manson & Coolidge, for defendant.

HALE, District Judge. This action at law was begun in the Supreme Judicial Court of the state of Maine for the county of Piscataquis by a writ of attachment against the property of the defendant, who is alleged to reside in Boston, in the commonwealth of Massachusetts. The writ was returnable at Dover, in said county of Piscataquis, on the last Tuesday of February, 1907, and was entered on that day in that court. It appears by the record of the state court before me that upon the second day of the term a motion to dismiss was filed. The motion to dismiss alleges that the state court had no jurisdiction over the defendant's person, because the defendant was a nonresident of the state, and because it does not appear by the writ and officer's return of record that he was ever served with process within the limits of the state, or that any property belonging to him was found within the state, or that there had been any service of writ or process upon his tenant, agent, or attorney in the state of Maine. The motion further alleges that the writ should be dismissed for the reason that the action is brought by the plaintiff in the capacity of trustee in bankruptcy of the Dews Woolen Company, a corporation organized under the laws of Maine, and having its place of business in Dexter, in the county of Penobscot; that the defendant is a nonresident of Maine; and that the action should have been returnable in Penobscot county, the residence of the bankrupt corporation, and not

in Piscataquis county, where the trustee in bankruptcy resides. The record shows that the motion to dismiss was overruled on the day of its filing, and thereupon exceptions were taken by defendant, and were filed and allowed. Counsel on both sides admit that the motion was argued in the state court, and was decided upon argument in that court. Without carrying the exceptions forward, however, the defendant appears by the docket entries to have presented his removal papers after the motion to dismiss had been overruled and exceptions taken. The state court thereupon proceeded no further. The case therefore comes to this court by removal. On April 16th, the first day of the April term of this court, the defendant filed a motion to dismiss the writ. The motion is the same, in substance, and practically the same in form, as the motion made and overruled in the state court.

It appears, then, that the Supreme Judicial Court of Maine acted upon this question before the removal of the cause to this court, and that it had jurisdiction in the premises. The defendant's motion was overruled in the state court, after a full presentation of the same to that court, and arguments upon it. The defendant excepted to the ruling of the state court. Instead of waiting, however, to prosecute his exceptions before the appellate tribunal of the state, he removed the cause to the federal court. The renewal of the same motion in the federal court is practically an attempt to appeal the cause from the state court to the federal court upon the questions which arise under this motion. The motion in this court is based upon a misapprehension of the effect of removals from the state court to the federal court. Upon removal of a cause, the federal court does not, in any way, act as a court of appeals. It takes the case precisely as it finds it, accepting all decrees and orders of the state court as adjudications. In this case, we might have had a very serious doubt upon one question arising under this motion, if the motion had come before us in the first instance, instead of having been presented to, and decided by, the state court before the removel of the cause. But we take the cause as we find it when it left the state court. We cannot treat the decree of that court as a nullity.

In Duncan v. Gegan, 101 U. S. 810, 812, 25 L. Ed. 875, in delivering the opinion of the Supreme Court, Mr. Chief Justice Waite said:

"The transfer of the suit from the state court to the Circuit Court did not vacate what had been done in the state court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the state court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the state court would have had if the suit had remained there. It takes the case up where the state court left it off. * * * Duncan, who caused the removal to be made, is the only party who complains of the decree below, and he cannot object here to what has been done below by his own procurement." Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; French v. Hay, 22 Wall. 231, 22 L. Ed. 799; Brooks v. Farwell (C. C.) 4 Fed. 166; Loomis v. Carrington (C. C.) 18 Fed. 97; Allmark v. Platte S. S. Co. (C. C.) 76 Fed. 615; Bragdon v. Perkins-Campbell Co. (C. C.) 82 Fed. 338.

In Bragdon v. Perkins-Campbell Co., supra, the federal court applied the rule to a state of facts very similar to that presented in the case at bar.

In Loomis v. Carrington, supra, the federal court expressed doubt as to the correctness of the ruling of the state court, but stated the rule as the Supreme Court has given it in Duncan v. Gegan, supra.

In Milligan v. Lalance Co. (C. C.) 17 Fed. 465, Judge Brown stated the rule as we have given it. He took action, however, upon a matter which had been pending in the state court when the cause was removed, but which had not been decided in that court. Judge Brown said:

"If this motion were in the nature of an appeal, or even of a motion for rehearing or reargument, as the plaintiff contends, it must have been denied. But it cannot be so considered. At the time the cause was removed, a motion for a modification of the order had been entertained by the general term, and was then pending and unheard. That application must be disposed of by this court. It is brought before it by means of this motion, and in disposing of it this court must necessarily act as the general term, and may and should make any proper order consistent with the prior general term decision, which, upon that motion, it was competent for the general term to make."

In Miner v. Markham (C. C.) 28 Fed. 387, 395, the federal court acted upon a matter where the state court had denied the motion, but had expressly held that it was without prejudice to a renewal of the same. The court held that under those circumstances the defendant had not waived his privilege, and could assert it in the federal court with the same force and effect as if the suit had been brought and the motion made in the federal court in the first instance, citing Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237.

If, then, in the case at bar, the defendant had made his motion to dismiss, and, pending such motion, and before its denial, had removed the cause to this court, he could be heard in this court upon that motion, under Judge Brown's decision in Milligan v. Lalance, etc., Co., supra. If the defendant had made his motion in the state court before removal, and the state court had denied his motion, but had made a special ruling that such denial was without prejudice to its renewal, we could then have held that the defendant had not waived his privilege, but could assert it in the federal court with the same force that he might have renewed it in the state court, or that he might have made it in this court if the suit had been brought in the first instance in this court. Miner v. Markham, supra.

But this cause presents a clear case for the application of the general rule in Duncan v. Gegan, supra. The defendant made his motion to dismiss in the state court, before the removal of the cause to this court, argued it to the state court, was overruled by the state court, and filed his exceptions in the state court. He cannot now be heard to object to what was done in the state court by his own procuremnt. The federal court takes a case up where the state court left it, and must recognize the decree which the state court made upon a question within its cognizance.

The motion of the defendant is overruled.

MOODY v. PATTERSON, Collector of Customs.

(Circuit Court, D. Oregon. March 18, 1907.)

No. 2,888 (1,688).

CUSTOMS DUTIES—CLASSIFICATION—SHEEP DIP—USE.

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 657, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1687], providing for sheep dips, except "compounds or preparations that can be used for other purposes," the application of this exception is not to be determined by the rule of chief or predominant use of an article as sheep dip; and Cannon's dip, a preparation advertised as fit for various other purposes, and presumably having commercial value for such purposes, is not covered by the paragraph.

[Ed. Note.—Interpretation of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. United States, 18 C. C. A. 545.]

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

These proceedings were brought by R. E. Moody, importer, against I. L. Patterson, collector of customs at the port of Portland, Or. Note, Shallus v. Stone (C. C.) 150 Fed. 605.

Ralph E. Moody, for plaintiff.

Wm. C. Bristol, U. S. Atty.

WOLVERTON, District Judge. On August 22, 1902, the petitioner imported from England 350 drums of coal tar preparation for sheep dip. This was classified by the collector of customs as a chemical compound under paragraph 3 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]), and a duty of 25 per cent. ad valorem assessed thereon. The petitioner, not being satisfied with the action of the collector, paid the duty under protest, and appealed to the Board of United States General Appraisers. The compound was referred to the United States chemist at New York, who found it to be an "alkaline preparation of mineral oil and coal tar distillates [phenoloid bodies, etc.] pyridin bases, and some resin compounds; does not contain arsenic compounds." Upon the testimony submitted, this report of the chemist being considered, the Board of Appraisers found that the merchandise in question was a preparation adapted for use as a sheep dip, as a medicine, and as a disinfectant, and therefore affirmed the survey of the collector of customs. The plaintiff now petitions the court for a review of the findings of the appraisers, and prays that their judgment in the premises may be reversed. The petitioner claims that the preparation imported is free of duty, and falls within the purview of paragraph 657 of the act of Congress above designated. This paragraph comprises "sheep dip, not including compounds or preparations that can be used for other purposes." The question for decision is whether or not this preparation falls within paragraph 3 of the act alluded to, or within the exception as denoted by paragraph 657. It has been determined as to the latter paragraph that the phrase employed thereby, namely, "that can be used for other purposes," refers to a compound fit for other purposes than dipping sheep

in the commercial sense, or that people buy and actually use for other purposes. In re Hulme, G. A. 4124 (T. D. 19,228).

The petitioner insists, in respect of the importation of the compound in question, that if, as compared with its use for other purposes, its chief or predominant use was for sheep dip, then it was not dutiable. Cases are cited by which the rule is determined that, as between two classifications carrying different duties, where the article is adapted to use within the language of either classification, it should bear the duty according to its chief or predominant use, and that that would be so even if the article might be used practically and generally for another purpose suitable to the other classification. Such are the cases of Hartranft v. Langfeld, 125 U. S. 128, 8 Sup. Ct. 732, 31 L. Ed. 672, and Meyer v. Cadwalader, 89 Fed. 963, 32 C. C. A. 456. In the former the question came up whether the article of importation should be classified under the clause of the act requiring a duty of 50 per cent. ad valorem on "all goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value," or whether it should take the classification under another clause, namely, "hats and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow-sheets, and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this act," upon which merchandise a duty of 20 per cent. ad valorem was assessable. It was held that, as the chief or principal use made of the importation was for hat trimmings and not for dress trimmings, although it was commonly used for the latter purpose, it was subject to classification under the latter clause, and to a duty of 20 per cent. ad valorem only. The other case cited is of the same nature. But are these cases so in point here as to be controlling? The language employed by paragraph 657 of the present statute, namely, "that can be used for other purposes," would seem to be restrictive rather than general. Concededly it could not have the same signification as if it read "used for other purposes"; and it was a condition of the latter character that the courts were considering in the cases cited. The doctrine of those cases is much older than the statute, as the Hartranft Case was decided in 1887, and presumably was familiar to Congress when it adopted this later statute. The most natural inference, therefore, is that it was the intendment of Congress that paragraph 657 should bear a more restricted construction than if the general language had been employed. See Swan & Finch Co. v. United States, 113 Fed. 243, 51 C. C. A. 200, where "common" or "predominant" use is controlled wholly by the condition "fit only for such uses." The paragraph came up for interpretation in the case of Wyman et al. v. United States in the Circuit Court for the Eastern District of Missouri (118 Fed. 202), wherein Adams, District Judge, after remarking that he was disposed to approve of the interpretation placed upon the act by the general appraisers in the case of In re Hulme, supra, says:

"This interpretation permits the admission of any preparation for sheep dipping free of duty when the preparation is, in the commercial sense, adapted

to and usually and generally employed for that purpose only. I take it that any preparation that is so adapted to that use and generally employed for that purpose should be admitted free of duty, even though it incidentally may be used for other purposes. If its main and very general purpose is for sheep dipping, it may be brought in free of duty; but if, as in the case at bar, the article is not only used as a sheep dip, but is a compound adapted to and is extensively used for other purposes, such as those just detailed, it is not an article admissible duty free."

The testimony in the present case does not show as large use for other purposes as was established in that case, but what is shown in that regard appears from a folder found with the evidence, making announcement as follows: "Cannon's Dip (nonpoisonous), sheep dip and cattle wash, for scab, lice, ticks, and all parasites, disinfectant for destroying all infection and contagion"—and contains instructions for use as a remedy for "hoose and tapeworm in calves, and worms in horses," and various diseases of horses and cattle. This suffices to show that the manufactured product was of commercial value for other uses than for dipping sheep. It is adaptable for such other uses, and presumably was actually used in that way. If not, why the advertisement? So that the facts here bring the case within the doctrine of the Hulme Case; and in my opinion that is as far as it was necessary for the government to go, notwithstanding the burden of proof was upon it to establish the fact that the article was subject to duty. Much of what Judge Adams has said in Wyman v. United States, supra, was spoken with reference to the facts of that particular case; and yet, from a careful analysis of his language, it would seem that it was his purpose to approve the doctrine as announced in the Hulme Case, and not to modify it in any particular.

Holding these views, it follows that the finding and judgment of the Board of Appraisers should be affirmed; and it is so ordered.

THE GEORG DUMOIS.

THE CLARA E. BERGEN.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1907.)

No. 679.

1. COLLISION—CONTRIBUTING FAULTS—ABSENCE OF LOOKOUT.
The absence of a lookout on a vessel, although a fault, is immaterial in fixing liability for a collision, where it clearly was not a contributory cause because the other vessel was seen in ample time, so that with proper navigation on the part of both vessels the collision would not have occurred.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 148.]

2. SAME—STEAM AND SAILING VESSEL—CHANGE OF COURSE BY SAILING VESSEL.
Where a sailing vessel by her unnecessary deviation from her course renders a collision with a steamer unavoidable, the steamer cannot be charged with liability.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 51.]

3. SAME.
A collision at sea in the night between a schooner and a meeting steamer *held* due solely to the fault of the schooner in changing her course after the vessels had seen each other, and the steamer had so changed her course that there was no danger of collision if the schooner held her course.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 51.]

Cross-Appeals from the District Court of the United States for the District of Maryland.

Randolph Barton, proctor for the Georg Dumois.

Robert H. Smith (Harrington Putnam, on brief), for the Clara E. Bergen.

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

GOFF, Circuit Judge. The three-masted schooner Clara E. Bergen, from Staten Island, bound for Charleston, S. C., 145 feet long with 33 feet beam, carrying 103 tons of nitrate of soda, when approaching Hatteras, soon after 1 o'clock a. m. of the night of June 24, 1905, was in collision with the steamer Georg Dumois, 180 feet long by 28 feet beam, with a cargo of fruit from Banes, Cuba, bound for the port of Baltimore. The weather had been thick and misty, when shortly before the collision the sky became overcast, and rain began falling. The fixed lights of Diamond Shoal Lightship first distinctly visible became obscured, but the flash lights were reflected from the sky. After the rain came a squall from the westward. Because of the storm the schooner's light sails were taken in. There is some dispute as to the locality of the collision; the schooner's testimony placing it to the southwestward after she had passed the lightship, while the steamer insists it was to the northward after she had passed the lightship. The schooner coming down the coast sailing on the starboard tack was making about seven knots an hour. The speed of the steamer was between ten and eleven knots an hour, and at the time of the collision she had no lookout forward; her mate and

wheelsman being on her bridge, which was about 64 feet abaft her stem. The schooner, struck on her starboard side, was abandoned; the vessel and her cargo becoming a total loss. The libel of the schooner, filed June 30, 1905, included the loss of her cargo, while the cross-libel, filed February 9, 1906, was for damages to the steamer. The causes were consolidated, the testimony being by deposition, except that the captain of the schooner was examined in open court. The decree below adjudged both vessels at fault, and directed that the damages should be divided. Cross-appeals were sued out.

The testimony for the schooner shows that about a quarter after 1 o'clock a. m. her lookout reported a steamer on the starboard bow, and that the captain and mate duly observed it. The lookout states that the steamer was about three-quarters of a mile from the schooner when the steamer's masthead light was first observed; that after reporting it he went over on the port side, and, seeing nothing there returned to the starboard, when he saw the light closer to the schooner and in the same direction; that the light was so far ahead he did not then think there would be a collision. The mate of the schooner heard the report of the lookout, and thought the steamer was from 600 to 700 feet distant when her mast light was first noticed. He notified the captain that the steamer was right off the weather bow of the schooner. The captain of the schooner heard the reports of the lookout and the mate, answering, "I see her." He recognized it as a steamer's light; says he did not see the steamer until she was two lengths away, but saw the mast light when she was farther distant. He differs with his lookout as to the distance the vessels were from each other when the mast light of the steamer was first reported to him.

The testimony offered by the steamer is to the effect that at 1:15 a. m., when she was under full steam, the schooner was seen on the starboard side of the Georg Dumois, showing the red light, and distant "something around two miles, perhaps closer." The captain and the mate of the steamer observed the schooner about the same time. The wheel of the steamer was ordered to port by the captain, the effect being that the steamer swung to the eastward, bringing her red light to the red light of the schooner and placing the two vessels on parallel lines; that soon after the helm of the steamer had been ported the schooner changed her course, thereby presenting her green light to the steamer; that then the steamer's wheel was put hard aport, and one whistle blown, the schooner still showing her green light, the captain of the steamer rang the engine full speed astern, and between 15 and 20 seconds afterward the collision occurred. At the time of the collision the schooner was sailing about southeast.

The court below in directing the decree appealed from said:

"There are two decisive facts which stand out very strongly. First. That the steamer, when she started to avoid the schooner by porting her helm when the schooner's red light was observed 3½ points on the steamer's starboard bow, either did not put her helm to port sufficiently, or that she did not begin to port at sufficient distance off. This may have been, as seems quite probable from the testimony, because the light she was manœuvring to avoid was not the light on the schooner, but on some vessel more distant and more to the westward, and this may have resulted from having no special lookout on the

steamer, or else the master of the steamer, not having carefully watched the schooner, ran too close to the schooner, closer than was justified by good seamanship in the nighttime and with every opportunity in the open ocean to give her plenty of room. On a steamer going at full speed in a place where vessels were likely to be met on a dark night with squalls of rain obscuring lights, the absence of a lookout properly placed and charged with that sole duty, is sufficient to require the court to resolve doubtful questions of fault against the steamer in a case where the absence of a lookout may reasonably have contributed to the collision. Second. With regard to the schooner, it is clear, I think, that the schooner did not obey the rule requiring her to keep her course. The schooner's master states in his testimony that, when he made out the steamer through the mist and rain, she was very close to the schooner and right on the schooner's starboard bow, and, as he took her to be a steamer whose proper course would probably be north, he, in order to give her more room, put his helm to starboard. There was a strong breeze from the north and west, and, no doubt, the schooner went off rapidly to the eastward, so much so, it would appear, that at the time of the collision she was heading about southeast. This counteracted the porting of the steamer and a collision became inevitable. It is quite clear to my mind that this is a case of mutual fault and the damages should be divided."

The schooner assigned error in the finding that she was guilty of contributory fault in putting her wheel up and changing her course. The steamer assigned it as error that she was adjudged to have insufficiently ported, or not to have ported at the proper time, and that the absence of a lookout might have caused the collision.

The absence of the lookout at the time of and for about an hour immediately preceding the collision is admitted by the steamer. This admission establishes prima facie that the collision was the fault of the steamer. Does the testimony show that, had a lookout been on duty at the time, that the collision would have been prevented? If so, the steamer was at fault; if not, the absence of the lookout was immaterial. In other words, it is well understood that faults which do not cause a collision, or that have not borne directly upon it, are unimportant. The Pilot Boy, 53 C. C. A. 329, 115 Fed. 873; The Farragut, 10 Wall. (U. S.) 334, 19 L. Ed. 946; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; The Blue Jacket, 144 U. S., 371, 12 Sup. Ct. 711, 36 L. Ed. 469.

If the schooner was seen at a distance sufficiently great to have enabled the steamer to pass her in safety, then the collision must have been caused by some fault other than the absence of a lookout. The captain of the steamer says that he saw the light of the schooner at the distance of "something around two miles, perhaps closer," and that he then ordered the wheel to port; the first mate of the steamer saw the lights of the schooner "about a couple of miles" distant. The man at the wheel saw the lights of the schooner "about 20 minutes" before the collision. One of the crew of the schooner says that after the light of the steamer was reported he saw it for about 12 minutes. The lookout on the schooner says that he saw the white light on the steamer "about three quarters of a mile" away. The captain of the schooner testifies differently from all the other witnesses, contradicts the evidence of the steamer, and differs with his own crew, places the distance the vessels were from each other when the light of the steamer was first seen as not over a quarter of a mile, brings them together in collision starboard side to starboard, when it is quite

evident that they came together the port bow of the steamer striking the starboard side of the schooner. If the evidence of the schooner's captain is correct, that he did not see the steamer's light until it was about one point on his starboard bow, then it was about the time the steamer went hard aport that the lookout of the schooner reported the steamer's light; and that to us in the light of the testimony is inconceivable. We are impelled to the conclusion that the schooner's captain in his effort to establish a satisfactory reason for the change in the course of his vessel—which change he had ordered—saw the lights and estimated the distance quite differently from all others who were on the vessels and subsequently examined as witnesses. If he is correct, the steamer was nearly west of the schooner and about a quarter of a mile distant when he first noticed its mast light. Even then, conceding that to be true, had each vessel maintained its course, there would have been no danger of collision, for the steamer would have gone on northward, and the schooner would have passed to the south on its course W. by S. W. Again, had the vessels occupied that relative position, why should the steamer have ported, and why the schooner have changed its course; for, having due regard for speed, distance, and course, where would the vessels have been after the expiration of the 20 minutes that the man at the wheel of the steamer speaks of, or of the 12 minutes that the member of the crew of the schooner says the light of the steamer was seen, after it was reported and before the collision occurred?

Without further discussion of the testimony, we content ourselves with saying that it clearly shows the officers of the steamer were fully advised of the location of the schooner, and that it was at such a distance as to obviate all danger of collision, had the rules applicable to the situation been observed. Hence the collision must therefore be accounted for in some other way. The presence of the schooner was known, its light was in full view, and action on the steamer's part to keep out of her way was duly taken. We are of the opinion that, although the steamer had no such lookout as was required by law, that fact did not contribute to the collision.

Finding the testimony of the captain of the schooner to be unreliable, and taking the lesser distance given by any of the other witnesses—that of the lookout of the schooner—the vessels were three-quarters of a mile apart when the schooner saw the light of the steamer. He also testifies that the steamer was so far away when he first saw its light that the idea of a collision did not occur to him. It was the duty of the steamer to keep out of the way of the schooner. The steamer ported, presuming that the schooner would keep her course, and the vessels would have safely passed if the schooner had not changed her course. It may be conceded that the red light of the schooner was seen by the steamer before the mast light of the latter was observed by the former, and that the order to port had been given on the steamer before her mast light was seen on the schooner; but still that, under the circumstances, would not have justified the latter in changing her course as she did, thereby rendering ineffective the effort of the steamer to safely pass to the eastward of the schooner. We have presented this point in the light of the testimony of the look-

out of the schooner, which is consistent with the suggestion that he first saw the steamer's mast light after she was aport. Why he did not see it sooner it is difficult to understand, for he testifies that such lights could readily be seen at that time at the distance of one mile. The duties of these vessels were mutual, and the strict observance of the rule was required no more by one than the other. The rule is imperative, and the vessel departing from it is liable for the damages resulting from such departure. As we see this case, the steamer was absolved unless she might have prevented the collision notwithstanding the schooner's error, and this the testimony does not show. Where a sailing vessel by her unnecessary deviation from her course renders a collision with a steamer unavoidable, the steamer should not be charged with damages. The Illinois, 103 U. S. 298, 26 L. Ed. 562.

The Bergen should have kept her course and speed. As a matter of fact she was not in danger of being run down. Her officer erred in concluding that the steamer would not keep out of the way, and that such emergency existed as justified him in taking the action he did. The precaution taken by the steamer would have been effective had not the schooner changed her course. The steamer was not at fault. The schooner was. The decree appealed from should be accordingly so modified.

Remanded, with directions to enter a decree in accordance with the views herein expressed.

Decree modified.

THE CALDY.

THE NEW ORLEANS.

(Circuit Court of Appeals, Fourth Circuit. May 7, 1907.)

No. 677.

1. COLLISION—VESSEL ANCHORING IN CHANNEL—OBSTRUCTING PASSAGE OF OTHER VESSELS.

While Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], providing that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels "in such manner as to prevent or obstruct the passage of other vessels or craft," was not intended to absolutely prohibit the anchoring in navigable channels, it makes it unlawful whenever the result is to obstruct other vessels in passing to such extent as to make such passing a dangerous maneuver; and the fact that other vessels have succeeded in passing one so anchored in safety is not proof that her anchorage was not in violation of the statute, or that she was not in fault for a collision with another vessel which was attempting to pass.

2. SAME—STEAMER AND VESSEL ANCHORED IN CHANNEL.

A steamship 314 feet long, which was anchored through the night in the Brewerton channel of the Patapsco river, where it was 600 feet wide, and which was allowed to swing around so as to lie nearly across the channel, so that her stern was only about 100 feet from one side, while her anchor chain extended toward the other, *held* in fault for unnecessarily obstructing the channel and liable for a collision with another vessel, which was attempting to pass under her stern. The passing vessel also *held* in fault for not navigating with proper care and at slower speed in

passing, in view of the well-known tendency of vessels to sheer when near the edge of the channel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 102.]

Brawley, District Judge, dissenting.

Cross-Appeals from the District Court of the United States for the District of Maryland.

For opinion below, see 123 Fed. 802.

T. Wallis Blakistone and J. Parker Kirlin, for appellant.

Daniel H. Hayne, for appellee.

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

GOFF, Circuit Judge. These cross-appeals are from a decree of the District Court for the District of Maryland, rendered on the 7th of April, 1906, in the consolidated cases of the Merchants' & Miners' Transportation Company, claimant of the steamship New Orleans, against Samuel Symonds, master and claimant of the steamship Caldy, and Samuel Symonds, master of the steamship Caldy, against the steamship New Orleans. The decree found both vessels at fault for a collision that occurred while the Caldy was at anchor in the Brewerton channel, off Sparrows Point, near Baltimore, about 8:30 p. m., on December 30, 1902.

The libel in the former case was filed January 3, 1903, in which the Caldy is charged with fault in these particulars: That she negligently and unlawfully located herself at anchorage, that she had a negligent and insufficient anchor watch, and that she failed to exercise a reasonable precaution in putting out stern anchors that she might lay up and down the channel. The answer of the Caldy denied the allegations of the libel, and averred that when she arrived off the mouth of Sparrows Point channel, near where the collision occurred, all the berths at said point were occupied; that the channel leading into Sparrows Point from the Brewerton channel was too narrow for the purpose of an anchorage, and that, there being no other anchorage ground in that vicinity, she anchored in the Brewerton channel, about opposite the mouth of the Sparrows Point channel, in such position that she was not an obstruction; that she complied with all legal requirements regarding her anchor lights and an anchor watch—and charged that the collision was caused by the fault of the New Orleans. The master of the Caldy on January 13, 1903, filed his libel against the New Orleans, in which the allegations as made in his answer to the libel of the New Orleans are in substance set forth; and to this libel the claimant of the New Orleans, in making answer, substantially repeated the allegations contained in its libel. A large number of witnesses were examined in behalf of each steamship, and a number of interesting and important questions are raised by the voluminous record presented for our consideration. The opinion of the court below is found in 123 Fed. 802, to which reference is made for a more particular description of the circumstances relating to said collision.

We fully agree with the court below in finding that the Caldy was in fault in anchoring as she did in the Brewerton channel. We are

of opinion that her anchor was considerably northward of the middle of the channel, and that, whatever her position may have been when her pilot left her, at the time of the collision she had shifted with the wind, until she was lying nearly across the channel, her stern not quite 100 feet from the southern bank thereof, heading but little east of north; the wind direction being from that quarter. Her pilot was mistaken when he located the Caldy's anchor south of mid-channel, else how could she, with at least 90 feet of anchor chain, herself 314 feet long, swing with the wind across the channel, which was 600 feet wide, and still leave her stern about 100 feet from the southern bank, as the evidence shows it was at the time of the collision. If the anchor was at the place the pilot of the Caldy thinks it was, then when the wind changed, and the vessel, shifting with it, swung southward with stem to north, where would her stern have been? The court below found—the conclusion was irresistible—that at the time of the collision the Caldy was lying nearly directly across the channel, and it is evident that her distance from the southern bank was not far from 100 feet; hence it follows that her stem must have been about 114 feet northward of mid-channel. It was a physical impossibility for the Caldy, at the time she cast her anchor, to have occupied the position relative to the middle of the channel that her crew testified she did.

Being in the position we find from the evidence she occupied, it follows that the Caldy did obstruct the passage of other vessels; for as she was anchored some distance north of mid-channel, the wind from the north holding her across the channel, she naturally caused other vessels entitled to the southern side to fear to attempt to pass to the north because of the unknown length of her anchor chain, and she rendered the southern side at least hazardous, as was demonstrated by the three vessels that did succeed with difficulty in passing, and by the one that made the effort and failed. The fact that other vessels had frequently anchored in the Brewerton channel, near where the Caldy had cast her anchor, and that no damage resulted therefrom, does not prove that the Caldy was not in fault, but tends to show that such other vessels were navigated with the prudence and judgment that unfortunately we are unable to find in the seamanship of the Caldy. It is likely true that the Caldy at the time she anchored was headed west by north, and that before her pilot left her she swung with the tide and wind, with her 15 fathoms of chain, until her heading was east by north; but still we are forced by the overwhelming weight of the evidence to the conclusion that at the time of the collision she had been carried by the wind, the tide not interfering, until she was heading but little, if any, east of north. This would place her almost directly across the channel, and allowing say 100 feet for the passageway south of her—the approximate distance given by those who passed her—would place her considerably north of mid-channel, with her anchor chain extending still farther to the northward.

Counsel for the Caldy insist that because other vessels, both before and after the collision, succeeded in passing her safely, it follows she was properly anchored, and that she did not obstruct navigation. We do not agree to this, for it does not follow that vessels of different size, some requiring more speed than others, some less or more depth

of water, moving with varying winds and tides, some being navigated with more skill than others, could all successfully, or with the same degree of risk, pass her as she was then anchored. Even in this particular instance, some of those passing, as a matter of precaution, went out of the channel in doing so, their draft permitting, and the others were materially interfered with by the sheer caused by their necessary proximity to the southern bank of the channel. This argument may show that the position of the Caldy did not prevent the passage of other vessels; but it does not show that it did not "obstruct the passage of vessels and craft."

The Caldy did not exercise proper care in anchoring, for she obstructed the channel to a far greater extent than the necessities of the situation required, than the statute permitted, than ordinary caution should have suggested. When she concluded to make her temporary anchorage answer for the night, she might have held her place by dropping her stern anchors, with which she was supplied, or she might have arranged for moving her anchor if the change of the wind and the consequent swinging of the vessel rendered it expedient for her to do so. No such precautions were taken, the risks of the night were either not appreciated or recklessly assumed, and with an indifference which it is desirable may never be duplicated, a careless watch was left on deck, all others going below. The pilot had left them. The crew were strangers to the locality, absolutely ignorant concerning the channel, without even a chart to guide them. They knew of their danger, for the pilot had admonished them, and the first officer was to have been called if the vessel swung; but he was not.

We do not think the Congress intended by Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], to absolutely forbid anchoring in navigable waters, except only at such places as the location of the vessel would necessarily prevent the passage of other vessels, or obstruct them in passing to such an extent as to make the effort to do so a dangerous maneuver. If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels, navigated with the care the situation requires, can safely pass, then she has neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though to a certain extent she has obstructed the channel.

The navigator of the New Orleans, coming down the middle of the channel, observed the Caldy when a mile distant and saw that she was at anchor, located as he thought across the channel, one-half her length on each side. He had therefore—provided his location of the steamer was correct—the distance of 143 feet on the northern side, from which the anchor chain was to be deducted, in which he could pass, and 143 feet for the same purpose between her stern and the southern bank. He was entitled to the southern side—to pass to the starboard—and, besides, as he was unaware of the length of the Caldy's anchor chain, which he thought was well across the channel, he concluded, as did the other steamers passing the Caldy that evening, that it would be safer to pass under her stern on the southern side. With this conclusion under then existing conditions we find no fault. But we think that the evidence conclusively shows he was mistaken when he located

the Caldy where he did, for at that time her stern was considerably nearer the southern edge of the channel than he had calculated it to be, as we have found from the testimony and as became apparent to him when his vessel sheered and refused to respond to his port wheel.

The master of the New Orleans did not give the order to port as soon as he should have done, nor did he seem fully to appreciate the danger he was incurring in his movement to pass the Caldy. The Atlanta ported when one-half mile from the vessel at anchor, the Georgia and the Howard in time to counteract, before they reached the Caldy, the sheer with which they both contended. The Georgia moved closer to the southern bank, and the Howard left the channel. The New Orleans was within 1,300 feet of the Caldy when she first ported. She then, having steadied her helm, proceeded with the Caldy's stern light half a point on her port bow, until she was about 500 feet distant, when she again ported; but her master, seeing that his vessel was swinging to port and not answering her helm, gave the order to hard aport, hoping thereby to overcome the sheer. But he failed so to do, and the orders to "slow down" and "to stop," which followed, did not prevent the collision. Her speed increased the danger from the sheer, which was well known to her master, who, familiar, as he was, with that channel, and of the tendency of vessels to sheer when near its banks, should have guarded against it by slowing down and approaching more cautiously, thereby retaining better control of his own vessel. The other passing vessels evidently went by under greater speed than was prudent, taking the risk and fortunately escaping accident.

The fact that the New Orleans has also been found in fault does not, under the circumstances disclosed by this record, palliate the offense of the Caldy; but it does provide for her a companion in misfortune and liability. The Caldy, having violated the provisions of the statute applicable to her anchorage, was required, in order to excuse her for that fault, to show, not only that her fault did not contribute to the disaster following, but also that it could not have done so. This she has signally failed to do. The decree appealed from is without error.

Affirmed.

BRAWLEY, District Judge, dissents.

In re E. M. NEWTON & CO.*

SWOFFORD BROS. DRY GOODS CO. v. BRYANT.

(Circuit Court of Appeals. Eighth Circuit. April 27, 1907.)

No. 2,454

1. BANKRUPTCY—SURRENDER OF PROPERTY—STIPULATION—PERFORMANCE.
Where intervener surrendered possession of property received from the bankrupts which was to be the subject of litigation, on the faith of a stipulation between the intervener and the bankrupt's receiver, approved by the referee, that intervener should lose no rights thereby, the bankrupt's trustee should not be permitted to repudiate the stipulation, though the receiver and referee may have acted improvidently in entering into it.

*Rehearing denied June 17, 1907.

2. CHATTEL MORTGAGES—DISTINGUISHED FROM CONDITIONAL SALE.
Intervener contracted in writing to deliver certain goods to the bankrupts prior to their bankruptcy, to be sold by them in the usual course of their business, but that the title and right of possession of all such goods and all the proceeds of sales thereof, whether in cash or in book accounts, should be vested and remain in intervener until the purchase price of the goods had been fully paid to it; that, except for the right to resell the goods in the ordinary course of business, the bankrupts should not remove any from the city in which they were doing business; and that they should keep the goods insured for intervener's benefit. *Held*, that the bankrupts, not only held such goods for intervener, but were bound to account for and pay over the proceeds of goods sold as collected, and that the contract was therefore a conditional sale, and not a chattel mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 23.]

3. BANKRUPTCY—CLAIMS TO PROPERTY—WHAT LAW GOVERNS.
Where intervener in bankruptcy proceedings claimed certain property delivered to it just prior to the institution of the proceedings, whether the contract under which intervener claimed was a conditional sale or a chattel mortgage, whether it was valid as between the parties, and the effect of intervener's failure to record it were questions which were determinable exclusively by the local law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 273, 275, 276, 277.]

4. SALES—CONDITIONAL SALES—RECORD.
Under the law of Arkansas a conditional contract of sale is valid though it provides that the vendee may sell the property in the usual course of business, and it is not recorded.

[Ed. Note,—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1352, 1353, 1384, 1397, 1370.]

5. BANKRUPTCY—TITLE OF TRUSTEE.
The bankrupts' trustees acquire no greater right to property which has been in the bankrupts' possession than the bankrupts themselves had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 193, 353, 1384, 1397, 1370.]

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

Swofford Bros. Dry Goods Company, a corporation, appeal from an order denying its right to certain moneys and property in the hands of the trustee of E. M. Newton & Co., bankrupts.

Ernest S. Ellis (Webber & Webber, on the brief), for appellant.

R. L. Searcy and William H. Arnold, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The appellant intervened in the bankruptcy proceedings, claiming to be the owner of certain goods, notes, and accounts under the terms of a written contract made with the bankrupts about a year before the proceedings were instituted. The contract provided, in substance, that appellant should sell goods to the bankrupts to be resold by them in the usual course of their business in Arkansas, but that the title to and right of possession of all goods delivered under the contract and of all proceeds of resales thereof, whether in cash, note, or book account, should be vested and remain in appellant until the purchase price had been fully paid to it; that,

except for the right to resell the goods in the ordinary course of their business, the bankrupts should not remove them from the city in which they were doing business; also that they should keep the goods insured for the benefit of appellant. The contract was not recorded. Thereafter, and at a time when the bankrupts were insolvent and appellant knew it, they turned over to appellant the remainder of the goods then on hand and certain notes and accounts, which were claimed to be proceeds of other goods obtained under the contract and resold by them to their customers. The notes were indorsed and the accounts assigned in writing to appellant. Three days afterwards voluntary proceedings in bankruptcy were commenced and an adjudication was made. A receiver was appointed, who demanded possession of the property from appellant. The demand was refused. Subsequently, however, the goods, notes, and accounts were delivered to the receiver under a written stipulation made with the approval of the referee in bankruptcy that the appellant should not be prejudiced thereby; that, while the property might be converted into cash, the proceeds should be held to abide the final determination of the controversy as to the ownership. The receiver succeeded himself as trustee. The goods were sold, and part of the notes and accounts were collected by him. By its intervention the appellant sought the proceeds of the sale and the collections and such of the notes and accounts as remained on hand. On final hearing the district court held that the contract under which appellant sold the goods to the bankrupts was in effect a chattel mortgage, and not a contract of conditional sale; that it contemplated that the bankrupts as mortgagors should retain possession of the goods with authority to resell them in the usual course of their business, and without obligation to pay over the proceeds to the appellant; and that it was therefore fraudulent and void under the doctrine of Twyne's Case, 1 Smith, Lead. Cas. (7th Am. Ed.) 52, obtaining in Arkansas.

The case must be considered upon the assumption that the goods which were returned to the appellant three days before the commencement of the bankruptcy proceedings were part of the identical goods originally sold by it to the bankrupts under the contract, and also that the notes and accounts were proceeds of like goods. When the bankruptcy proceedings were commenced, the appellant was in the possession of the goods, notes, and accounts and claimed them adversely to the receiver. It refused to surrender them until a stipulation recognizing the verity of the facts as claimed by it to exist was made with the approval of the referee. Upon the faith of that stipulation the court of bankruptcy acquired possession. By voluntarily yielding possession of property which was to be the subject of litigation the appellant parted with an advantage well recognized in the law; and the agreement that its rights should not be prejudiced thereby, and that the facts existed upon which its claim of title was predicated, should not be permitted to be repudiated, especially since it received the solemn sanction of the court of bankruptcy, and since the trustee whose present possession depends upon the act of the receiver holds fast to the advantage secured. There was no fraud practiced by the appellant in securing the stipulation, and the fact that the receiver and referee may possibly have acted improvidently affords no suf-

ficient cause for ignoring its terms. Therefore, the only questions that are open are those which arise from the face of the original contract, the failure to record it, and the fact that the appellant secured possession of the property on the eve of the proceedings in bankruptcy with knowledge of the insolvent condition of the bankrupts.

We are not able to assent to the contention that the contract authorized the bankrupts to resell the goods in the usual course of their business without obligation to pay the proceeds to appellant. The appellant expressly reserved the title to the proceeds, in whatever form they might be, and the right to take possession of the notes and accounts arising from resales and collect them for itself. They were property of appellant in the hands of the bankrupts. An obligation of the bankrupts to account for and pay over what they collected of the proceeds is implied, and a default in performing it would be a breach of contract as much as if a mortgagor of chattels without power of sale should nevertheless dispose of the mortgaged property and appropriate the proceeds to his own use. Whether the contract under which appellant claims is one of conditional sale or is a chattel mortgage, and, as between the parties thereto, whether it is valid, and what the effect of the failure to record it may be, are questions to be determined exclusively by the local law. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. Whatever may be the law in some jurisdictions it is authoritatively settled in Arkansas that a contract of conditional sale is valid notwithstanding it contains a provision that the vendee may sell the property in the usual course of his business.

Triplett v. Implement Co., 68 Ark. 230, 57 S. W. 261, involved a contract of that character, and the conditional vendor was allowed to recover the goods from the vendee's assignee in insolvency who had taken possession of them. The court cited with approval Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384, Dewes Brewing Co. v. Merritt, 82 Mich. 198, 46 N. W. 379, 9 L. R. A. 270, and Baring v. Galpin, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300. In one of these cases the contract of conditional sale of a stock of merchandise expressly provided that the vendee might resell in the usual course of business, and in the other two cases resales by the conditional vendees were held to have been in contemplation. In all of them the contracts were sustained as contracts of conditional sale. The contract involved in the Arkansas case provided that the title of the vendor should extend, not only to the property, but also to the proceeds of sales thereof made by the vendee. It is true that, in this connection, the court observed that, if the goods were sold by the vendee, they were to be sold as the property of the vendor, but we are unable to perceive how this difference is of importance in considering the peculiar circumstances of this case. If a conditional vendee sells the goods and mingles the proceeds with proceeds of his own goods so that they become indistinguishable, the vendor may lose title, but the case before us presents no such difficulty. It was expressly agreed in the stipulation that the notes and accounts involved here were the proceeds of goods

delivered to the bankrupts under the contract of conditional sale, and that agreement obviates all difficulties in tracing title. Observing the terms of the stipulation, there was no admixture of the proceeds of sales by the bankrupts with the proceeds of other goods. It was as though no other goods had been sold or as though the sales had been made in the name of the appellant and the notes and accounts taken accordingly. Therefore, under the stipulation and the rule of Triplett v. Implement Co., it must be held that, as between the appellant and the bankrupts, the former was the owner of the goods, notes, and accounts in controversy.. And further that, under the doctrine obtaining in Arkansas, it would have remained such owner even had an assignee in insolvency of the vendee first secured possession of them. There is no law in Arkansas requiring a contract of conditional sale to be filed or recorded in any public office.

Notwithstanding the views which this and other courts have at times entertained as to the effect of an adjudication in bankruptcy, and the right and title of the trustee resulting therefrom, it has been definitely settled by the Supreme Court that the trustee is vested with no better right or title than belonged to the bankrupt; that he stands simply in the shoes of the bankrupt, and as between them he has no greater right. York Mfg. Co. v. Cassell, supra. The right of appellant in this case did not first come into existence when it took possession of the property in controversy on the eve of the bankruptcy proceedings. On the contrary, it was secured by the contract which was executed almost a year before, and it is that date which we must regard rather than the date when possession was taken.

The order of the District Court must therefore be reversed, and the cause remanded for further proceedings in conformity with this opinion.

DELAWARE & H. R. CO. v. WILKINS.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 16.

1. RAILROADS—PERSONS ON TRACK—LICENSEES—CARE REQUIRED.

As against a bare licensee a railroad company may run its trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late to prevent injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1236.]

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—FEDERAL COURTS.

A federal court is not bound under all circumstances to submit the question of contributory negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 299.]

3. RAILROADS—PERSONS ON TRACK—LICENSEES—DEATH—CONTRIBUTORY NEGLIGENCE.

Intestate was killed while walking as a licensee along defendant's railroad track. He was aware of the approach of the train, and stepped outside the rails to stand until it should pass him, not appreciating the fact that a curve at the point where he was standing would cause the "bucking-beam" of the engine pilot to project further than usual. He

stood so close to the track that he was hit by the beam, though a single step back would have placed him in a position of safety. *Held*, that intestate was negligent as matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1286, 1287.]

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

This cause comes here upon writ of error to review a judgment of the Circuit Court, entered upon a verdict in favor of defendant in error, who was plaintiff below. The action was brought to recover damages for the death of plaintiff's intestate, who was killed by being struck by an engine operated by defendant on its railroad.

F. W. Maloney, F. M. Butler, and W. B. C. Stickney, for plaintiff in error.

O. M. Barber and M. C. Webber, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. Between the railroad station at Rutland and that at Center Rutland, nearly two miles westerly, the tracks of the Rutland Railroad Company and of the Delaware & Hudson Company run substantially parallel, on the same roadbed and close to each other, the track of the Rutland lying northerly of that of the Delaware & Hudson. About a quarter mile easterly from the Center Rutland station a highway crossed both tracks at right angles. This was known as the "Ripley crossing." Genovesi, plaintiff's intestate, lived in a house just south of Ripley crossing, and was employed in a shop of the Vermont Marble Company, located a short distance west of Center Rutland station. Such residence and employment had continued for about six months previous to the accident. From a marble mill located south of the railroads and east of Ripley road a spur—called also the "C. & P." track—runs diagonally across the highway northwesterly till it makes a switch connection with the Delaware & Hudson track. It crosses the highway about 60 feet south of the Ripley crossing, and the switch is located 280 feet west of the same crossing. Eastward of Ripley crossing, and between it and another crossing (known as "Chaffee crossing"), there was a signal post south of the track, intended to warn the engineer of a westbound train of the condition of the switch, with which latter it was connected by signal wires which ran to the switch target and for a considerable distance beyond it. From the Ripley crossing to near the switch the roadbed was about on the same level with the ground on both sides, except that there were ditches on each side of the roadbed. Somewhere near the switch an embankment commenced; that is, the roadbed is raised quite a little above the land adjoining on the south side. On the north side the land is as high as the roadbed or a little higher. From the switch target to the place where the northerly of the C. & P. rails first reaches the southerly Delaware & Hudson rail the distance was 71 feet, and it was nearly twice as far to the place where that C. & P. rail crossed the line of signal wires. The C. & P.

roadbed, the main roadbed, and the triangle of land bounded by those two roadbeds and the Ripley crossing were about on a level. After the accident Genovesi's body was found south of the Delaware & Hudson road, at the foot of the embankment, 35 feet from the Delaware & Hudson track and 17 feet west of the line of the switch target. From a point 825 feet east of the switch target to the target both roads (Delaware & Hudson and Rutland) run on a medium curve (a two-degree curve) towards the right or northerly. The distance between the south rail of the Delaware & Hudson and the signal wires varied from six to nine feet, and the projection of the ties beyond the south rail varied from a foot and six inches to two feet.

On the morning of November 22d at 6:07 a west-bound passenger train of the Delaware & Hudson left the station at Rutland. It was a regular train due to leave at 6:05 a. m. Before getting out of the yard at Rutland, it was delayed a few minutes by a long freight train of the Rutland Road, which was crossing from the freight yard on the left to the main Rutland track on the right of the Delaware & Hudson track. While waiting for the freight train to pass in front of him, the engineer of the Delaware & Hudson train extinguished the headlight on his engine. The freight train was also bound west, and, as it traveled more slowly than the Delaware & Hudson train, the latter had almost overtaken the engine of the freight train at Ripley crossing. Concededly Genovesi was struck somewhere near the switch target, and knocked off the embankment. When found, there were scratches on his face, bruises on his body, and he was lying face downward, with his neck dislocated. He was dead. The express stopped a little beyond the switch target, and the fireman came back with a lantern to find the man who had been hit.

It appeared that the track and roadbed between Chaffee crossing and Center Rutland station had been used to a considerable extent continuously for several years by the public as a short cut to mills or marble yards. That fact was known to defendant, which had endeavored by putting up signs and by scattering coarse stones along the roadbed to put a stop to it; but without success. Although the public were never invited to go upon the roadbed (except to cross it at the regular crossings)—either directly or indirectly as a convenient means of access to or from stations or waiting trains—the evidence warrants the conclusion that the persons who thus used the track for their own convenience were licensees. An examination of the Vermont cases cited on the briefs does not indicate that a railroad is held to any greater obligation of care towards licensees in that state than in other jurisdictions; the general rule being that:

"As against a bare licensee a railroad company has a right to run its train in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late."

Chenery v. Fitch. R. R., 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575; Keller v. Erie R. R., 183 N. Y. 67, 75 N. E. 965; Penn. R. R. v. Martin (C. C. A., Third Circuit) 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361; Butler v. N. Y. C. & H. R. R. (C. C. A., Second Circuit,

March 26, 1907) 152 Fed. 976; Nor. Pac. R. R. v. Jones (C. C. A., Ninth Circuit) 144 Fed. 47, 75 C. C. A. 205.

It will not be necessary, however, to discuss the law or the facts bearing upon that branch of the case. We are of the opinion that it was error to deny the motion made at the close of the case to direct a verdict in defendant's favor on the ground that, while using the defendant's track and right of way for his own convenience, plaintiff's intestate "did not exercise the care and prudence which the law requires, and was guilty of contributory negligence."

It is contended by plaintiff that in the federal courts the question of contributory negligence is always one for the jury to pass upon. This is not so. Elliott v. C., M. & St. P. R. R., 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; N. P. R. R. v. Jones, 144 Fed. 47, 75 C. C. A. 205. The case at bar differs from some which are found in the Reports, where there was no eyewitness of the accident or of the movements of the deceased immediately anterior thereto, and in which the jury have been allowed to infer the facts from the appearance of the body and the conditions of the locality and of the car or engine, coupled with a presumption arising upon the "natural instinct of self-preservation." In St. Louis & S. F. R. R. v. Chapman (C. C. A., Eighth Circuit) 140 Fed. 129, 71 C. C. A. 523, it was held that the doctrine that a person is presumed to have exercised due care to protect himself from injury, if applicable at all in the case of a person who goes upon a railroad crossing at night where there is known danger from moving engines on the tracks, is only so in the absence of any testimony explanatory of his conduct at the time and of the manner of his injury. The narrative of the transactions in the case at bar is as follows:

Moriglione, a witness called for the plaintiff, who lived with Genovesi in the same house near the Ripley crossing, testified: That they were accustomed in the morning to go to work together, timing themselves by the Delaware & Hudson express, generally starting after it went by, but sometimes starting ahead of it when it was late, as it sometimes was, and that they both knew that at about 6:10 the train used to go by, and that they used to wait for it; that on the morning in question, a very dark morning, they left the house at 6:10; it being time to start for work, witness not knowing of the Delaware & Hudson express having passed. They came out of the house together, and walked down the spur (C. & P.) track towards the Delaware & Hudson track; Genovesi being in advance. As the witness drew near the Delaware & Hudson, he saw the two trains approaching, and stopped at the end of the spur track to let them go by; the freight train being in the advance. As soon as they passed, he went along the spur into and along the main track of the Delaware & Hudson, and saw a train stop and a man with a lantern come out, whereupon he stopped and looked, and saw Genovesi lying dead. The last he saw of Genovesi the latter was going towards his work, but witness seems not to have noticed him after he himself stopped to wait for the train. There is nothing remarkable in this last statement. There was no reason why the witness should have called out or urged Genovesi to stop and wait with him on the spur, because on the roadbed of the Delaware & Hudson, as has been seen, there was at least until one got some distance

beyond the switch a safe place to walk alongside of and close to the signal wires, which were from six to nine feet from the rails. No doubt Moriglione supposed that Genovesi had seen the approaching trains which he himself had noticed, and would keep away from the vicinity of the rails.

Plaintiff's witness Mecier was walking west from Chaffee crossing between the tracks of the Rutland and the Delaware & Hudson. He heard the whistle and bell of the freight train, and looked back, but, being then near the Ripley crossing, kept on until he reached it, when he got off the roadbed altogether, stepping into the triangle between the spur and the Delaware & Hudson and beyond the line of signal wire. He was about six or eight feet west of the crossing when the freight began to go by him, and, while he was standing there, the Delaware & Hudson express also passed him. He noticed the approach of the latter train a few seconds after he got off from the track. He says that, when the Delaware & Hudson passed, he stood somewhat west of the crossing, about halfway between the crossing and where the spur rail runs in; but he nowhere qualifies the statement that he was near to the crossing when he got off the tracks after seeing the freight train. Just before this witness reached the Ripley crossing he saw two men (undoubtedly Genovesi and Moriglione) start from the houses towards the C. & P. track, and proceed along the spur. Just as witness was going across the Ripley crossing, he saw one of these men go by the spur over onto the Delaware & Hudson track. He did not notice him thereafter, and the last he saw of him he was walking between the rails of the Delaware & Hudson track. Evidently he thought the position an unsafe one, because he testified it was his intention when the train went by to look ahead to see what happened. Just after the train went by him he looked and saw the man go up in the air about four feet, and then down the bank. The train was between them, and he could not see how he was struck; and did not take any notice of him after he saw him go on the track where he went until he saw him in the air.

The engineer of the express testified that, when he was a little to the east of the Ripley crossing, he saw a man come out from in front of the Rutland freight engine which was ahead of him, that the man looked up towards him and crossed over towards the witness' left, apparently crossing the Delaware & Hudson to the south to get out of the way of the train. He was a considerable distance ahead, amply sufficient to clear the tracks. The engineer was sitting on the right-hand side of the cab, so the man soon passed out of his range of vision, and he supposed he had reached a place of safety until he heard the fireman, who was lookout on the left-hand side, call out, "We struck a man," whereupon he came to a stop as soon as he could, using "emergency" brake. The engineer estimated that the man he saw coming out from in front of the Rutland freight was somewhere near the switch target. If this estimate is correct, the man the engineer saw crossing to southward was undoubtedly Genovesi, who had (since Mecier saw him) got over as far as the Rutland track. Plaintiff's counsel contends that the engineer is mistaken in his estimate, and that the man he saw was really Mecier. We are not inclined to this

conclusion, because Mecier got off the tracks close to the crossing, although he subsequently moved further west into the triangle; and it seems singular that the engineer should be so far out of his way in estimating distance. The switch-target is 280 feet from the crossing. But really it makes little difference if it was Mecier whom he saw. The only result would be a finding that Genovesi had not at any time that morning got north of the track between the rails of the Delaware & Hudson where Mecier saw him walking.

The fireman testified that he was sitting on the left-hand side of the cab; that it was not daylight and it was not dark, and that he could see the track 200 or 300 feet ahead (the train was running on a curve to the right), and could see a man at that distance if one were there; that, while thus looking out and when they had got on the west side of the Ripley crossing, he saw a man step outside of the rail not a great way ahead, looking at the train; that he stepped over in front of the left side as they went west, and stood right outside the end of the ties with his face towards the train, and that witness supposed he was out far enough to clear the track. He did not undertake to estimate the man's distance ahead when he thus saw him, but estimates that there could not over four or five seconds have elapsed when he was struck by the bucking-beam of the engine and knocked down the embankment. This is the heavy timber covered with iron plate, which is located cross-wise across the front of the engine above the cowcatcher, and projects on each side about as far as the ends of the ties. When rounding a curve, the sharper the curve the more the bucking-beam projects out. It might be from four to six inches more than usual. The fireman called out, as stated before, the train was stopped, and he went back with a lantern, and, with others, found the body.

Plaintiff's counsel contends that the fireman's testimony is not entitled to consideration. He was cross-examined at great length as to what details of dress and personal appearance he noticed in the man he saw. Like many other inexperienced witnesses, he thereupon became voluble as to a number of wholly irrelevant details, irrelevant because no one disputes the proposition that the man whom the engine struck was Genovesi. We find nothing to impeach the witness, and no contradiction of his story on any material points. Moreover, it fits in with the other testimony and is corroborated by the testimony of the doctor called by plaintiff as to the condition of Genovesi's body. Evidently his neck was broken by the fall. There were contusions on the right shoulder and right hip, more swollen on the hip than on the shoulder. The bucking-beam would be about at the height of his hip. Whether there is some projection higher up on the engine does not appear. There can be no escape from the conclusion that these contusions mark the place where the blow was delivered which hurled him off the bank. If he had been overtaken while walking, unconscious of danger, between the rails, as Mecier saw him, these marks would have been on his back. If he were crossing the track trying to get out of the way to the southward onto the safe part of the roadbed near the signal wires, the marks would have been on the left side. Being on the right side, they furnish the strongest cor-

roboration of the story of the fireman as to where Genovesi was standing when he was struck. But, even if the evidence of the fireman were thrown out of the case, and the evidence of the engineer confined, as plaintiff contends it should be, to Mecier's movements, then we have Genovesi, familiar with the locality and aware that a train was due, failing to keep himself on the part of the roadbed where he could stand or walk with safety, but going, instead, unnecessarily so close to the track as to expose himself to being hit by passing trains when a single step would have put him out of danger.

There can be no doubt, however, that, aware of the approach of the train, he stepped outside the rails to stand till it might pass him, and, not appreciating the fact that a curve would cause the bucking-beam to project further than usual, stood so close to the track that he was hit, instead of stepping back, as he might have done, to the signal wires, or even over them and a bit down the slope.

Within the principles laid down in St. Louis & S. F. R. R. v. Chapman and Elliott v. C., M. & St. P. R. R., supra, the jury should have been instructed to find for the defendant.

Judgment reversed, and cause remanded for a new trial.

THE UMBRIA.

THE CHARLES E. MATTHEWS.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 246.

COLLISION—STEAMSHIPS—NEGLIGENCE—STARBOARD HAND RULE—VIOLATION.

A steamship observed a tug and tow nearly a mile distant in the channel of the upper New York Harbor. The tug at this time appeared at a point on the steamer's port bow with her tow in a westerly direction across the fairway of the channel, and bound across the steamer's course. The tug and tow in fact were not moving, but the tug was attempting to take one of its scows alongside and shorten the hawser on the other. When the steamer approached she blew two whistles, which were not answered, and then blew two more, with a similar result, about 10 seconds intervening. Between the whistles the wheel was put hard astarboard, so that the steamer's course was changed 20 degrees, in an attempt to pass astern of the tow. Being unable to accomplish this, an attempt to stop was made which was ineffectual, and a collision resulted. *Held*, that the steamer was the privileged vessel required by article 21 to keep her course and speed until she had received a signal from the tug, and was therefore at fault in violating the starboard hand rule; and the tug was also at fault in attempting to perform her maneuver, which occupied from 500 to 750 feet of the channel, at a point where it was less than half a mile in width, and at a time when seagoing vessels were known to be due, without having some one in the pilot house of the tug on the lookout to answer and give signals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 79.]

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

On appeal by all parties from a decree of the District Court for the Southern District of New York awarding damages in the sum of $17,363.23 to the libelant for injury to his scow sustained by collision with the Umbria op-

posite Bay Ridge, in the Upper Bay of New York, while the scow was in tow of the tug Matthews. The District Court held both the tug and steamship at fault and adjudged that one-half of the above amount be recoverable against each vessel. Both appeal.

The libelant also appeals, insisting that the commissioner and court erroneously disallowed $3,000 paid by it for repairs of the scow. The witnesses as to the collision, with one unimportant exception, were examined before the district judge. The opinion of the district judge, confirming the report of the commissioner upon the question of damages, is reported sub nom. The Umbria (D. C.) 148 Fed. 283.

J. Parker Kirlin, for the Umbria.
Chas. C. Burlingham, for the Matthews.
E. C. Benedict, for libelant.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The Umbria was condemned in the District Court for starboarding when she should have held her course under the starboard hand rule. She was also held to be in fault for not stopping and reversing sooner. The tug was held to be negligent because, for her own convenience, she stopped in a navigable channel and permitted her tow to drag out astern, thus closing to navigation a considerable portion of the fairway. We think the District Court correctly disposed of the case and will indicate our reasons for holding both vessels in fault.

First, as to the Umbria. The collision occurred December 24, 1905, at about 8:21 in the morning. There was a little haze on the water but nothing to prevent objects being seen a long distance away. In fact the master of the Umbria testified that "you could see a safe distance, for a December morning." He saw the Matthews when she was a mile distant. There can be no doubt that at this time the starboard hand rule applied. The answer of the Umbria admits this as follows:

"After leaving Robbins' Reef Light abeam the Umbria sighted a mile or more distant, a tug [the Matthews] one point on her port bow. * * * Apparently, said tug, with her tow, was under way in a westerly direction across the fairway of the channel and bound across the course of the Umbria."

To the same effect is the testimony of Capt. Stephens:

"I should say from where I stood that he [the tug] was nearly right ahead, perhaps a few degrees on the port bow, the scow was a point and a half on the port bow I should say."

The pilot testified:

"When I first saw her [the tug] I thought the tow was going across the channel; of course she had me on her starboard-hand, the tow boat was right ahead of me and the scow on our port bow one point."

In The Gladys, 144 Fed. 653, 75 C. C. A. 455, we held that "the tug and barges for the purposes of navigation with reference to others are to be regarded as a single vessel."

Indeed, the counsel for the Umbria concedes that "the court was right in holding that the case fell under starboard-hand rule." The Umbria was the privileged vessel, required by article 21 to keep her course and speed, at least until she had received the assent of the

tug to navigate contrary to the rule. To demonstrate that her conduct was in complete disregard of the rule it will only be necessary to refer to her navigation from the moment she saw the Matthews until she collided with the tow, as described by the pilot who had her in charge. His testimony bearing upon this question is in substance, as follows:

"The report was 'tug right ahead,' scow on her port bow, about a point astern of the tow. I blew two whistles, I got no answer; I blew two more and no answer. I put my wheel hard astarboard before I blew the second whistle. The order to the wheel was starboard and hard astarboard. I gave the order to starboard between the whistles. There was about ten seconds between those two signals. I got no answer whatever to these signals. I blew no danger signal. I blew two whistles that is the only signal I blew. I did not wait to get a reply, I starboarded my helm right away. The first order was hard astarboard. When I found the tug lying still it didn't pass through my mind that I could go on either side. There was only one way for me to go, astern. My helm was starboarded and I kept it there; it was my duty to pass to the eastward; there was plenty of water."

The pilot's idea of correct navigation in such circumstances is stated by him as follows:

"Q. If you had supposed that the Matthews and her scow were not moving at all when you first looked at her through the glasses would you starboard your helm and try to go astern? A. I would. It is always a proper thing to go astern of every vessel when you have room and get a chance.

"Q. No matter whether you have right of way or not? A. Go astern. Blow your whistle—the first man that blows the whistle has got right of way in any harbor.

"Q. You think it is different from sea? A. Yes. At sea they blow one long blast, in the harbor they blow one and two.

"Q. Whoever blows first must stick to it? A. Yes, sir; and the man that blows a cross whistle he does wrong.

"Q. That is your view from your experience as a Sandy Hook pilot? A. Yes, sir."

Not only did the pilot fail to observe the rule but he completely reversed it. He acted apparently upon the supposition that his was the burdened vessel, and the Matthews the privileged vessel. Instead of holding his course he gave two blasts and immediately, without waiting for a reply changed his helm to hard astarboard so that the Umbria changed her heading 20 degrees. The violation of the rule was deliberate and occurred when the vessels were a mile apart and before the Matthews had indicated her intention in any way.

We are not called upon to decide what the Umbria should have done or speculate as to the result if she had obeyed the rule. It is enough that she disobeyed it at a time when for aught that appeared the Matthews was intending to follow it.

The district judge also condemned the course of the Umbria for not stopping and reversing sooner. It is true that up to the time when Capt. Stephens interfered and gave the order to "stop her" the Umbria had been going under a full speed order. It is also true that the captain testified that had the scow been three lengths instead of one length away when the order "full speed astern" was given there would have been no collision. We are inclined to think, however, that the failure to stop sooner was not a fault but an error of judgment in extremis.

Was the Matthews in fault? The District Judge found that the "collision was as near as may be about the middle of the channel." The testimony on this point is very conflicting; it is impossible to locate the place with perfect accuracy and we are unable to say that this finding is against the weight of evidence. The collision certainly occurred in the channel and that, too, at one of its narrowest points, about a third of a mile below the bell buoy at Bay Ridge where it is, probably, a little under half a mile in width. A strong flood tide was running, and it was Saturday morning when every pilot in the port knows that a large number of ocean steamers are arriving and departing.

The Matthews stopped with two scows in tow, on hawsers aggregating 220 fathoms, somewhere about a mile above Fort Wadsworth, to take the first scow alongside and shorten the hawser of the second before entering the Kills. During this maneuver, which took over twenty minutes to execute, the entire flotilla was drifting with the tide so that just before, and at the time of the collision, the distance from the bow of the scow, which was lashed to the Matthews, to the stern of the scow that was sunk, was from 500 to 750 feet. These vessels were on a line almost athwart the channel. It was probably necessary to execute this maneuver, but it does not appear that it was necessary to execute it in a crowded channel and in such a manner that nearly a quarter of the channel was blocked for twenty minutes. The work of rearranging the tow was carried on without the slightest regard to other vessels navigating the channel. The master of the Matthews was in the cabin asleep. There was no lookout. Every one on the tug was below except the mate and two deck hands, who were engaged in heaving in the hawser by the steam capstan, which was located aft on the deck. The mate heard the Umbria's signals but paid no attention to them. In fact, nothing was done by the Matthews until the scow was almost in the jaws of collision when her engines were ordered "slow ahead."

The Matthews was at fault for executing a maneuver, which required so much time and occupied so much space, so near the center of the channel without taking precautions to prevent passing steamers from being misled. It is not shown that it was necessary for her to occupy the channel at all and she certainly could have made the change at the edge of the channel with almost absolute safety. Having chosen the channel itself as the theater of her operations she should have had a competent lookout constantly on duty and should have been ready at all times to answer and give signals and to act promptly in order to prevent disaster to herself, to her scows and to others. With no one awake in the pilot house this was impossible.

On the question of damages the libelant was given unusual opportunities to prove the amount of his loss. The commissioner's original finding was reopened to give the libelant another opportunity to obtain the necessary proof, but in this he failed again, in the opinion of the commissioner, and a second award to the same effect was made, which was carefully reviewed by the judge who decided that the commissioner had reached a just conclusion.

We have examined the record with care and are not satisfied that a finding of fact reached after so careful and painstaking an investigation should be disturbed.

The decree is affirmed, with interest, but without costs of this court.

THE ST. GOTHARD.

(Circuit Court of Appeals, Second Circuit. April 3, 1907.)

No. 231.

SHIPPING—STEVEDORES—INJURIES—NEGLIGENCE OF SHIP.

Plaintiff, a stevedore engaged in unloading bags of sugar from the hold of a vessel, was injured by the falling of a sling caused by the breaking of the rope fall as the sling caught under the coamings of the between-decks hatch. The fall provided for use at such hatch was made of wire, but shortly before the injury the stevedores not employed by the ship had substituted the rope fall in order to use the wire fall at another hatch. The rope was a four-inch one, and, if properly used and inspected, was fully capable of the work in hand. The ship had also provided an abundance of spare falls, both wire and rope, which were at the service of the stevedores whenever any fall indicated that a change was required, and the ship's officer, on noticing the change, asked concerning it, and the foreman replied that the wire fall was wanted elsewhere, and that the rope was quite good to lift anything they wanted to lift. *Held*, that the ship was not negligent nor responsible for the breaking of the rope.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 350.]

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

This cause comes here upon appeal from a decree of the District Court (149 Fed. 790) holding the steamer liable for injuries sustained by the libelant, who was working upon her as a longshoreman.

J. Parker Kirlin and Charles R. Hickox, for appellant.

Lorenzo Ullo, Albert M. Yuzzolino Ullo, and Ruebsamen & Yuzzolino, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

LACOMBE, Circuit Judge. The main facts of the case are set forth in the opinion of the district judge as follows:

"The vessel in its charter party agreed to furnish tackle for loading and discharging cargo. At each hatch a fall was provided to lift the cargo (bags of sugar) from the hold, and, save at the bunker hatch, there was another fall to carry out-board and deposit it on the dock. All falls of the first class were made of wire, and all of the second class were made of rope. At the spare bunker hatch but one fall was used, and that was made of wire. The ship discharged a part of her cargo at Yonkers, and then went to Arbuckle's dock in New York, where, after the work had begun, the stevedores not employed by the ship substituted the rope fall of No. 3 for the wire fall at the spare bunker hatch, for the probable reason that the wire fall was on account of greater length more available at No. 3 hatch. The libelant, a longshoreman employed by the Arbuckle company, was in the hold under the spare bunker hatch making up the slings. As a sling containing five bags was rising, it caught under the coamings of the between-decks hatch, and thereupon the rope broke and the sling fell upon libelant's knee, causing serious injury. Some portion of

the rope was produced in court on the trial April 4, 1906, and as it then appeared was unfit for the purpose of a fall. The rope had been used somewhat since the accident, which was October 9, 1905. * * * The sling came into contact with the coaming. The winch continued to work and the rope broke. * * * The hatch was 14 feet athwartship and 5 feet 6 inches fore and aft, and through this opening in rapid discharge of cargo the sling was taken. The collision with the coamings at times was expectable, and a fall was required that should withstand reasonably the shock of such contact. To meet this demand the ship had provided and rigged wire falls, and the stevedores had for their own convenience substituted the rope."

The district judge held the ship liable because it did not "use suitable care to furnish falls that would meet the duty that the stevedores would allot to them, and because "both the stevedore's foreman and the ship's officer were negligent in allowing the rope to be used."

We are unable to concur in this conclusion. Besides the facts above set forth others appear in the record, either undisputed or established by the fair weight of evidence. First as to the rope. The expert witness called by libelant testified that a new four-inch fall such as the one in question, if used for lifting cargoes from the deck of a vessel over the side where the rope does not come in contact with any sharp or hard surface, would have a life of from 30 to 36 hours; that if used for hoisting cargo from under deck, where it is being constantly exposed to chafing over the sides of the hatch, and to sudden strains as a sling catches under the hatch, it ought not to be used over 15 hours. And he added:

"It all depends on how the rope is used. I have seen some rope that wouldn't last three hours with the gang of men aboard that boat."

There is evidence that for a considerable time the stevedores used this fall to lift out five bags to a sling, instead of four, although cautioned not to do so. The extra weight is not important; but, since five bags made the draught more bulky, the chances of catching under the hatch were greater. Moreover, there is evidence to show carelessness in guiding and in directing the hoisting, so that such catching with consequent sudden strain on the rope was increased. The fall had been in such use four or five hours before the accident. To whatever extent use subsequent to the accident had deteriorated it, it is manifest that its condition on the trial was considerably different from what it was when the stevedores substituted it for the wire fall which would have stood the chafing and the strains for a vastly longer period. There is not a particle of evidence to show that if left where the ship had placed it, to serve in lifting cargo from the deck to the dock, it was not in perfectly proper condition to complete the discharge of all this cargo.

The ship had also provided an abundance of spare falls, wire and rope both, which were at the service of the stevedores whenever the appearance or the use of any fall indicated that reasonable prudence required a change. Where a ship supplies proper falls for unloading cargo, with an abundant supply to take the place of such as show signs of wearing out during the operation, all at the disposal of the stevedores, the authorities do not sustain the proposition that she is to be held in fault because the stevedores make improper use of such appliances. When she has done this, she has used suitable care to fur-

nish falls that would meet the duty that the stevedores would be expected to allot to them. The facts in the case at bar differentiate it from those cited by libelant. In The Kate Cann (D. C.) 2 Fed. 246, dunnage improperly stowed by the crew broke away. In The Edith Goddon (D. C.) 23 Fed. 43, an insufficient derrick, under the disadvantageous condition of a very rough sea, was used by the ship's officers to lower away a long boat. In The Carolina (D. C.) 30 Fed. 199, the guy rope which broke had been rigged in the place where it was put to use by the ship's officers, who were held guilty of negligence when they "permitted it to be used after its insufficiency had been decided by its breaking." In The Tresco, 134 Fed. 819, 67 C. C. A. 465, a defective splice in a wire cable, concealed by a tarred twine serving, gave away, and the cable, which was taken from another ship and had not been carefully inspected, was rigged by the ship for the service for which it was being used. In The William Branfoot (D. C.) 48 Fed. 914, the accident was the fall of an iron stanchion supporting the between-decks. In The Nebo (D. C.) 40 Fed. 31, a cross-beam supporting a platform made by the mate and carpenter to aid in discharging cargo gave way. In Coughlin v. The Rheola (C. C.) 19 Fed. 926, the chain which broke was supplied by the ship for the purpose for which it was being used. In The William F. Babcock (D. C.) 31 Fed. 418, there was an improperly protected hatch. In Cliffe v. Pac. Mail S. S. Co. (C. C.) 81 Fed. 809, a defective manhole cover on deck. In Lowndes v. The Phenix (D. C.) 34 Fed. 760, the mate upon request, furnished the rope sling for the very use to which it was put. In The Alejandro, 56 Fed. 621, 6 C. C. A. 54, the "general management of the work on hand was under direction of the officers of the vessel," who put the rotten rope to the use in which it broke. Libelant has quoted from the decision of this court in The King Gruffydd, 131 Fed. 189, 65 C. C. A. 495. In that case the stevedore's men were raising a heavy skid from a lighter. The boom was held by a wire cable known as a "topping-lift," which extended from the end of the boom to a block on the mast. The skid caught on the side of the vessel, and, the winch not stopping, the topping-lift broke close to the eye. The boom was rigged by the stevedores, not by the ship, and an ample supply of gear and tackle for such rigging was furnished by the ship. Such supply of rigging included chains as well as wire rope in proper lengths for use as "topping-lift," and the ship sought to escape liability because the stevedore's men, with rigging before them (the chains) which would have stood the strain, selected rigging (the wire) which would be likely to break if the load caught. That contention, however, was found by the court to be without merit, because the evidence showed that a wire topping-lift was as safe for the purpose as a chain. It appeared that the utmost lifting capacity of the engine was only 3 tons, while a wire cable of the size used, if in good condition, would lift easily 20 tons. The ship was held liable because the splice near the eye of the cable had become weakened by the corrosive action of rust, a condition which would have been apparent if the "service" of bagging and spun yarn had been removed when the ship's officers made their regular inspections. We did not hold that it was necessary to remove such "service" at

every inspection, but that the cable in question had been so handled, being left exposed in the rigging when at sea, instead of being housed in some warm, dry place, that the ship's officers were bound to anticipate that its life was nearing an end, and that its weakest point (the splice) "should have been subjected to some periodic examination and renewal of the oiled service which was intended to protect it." The King Gruffydd is a very different case from the one at bar, where there is no proof of unfitness for the purpose to which the fall was appropriated, and where the stevedores remove a wire fall manifestly impervious to chafing and substitute a rope one which they knew would rapidly deteriorate under the hard usage to which they thereafter expose it.

The facts in Jeffries v. De Hart (Third Circuit) 102 Fed. 765, 42 C. C. A. 615, are similar to those in the case at bar. The stevedores themselves selected from the ship's tackle what rigging they preferred, and the ship was held not to be in fault because their selection turned out to be improvident.

The conclusion of the district judge that both the stevedore's foreman and the ship's officer were negligent is based solely upon the circumstance that the mate, about 10 a. m., some time after the substitution, noticed that the change of rope for wire had been made and asked the foreman the reason for it. The reply was that they wanted the wire for aft, and that the rope was quite good to lift anything they wanted to lift. This is not sufficient to hold the ship in fault. For aught that appears, the rope was perfectly good if it were used carefully and overhauled from time to time to see if it was being chafed by use.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to dismiss the libel.

G. GULBENKIAN & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 234 (4,125).

CUSTOMS DUTIES—APPRAISEMENT—MIXED WOOLS.

White and colored wools were sold together in the Bagdad market at one price, without any distinction as to color; this being in accord with immemorial practice in that market. *Held*, that in finding "the actual market value * * * in the principal markets of the country whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States," under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924], both kinds of wool should be appraised at the same price, in accordance with the manner of purchase, without regard to any difference in value which may attach to each kind in any other country.

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

The decision below affirmed a decision of the Board of United States General Appraisers (G. A. 6,151 [T. D. 26,719]), which had affirmed the assessment of duty by the collector of customs at the port of New York. The importation in controversy consisted of 1,000 bales of wool, of which 800 were

invoiced as white, and 200 as colored. This wool was the subject of reappraisement proceedings under Customs Administrative Act June 10, 1890, c. 407, § 13, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], before a single General Appraiser, and then, on appeal, before a board of three General Appraisers, as a result of which an advance in value as to the white bales, which was made by the local appraiser, stood affirmed. Proceedings were then brought by the importers under section 14 of said act (26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]), for the purpose of testing the legality of the appraisement and the reappraisements; and at the hearing before the Board of General Appraisers in these latter proceedings the importers introduced evidence intended to show that the appraisement by the local appraiser was illegal. The Board, however, held that, whatever irregularity may have characterized that appraisement, it would have been cured by a valid reappraisement, and that there was no evidence that the reappraisements before a single General Appraiser had not been properly made. The assessment of duty was therefore affirmed. In the Circuit Court, on appeal, considerable additional evidence was introduced by the importers.

The pertinent part of section 19 of said act (26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]), the construction of which is involved herein 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."

The opinion filed by the court below reads as follows:

WHEELER, District Judge. These are white and colored wools, mostly white, coming from Bagdad. They are by practice sold there at the same price, although the white is worth considerably the most for bringing here, and they have been appraised here according to that difference. The principal question seems to be whether the appraisers here must follow that practice in ascertaining the actual market value or wholesale price of the wool, or may the actual value of each there separately for exportation to this country be ascertained. That arbitrary practice does not aid in ascertaining, but rather conceals, the actual market value of the white wool, and it should not be followed when it would have that effect.

Some questions have been made about the regularity of the first appraisals, but these were appealed from, and the proceedings on the appeals seem to be the only ones in question, and they do not appear to be radically wrong when the basis is found to be right.

The paragraphs of Tariff Act July 24, 1897, c. 11, § 1, 30 Stat. 182, 183 [U. S. Comp. St. 1901, pp. 1664, 1665, 1666], in question are as follows:

"Par. 351. Class three, that is to say, Donskoi, native South American, Cordova, Valparaiso, native Smyrna, Russian camel's hair, and all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Syria, and elsewhere, excepting improved wools hereinafter provided for."

"Par. 358. On wools of the third class and on camel's hair of the third class, the value whereof shall be twelve cents or less per pound, the duty shall be four cents per pound.

"Par. 359. On wools of the third class, and on camel's hair of the third class, the value whereof shall exceed twelve cents per pound, the duty shall be seven cents per pound."

Hatch & Clute (J. Stuart Tompkins, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The question in controversy is, whether the wool brought here from Bagdad, Turkey, shall pay four cents per pound under paragraph 358 or seven cents per pound under paragraph 359. If the value of the wool was twelve cents or less per pound the appellants should succeed; if more than twelve cents per pound the appellee should succeed.

There is no disputed question of fact. The wool in question, without any distinction as to color, was purchased by the importers at Bagdad for 7.36 piasters per oke and, after adding all packing charges required by section 19 of the administrative act, the value of the wool at Bagdad was less than twelve cents per pound.

The appellants have been importing wool from Bagdad for twenty-five years. They purchased white and colored wool in the market for the same price and always invoiced their purchases at the cost price precisely as in the present instance. The white and colored wool are invariably sold together and for the same price.

One of the importers testifies:

"The owner of a lot will say 'here is my lot, this is my price.' We take it, we pack it as far as possible, so called white and so called colored separately. We sell the wool in this country. It contains maybe 30 per cent. of gray, from 10 or 5 per cent. We can never separate them; we take one fleece, for instance, you will see on one side it looks all white, and turn it and find it is black or some other color; it is the character of the wool that they never come absolutely white; there is always mixed colors, part of the sheep fleece may be white, might have a black mark on it, or near the skirt may be yellow or brown. * * * We buy them at one price. If I were to invoice it at any different prices I would not know what price to invoice one from the others. * * * There is no distinction. We have to pay the same price whether it is white or colored."

The testimony establishes overwhelmingly, and without contradiction, that in the Bagdad market from time immemorial, the white and colored wools have been sold together and always at the same price. Even when a partial separation was made the price was the same for the white as for the colored wool. There is no such thing as a strictly white wool coming from the Bagdad markets. Wools called white by manufacturers and dealers are not white. There is no difference in quality between the so-called white and the so-called colored wools.

The local appraiser, without altering the total invoice value, reduced the value of the colored wool to about nine cents per pound and added the amount so deducted to the white wool, making the value above twelve cents per pound, and thus subject to the high duty of paragraph 359.

The action of the local appraiser was sustained on reappraisement. The Board of General Appraisers overruled the protests and its decision was affirmed by the Circuit Court.

We are of the opinion that the protests should have been sustained.

When the merchandise arrived at the port of New York the duty of the collector was plain. Having ascertained that it was wool imported from Bagdad he had only to ascertain its market value, not at New York or London or Marseilles, but at Bagdad, add thereto the packing charges, and his duty was done.

If the value of imported wool is to be ascertained by proof addressed to each separate importation a cumbersome, unworkable system will result which will open the door to uncertainty and fraud.

In order that the collector may have an infallible standard by which to measure value Congress enacted (section 19 of the customs administrative act) that duty shall be assessed upon the actual market value of the merchandise as bought and sold in usual wholesale quantities in the principal markets of the country from whence imported.

The rule thus fixed by statute is plain and simple; binding alike on importer and collector. Neither may vary or evade it. Neither may appeal to other criteria of value.

If the rule had been followed in the present case the value of appellants' wool would inevitably have been fixed at less than twelve cents per pound. By discarding the rule, and substituting argument and conjecture, a conclusion is reached which fixes the value of four-fifths of the importation at thirteen cents per pound and one-fifth at nine cents per pound. And yet if the record contains a syllable of proof that any of this wool, or similar wool, was ever bought and sold in Bagdad for thirteen cents or nine cents per pound, or that such difference in value as this can exist in the same lot of wool, we have failed to discover it.

The argument of the appellee rests, we think, upon the initial fallacy that the white wool was worth more in the markets of Bagdad than the colored wool.

The proof shows that it was not worth more and a finding to the contrary must either be wholly arbitrary or based upon facts which the statute excludes from consideration, viz., value in this country. The value of the wool here or in foreign countries, other than Turkey, the use to which the wool was to be put, the object of the purchaser in separating it, are all, in our judgment, matters extraneous to the issue.

By the express command of the statute the collector was prohibited from considering anything but the actual market value of the wool in the principal markets of Turkey. Having ascertained that value he should have levied duty accordingly.

The proof establishes beyond contradiction or doubt that the value of the wool at Bagdad was less than twelve cents per pound and it should have been so fixed.

The decision is reversed.

EDWARD BENNECHE & BRO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 236 (4,049).

CUSTOMS DUTIES—CLASSIFICATION—HAND-MADE PAPERS—INDIA TRANSFER PAPER.

The hand-made papers coverer by Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 401, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672], enumerating "writing, letter, hand-made, drawing, * * * and typewriter paper," are not only those used as writing papers, but also that suitable for other uses, as hand-made India transfer paper used for making lithographic transfers and in printing.

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

See G. A. 6,058 (T. D. 26,440).

Following is the opinion of the court below:

WHEELER, District Judge. This is found to be specifically hand-made paper, which is specifically provided for under paragraph 401 of the act of 1897, and is not such as was under consideration in Miller v. U. S. (C. C.) 128 Fed. 469, although the remark there made would cover it, as held by the Board. That remark as made by me does not appear to have been sound, and was not essential to the decision, and was not approved by the mere affirmance of the decision. The question seems to be still open, and the specific designation must govern. The decision of the Board brought about apparently by that remark, therefore is erroneous.

Decision reversed.

Walden & Webster (Albert H. Washburn, of counsel), for importers.

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

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The merchandise in question is hand-made India transfer paper imported from China. It is used for making lithographic transfers and is sold to dealers in lithographic supplies. It is also used for printed proofs and plates. It was assessed by the collector as hand-made paper under paragraph 401 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672], the relevant portions of which are as follows:

"Writing, letter, note, hand-made, drawing, ledger, bond, record, tablet, and typewriter paper, weighing not less than ten pounds; * * * but if any such paper is ruled, bordered, embossed, printed, or decorated in any manner, it shall pay ten per centum ad valorem in addition to the foregoing rates."

The importers insist that the merchandise should have been assessed as paper not specially provided for under paragraph 402, which, so far as it relates to this controversy, is as follows:

"Paper hangings and paper for screens or fireboards, and all other paper not specially provided for in this act, twenty-five per centum ad valorem." 30 Stat. 189.

The Board of General Appraisers felt constrained to overrule the classification of the collector upon the authority of Miller v. U. S., 128 Fed. 469, in which it is said, in substance, that paragraph 401 relates exclusively to writing papers.

Judge Wheeler who decided the Miller Case also decided the case at bar. He points out that his previous interpretation of paragraph 401 was incorrect and obiter dictum and finds the merchandise specifically provided for therein as hand-made paper. We believe the later decision to be correct.

Paragraph 401 cannot, as the appellants contend, be limited to the class of hard stock, hard sized writing and drawing papers. If it had been the intention of Congress so to limit the paragraph that intention could have been succinctly expressed by the use of the words, "writing and drawing paper weighing not less," etc. The inclusion of hand-made paper and typewriter paper indicates a purpose not

to confine the paragraph within the narrow limits suggested, for neither is particularly suitable for drawing or writing.

Furthermore, the appellants' contention overlooks the significance of the clause "but if any such paper is * * * printed or decorated in any manner." Congress evidently had in mind paper not only suitable for writing and drawing but for printing as well. In other words, the language specifically covers a hand-made printing paper. That the paper in question is hand-made is undisputed. The statement that it is wholly unfit for printing is not sustained by the testimony, at least as broadly as counsel assert.

One of the witnesses says:

"It is transfer paper, used from one stone to another. It would be bothersome, of course, to print that so many times and the lithographer takes a piece of that paper and puts it on the stone, from there it is printed out. That is what the paper is used for. * * *

"Q. Do you know whether you can print on it?

"A. Oh, yes.

"Q. Do you know whether it can be printed on?

"A. They print transfers on it."

That it can be printed on with type can be demonstrated by a very simple experiment with a rubber stamp.

We find that the paper in question is specially provided for as hand-made under paragraph 401 of the tariff act.

The decision is affirmed.

THE ROBERT R. KIRKLAND.

(Circuit Court of Appeals, Third Circuit. May 7, 1907.)

No. 20.

1. SHIPPING—OWNERSHIP OF VESSEL—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to sustain the claim of a respondent to the ownership of a vessel in controversy.

2. SAME—LIEN—AUTHORITY TO CONTRACT FOR REPAIRS.

One of the respondents and another person were appointed joint agents to represent a number of parties who had joined in the purchase of the plant and vessels of a dredging company to be paid for in installments, with power to make the payments and receive and manage the property. The other respondent was a firm of which the first respondent was a member, and which was also one of the purchasers of the dredging property. *Held*, that the individual respondent had no power as agent to contract for the making of repairs by his firm on one of the vessels purchased and delivered to the agents, without the concurrence of his co-agent, and that the firm could not hold the vessel under a claimed lien for repairs so ordered by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 323.]

3. SAME—SUIT TO RECOVER VESSEL—TITLE TO SUPPORT.

The purchasers of such dredging fleet having ratified the action of the directors of a dredge owners association of which they were all members, appointing a committee to supercede the agents previously acting, with power to complete payment and take title to the property purchased and to manage and dispose of the same, such committee, after receiving a bill of sale of the purchased vessels, in their own names, were authorized to maintain a suit as owners to recover possession of one of the vessels against one of the constituent owners which wrongfully withheld it.

4. ADMIRALTY—COST OF KEEPING LIBELED VESSEL—ALLOWANCE TO MARSHAL.
A marshal who has taken possession of a vessel on a process from a court of admiralty is responsible for her safe keeping to all parties in interest, and, if he dispenses with a caretaker at the request of one party, it is within his discretion to again take possession and incur the expense of a keeper as authorized by Rev. St. § 829 [U. S. Comp. St. 1901, p. 636].

Appeal from the District Court of the United States for the District of New Jersey.

For opinion below, see 143 Fed. 610.

R. D. Benedict, for appellants.

Albert A. Wray and Linsly Rowe, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the United States District Court for the district of New Jersey, in admirality, in a libel for possession, by the appellees, against the steamtug Robert R. Kirkland, Ralph G. Packard and Josiah S. Packard, appellants.

On the pleadings and proofs of the respective parties, the court below adjudged that the libelants were the true legal owners of the said steamtug, and that possession of the same be delivered to them by the marshal, and that the libelants recover against Ralph G. Packard and Josiah S. Packard their taxed costs, amounting to $524.00.

The opinion, pursuant to which this decree was entered, is reported in 143 Fed. 610.

After a careful examination of this record we are convinced that the learned judge of the court below was correct in his findings of fact and conclusions of law. The contention of appellants on the question of title to the tug, seems to rest largely on an erroneous conception of the authority of the Board of Directors of the Atlantic & Gulf Coast Dredge Owners Association, with respect to the business and affairs of the parties of the second part to the agreement of October 12th, 1892. Its relation to these parties was purely advisory, and though intimate, by reason of the fact that the parties of the second part constituted a part of its membership, its board of directors did not represent, and did not claim to represent, said parties to the agreement referred to, otherwise than by their friendly offices. Even if the weight of the testimony established the fact of the agreement to sell, alleged by R. G. Packard to have been made by said board of directors, of the steamtug to himself, for $1600.00 (which we do not think it does), such an agreement would have been, as found by the learned judge of the court below, a nullity. There was no evidence of any authority in said board to make such a sale, and they had expressly disclaimed any such authority in the vote adopted by them on December 4th, 1895, in which R. G. Packard participated, by providing:

"That this vote should be submitted to the members of said party of the second part to the contract aforesaid, for their ratification, adoption and confirmation."

In regard to the possessory lien claimed by the firm of R. G. Packard and J. S. Packard, it may be added to what has been said

by the learned judge of the court below, that the bills for repair made by the firm, of which R. G. Packard was a member, are open to the criticism to which all transactions are amenable, where a trustee deals with himself in matters affecting the trust property. We agree, however, to the correctness of the ground upon which the court below rested its decision.

Counsel for the appellants say in their brief, that:

"The district court committed two grave errors, in its consideration of the claim of R. G. and J. S. Packard to be reimbursed for their expenditures on the vessel, before possession should be taken from them."

They say:

"The first error consisted in misunderstanding the nature of the claim of the Packard firm."

In proof of this, they cite the following language of the court:

"He (Packard) could not, without the consent of his co-trustee, authorize his firm to repair the tug in any such manner as to give to that firm a *maritime lien* upon her."

The italics are those of counsel, who proceed to say that the firm "never claimed to have a maritime lien on the tug. They claimed below, and claim here, a simple common law or possessory lien." We think it is quite clear, that the learned judge of the court below used the words "maritime lien" in a general or non-technical sense, as being a lien, the subject matter of which was a vessel, and not as distinguished from a common law or possessory lien. What was said by the learned judge, was entirely applicable to the common law lien claimed by appellants.

We have examined carefully the exceptions filed by claimants and respondents in the court below, to the marshal's fees for compensation to a keeper, from March 17th, 1899 to May 29th, 1899, at $2.50 per day, and also for extra compensation for expenses of pumping, 74 days at 50 cents per day, amounting in all to $222.00. The ground of appellant's contention is, that, inasmuch as, shortly after the marshal had taken possession of the tug, by virtue of the process issued at the instance of the libelants, the watchman placed thereon by the marshal was withdrawn at the request of the proctors for the libelants. Some days after this withdrawal, the tug was again seized by the marshal, on a libel filed by R. G. Packard, one of the respondents in this case. A keeper was then put in charge of the tug, and after the dismissal of the said libel by the court, was kept in charge under the authority claimed by the marshal under the original process, by virtue of which he first seized the tug at the suit of the libelants in the present case. It appears from the exhibits that some protest was made, against thus incurring the expense of the keeper, by the proctors for the libelants, and an offer was made to give the marshal an indemnity bond, on condition that he would dispense with such custody. This bond, however, was never given, and the marshal insisted that his responsibility under the process in his hands was such as required him to see to the safety of the vessel that he had seized. The responsibility thus incurred was not only to the libelants, but to

all who were interested as claimants, or otherwise, in the property seized. In dispensing for a few days with a keeper, at the request of the proctors for the libelants, in the first instance, the marshal acted on his own responsibility, but it was entirely within his discretion, for his own protection, and in the performance of his duty, to again take possession and incur the expense of a keeper, authorized by section 829 of the Revised Statutes [U. S. Comp. St. 1901, p. 636]. We think the marshal, in doing so, acted within his rights, and that the charges allowed by the court for a keeper, were within the legal limit prescribed, and the charge for extra labor for pumping to keep the vessel afloat was reasonable, and was properly incurred.

The order of the court below in that respect is, therefore, approved, and its decree is hereby affirmed.

THE ANNA M. FAHY.

THE OVERBROOK.

THE MEDIA.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)
No. 266.

1. NAVIGABLE WATERS—OBSTRUCTION BY WRECK—LIABILITY OF OWNER FOR FAILURE TO MARK WRECK.

Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], which provides that, whenever a vessel is wrecked and sunk in a navigable channel, "it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night," places such duty upon the owner, and no one else, and he cannot shift the responsibility for an injury to another vessel resulting from his failure to perform it upon tugs which caused the wreck by their fault, when he had notice of the situation in ample time to have performed the duty before damage resulted.

2. SAME.

The owner of a canal boat which was sunk in New York Bay, who received notice of the sinking at once, and could have had it marked as required by statute within an hour, is liable for the damages caused by a passing vessel coming into collision with the wreck six hours later, when it was still unmarked.

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

On appeal from a decree of the District Court for the Southern District of New York awarding damages to the libelants, owners of the tug Bulley, for injuries sustained by her as the result of running upon the sunken canal-boat Anna M. Fahy. The Fahy was sunk by reason of the negligence of the tugs Overbrook and Media in towing her upon the rocks near St. George, Staten Island. The claimant of the Fahy brought in the tugs under the fifty-ninth rule in admiralty. The District Court dismissed his petition with costs and the claimant has appealed to this court, insisting that the Fahy should be absolved and the tugs Overbrook and Media held for the libelants' damages.

John F. Foley, William J. Martin, for libelant.

James K. Symmers, James Emerson Carpenter, and Carpenter, Park & Symmers, for the Fahy.

William S. Montgomery, Henry Galbraith Ward, and Robinson, Biddle & Ward, for The Overbrook and Media.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The tug Bulley was damaged by running upon the sunken wreck of the canal boat Fahy shortly after 6 o'clock on the evening of April 4, 1905. The Fahy sank about 8:30 on the morning of the same day having been negligently towed on the rocks by the tugs having her in charge. The Bulley was without fault and is entitled to a decree against the vessel or vessels responsible for her damages. This proposition is not controverted.

The libel was filed upon the theory that the Fahy was solely liable for the reason that her owner neglected to comply with the provisions of section 15 of the act of March 3, 1899, which directs that it shall be the duty of the owner of a vessel sunk in a navigable channel immediately to mark it with a buoy or beacon during the day and a lighted lantern at night. 30 Stat. 1152, c. 425, U. S. Comp. St. 1901, p. 3543.

The duty thus made imperative was wholly neglected. From the sinking of the Fahy to the collision with the Bulley nearly ten hours elapsed and no buoy or beacon, or mark of any kind, had appeared above the wreck. This failure to act, imperilling as it did the lives and property of those navigating a much frequented channel, is made unlawful by the statute and was negligence of a pronounced type.

It is argued that the word "immediately" as used in the statute means within a reasonable time. Undoubtedly the word should be construed having in view the circumstances of the particular situation in hand; what might be justifiable delay in one case would be culpable delay in another. Here, however, we are confronted with no problem of this character, for the reason that the owner was informed of the disaster shortly after 12 o'clock, and, had he acted promptly, he could have had a mark placed over the wreck within an hour thereafter. Instead of doing this he wasted valuable time in communicating with his insurers and the engineer corps and did not notify the Merritt & Chapman Wrecking Company until about 2 o'clock, when he asked them to locate the wreck and, incredible as it may seem, he gave no order to mark it. It was not until 4 o'clock that the order finally came to place a buoy above the wreck. Thereafter, the negligence in failing to act until after 6 o'clock was that of the wrecking company, but its fault in this regard must be imputed to the claimant. The law placed the duty of marking the wreck upon him and he cannot escape responsibility by delegating it to others. The Merritt-Chapman Company was his agent and he is responsible for its acts and omissions. No construction can be placed upon the statute which makes it inapplicable to an owner who delays action for six hours after knowledge of all the essential particulars, when he could have communicated with those in the vicinity of the wreck immediately and could have reached it in person in less than an hour.

The tugs Overbrook and Media are undoubtedly liable to the owner of the Fahy for their negligence in towing her upon the rocks, but are they liable to the Bulley for failure to mark the wreck? The district judge thought not and we are inclined to agree with him.

The statute places the duty to mark upon the owner and no one else; there is no divided responsibility and, if the statute is to be effectual, there cannot be.

When the towage service ceased by the sinking of the Fahy we think the tugs were justified in assuming that the duty imposed by statute upon the owner would be performed. The masters of the tugs knew that the master of the Fahy was uninjured and able to communicate with her owner which he did as soon as he arrived in New York, and they might well have supposed that if they took measures to buoy the wreck it would be regarded as an impertinent interference with the business of another to whom that duty was specifically delegated.

We do not intend to hold that conditions may not arise where a duty is imposed upon a tug to mark a wreck caused by her negligence. It may well be, where all representatives of the owner are drowned or where communication with him is impossible from any cause, that a duty rests upon the tug to mark the wreck. No such situation arises in the case at bar. There was nothing whatever to prevent the owner from marking the wreck; the tugs knew this and were justified in assuming that the owner would act as he was commanded to act by law.

The decree is affirmed with interest and costs.

HORMANN, SCHUTTE & CO. v. UNITED STATES.

UNITED STATES v. HORMANN, SCHUTTE & CO.

(Circuit Court of Appeals, Second Circuit. February 4, 1907.)

No. 92 (4,086).

1. CUSTOMS DUTIES—CLASSIFICATION—BUTTON MOLDS—BUTTON SHANKS.
   The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 414, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674], for "button molds," includes articles commercially known as button shanks, consisting of pairs of metal disks so constructed that when a piece of cloth is placed on top of one of the disks, and they are subjected to pressure, a cloth-covered button is produced.

2. SAME—METAL BUTTON MOLDS.
   Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 414, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674], provides that "buttons * * * and button molds * * * shall pay duty at the following rates," and the schedule of rates then prescribed mentions only "buttons." *Held*, that this provision for "buttons" should be construed as though reading "buttons and button molds," and that metal button molds should pay the rate assigned to metal buttons.

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

Cross-appeals from order of the Circuit Court, reversing the decision of the Board of General Appraisers (G. A. 6,142, T. D. 26,687), who had affirmed the action of the collector in his assessment of duty on certain merchandise under the act of 1897.

The opinion of the court below is reported in 144 Fed. 707.

Everit Brown, for the importers.
D. Frank Lloyd, Asst. U. S. Atty.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The question involved in these appeals is as to the construction of paragraph 414 of Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1674]. Said paragraph is as follows:

"Buttons or parts of buttons and button molds or blanks, finished or unfinished, shall pay duty at the following rates, the line button measure being one-fortieth of one inch, namely: Buttons known commercially as agate buttons, metal trousers buttons (except steel), and nickel bar buttons, one-twelfth of one cent per line per gross; buttons of bone, and steel trousers buttons, one-fourth of one cent per line per gross; buttons of pearl or shell, one and one-half cents per line per gross; buttons of horn, vegetable, ivory, glass or metal, not specially provided for in this act, three-fourths of one cent per line per gross, and in addition thereto, on all the foregoing articles in this paragraph, fifteen per centum ad valorem; shoe buttons made of paper, board, papier mache, pulp or other similar material, not specially provided for in this act, valued at not exceeding three cents per gross, one cent per gross; buttons not specially provided for in this act, and all collar or cuff buttons and studs, fifty per centum ad valorem."

The articles in question consist of pairs of metal disks, so constructed that when a piece of cloth is placed on top of one of the disks, and the two are subjected to pressure, a cloth-covered button is produced. These pairs of disks are commercially known as button shanks. They are concededly "parts of buttons and button molds." The appraiser returned them as metal button molds or parts of metal buttons, and the collector assessed each pair at three-fourths of one cent per line per gross and 15 per cent. ad valorem. A line is one-fortieth of an inch, and is used as a unit of measurement from the center to the circumference of the disk. The importers protested against said assessment, claiming that the articles were dutiable either at only 15 per cent. ad valorem, under said paragraph 414, as one of the "foregoing articles" not covered by the word "buttons," or at 50 per cent. ad valorem, under said paragraph, as "buttons [or parts of buttons] not specially provided for," or at 45 per cent. ad valorem, under paragraph 193 of said act, as "articles * * * not specially provided for * * * composed * * * of * * * metal * * * partly or wholly manufactured." The Board of General Appraisers overruled the protests, and affirmed the action of the collector, on the ground that the goods were metal molds, or parts of buttons. The importers appealed, and the court below reversed said decision, and held that the articles should be assessed at 45 per cent. ad valorem, under said paragraph 193 of the act. From this decision both parties appeal.

This case has been argued upon the fact, conceded by both sides, that these blanks are parts of buttons, and that it was the intention of Congress, as manifested by the language of said paragraph, that parts of buttons should be subjected to some duty. Counsel for the United States insists that the words "or parts of buttons" should be read into the paragraph wherever a class of buttons is provided for, and that then the relevant portions of the paragraph would read as follows:

"Buttons, * * * of metal [or parts of buttons of metal], * * * three-fourths of one cent per line per gross, and in addition thereto, on all the foregoing articles in this paragraph, fifteen per centum ad valorem."

But there are two objections to this construction. These disks are not parts of buttons of metal or of metal buttons, but of cloth-covered buttons, as distinguished from metal buttons, and therefore, as there is no specific provision for cloth-covered buttons, or parts thereof, they could only be assessed as parts of buttons, not specially provided for, at 50 per cent. ad valorem.

Again, if these disks should be thus assessed for duty as parts of buttons, each disk, being a part of a button, would pay the same rate of duty, according to line measurement, as a whole button.

We think these objections may be obviated, and the intention of Congress may be effectuated, by construing the provisions of the paragraph to refer to what these articles are proved and conceded to be; that is, not only parts of buttons, but something more, namely, button molds. The two witnesses testify that they are button molds, and one of the witnesses testifies as follows:

"Q. Do you call both parts of those things that match each other button molds, or do you call the two parts together button molds? A. The two parts together."

By this construction the pertinent portion of the paragraph may be applied as though it read "buttons [or parts of buttons, and button molds] * * * of metal," and thus the intention of Congress is effectuated, while only one assessment of duty is laid on each pair of disks constituting a button mold.

The decision of the Circuit Court is reversed, and the decision of the Board of General Appraisers, affirming the action of the collector, is affirmed.

BOWERS HYDRAULIC DREDGING CO. v. FEDERAL CONTRACTING CO.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 221.

1. SHIPPING—CHARTERS—CONSTRUCTION—DREDGES.
   Where a dredge charter provided that the dredge should be able to deposit on shore an average of 300 cubic yards of material per hour, the owner merely warranted the dredge's capacity, and not that the dredge should in fact deposit that quantity of material.

2. SAME—EVIDENCE.
   In a libel for the hire of a dredge, evidence *held* insufficient to show that the dredge did not pump 300 yards of material per hour, according to its warranted capacity.

3. SAME—CHARTER—CONSTRUCTION.
   Where a dredge charter provided that it should be used as the charterer or his agents might direct in dredging material and putting the same ashore on the meadows adjoining the Passaic and Hackensack rivers, or at such other localities as the charterer might direct, the charter did not cover dredging material not ordinarily found in such operations, and for which such a dredge as that chartered by reason of its peculiar construction was not adapted.

4. ADMIRALTY—APPEAL—EVIDENCE—ADMISSION—PREJUDICE.

Where, upon a proper construction of a dredge charter, it did not cover the dredging of material not ordinarily found in such dredging operations, and for which a dredge of that construction was not adapted, the charterer, in a libel for the hire of the dredge, was not prejudiced by the admission of representations made by one of its officers as to the character of the material which was to be dredged.

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

This cause comes here on respondent's appeal from a decree of the United States District Court for the Southern District of New York in favor of libelant for $2,525.62 for hire of libelant's dredge. The opinion of the District Court is reported in 148 Fed. 290.

Ed. Norris, for appellant.

H. L. Cheyney, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. The material portions of the agreement between the parties are as follows:

"The owner agrees to let, and the charterer agrees to hire, the said hydraulic dredge and its appurtenances, including necessary pontoons, discharge pipe including two thousand (2,000) feet of shore pipe, derrick scow and two coal scows for and during the working season of 1905, viz., from the date of delivery of said dredge and appurtenances to said charterer at Camden, N. J., on or about the first day of April, A. D. 1905, until on or about December 1st, A. D. 1905; delivery to be made by the charterer to the owner at any locality where said dredge may be at that time.

"Said dredge and appurtenances to be used as the charterer or its agents may direct in dredging material and putting same ashore on the property of the Hackensack Meadows Company, located on the Passaic and Hackensack rivers, N. J., or at such other localities as said charterer may direct. * * *

"The charterer shall pay for the use and hire of the said dredge at the rate of three thousand ($3,000) dollars per calendar month, excepting for delays at Delaware Breakwater and time lost for repairs, etc., as herein provided for, commencing on the day of delivery of the dredge at Camden, N. J., and at and after the same rates for any part of a month, hire to continue until redelivered to the owner as hereinbefore specified; delivery to be made in same good order as when received by the charterer, ordinary wear and tear only excepted; payments to be made as hereinafter provided, and in case of default of such payment or payments as herein provided the owner shall have the right of withdrawing the said dredge from the service of the charterer. * * *

"It being understood and agreed that said dredge shall be able to deposit on shore an average of 300 cubic yards of material, scow measurement, through 2,000 feet of land pipe per hour."

The dredge commenced work under said contract on April 11, 1905, and the libelant on July 21st withdrew the dredge from the respondent's service, under the provision of the contract for nonpayment of the charter hire for the month of June. Payments were duly made up to July 1st, and this libel was filed to recover for the hire from July 1 to July 24, 1905, amounting to $2,322.48.

Error is assigned to the action of the court below in the following particulars:

"(1) In overruling the objections of the respondent to the * * * question * * * propounded by libelant's proctor to witness Sommers, as follows: 'Q. At the time that contract was entered into, what representations were

made to you by Mr. Thompson as to the character of the material which was to be dredged by your dredge? (Objected to as incompetent, that the contract speaks for itself. Objection overruled. Exception.) A. Mr. Thompson called on me and asked for terms for chartering the dredge to place material on Hackensack Meadow which would come from Bay Ridge or Erie Basin, and the contract was based on that statement entirely.'

"(2) In not allowing respondent damages to offset claim for hire for failure of dredge to carry out its agreement in not depositing 300 cubic yards of material per hour.

"(3) In not dismissing the libel with costs; that the contract sued upon was a land contract, and not a maritime contract; and that admiralty had no jurisdiction of this action."

The second assignment of error will be first considered. The respondent contended that the dredge did not, in fact, deposit on the shore an average of 300 cubic yards of material per hour, and that therefore libelant had broken its agreement. We do not so construe the agreement. It provided, not that the dredge should, in fact, deposit such an amount on the shore, but should be able to deposit such an amount. The evidence conclusively shows that the dredge did have a working capacity for an average of 300 cubic yards of ordinary material per hour, and that on several occasions it dredged such an average, and in fact so far exceeded it as to indicate that its actual capacity with ordinary material was from 500 to 600 yards per hour. The evidence claimed to show that the dredge did not pump 300 yards per hour falls far short of proving said fact. The testimony of the superintendent of the respondent was based merely on the recollection of an estimate obtained by measuring basins before and after dredging. Upon this point he testified that as close as he could figure the dredge averaged about 3,700 yards per day; that he measured it, and figured it up, and multiplied the length by the breadth and depth, but that he had no estimate or figures; that he did not give his estimate to the company; that the figures were in No. 2 when she sank in the Passaic river, two or three weeks before; that he had not the slightest idea how those figures were made up, or what they were, or how many days he allowed; that he did not charge up any days, but charged by the basin; and that he could not carry in his head how many hours he called a day.

Furthermore, there is no testimony in the record which shows the number of hours which were estimated in making up a day, except in so far as it may be inferred from a statement that the dredge worked constantly all the time.

The libelant claimed that the failure to dredge 300 yards per hour on certain occasions was due to the fact that the dredge encountered brickbats and stones in such quantity and of such a character that they materially lessened her capacity. The libelant further claimed that the dredging contract contemplated dredging for materials such as are ordinarily found in basins, and did not contemplate any kind of material which the respondent might choose to place there. In support of this contention, the testimony was admitted to which the first assignment of error is directed. Whether or not this oral testimony was admissible, on the theory that it covered a matter concerning which the written contract was silent, need not be decided. In any event, this evi-

dence could not prejudice the rights of the respondent, because upon a proper construction of the contract it must be held that it would not cover dredging material not ordinarily found in such dredging operations, and for which such a dredge, by reason of its peculiar construction, was not adapted.

The evidence, generally, indicates that the offset claimed by the respondent was only an afterthought when the respondent found itself financially embarrassed, and therefore unable to pay libelant's bill. The testimony and correspondence between the parties shows that the respondent paid for services up to the 1st of July without making any objection to the working of the dredge, and that on September 14, 1905, after the respondent had received the bill for the charter hire during the month of July, no objection was made to the bill, except for the last day of service, when the dredge broke down; and, even as late as October 17th, the respondent promised a remittance on account of libelant's bill.

The decree, in so far as this branch of the case is concerned, should therefore be affirmed.

Upon the further question raised by the third assignment of error, as to the jurisdiction of this court, we concur in the reasoning and conclusion of the court below, as stated in its opinion.

The decree is affirmed, with interest and costs.

UNITED STATES v. HUNTER & WITCOMBE.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 232 (3,978).

CUSTOMS DUTIES—RELIQUIDATION—DUTY OF COLLECTOR.

The Board of General Appraisers sustained an importer's protests, directing that the collector should reliquidate the duties at the rates appearing to be applicable "from the invoices, samples, or record," or, in the absence of sufficient data, should reliquidate at the rate of 40 per cent. ad valorem. *Held*, that the terms of this decision did not require the collector to consider data outside of the record made before the Board.

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, which reversed a decision of the Board of General Appraisers (Ga. 5,985 [T. D. 26,210]), sustaining the reliquidation of duties on certain cotton goods.

The opinion of the court below is as follows:

WHEELER, District Judge. These are cotton goods which were assessed at 45 per cent. under paragraph 322 of the act of July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]. They were countable under paragraphs 304 to 309, and on protest and appeal reliquidation was ordered: "(2) That where the particulars of count of threads, condition, weight, value, etc., necessary to reliquidation, can be ascertained from the invoices, samples, or record, reliquidation will proceed at the applicable rates thus ascertained: that as to all items and cases wherein these cannot be ascertained from the invoices, samples, or records, the statutory particulars above stated, or any of them, sufficient for reliquidation at the appropriate rate, such re-

liquidation is, for want of proof in support of the protests, denied, but in such cases reliquidation at the rate of 40 per cent. ad valorem, the minimum rate applicable to such goods as countable cottons, will follow." On reliquidation the collector reported: "I have to state that the entries in question were reliquidated in strict conformity with the decision of the Board of Appraisers of May 27, 1904, supra, and in the reliquidations, as the invoices failed to state whether the merchandise was bleached, unbleached, or colored, this office applied the rate of 40 per centum ad valorem, as directed by the Board in the second holding of said decision."

This appears to have been done upon the record, so called, as it came from the Board, without examining or considering the government samples; and the importers within 10 days from the reliquidation protested against this rate of 40 per cent. The protests are said not to have been in time, but they appear to have been within 10 days of this assessment of 40 per cent.

The statute requires one package of every invoice and at least one of every ten to be designated, opened, examined, and appraised, and ordered to the public stores for examination. Rev. St. § 2901 [U. S. Comp. St. 1901, p. 1921]. These packages belong to the collector for the purposes of classification and appraisal, and he could not be without means more or less convenient for making these appraisals. The protests against the reliquidation at 40 per cent. seem to be well founded and in due time; and it is not easy to see why the highest duty in a varying schedule should be laid for mere want of description.

Decision reversed.

J. Osgood Nichols, Asst. U. S. Atty. (Charles Duane Baker, on the brief), for United States.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The goods consisted of cotton curtains, table covers, and other similar merchandise, and were assessed for duty at 45 per cent. ad valorem as manufactures of cotton not specially provided for, under paragraph 322 of the Tariff Act of July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]. The importers protested, claiming that they should be classified according to the various provisions of the "countable" paragraphs of the cotton schedule. These paragraphs (304 to 309) prescribe rates of duty which vary with the number of threads to the square inch, and vary also with the condition of the cotton cloth, whether bleached, dyed, colored, printed, etc., or not. In order to decide what rate of duty any particular piece of cotton cloth shall pay, evidence of some sort must be presented to the official who has to decide, showing how many threads there are to the square inch, and whether it is or is not bleached, dyed, etc. Upon receipt of these protests, the collector undertook to transmit to the Board of General Appraisers the invoices and all the papers and exhibits connected therewith, and the board undertook to examine and decide the case. Under section 16 of the customs administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1935]), the Board is given power to take additional proof, and it is, and always has been, the practice for the importer and the government to offer to the Board any testimony which either side may think tends to support its contention. When the Board has decided such question, and no appeal

is taken, it is the duty of the collector to liquidate the entry accordingly.

In this particular case the papers and exhibits which the collector transmitted to the Board were not sufficient to show the precise character and condition of the different articles so as to enable it to determine the exact rates of duty, and the importers failed to produce the additional evidence, which it would seem they might readily have procured, to secure such determination. The decision of the Board was as follows:

"Where the particulars of count of threads, condition, weight value, etc., necessary to reliquidation, can be ascertained from the invoices, samples, or record, reliquidation will proceed at the applicable rates thus ascertained; that as to all items and cases wherein there cannot be ascertained from the invoices, samples, or records, the statutory particulars above stated, or any of them, sufficient for reliquidation at the appropriate rate, such reliquidation is, for want of proof in support of the protests, denied, but in such cases reliquidation at the rate of 40 per cent. ad valorem, the maximum rate applicable to such goods as countable cottons, will follow."

No appeal was taken from this decision. Upon reliquidation the collector made return that, as the invoices failed to state whether the merchandise was bleached, unbleached, or colored, he applied the rate of 40 per cent. ad valorem as directed by the Board.

Against this reliquidation the importers protested, upon the ground that the collector "should have reliquidated the duty at 35 per cent. ad valorem; the particulars shown on invoice and entry being sufficient to show that no higher rate could be applicable, but only 35 per cent., or some lower rate." If the facts were as stated in this protest, it is manifest that there was the same defect of proof which existed when the Board directed reliquidation at 40 per cent. There is no averment that the invoice and entry were sufficient to show exactly under which specific provision any article should be placed. Some contention is made upon the proof that the collector did not supplement the record before him by sending to the appraiser's office or elsewhere for samples of the goods; but this was not an original liquidation. The Board, upon a case made by the importers, had decided that the proper rate was 40 per cent., and gave them one more chance to show exactly under what clauses their various goods belonged. If the record sent back to the collector from the Board lacked proof sufficient to show this, it was for the importers to supply such further evidence as the decision allowed them to produce. Moreover, an examination of the record now before us leads to the conclusion that the samples from the appraiser's office would not have helped the situation, unless they were supplemented by evidence of the importers as to the meaning of certain arbitrary letters "P," "S. W.," etc., found upon the invoices. But the decision of the Board admitted no such proof. Reliquidation was to be had on "invoices," "samples," and "record," which we assume means the record already made, and which was before the Board.

We concur, therefore, with the Board, in the conclusion that there was not sufficient data before the collector to enable him to reliquidate at lesser rates than the 40 per cent. which the Board had already fixed upon "for want of proof in support of the protests."

The decision of the Circuit Court is reversed.

WHARTON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 27, 1907.)

No. 661.

EMINENT DOMAIN—CONDEMNATION OF PROPERTY—RIGHT TO COMPENSATION.

Lots on a tract of land were conveyed by deeds containing a condition prohibiting their use for certain purposes, such as for the erection and maintenance of any slaughterhouse, smith shop, steam engine or distillery, brewery or saloon, etc., and providing that such condition might be enforced by action by the owner of any other lot on the tract. Certain of such lots were condemned by the United States as a site for a seacoast fortification. *Held*, that these particular conditions did not create a true easement as known to the common law in favor of other lot owners, nor were they intended to apply to public works, but merely to restrict what might be done by persons of business corporations in their own interest, and that, under the circumstances the owners of lots not taken had no interest for which they were entitled to compensation.

In error to the Circuit Court of the United States for the District of Rhode Island.

For opinions of Circuit Court in same case, see 112 Fed. 622.

William P. Sheffield, Jr., and William R. Harvey (Max Levy, on the brief), for plaintiff in error.

Charles A. Wilson, U. S. Atty., and Amasa M. Eaton, for the United States.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This is a proceeding by the United States for the condemnation of certain lands at Conanicut Island, in the state of Rhode Island. The petition of the United States declares that the purpose was for "the location, construction and prosecution of works for fortification and coast defense." The plaintiff in error intervened, claiming damages in behalf of two distinct matters. The first related to a certain right of way, with regard to which we are not concerned. The judgment sustained his petition so far as that was concerned; but, as to all other claims, it denied him any relief. Thereupon he took out this writ of error.

We need add little, if anything, to the statement of the facts with reference to the issue before us as given in the opinion of the learned judge of the Circuit Court, as follows:

No land of these claimants is actually taken by the decree of condemnation. Nor do their lands adjoin the lands taken by the United States. The claimants are owners of lots of that large tract at the southern end of Conanicut Island, at the entrance of Narragansett Bay, known and platted as "Ocean Highlands." Many lots on this plat have been sold by the Ocean Highland Company subject to restrictions or conditions, the design whereof is to make every portion of Ocean Highlands subject thereto for the benefit of every other portion. Certain lots subject to these restrictions and belonging to other persons have been condemned by the United States for "the location, construction and prosecution of works for fortifications and coast defense," otherwise described as "military uses."

The claimants first assert that the taking of these lands has destroyed the rights to restrict their use, and that these rights of restriction are appurtenant to the estate of the claimants as "negative easements." The claimants next contend that the destruction of these "negative easements" is a taking of their property by the United States, and that they are entitled to compensation therefor. For the United States it is contended that these rights are not taken, and that the claimants are not entitled to compensation.

The restrictive provision contained in the deeds of part of the land actually taken is as follows:

"But this deed is on condition that no slaughter house, smith shop, steam engine, furnace, forge, bone-boiling establishment, iron or brass foundry, no manufactory of chemicals of any description, of gas, soap, fish guano, fish oil, kerosene or other oil, no brewery, distillery, bar, ale house, drinking saloon, or other place for the manufacture, compounding or selling of any kind of intoxicating liquors in any manner or form, shall ever be erected, located, used, or suffered, in or upon any part of said granted land; and that no other noxious, dangerous or offensive trade or business whatever shall ever be done, carried on or permitted in or upon said land or any part thereof; with the understanding, however, that this shall not exclude from said land any invention, apparatus or machine, appurtenant to a dwelling house, for lighting or warming the same or supplying the same with water; and said conditions may be at any time enforced, by action, injunction or otherwise, by said grantor, its successors and assigns, against said grantee and his heirs and assigns forever, and also by the owner or owners, occupant or occupants, for the time being, of any portion of said Highlands, on the said plat thereof, against any owner or owners, occupant or occupants for the time being of said granted lands, or of any part thereof, forever; the design being to have the conditions hereof in every deed given by said grantor in the premises and make every portion of said Ocean Highlands subject to said condition for the benefit of every other portion thereof forever."

As stated in the opinion from which this quotation is made, no land owned by the plaintiff in error was taken by the condemnation. If any had been so taken, then the interests appertaining to that land, either at law or in equity, in any manner, might properly have been considered in determining its value; and the same would have been true if the plaintiff in error had had any easement as known to the law in or over the lands which have in fact been taken. Under the present circumstances, the only possible interests for which the plaintiff in error could recover, if any, are those arising from the conditions contained in the various deeds shown by what has already been stated, coupled with the facts that the deed or deeds under which he holds contain the same conditions, and are part or parts of the same plan.

The learned judge of the Circuit Court pointed out various reasons why the plaintiff in error had no right or interest which the law requires to be taken care of in this proceeding. It appears from the four corners of all that is contained in the deeds, as indicated by the enumerations therein stated, that the conditions are not to be construed as having reference to ordinary public works, or the incidents thereof. They relate to what might be done in individual interests by persons or business corporations. The purpose of the United States in acquiring the property does not appear to be in any substantial particular inconsistent with the conditions of the deeds or destructive thereof.

We pass by the question raised by the learned judge whether a provision directly aimed against the taking of the lands in question for public uses would not be contrary to public policy, and we observe only that the general outlook of the conditions is in the direction of that taken by him; and, especially, we are impressed by the fact that, after the long enumeration of various structures, the conditions close:

"And that no other noxious, dangerous or offensive trade or business whatever shall ever be done, carried on, or permitted in or upon said land or any part thereof."

The words "trade or business" give a color to all that precedes them; and this color is intensified by the words "no other" in this connection, signifying that all that precedes is of the same class as what follows. It would be a long stretch of the ordinary rules of construction to hold that these conditions would apply to a steam engine which proved to be a necessary incident of a public park, a public arboretum, a public bathing establishment, or any other great public pleasure resort, as to which it could be only a very minor incident. The position of the learned judge of the Circuit Court on this particular topic strikes us favorably, and we regard it as sufficient to meet the case of the plaintiff in error.

Whatever interest the plaintiff in error has with regard to the lands taken by the United States does not constitute a true easement as known to the common law. Had the deeds contained covenants, they would have been recognized at the common law so far as suits on the covenants between the parties to them were concerned. They contain only conditions. Nevertheless, in equity such conditions are treated to a certain extent as covenants running with the land, and enforceable by decrees for specific performance between subsequent holders who purchased with notice. Such rights are often incorrectly spoken of as negative easements; but what are really negative easements is pointed out in Gale on Easements (7th Ed. 1899), 19 and sequence, a work of the highest authority, where easements known to the common law are catalogued and classified. The better authorities speak of such rights as analogous to negative easements. If they were in fact easements, they would constitute true hereditaments, and the plaintiff in error would be entitled to the allowance of damages, even if nominal. They are subject to the general rules by virtue of which equity refuses to require specific performance of obligations which are unreasonable, or which become so under a change of circumstances, or which involve only nominal values. We need not, however, consider these difficulties in the way of the plaintiff in error, or other possible difficulties, because what we have already said fully disposes of the litigation.

The judgment of the Circuit Court is affirmed.

CHOY CHONG WOH & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 225 (4,165).

CUSTOMS DUTIES—CLASSIFICATION—DRIED MUSHROOMS—MUSHROOMS PRESERVED IN TINS.

Mushrooms dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649], relating to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], relating to "vegetables in their natural state."

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

The decision below reads as follows:

WHEELER, District Judge. These are mushrooms dried wholly by evaporation, without other treatment, and imported in large zinc-lined boxes for protection and convenience in transportation. They appear to be "vegetables in their natural state," as classified (Kraut v. U. S. [C. C.] 139 Fed. 94), and do not appear to be in any sense preserved in tins, jars, bottles, or similar packages as claimed.

Decision affirmed.

Everit Brown, for importers.

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

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The articles in question are mushrooms inclosed in tin boxes holding from 30 to 45 pounds. They were assessed for duty under paragraph 257, Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. [U. S. Comp. St. 1901, p. 1650], at 25 per cent. ad valorem as "vegetables in their natural state, not specially provided for." The importers, appealing from this classification and assessment, claim that the mushrooms in this condition are dutiable at 2½ cents per pound, under the provision of paragraph 241 of said act for "beans, peas, and mushrooms prepared or preserved, in tins, jars, bottles or similar packages." The uncontradicted testimony is to the effect that these mushrooms have been sun dried or kiln dried, or both, in order to preserve them, and have then been placed in hermetically sealed tins, inclosed in outside wooden boxes to protect the tin. There can be no question, therefore, that these mushrooms are "prepared or preserved in tins," and, being thus specially provided for by paragraph 241, are excluded from the provisions of paragraph 257.

The judgment is reversed.

A. ZANMATI & CO. v. UNITED STATES.

(Circuit Court of Appeals. Second Circuit. March 26, 1907.)

No. 226 (4,176).

CUSTOMS DUTIES—CLASSIFICATION—MUSHROOMS SLICED AND DRIED—"NATURAL STATE"—"PREPARED"—"PRESERVED."

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1650], rather than as "vegetables prepared or preserved," under paragraph 241, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649].

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

This cause comes here on appeal from a judgment affirming the decision of the Board of General Appraisers, G. A. 6,253 (T. D. 26,968), which affirmed the action of the collector. The decision below reads as follows:

WHEELER, District Judge. These are mushrooms cleaned, sliced, and dried on sieves in the sun. The question is whether they are "vegetables prepared or preserved," under paragraph 241, or "vegetables in their natural state," under paragraph 257, of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170, 171 [U. S. Comp. St. 1901, pp. 1649, 1650]. In Petry v. U. S. (C. C.) 99 Fed. 261, beets sliced and kiln dried were held not to be in their natural state, and in Kraut v. U. S. (C. C.) 139 Fed. 94, mushrooms merely dried in the sun were held to be so. There would be apparently no difference in effect upon the vegetables between sun drying and kiln drying; but the slicing seems to take them out of their natural state.

Decision affirmed.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

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

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The merchandise involved in this appeal consists of mushrooms cleaned, sliced, dried in the sun and imported in barrels, which were assessed for duty under the provisions of paragraph 241 of the Tariff Act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1649]), at 40 per cent. ad valorem, as "vegetables prepared or preserved * * * not specially provided for," and claimed by the importers as dutiable at 25 per cent. ad valorem, under the provisions of paragraph 257 of said act, as "vegetables in their natural state, not specially provided for." The Board of General Appraisers upon an examination of the samples found that the mushrooms were sliced to facilitate the drying, and the evidence showed that this slicing was done when the mushrooms were cleaned.

This importation is to be distinguished from that considered in Choy Chong Woh & Co. v. United States, 153 Fed. 879, where we held, as mushrooms subjected to a drying process and preserved in tins

so sealed as to be air tight were dutiable eo nomine as mushrooms "prepared or preserved in tins," they were not dutiable as "vegetables in their natural state, not specially provided for." And this importation is not within the reasoning of this court applied in Leaycraft v. United States, 130 Fed. 106, 64 C. C. A. 440, where we held that the starch obtained from the arrowroot plant by mashing the tubers, soaking the pulp in water and thus dissolving it out, allowing it to settle, cleansing it, and finally drying it, was not free as "arrowroot in its natural state," but was dutiable as "starch" eo nomine under paragraph 285 of the tariff act of 1897. Here the mushrooms have not been subjected to any process whereby their condition is changed or advanced from a state of nature.

It has frequently been held that mere evaporation of the juice or sap in a vegetable product by the heat of the sun does not change the nature of the product or remove it from its natural state. Frazee v. Moffitt (C. C.) 18 Fed. 584; Kraut v. United States (C. C.) 139 Fed. 94; Sonn v. Magone, 159 U. S. 417, 16 Sup. Ct. 67, 40 L. Ed. 203. It would seem to follow that the slicing of the mushrooms solely in order to facilitate the natural drying operation should not take them out of the category of "vegetables in their natural state."

The judgment is reversed.

U. H. DUDLEY & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 228 (3,705).

CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLES PRESERVED IN OWN JUICE—ADDED SUGAR.

The addition of from 2.28 to 8.82 per cent. of sugar to pineapples preserved in cans in their own juice does not remove the fruit from the provision for "pineapples preserved in their own juice," in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], to the provision in the same paragraph for "fruits preserved in sugar."

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

For decision below, see 148 Fed. 333, affirming a decision of the Board of United States General Appraisers (G. A. 5,787 [T. D. 25,577]), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The articles in controversy consist of Singapore pineapples in tin cans. They were classified as "fruits preserved in sugar," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], and were claimed by the importers to be dutiable under the provision in the same paragraph for "pineapples preserved in their own juice." The Board of General Appraisers found that cane sugar had been added in the preserving process in quantities varying from 2.28 to 8.82 per cent., and affirmed the assessment of duty, on the basis of the conclusions stated as follows in the Board's opinion:

"Somerville, General Appraisers. We are disposed, therefore, after due consideration, to adopt the following principles for the classification of goods

of this kind: (1) Where the chemical analysis shows not over 14 per cent. of total sugar, including both invert and cane sugar, and the chemist expresses no expert opinion on the subject, the goods are prima facie subject to classification as pineapples preserved in their own juice and not in sugar, and are therefore dutiable at 25 per cent. ad valorem, under the last clause of said paragraph 263. (2) Where the percentage of total sugars runs over 14 per cent. and there is no expert opinion expressed by the chemist as to whether or not cane sugar has been extrinsically added, the probability is nevertheless that such cane sugar has been added, and the goods are, accordingly, pineapples preserved in sugar, and are dutiable at 35 per cent. ad valorem and one cent per pound, under said paragraph 263."

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importers.

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

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Since the decision of this cause at circuit, our opinion has been filed in U. S. v. Johnson (Jan. 8, 1907) 152 Fed. 164, in which we had before us pineapples similarly preserved, except that the cans contained a trifle less sugar.

We are unable to distinguish between the two causes, and therefore the decision of the Circuit Court is reversed.

AMERICAN CAN CO. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. February 17, 1907.)

No. 176.

INJUNCTION—RECEIVER OF NATIONAL BANK—DIRECTION TO RETAIN FUND PENDING SUIT.

When a party asserts the ownership of property, or a specific lien thereon, it is within the discretion of the trial court to retain the property within its jurisdiction until the questions at issue can be determined, even though such property is a fund in the hands of the receiver of a national bank and an injunction is necessary to restrain him from transmitting it to the Comptroller of the Currency in the usual course as required by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 86–90.]

On rehearing. For former opinion, see 149 Fed. 200.

Edward B. Whitney, for the Comptroller.

James McMitchell, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. A rehearing was granted at the request of the Comptroller of the Currency. A majority of the court is of the opinion that the order of the Circuit Court does not interfere with the Comptroller's administration of the affairs of the insolvent bank, except so far as may be necessary to preserve the rights of complainant. Our decision was simply to the effect that, when a party asserts the ownership of property or a specific lien thereon, it is within the discretion of the trial court to retain the property within its juris-

diction until the questions at issue can be determined. To permit the property to be removed from the jurisdiction of the court is, in effect, deciding in limine that the complainant has no cause of action.

The former decision of the court is reaffirmed.

UNITED STATES v. COLBY & CO.

(Circuit Court of Appeals, Second Circuit. March 26, 1907.)

No. 233 (3,967).

CUSTOMS DUTIES—CLASSIFICATION—NIGER OIL—SOAP STOCK.

Niger-seed oil, which, while used in soap making, can be used for other purposes, though without the proper qualities for such purposes, is within the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 568, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1684], for oils "commonly used in soap making, * * * fit only for such use."

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

In the decision below the Circuit Court reversed a decision of the Board of United States General Appraisers (G. A. 5,954; T. D. 26,109), which had affirmed the assessment of duty by the collector of customs at the port of New York.

The opinion of Wheeler, District Judge, in the Circuit Court reads as follows:

This is an oil expressed from niger seed, and comes under paragraph 3 of the act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]), where it was assessed, unless it is "commonly used in soap making" and is "fit only for such use," under paragraph 568, § 2, Free List, 30 Stat. 198 [U. S. Comp. St. 1901, p. 1684]. The Board found that it was scarcely known in this country, and failed to find that it was commonly used in soap making, and found that it is fit for other uses, apparently as a lubricant, an illuminant, and an adulterant of other oils, and affirmed the assessment. The evidence taken in this court shows that it is commonly used in soap making in this country, and that it can be used for these other purposes. But that is not the true test. The question is whether it is fit for other uses, and it does not appear to be. It would have to be refined for an adulterant, is too sticky for a lubricant, and too gummy for an illuminant.

Decision reversed.

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

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decision affirmed, upon opinion of the Circuit Court.

THOMSON-HOUSTON ELECTRIC CO. v. McLEAN.

(Circuit Court of Appeals, First Circuit. April 11, 1907.)

No. 668.

1. PATENTS—TERM—EXPIRATION OF FOREIGN PATENT.

The rule applied that a patent is not exempted from the operation of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], making it expire with a prior foreign patent for the same invention, because there may be differ-

ences in detail between the devices of the two patents, unless such differences affect the essence of the invention in a patentable sense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 188½. See Westinghouse Co. v. Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189.]

2. SAME—ELECTRIC METER.

The Thomson patent, No. 448,894, for an electric meter, expired on July 8, 1904, with the British patent for the same invention.

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

Drury W. Cooper (Thomas B. Kerr, on the brief), for appellant.

Robert H. Parkinson (Henry C. Stetson, on the brief), for the appellee.

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

PUTNAM, Circuit Judge. This is a bill in equity alleging infringement of letters patent No. 448,894, issued on March 24, 1891, to Elihu Thomson on an application filed on September 26, 1890. The patent contains 18 claims, but the bill alleges specifically infringements of only claims 12, 13, 14, and 17. Claims 15 and 16 have relation to the interpretation and effect to be given to those on which the bill is specifically rested, and therefore we will recite herein claims 12 to 17, each inclusive. The only issue before us arises on a plea alleging that the invention sued on had been previously patented in Great Britain by letters issued on December 23, 1890, as of July 8, 1890, so that, under the laws of Great Britain, the patent expired on July 8, 1904, and so that, consequently, the patent in suit, by force of section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], expired also on the day last named, and thus before the bill was filed. The plea was joined by a replication, thus bringing before the court issues of both fact and law. The Circuit Court rendered a judgment for the respondent, and the complainant appealed to us.

The introduction to the patent in suit describes it as consisting "in certain details of construction and combinations" concerning electric meters for use on either continuous or alternating current circuits, "more particularly applicable to meters wherein an electric motor is employed, and the consumption is indicated or registered by the speed of such motor." The specification also states that the meter as to which the patentee has shown the improvements covered by the patent in suit is like that described in an application filed on August 26, 1889, which resulted, as we understand, in the patent for the well-known Thomson meter of the motor type. Having especial reference to this, the counsel for the complainant says:

"The issues, then, have to do with meters that record electrical energy; that is, they take account of the amount of current (the unit being called an ampere), and the pressure at which it is flowing (the unit of this being a volt). And the electrical circuits are so arranged that the rotating part, which is termed the 'armature,' revolves at a rate proportional to the product of the amount of current by the pressure. This product is electrical energy, whose unit is called the watt. As either the amount of the pressure or the current varies, the speed of rotation varies; and, as the counting train which actuates the dials is driven by the armature shaft or spindle, the dials record and

add or sum up, or integrate, the energy, or watts, flowing through the circuit, taking account of all variations. Such a device is called an 'integrating,' or 'recording,' watt meter.

"It will be made to appear that Prof. Thomson devised two general types of meter of this sort; one having a rotating, and the other an oscillating armature. The patent in suit contemplates certain improvements upon the rotating form."

The complainant, also, explains that the patent in suit covers other improvements in the construction of meters, with which the claims involved here have nothing to do. These are quite fully explained in the specification, in part as follows:

"W is an artificial resistance in the circuit of the armature, but external thereto, and made high in amount, so as to limit the current and avoid the necessity for winding the armature of extremely fine wire to stand considerable potential. By making this resistance very high in proportion to the armature-resistance, a practically-constant current in such armature under conditions of change of speed is attained, owing to the fact that the variations of resistance and counter electro-motive force in the armature itself will be so small in proportion to the total resistance as to be practically negligible. The high resistance, W, will therefore also have an important function practically abolishing any variations in the action of the motor arising from any change of resistance at the commutator-contacts, and will for this and the reason above noted add greatly to the regularity of action of the motor."

The important claims are as follows:

"(12) In an electric meter, the combination, with an electric motor and a register for counting the movements thereof, of an artificial resistance external to the motor and placed in the circuit of such motor wherein a constant current is to be maintained; such resistance being the larger part of the total resistance of such motor-circuit.

"(13) The combination, with an electric meter operated by alternating currents, of a noninductive artificial resistance placed in that portion of the meter-circuits wherein a constant current is maintained and made to form the larger part of the resistance of said circuit.

"(14) The combination, with an electric motor operated by alternating currents, of a register for counting the movements of said motor, and a noninductive artificial resistance external to the motor and placed in the meter-circuit including the armature and commutator; such artificial resistance being made large in proportion to the resistance of the normal resistance of the armature and commutator.

"(15) The combination, in an electric meter, of an electric motor having its field traversed by current varying with the consumption and an armature for such motor placed in a constant-current circuit, in combination with an artificial resistance placed in the armature-circuit external thereto.

"(16) The combination, substantially as described, of an electric-motor field-coil, an electric-motor armature-coil provided with a commutator and placed in an alternating current circuit, including a noninductive resistance external to the armature and commutator, as and for the purpose described.

"(17) In an electric meter for measuring alternating electric currents, the combination, with that part of the motor which is included in a constant alternating-current circuit, of a noninductive resistance external to such part of the motor and made large in amount in proportion thereto."

As the complainant makes much of the fact that the external resistance covered by the claims on which the bill is rested is, as said in claim 12, "the larger part of the total resistance of such motor-circuit," we deem it important to call attention to the fact that claims 15 and 16 demand only an external resistance, without any condition as to its proportionate relation to the total resistance of the circuit to which the external resistance is incident. The complainant explains

this on the ground that they were evidently drawn "to anticipate an attempted evasion of the patent by making the external resistance somewhat less than that of the armature."

The complainant urges on us that whether the patent in suit expired as an entirety with the British patent cannot be determined, except by making a comparison claim by claim; so that, as it maintains, the mere fact that only one or more of the claims in the British patent were coequal with only one or more of the claims in the domestic patent would not affect the claims in the domestic patent not thus coequal, but would leave them still to run out the expressed term of the patent as granted. The complainant does not bring to our attention any controlling authority on this proposition. The nearest approximate is Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153, which is not favorable to the complainant. However, we are not called on to pass on this issue. It is sufficient for our purpose, as said by Mr. Walker, at page 151 of Walker on Patents (4th Ed.) that section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] applied, so far as the issue here is concerned, to such claims in suit as correspond with any invention covered by some prior foreign patent, even though others of the claims of the domestic patent do not thus correspond.

The British patent was amended several years after it issued. It is so correctly and clearly shown by the opinion of the learned judge of the Circuit Court that this fact cannot in any way avail the complainant that we leave the case, so far as this topic is concerned, to rest on that opinion, without any additional comments in regard thereto.

The claim in the British patent on which the respondent relies is claim 2. The better way to exhibit this claim is in the form of the parallel columns which are given by the complainant in its brief, and which disintegrate, analyze, and compare its various elements in connection with those of claim 17 of a prior patent issued to the complainant, as follows:

Claim 17 of Patent 432,654.	Claim 2 of British Patent.
The combination, in an electric meter,	An electric meter having
of coils or sets of coils in moving relation one to the other, and	stationary coils in a main circuit, and
placed, respectively,	movable coils forming an
in the main and	armature in a shunt circuit around the work, and a
in a branch circuit	supplemental resistance
or their equivalent, as described,	in the said armature circuit; combined with
and a copper plate and	a retarding device comprising
magnet for absorbing the	a close conductor moving
dynamic energy of the coils carried	in a permanent and constant magnetic field, which
upon the structure whose	is independent of and
movements are registered to	uninfluenced by the currents
form a record of the current	flowing in the aforesaid
consumed.	coils, for the purposes
	above specified.

It will easily be seen from this analysis of claim 2 of the British patent that, except as we will hereinafter state, it contains all the elements of, for example, claim 12 of the patent in suit; that is, (1) electric meter, (2) of the motor type, (3) with artificial external resistance, (4) with the retarding device which is implied in the meter of the motor type. It does not specify a register, nor that the meter is of the motor type; but, for plain reasons, no question is made in this case on account of the omission to name in the claims the motor or the register, and no assertion is made of any differences, except as we will hereinafter state. The history of the art makes it plain that, so far as the comparison is concerned, the only true novelty in either is what is described in one as an artificial external resistance, and in the other as a supplemental resistance. The learned judge of the Circuit Court held that there were no differences of a patentable character, that is, involving invention, and that therefore the statute pleaded by the respondent controls the case.

The complainant shows that the improvements in the claims in suit are said to relate specifically to meters with motors of the rotary type, while the British patent covers also the oscillating type. So far as we are able to perceive, the fact that the British patent groups two kinds of meters, even if the domestic patent was occupied with only one, could avail nothing, unless in connection therewith there was some patentable difference in the function or mode of operation, or in some other particular. Otherwise, the statute could easily be evaded by running into one claim of the domestic patent meters of the rotary type, and into another claim meters of the oscillatory type, thus apparently dividing the grouping in the British patent, but ultimately getting back to cover its entire field. The result of mere division into moieties leaves nothing in the later domestic patent which was not in the earlier foreign one.

In regard to the differences between the claims under consideration in the domestic and British patents, we are referred by the complainant in lump to eight printed pages of the testimony of its expert witness Bentley, without any attempt on its part to analyze that evidence. We, of course, decline to analyze it ourselves, pointing to our rules which require this to be done by the complainant itself, with proper specific references as therein stated. We presume, however, that the particular propositions on this topic to which we will refer, and which have been called to our attention by the complainant at bar, will cover everything it maintains in this direction.

We gather that the Circuit Court understood that the complainant maintained that the retarding device which appears in the British claim is not included in the elements shown by the claims of the domestic patent. This did not mean that a retarding device is not implied in the claims of the domestic patent, but, as stated by the complainant, that the reference to a retarding device which appears in the specification is only incidental. This might well be, because its presence is necessarily implied. The propositions of the complainant with regard to the specific form of the retarding device shown in claim 2 of the British patent are not easy to understand. Its expert says that that device is a good thing, "probably the best form now

known, yet it is not the only retarding device"; and, what is the fact, that the claims on which this suit rests are not limited to any specific form thereof. But nothing brought to our attention shows that there is any patentable difference in favor of either patent on account of the retarding device, or that the force of the second claim of the British patent was affected by reading into it the retarding device there described, any more than it would be by reading in or reading out stationary coils in the main circuit, or by reading in or reading out of the claims in the patent in suit the register, or by reading in or reading out of the claims in either patent any well-known, implied element necessary to a practical machine.

In fact, we cannot clearly discover that the complainant places any real reliance on any alleged differences, except what it maintains is indicated by the words in claim 12 of the patent in suit, "being the larger part of the total resistance," and by analogous expressions in the other claims in suit, the phraseology of each of which is only slightly changed, and the legal effect of all of which is the same. It insists that these words do not appear in claim 2 of the British patent, and such is the fact. The observations we have already made in this connection with reference to claims 15 and 16 support the proposition that there exists here nothing fundamental or essential, so that these expressions do not in any way represent invention; otherwise claims 15 and 16 would be mere rubbish.

As truly said by the learned judge of the Circuit Court, the mere matter of difference in degree does not ordinarily suggest invention. The learned author of Walker on Patents (4th Ed.) 27, observes: "It is not invention to change the size or degree of a thing, or of any feature or function of a machine or manufacture." Mr. Renwick's practical work, entitled "Patentable Invention," observes very sensibly in regard to this, with reference both to size and proportion, that a mere change does not amount to invention; and it illustrates some exceptions to this by references to Sir Humphrey Davy's safety lamp, and to changes of proportions in chemical combinations which produce essentially new products. This fact is peculiarly illustrated in the present case. Turn again to the words "the larger part," in claim 12. Out of 100 this may be 50 plus, while anything less than "the larger part" would be 50 or 50 minus; in either case the plus or the minus being perhaps quite negligible quantities. It is impossible to say that, under such circumstances, there is any patentable difference between 50 plus, on the one hand, and 50 or 50 minus on the other. In connection with the fact that the specification of neither patent undertakes to give any rule for determining any fixed proportions of the external resistances, it is plain that the ratios are of a character to be determined by the skilled mechanic according to the changes in exigencies, and as to all this the views of the learned judge of the Circuit Court are correct.

Indeed, we may say that, as to all the alleged differences between claim 2 of the British patent and the claims in suit, our attention has not been called to anything in the record establishing invention in behalf of either patent as against the other. The complainant speaks of the differences pro and con only as improvements, without,

so far as we can discover, alleging invention at any point. Indeed, we are justified in understanding that the complainant makes no serious claim of invention in any of these differences, because it urges on us the proposition that the arguments in behalf of the respondent admit that there are differences; and thereupon it cites Thomson-Houston Co. v. Ohio Brass Co., 80 Fed. 712, 724, 26 C. C. A. 107, decided by the Circuit Court of Appeals for the Sixth Circuit, and undertakes to apply here the following words which appear in that opinion, namely: "It is not material to this discussion whether these improvements are patentable or not." It also adds that the Circuit Court fell into its error because, admitting differences to exist, its opinion proceeded to argue that the differences were unpatentable. We would have been very much surprised if so able a tribunal as the Circuit Court of Appeals for the Sixth Circuit had laid down any proposition of the kind maintained by the complainant to be applicable here. Following down the same page to which the complainant refers, the purpose of the observation cited is made clear, because the court states, almost in the same breath, the reason why the improvements were not material, even if they were in fact inventions, but, also, that, if they were not inventions, they covered nothing.

If differences could be set up to defeat the application of section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], even when they involve no patentable invention, the statute would have been emasculated, and its application could always have been defeated by trivial and unimportant changes, so that it would be left practically worthless. In Westinghouse Co. v. Stanley Instrument Co., 138 Fed. 823, 829, 71 C. C. A. 189, so much relied on by the Circuit Court, we rested on the fact that the differences between the foreign patent and the domestic patent there in question involved "an essential, novel, and patentable improvement." We were not there required to rule directly on the question pressed on us here, although it is evident that we assumed the law to the contrary to what the complainant maintains. If it had been pressed on us, we would probably have pursued Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153, farther than we did. It was there said, at page 283 of 123 U. S., page 119 of 8 Sup. Ct., as follows: "A patent cannot be exempted from the operation of the law," that is, section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382], "by adding some new improvements to the invention." It was held in that case that the domestic patent contained certain improvements not exhibited in the foreign patent; but they did not help the complainant. Neither the decision of the court nor the opinion was directly on the issue before us; but each seems to bear strongly, if not conclusively, in support of the views of the learned judge of the Circuit Court, and of our opinion, that no mere changes in detail which do not affect the essence of the invention as covered by the respective patents can avail this complainant.

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

WESTINGHOUSE ELECTRIC MFG. CO. v. MONTGOMERY ELECTRIC LIGHT & POWER CO.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 268.

PATENTS—INFRINGEMENT—ELECTRICAL CONVERTERS.

The Stanley patent, No. 469,809, for a system of electrical distribution, was not anticipated, and claims 1 and 3 cover combinations including a converter in which the length of wire in the primary coil is substantially the same as would result from following the so called "Stanley rule," and are infringed by a converter having such length of wire irrespective of the rule or method by which such length was ascertained.

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

This cause comes here on defendant's appeal from an interlocutory decree of the United States Circuit Court for the Northern District of New York on final hearing, sustaining the validity, and finding infringement by defendant, of the first and third claims of complainant's patent, No. 469,809, granted to it as assignee of William Stanley, Jr., on March 1, 1892. The court below originally granted an order for a preliminary injunction (131 Fed. 86) which was reversed by this court (139 Fed. 868, 71 C. C. A. 582), and subsequently, on final hearing, the court below entered a pro forma decree for complainant, from which this appeal is taken. Prior opinions of the Circuit Court and of this court, construing and sustaining this patent, in the suit by this complainant against the Saranac Lake Electric Light Company, and known as the Saranac Case, are reported in 108 Fed. 221, and 113 Fed. 884, 51 C. C. A. 514. The opinion of Judge Colt, in the First Circuit, denying a motion for a preliminary injunction against the Stanley Electric & Manufacturing Company, is reported in 117 Fed. 309. A subsequent opinion of Judge Lacombe in the suit by this complainant against the Orange County Gas & Electric Company, known as the Orange County Case, is reported in 119 Fed. 365.

A. C. Fowler, for appellant.

J. Edgar Bull and Gifford & Bull, for appellee.

Before WALLACE and TOWNSEND, Circuit Judges, and HOLT, District Judge.

TOWNSEND, Circuit Judge. The following statement may conduce to a clearer understanding of the Stanley patent and the questions herein involved:

The invention relates to a system of electrical distribution and regulation especially adapted to incandescent light plants. The problem which confronted the inventor, Stanley, was presented by defects in existing systems which resulted in variation in the luminosity of individual lamps upon variations of pressure due to variations in the number of lights in use. Stanley discovered that the cause of this variation was a lack of harmonious action between the dynamo and the converter. He had to deal with the antagonism between leakage at the dynamo and self-regulation of secondary pressure in the transformer. Increasing the length of the primary wire decreased leakage, but diminished self-regulation. Decrease in the length of the primary wire improved regulation, but increased leakage. Stanley further discovered that these antagonistic relations could be co-ordinated to each other by the use of a certain length of wire on the primary of the con-

verter, and he told the public in his patent that the wire should be "of such length that reacting self-inductively upon its own magnetic circuit, the average counter-potential so produced approximately equals the potential applied to the primary circuit."

Of this statement, Judge Coxe says in his opinion, supra:

"In other words, if wire be wound on the primary coil until the ammeter practically shows no current when the secondary current is open, the result will be the invention of the Stanley patent."

In addition to this disclosure, Stanley further stated in the succeeding portion of the same paragraph the method employed by him in practice for accomplishing his invention, which method involves the so-called "C2R rule."

The portion of the specifications of the patent in suit containing the above statements and the statement of the C2R rule is as follows:

"In the construction of the coils P and S the following principles are to be observed: The first thing to be determined is the length of the primary wire. This should be of such length, that reacting self-inductively upon its own magnetic circuit the average counter-potential so produced approximately equals the potential applied to the primary circuit. When so constructed an ammeter will practically show no current when the secondary circuit is open. To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter-potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of wire until the desired results are attained."

The claims in suit are as follows:

"1. In a system of electrical distribution, and in combination, an alternating-current dynamo and converters electrically connected with the main-line conductors in multiple arc and organized to transform the current in the main conductors into currents of less potential and greater quantity in the secondaries, each converter made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used with its secondary circuit open the electrical pressure and counter-pressure in its primary circuit shall be equal with incandescent lamps or other translating devices in the secondary circuits, substantially as and for the purposes set forth."

"3. In a system of electrical distribution and in combination, an alternating-current dynamo and converters organized to transform the current generated by the dynamo into currents of less potential and greater quantity at or near the points of consumption electrically connected with the main-line conductors in multiple arc and having their primary circuits constantly closed, each converter adapted to the dynamo operating the system by making its primary coil of such length that when supplied with its full proportionate share of the entire normal electro-motive force of the machine its secondary circuit being open the electrical pressure and counter-pressure in its primary circuit shall be approximately equal with the translating devices in the secondary circuits of the converter to be cut out of the circuit when not in use without the introduction of any resistance in the place of them substantially as and for the purposes set forth."

We are satisfied upon all the evidence that the length of wire given by the Stanley C2R rule does not substantially differ from, and is not inconsistent with, the disclosure of the discovery of the principle of co-ordination between the generator and the primary.

For reasons to be hereafter stated, it is unnecessary in the disposition of this case to discuss at length the utility or accuracy of the disclosure as to length of wire, as compared with the particular rule or method used in practice, or the alleged discrepancies between them, or to what extent the former is to be imported into the other and made a part of it. As we understand it, Stanley told the world in the earlier part of the paragraph that, in order to obtain automatic regulation, the wire must be given a length which, under certain open circuit conditions, would show practically no current or a zero current, and by this C2R rule he showed the method by which he secured the length of wire essential to the accomplishment of the desired results.

Twenty-five pages of defendant's brief are devoted to a discussion of its construction of the patent in suit. It is unnecessary to discuss all the arguments advanced in support of this construction. The fallacy of these contentions, and the fact that they proceed upon a misconception of complainant's position and our decisions, is indicated by the following quotations from defendant's brief:

"After stating in his specification that the primary circuit should be of such length that an ammeter will practically show no current when the secondary is open, the patentee says, 'To obtain these results in practice I use the following method,' and then the C2R rule is given, clearly indicating that the part of the specification which the complainant now relies upon will not give these results in practice, but that to obtain these results in practice, the C2R length of wire must be secured. The complainant, however, wishes now to reject the C2R rule and the length of wire given by it."

The first argument of defendant, whereby the rule is made a part of the claims in suit, is stated by counsel in its brief as follows:

"This court in its opinion on motion for preliminary injunction in the case at bar set at rest this question (the question whether the rule was part of the claims in suit), holding that in its decision in the Saranac Case it did not mean that the rule was to be regarded as an element of the combination, but 'that the first and third claims of the patent were for combinations which broadly included his invention.' The express finding of this court in the Saranac Case that the Stanley patent is limited to the length given by the Stanley C2R rule which this court read into the claims to save them from anticipation, and which therefore is a different length from that given by the length of the claims, stands, and has not been modified in the slightest, and not being so modified is still controlling against the complainant."

In support of this argument counsel for defendant refers to the statement in our opinion on the motion for preliminary injunction that we were not convinced that in the Wagner transformer used by defendant there was the length of primary wire required by the Stanley patent, and that infringement was not so clearly established as to justify a preliminary injunction. Counsel, therefore, claims that this statement shows that "this court did not agree with the lower court that this rule which it applied was the Stanley rule or some other method which would give the length of wire which this court sustained the patent for," etc. There is no foundation in fact or in our opinion for this assertion. Both of the judges who sat in said cause were of the opinion that the construction adopted by the court below was the correct one. But we reversed the order of the court below with great hesitation, upon the expert testimony as to the sandwiched coils in defendant's transformers and the conflicting theories upon other ab-

struse electrical problems, and gave the defendant the benefit of the doubt raised, not as to the construction of the rule or its application, but because, as stated in our opinion:

"The experts are in flat contradiction upon the question of infringement, and, in view of the large importance of the controversy, the rights of the parties should be reserved for decision until the final hearing of the cause."

Counsel for defendant quoted from our opinion on the motion for preliminary injunction as follows:

"We are not convinced that in the Wagner transformer used by defendant there is the length of the primary wire required by the Stanley patent."

Counsel then says:

"This court could not have meant 'we are not convinced that in the Wagner transformer used by defendant there is such length of primary wire that there is practically no current when the secondary circuit is open,' for it was expressly admitted, so this court could only have meant that it was not convinced that the Wagner transformer had the length of wire given by the Stanley C2R rule."

On the contrary, this is exactly what the court did mean, namely, that it was not convinced that the length of primary wire used by the defendant corresponded to the length of wire by which the co-ordination of the transformer to the generator was secured, according to Stanley's statement of his discovery, and that the co-ordination between the generator and the primary was secured by such a length of wire that under certain conditions the current would be practically zero when the secondary was open.

Counsel for defendant insists that "the part of the specification immediately preceding the Stanley C2R rule and in the same paragraph with it is imported into the C2R rule and made a part of it," while in our opinion we say: "The rule was not to be regarded as an element of the combination."

The defendant, quoting certain portions of said decision, but omitting our statement in regard to the rule, says as follows:

"The decision of this court was not to the effect that the Stanley invention is for co-ordinating the transformer to the generator with which it is to be used by any length of wire, but that it is for co-ordinating the transformer to the generator by means of 'the length of the primary wire required by the Stanley patent'; that is, 'the Stanley length.' It is evident, therefore, that this court regarded 'the length of the primary wire required by the Stanley patent,' or the 'Stanley length,' as some peculiar and definite length, and did not regard the Stanley invention as covering any length of wire by which the transformer was co-ordinated to the generator."

A reference to the claims in suit shows that the wire of suitable length was for such a length exposed to magneto-electric induction that when operated by the dynamo on open circuit the electrical pressure and counter-pressure in the primary circuit should be equal.

In the prior opinions of this court in the Saranac Case the character and scope of the discovery and invention of the patent were discussed and defined, and the validity of the claims in suit was sustained. In the opinion in this cause on appeal from the order for preliminary injunction we said as follows:

"The decision of this court in Westinghouse Co. v. Saranac Lake Co. was in effect that Stanley contributed to the prior art the discovery that the auto-

matic and constant regulation of the pressure of the alternating current at the secondary terminals depended upon the co-ordination of the transformer to the generator, and the invention that this could be effected by means of a primary wire of suitable length, that the first and third claims of the patent were for combinations which broadly included his invention, and that because, in order to instruct those skilled in the art how to ascertain the length of the primary wire he had formulated in his patent one rule for doing so, the rule was not to be regarded as an element of the combinations."

In the opinion of Judge Lacombe in the Orange County Case, he said, referring to our opinion in the Saranac Case, as follows:

"It seems to this court that the Court of Appeals found that the claims of the patent were for a combination of the elements therein set forth, of which one element was a primary coil having a length of wire equal to what would be found to produce the indicated results when applying the Stanley rule."

In this statement we concur.

It may, therefore, be considered as determined by the prior decisions in this circuit that as Stanley was the first to discover and suggest that the difficulties encountered in attempting to secure self-regulation were due to an improper length of wire in the primary coil, and to disclose a method and means for determining the proper length of wire, thereby proportioning the energy absorbed by the generator to the energy consumed, he was entitled to cover broadly any transformer having substantially such length, irrespective of the method by which such length was ascertained. It follows from this conclusion that the Stanley C2R rule, which states the method of securing the proper length is not to be regarded as an element of the combination of means of the claims in suit, which include such wire, and that the question of infringement depends on whether the primary of defendant's transformer has substantially such a length of wire as would have been obtained if its length had been determined by the Stanley C2R rule.

Upon further examination of the prior opinions bearing on the questions raised herein, and exhaustive consideration of the briefs and arguments of counsel, we remain of the opinion that the claims in suit are for combinations which include the invention of a transformer which produces the automatic regulation of the Stanley patent by the use of a length of wire substantially the same as that which would result from following the method stated by him in his general rule applicable to all conditions, and that a transformer having such a length of wire is an infringement of the claims in suit, irrespective of the process or rule or method by which the result may have been obtained.

That the defendant, in support of its argument, misstates the position of complainant, appears from the following statements in the respective briefs:

Defendant.	Complainant.
Referring to the Hopkinson equation, counsel says: "The complainant, seeing the force of the situation, now says that it is not necessary to have in a transformer the corresponding length of wire given by the C2R rule."	"I admit, as emphatically and as broadly as words can make it, that no transformer infringes which does not have on its primary a length substantially such as it would be if such length had been determined by the Stanley C2R rule."

In the disposition of the questions herein we have proceeded upon complainant's admission, quoted above, and for that reason have found it unnecessary to pass upon defendant's claim founded on its statement of complainant's contention as to the C2R rule length of wire. In view of the fact that anticipation and lack of patentable novelty are not res adjudicata as to this defendant, the further defense is here pressed that the Stanley rule, so far as defendant follows it, was anticipated by Kennedy and Hopkinson. This contention is based on the fact that the Stanley C2R rule did not appear in Stanley's original specifications of November 26, 1885. It is claimed by complainant, however, that the Stanley discovery and invention as construed by this court was disclosed in said original specifications, and was then embodied in a transformer. And the date of the Stanley invention was found to be in 1885 by Judge Coxe in the Saranac Case, and by the Commissioner of Patents in interference proceedings of Stanley against Slattery.

The Kennedy patent and articles were fully considered and disposed of by the court below and by this court in the Saranac Case, and need not be reconsidered. But, so far as concerns the Hopkinson equation, whether the Stanley invention be given the date of 1885 or 1888 is immaterial, for the following reasons: Like the other alleged anticipations relied upon in the Saranac Case, it fails to state that one "may determine the proper length of the primary coil by connecting the transformer in circuit with the dynamo with which it is to be used, and then winding on wire until the loss indicated by the formula C2R, with the secondary circuit open, equals a certain loss of energy." It appears from defendant's testimony that they did not use the Hopkinson formula until 1891 or 1892, some years after Stanley had explained why and how his rule disclosed a practicable method for securing self-regulation. The Hopkinson equation is not mentioned or discussed by complainant's expert, and we are therefore left without any means of determining the accuracy of Hopkinson's statement that "for practical purposes these equations are really sufficient." But upon the testimony of defendant's experts it is shown to have no bearing on the issues herein. Thus, defendant's expert, Nipher, says:

"It was these equations which gave the public—those skilled in the art—the information which they needed concerning the nature of the problem, and the work of Rankin Kennedy and Zipernowski and Deri furnished the practical application of these principles, at the same time giving specific and sufficient instructions concerning the exact method of procedure, in order to realize the conditions in practice."

But this court has already considered and disposed of these alleged anticipations, and has held that they failed to disclose the invention in suit.

Again, as defendant's expert, Nipher, says:

"The length of the wire wound on in this method of design [Hopkinson's] is entirely different from that which would be obtained by following the Stanley rule."

That is, the defendant relies on the disclosure by Hopkinson both as a defense against infringement, on the same ground on which it claims

noninfringement by its own transformer, and also as an anticipation. It claims, on the one hand, that upon its construction of the Stanley rule, which admittedly makes it indefinite and misleading and gives an impracticable length of wire, the defendant does not infringe, because its construction, in which wire of a different length is used, follows the practicable method disclosed by Hopkinson, which gives the proper length of wire. And, on the other hand, it claims that its method anticipates the Stanley rule because it follows the prior Hopkinson equation. The defendant, therefore, is in this dilemma: If the Hopkinson equation, as Nipher, defendant's expert, asserts gives a length of wire different from that specified by Stanley, then, as we are of the opinion, as hereafter shown, that the defendant uses the Stanley length, the contention that it uses the length of the earlier Hopkinson equation is not sustained. And, if the Hopkinson equation could be so construed as to give the Stanley length of wire, then the admission that it merely gave the information by means of which Rankin Kennedy, etc., furnished a later practical application of these principles, as stated above by defendant's expert, then Hopkinson is relegated one step further back than the post-art publications already disposed of in the earlier opinions of the court.

We find nothing new in this record which indicates that any of the so-called prior art adversely affects the status of the patent in suit. The single question to be disposed of on this appeal is that of infringement. Infringement is denied, on the following grounds:

"Defendant uses a different length of wire than that prescribed by the patent, by reason of using less iron in the core."

In support of this proposition defendant states that the length of wire used in its transformer has a length in the primary coil over 50 per cent. greater than the length in the complainant's Great Barrington transformers and contends that if the Great Barrington transformers have not the C2R length then the Hopkinson length antedates the C2R length whatever the latter may be. For reasons stated above the alleged priority of the Hopkinson length equation is immaterial.

The defense that as defendant uses a core of lesser weight and therefore a length of wire different from that used by complainant, it does not use the length of wire of the Stanley rule, is immaterial because, as the Court of Appeals has held:

"The amount of wire for a given character of current supply cannot be stated in feet and inches because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformer, and the way the coils are applied."

The curve sheets illustrating tests of complainant's transformers and of defendant's transformers in the Saranac Case and in this case show that in each the currents are substantially the same, and that the current falls with an increase in the number of windings until it reaches the point where the current is practically zero, this being the point where by the application of the C2R rule the winding should cease. And, while different lengths of wire were used on certain of the com-

plainant's Westinghouse transformers, and on the infringing Saranac transformers, and on defendant's transformers, yet in each case the lengths of wire cease at the same point or just beyond the knee of the curve. Again, it appears from a comparison of such of complainant's and defendant's transformers as have substantially the same length of wire that the respective transformers are substantially alike in material, size, and shape of cores. In fact, the assertion of complainant's expert, Waterman, that the defendant's transformers are in their essential particulars like those held to infringe in the Saranac Case does not seem to be seriously disputed.

The construction of defendant's transformers in the Saranac Case is stated by Judge Coxe in his opinion therein, where, referring to defendant's plant, he says:

"Each converter is made with a primary coil containing such length of wire exposed to magneto-electric induction that when operated by the dynamo with which it is to be used, with its secondary circuit open, the electrical pressure and counter-pressure in its primary circuit are approximately equal."

A further defense is that:

"Defendant's transformers have their coils sandwiched, which not only gives a different length of wire from the patent, but does not require such transformers to be adapted to the dynamo, except as to pressure, and therefore they do not infringe."

Great stress is laid by counsel for defendant on this feature of sandwiching. As explained by the expert for defendant, it consists in the "subdivision of the coils into sections to avoid excessive electro-motive force between adjacent parts." By this method of construction the primary and secondary coils are brought close together and the amount of leakage is reduced. The result of sandwiching the coils is to require a greater length of wire. No reference is made in the Stanley patent to sandwiching, and its practical importance in constructing transformers was not at first appreciated by the complainant company, and it did not adopt this construction until the year 1892.

The plausible argument is made that as Stanley used a large core to prevent leakage, while the defendant produces the same result by sandwiching its coils, necessarily using in so doing different lengths of wire, that thereby the necessity of correlating the transformer to the dynamo as to "frequency and electrical pressure," as in the Stanley construction, is dispensed with, and that infringement is thus avoided.

But it appears from the testimony of defendant's experts that this sandwiching and its desirability to prevent leakage was well known long prior to the invention in suit; in fact, that it was a common expedient for that purpose. We fail to find any suggestion that this arrangement dispenses with the necessity of "the co-ordination of the transformer to the generator" by the use of a primary wire of suitable length. And we do not understand that in these circumstances a mere difference of length of wire by reason of sandwiching is any more material upon the question of infringement than differences in other parts of the apparatus. We again repeat, but with our italics, what this court said in the Saranac Case:

"The amount of wire for a given character of current-supply cannot be stated in feet and inches because it is, to some extent, dependent upon other things, such as the quality of iron employed in the core, the quality of copper used in the coils, the shape of the transformers and *the way the coils are applied.*"

The whole argument of defendant in support of noninfringement proceeds upon the theory that the Stanley rule is misleading and impracticable.

Thus, Prof. Gray, one of defendant's experts, having testified as to his construction of the rule (a point to be hereafter discussed), says as follows:

"X–Q. 29. And, in your opinion, no transformer will have what you term the Stanley length of wire unless it has on its primary a length which will give these impossible results. Is that right?

"A. I believe the instructions in the patent lead to such an impossible conclusion.

"X–Q. 30. So that, when you say that the Wagner transformers which are involved in this controversy do not have the Stanley length of wire, you would make the same statement concerning every transformer that was ever built?

"A. When I say that the defendant's transformers do not contain the Stanley length of wire, I mean practically that the length of wire used in defendant's transformers could not have been obtained by the Stanley rule, because I consider the rule to be entirely an unworkable one.

"X–Q. 31. Being an entirely unworkable rule, in your opinion, of course, no transformer that was ever built could have what you are construing to be the Stanley length of wire?

"A. I consider that no transformer that was ever built, and successful, could have been designed by this rule."

The substantial and difficult proposition presented by the argument of defendant on the question of infringement, therefore, is that the commercial transformers do not have the Stanley C2R length of wire; or, in other words, that the patent is invalid for lack of invention. We have carefully studied the argument in defendant's appendix on this point, and we think each proposition there advanced is met by the discussion in complainant's brief, supported by the facts proved or admitted on the record. That Stanley made and disclosed an invention of a practical, working device must be assumed; that upon defendant's construction of the patent a transformer built according to its instructions would be a useless one is admitted.

The decision as to infringement depends upon the construction to be given to the phrase "loss of energy inevitable in conversion," occurring in the following passage in the specifications:

"To obtain these results in practice I use the following method: I first choose the percentage of efficiency to be obtained. Then having selected a type of magnetic circuit affording as great magnetic conductivity as possible I apply such a length of primary conductor that acting self-inductively upon its core the difference of the counter-potential and applied potential multiplied by the current in the converter shall equal the predetermined loss of energy inevitable in conversion and vary the length of primary wire until the desired results are attained."

This language is construed by the counsel and experts, respectively, as follows:

Complainant.

"I contend that this phrase means the copper loss in the primary before the secondary is applied to the core; or, as electricians say, the primary open-circuit copper loss."

Defendant.

"I understand the passage referred to to give instructions to wind on wire until the copper losses in the primary equal the total loss inevitable in conversion. I was careful to point out in my direct testimony that I considered the inventor to believe that there was no iron loss, and also that there was a probability that the energy lost in the secondary was considered to be part of the energy converted and was therefore not included in the loss appearing in the primary. * * *

"X-Q. 25. You use the term 'loss inevitable in conversion' to include what?

"A. I consider that the losses inevitable in conversion include the copper losses in both coils, and also the iron loss."

Defendant's construction is supported by expressions in Stanley's original specification and by indications that he knew very little about iron losses in the core of the transformers, and it is claimed that he thought the copper losses were the same for all loads.

Prof. Nipher, expert for defendant, says on this point as follows:

"The loss of energy inevitable in conversion he thought was a definite loss, constant for all loads, and the same as for no load, and could therefore be determined by finding the C2R loss in the primary coil with the secondary circuit open. The Stanley rule was based on this fundamental misconception of the action of the transformer."

And it is claimed that because of his ignorance in these regards he made an impracticable and misleading rule, which, if followed, upon one interpretation would give a length of wire which would be "ridiculously small," or upon another interpretation "enormously large."

The arguments in support of these assertions are elaborately discussed in the opinions of defendant's experts. It is admitted that the language used is capable of either of the constructions claimed.

The construction contended for by defendant assumes that the meaning of the term "predetermined loss of energy inevitable in conversion" means the "total losses in the transformer," including therein "the full load primary and secondary copper loss plus the iron loss, which is the same at no load as it is at full load." The result of this construction is to make the patentee say that after having selected in advance a percentage of efficiency, which, it is agreed, is the ratio between the input and output at full load, say, for example, in a 1,000 watt transformer, an efficiency of 95 per cent., which would mean a loss of 50 watts, that then the C2R rule means that the constructor is to wind on wire on the primary until the copper loss thereon shall equal the total copper and iron losses of energy inevitable in conversion.

This construction is explained by one of defendant's experts as follows:

"The patentee had a theory that there were no iron losses, that the iron core was a frictionless vehicle, and that the losses were all in the copper, and he thought that when the wire was wound on until the copper loss was equal to the predetermined loss that he would have a transformer which, when completed, would deliver the power put into it, less the copper loss on open circuit. He thought he had taken into account all the losses in the transformer."

As stated above, there is evidence outside the patent indicating that the patentee in common with the general public was ignorant in regard to iron losses in the core at this period.

One of the experts for defendant says as follows:

"If the patentee's ideas as above recited had been correct, if there had been no iron loss, and if the copper loss had been constant throughout the entire working limits of the converter, this Stanley rule would not have been absurd any more than it would have been absurd to build a buggy with the friction on one axle equal to the friction on four axles, if the other three axles had no friction. In the Pope letter of December 10, 1886, he has stated that this iron core 'should have such capacity as to act as a frictionless vehicle to transform all the lines of force from the primary to the secondary circuit, without loss in transmission.'"

The forcible arguments in support of complainant's construction, as stated above, accord with the fundamental principles of interpretation applied to this patent, and enforced by its inventive results, and with the reasoning which would naturally be attached to the language used.

These arguments may be summarized as follows:

1. It is settled by the decisions of this court that the patentee contributed the discovery of the dependence of regulation of pressure upon the co-ordination of generator and transformer, and the invention of a means by which this could be effected, namely, the primary wire of suitable length, and disclosed a method for determining that length with mathematical exactness by a rule applicable to all conditions, including the winding on of wire until the loss indicated by the C2R, with the secondary circuit open, shall equal a certain loss of energy.

2. The defendant's construction would nullify the invention by making the patentee direct either the use of a wire so short that it would burn up the transformer, or so long that it would extend for hundreds of miles. This construction, as shown above, would further make the patentee say that the copper loss on the primary with the secondary open should be equal to all loss of energy with the secondary applied, although the whole context indicates that the patentee was dealing with open circuit conditions.

3. Counsel for defendant in the Saranac Case assumed that complainant's construction was the correct one. In their brief they say:

"There can be no question that 'the predetermined loss of energy inevitable in conversion,' here referred to, is the wire or resistance loss in the primary coil at no load, and that the rule deals merely with the primary coil, and can have nothing to do with the total loss in the converter when the secondary coil had been adapted thereto. * * * It is merely the wire or copper loss in the primary coil when there is no secondary coil, or with the secondary circuit open."

4. It is the duty of the court to adopt such a construction of a meritorious patent as shall sustain rather than invalidate it.

As this court said in Dixon-Woods Co. v. Pfeifer, 55 Fed. 390, 395, 5 C. C. A. 153:

"The patentee told the trade of which he was a member by what mechanical means breakage of glass in the process of annealing could be saved; in other words, how to anneal glass better and more economically. His patent described clearly enough the ways in which bars and the operative mechanism should be constructed and operated, and the glass should be conveyed through the leer. He did not know, or he did not tell, why the new method would produce better results. He simply told how to construct a machine which carried the glass through the leer on a level, and saved much breakage; but he ought not to lose the statutory benefits which would certainly belong to him if he had seen and described the philosophy of his machine accurately."

The patentee stated a rule to be applied with reference to the only losses which at the time of the invention were capable of ascertainment by the then known devices of the art. It now appears that by the use of later appliances other losses, of which the patentee was ignorant, may be measured and ascertained. But we do not understand that this ignorance of the patentee, or the knowledge subsequently gained from the prior art, affects the status of the invention in suit. The fact that the patentee did not fully understand the principle upon which his invention operated, or that his instructions were capable of a construction which would render the patent impracticable and defeat its purposes, should not deprive him of the benefit of a meritorious invention, provided it appears, as is found in this case, that the patent sufficiently disclosed to those skilled in the art the cause of previous defects and a new and useful discovery and invention, by means of which they might be successfully overcome. He is not to be deprived of the benefit of his invention because he may have been mistaken in his statement of the reasons why the result was secured, or may have failed to correctly state the theory of their operation.

As to the use of the word "predetermined," we think that the inventor merely meant that the constructor should ascertain beforehand by experiment, as complainant's expert says and explains, certain "physical properties, with regard to which the construction is to be worked out."

5. It is admitted that at the time of the Stanley invention there was no means of measuring the loss of energy inevitable in conversion, other than the copper loss on open circuit.

Complainant quotes from defendant's brief in the court below the following statement:

"Stanley knew nothing about the loss of energy inevitable in the core. If he did, he said nothing about it in his patent, and he had no way of measuring the loss of energy inevitable in the core at the time his patent was applied for. The only way in which the loss of energy inevitable in conversion can be measured is by a watt-meter. At the time of Mr. Stanley's invention and application for patent there were no watt-meters."

Therefore, when Stanley instructed the constructor to wind on wire until the loss of energy was provided for, he must necessarily have referred to that loss which was capable of being ascertained by measurement. Neither the patentee nor the public, at the date of the invention, could have estimated losses other than the copper losses on the open primary.

6. That defendant's construction should not be adopted is further indicated by the following statements in complainant's brief, which seem to be sufficiently established by the record. Referring to defendant's construction, counsel for complainant says:

"If the phrase means this, then a transformer built according to the Stanley rule will violate every line of the specifications outside the rule. It will have an oversaturated core, whereas the specifications say that an undersaturated core is 'indispensable.' It will have a leakage current of enormous and even destructive volume, whereas the specifications say that the leakage current will be 'practically zero.' It will not have anything like the efficiency chosen, although the rule says its object is to produce a transformer having the chosen efficiency. It will not be self-regulating, although the object of the rule is to produce a self-regulating transformer. It will not be a transformer at all, because it will burn up the minute the current is turned on. It will be nothing but a piece of electrical fireworks."

It remains to consider the further argument of defendant that if the length of the primary wire on the core were such that the ammeter would show practically no current, as specified by Stanley, there is nothing in the specifications to show when to stop, because the rule fails to state definitely how much is to be wound, and that a person might wind an amount of wire which would be so short that it would burn out, or so long that it would stretch to hundreds of miles. But, upon an examination of the curves shown in complainant's exhibits, it appears that the number of turns when the working point is first reached is the time when you first get the zero result, as stated in the patent. If you continue to wind more wire on, the transformer would not be self-regulating. Therefore the patent may fairly be interpreted as directing the constructor to stop at that point.

We think the contention of complainant that the patent does, in substance, say "wind on wire until the current becomes practically zero, and then stop," is correct because it says "that the primary coil should have such length that an ammeter would practically show no current," etc., when the secondary circuit is open, and practically says, or may fairly be construed to say, that the wire should be wound on until the desired result is secured.

Counsel for defendant asserts that under the instructions of the patent the constructor may continue to wind on such a great number of turns, after reaching the zero point, that the transformer would not be a commercial one, and claims that the length is "indefinite and indeterminate" because "the number of turns may be so great, and in consequence thereof the resistance of the primary coil so high, that the transformer would not be commercial." We think it has been sufficiently shown that no such construction is justified.

In view of the importance of the interests involved, we have given exhaustive consideration to the various intricate technical questions raised, and have endeavored to dispose of them in the light of the invention derived from the expert evidence. It is, of course, possible, in view of the conflicting claims upon the electrical problems and tests involved, that we may have been mistaken in some of attempted statements of fact. But, in any event, we are satisfied that under the construction of the patent originally adopted by this court in its opinion in the Saranac Case, infringement by defendant is abundantly es-

tablished, and that the adoption of the view as to anticipation and construction now contended for by the defendant would practically result in a reversal of our former opinions.

The decree is affirmed, with costs.

WORCESTER COUNTY GAS CO. v. DRESSER.

(Circuit Court of Appeals, First Circuit. May 2, 1907.)

No. 691.

PATENTS—VALIDITY AND INFRINGEMENT—PIPE COUPLING.

The Dresser patent, No. 625,155, for pipe coupling designed to unite the ends of sections of pipe and to insulate them from each other to prevent electrolysis, was not anticipated and discloses invention. Also *held* infringed.

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

The following is the opinion of the Circuit Court, by Lowell, Circuit Judge:

This was a bill in equity for the infringement of letters patent No. 625,155, granted to Dresser, for improvements in pipe coupling. The following claims are in suit:

"1. The herein described combination of a clamping-ring provided with an aperture therethrough, a pipe-section having a uniform diameter throughout its length less than the diameter of the aperture in said ring and passing through such aperture a second pipe-section, means for insulating the pipe-sections from each other, means for insulating said first-mentioned pipe-section from the ring through which it passes, and means for compressing the insulating material by a movement of the clamping-ring longitudinally of the pipe-sections, whereby said pipe-sections are insulated from each other, said ring is insulated from the pipe-section passing therethrough, and provision is made for the movement of the said pipe-section through said ring to allow for expansion and contraction, substantially as described.

"2. The herein-described combination with two pipe-sections, of a clamping-ring for each pipe-section, provided with an aperture through the same for the passage of its pipe-section therethrough, means for insulating the adjacent ends of said sections from each other, means for insulating each of said rings from the pipe-section passing therethrough, clamping means for drawing said rings toward each other to compress the insulating material, whereby said pipe-sections are insulated from each other, each pipe-section is insulated from the ring through which it passes and provision is made for the free movement of each of said pipe-sections through their respective rings and through the insulating material to allow for longitudinal expansion and contraction, substantially as described.

"3. A pipe-coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, including among its members a cylindrical portion, a clamping-plate adapted to surround one of said pipe-sections and provided with clamping-bolts, and an insulating and packing ring having a portion interposed between said cylindrical portion and said plate and an insulating sleeve portion surrounding said pipe-section between it and said plate, substantially as described.

"4. As pipe-coupling for uniting the adjacent ends of pipe-section and insulating them from each other, including among its members a cylindrical portion adapted to extend over the end of one of the pipe-sections, a clamping-plate adapted to surround said pipe-section and provided with a packing-recess on one side, and a packing and insulating ring having a portion adapted to be interposed between the said cylindrical portion and said plate and to

occupy said packing-recess and an insulating-sleeve adapted to extend between said plate and said pipe-section, substantially as described."

"7. A pipe-coupling for uniting the ends of two pipe-sections and insulating them from each other, comprising among its members two clamping-plates adapted to surround said pipe-sections, each provided with a packing-recess and apertures for clamping bolts, a coupling-sleeve adapted to extend over the adjacent end portions of the said pipe-sections, packing-rings adapted to engage said packing-recesses and to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to be interposed between one of said pipe-sections and the clamping-ring through which it passes and the clamping-bolts, substantially as described.

"8. A coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, comprising among its members two clamping-plates, each provided with an aperture for the passage of the pipe therethrough and a packing-recess, a coupling-sleeve adapted to cover the adjacent portions of the pipe-sections between said plates, the packing-rings engaging said packing-recesses, and adapted to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to lie between one of said plates and the pipe passing therethrough, insulating material interposed between the ends of said pipe-sections and the clamping-bolts for uniting said clamping-plates, substantially as described.

"9. A coupling for uniting the adjacent ends of pipe-sections and insulating them from each other, comprising among its members two clamping-plates, each provided with an aperture for the passage of the pipe therethrough and a packing recess, a coupling-sleeve adapted to cover the adjacent portions of the pipe-sections, between said plates, the packing-rings engaging said packing-recesses, and adapted to engage the ends of said sleeve, one of said rings being provided with an insulating-sleeve adapted to lie between one of said plates and the pipe passing therethrough, an insulating-sleeve engaging said pipe within the coupling-sleeve, and having a flange engaging the end of the pipe, and the clamping-bolts, for uniting said clamping-plates, substantially as described."

From the specifications it appears that the object of the patent was to prevent the electrolytic action which disintegrates water and gas pipes laid underground in the neighborhood of electric wires. If the return current passing through a pipe thus laid is broken by insulating each length of pipe from its neighbor, electrolysis is so far diminished as to be negligible. The problem to be solved by the patentee, therefore, was the insulated coupling of pipes of several inches diameter laid under ground. The complainant's patent in suit has gone into considerable use. The defendant contends that the claims in suit are invalid, but otherwise does not deny infringements of claims 1, 2, 7, 8 and 9. No earlier device for accomplishing the object just described was put in evidence. The defendant relied wholly upon two classes of patents:

First. Those concerned with the coupling of pipe, without reference to insulation. Of these, 18,116, issued to Wright, is typical. Wright employed vulcanized rubber to make a tight joint, but without insulation or the thought of it. No sufficient provision was made in the Wright patent for the shrinkage and expansion of the pipes, a most important consideration in the art before the court. No. 389,797, a patent issued to the complainant before that here in suit, and even before the danger from electrolysis was recognized, also had for its object a tight joint, and it neither sought nor effected insulation.

Second. Patents intended to insulate a chandelier or a bracket from a gas pipe. This is a different art, whose appliances are useless for laying pipes underground. Corrosion of the insulating substance by water, acid, and other constituents of the soil is not to be feared in the air of a house. On the other hand, the chandelier joint must sustain a considerable weight in proportion to its size, which is not necessary in coupling gas and water pipes under ground. The patents thus urged on the court are in a different art from that of the patent in suit. In the Deav's patent, No. 299,206, for example, the two ends of the gas pipe are screwed into flanged heads, an arrangement impossible of adaptation to large pipes laid under ground. Moreover, there is uncontradicted evidence that all these gas couplings failed of their purpose. All the elements of the patent in suit were old, as the defendant points out, but

their combination was new, and it accomplished for the first time the end sought, viz., the coupling an underground joint so as to secure insulation and prevent electrolysis. The patentee thus obviated a difficulty recently discovered. The claims in suit are held valid.

Some slight question was made at the argument concerning the defendant's infringement of claims 3 and 4. No mention of the matter was made in the brief, and the suggestion came from the court. In the absence of some analysis of these claims, and of argument thereon, I do not feel myself required to make full investigation and to determine if claims 3 and 4 are limited to a specific form of the invention shown in figure 4 of the drawings, a form which the defendant does not employ. These claims, as well as the others in suit, are held to be infringed.

Decree for the complainant.

Richard J. McCarty (Arnold Scott, on the brief), for appellant.

Louis P. Whitaker (Whitaker & Prevost, on the brief), for appellee.

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

PER CURIAM. We are entirely satisfied with the conclusion reached by the Circuit Court, and with the reasons given therefor by the learned judge of that court.

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

NATIONAL CASH REGISTER CO. v. GROBET et al.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 269.

PATENTS—INFRINGEMENT—COMBINATION OF PARTS OF DIFFERENT MACHINES.

Complainant manufactured and sold without restriction two styles of patented cash registers and indicators, numbered, respectively, 78 and 79. The two were alike, except that No. 79 contained an additional printing device, which, in combination with the other parts, was covered by a separate patent. Defendants, becoming the lawful owners of a No. 79 machine, removed the printing device therefrom and supplied and attached it to a No. 78 machine of another owner, charging and receiving payment therefor, and making, in effect, a No. 79 machine. *Held*, that such action was an infringement of the right to manufacture the patented combination, with which complainant had not parted by the sale of the No. 78 machine.

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

This cause comes here by appeal from a decree of the United States Circuit Court for the Southern District of New York, dismissing the bill alleging infringement of complainant's patent No. 483,511, granted September 27, 1892, to Hugo Cook, for improvements in cash registers and indicators. The opinion of the court below is reported in 148 Fed. 385.

J. B. Hayward and Drury W. Cooper, for appellant.

Samuel Owen Edmonds, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The questions at issue herein are raised by a stipulation, which, inter alia, sets forth the following facts:

"That continuously since the issuance of the patent in suit * * * complainant has manufactured and sold outright and unconditionally two styles of machines to which it has applied the trade designations 'No. 78' and 'No. 79.' No. 78 prints and ejects from the machine individual checks containing data of each registration as made. * * * No. 79 contains, in addition to what is contained in the No. 78 machine, mechanism for printing at each operation, upon a record contained permanently within the machine, the data of each registration; such permanent record being known as a 'detail strip,' and said mechanism being termed herein, for the purpose of the stipulation, the 'detail strip printing mechanism.' The No. 79 machines are those alleged in the bill to contain the invention of the patent in suit, and particularly the improvements set forth in claims 1, 3, 4, 12, and 17, upon which alone complainant relies.

"That during the year 1898 the complainant or its predecessor made and sold outright and unconditionally a cash register of the No. 78 type; * * * that said machine ultimately came lawfully into the possession of one Gustav Kessler as a vendee, direct or indirect, of the complainant, who, on or about the 1st day of May, 1906, procured the defendants in this action to add the parts to said machine (i. e., a detail strip printing mechanism) that would enable it to print also upon the permanent record or 'detail strip'; and that said defendants did, in fact, add to said No. 78 machine the said parts; * * * that said defendants charged the sum of $50 and were paid that sum by said Kessler for so doing, and the cash register made a part of this statement, and marked 'Exhibit B,' is the cash register so altered by the defendants for Kessler; that the defendants have, under like circumstances and in like manner, added detail strip printing mechanism to other No. 78 machines for their uses, and have also bought No. 78 machines, and after adding such detail strip printing mechanism have sold them as No. 79 cash registers.

"That the defendants, in doing the work hereinabove referred to, have used only parts or mechanism taken from No. 79 machines originally made and sold, outright and unconditionally, by the complainant or its predecessors, during its or their ownership of the patent in suit, which machines were put in use by the several vendees thereof and have come into defendants' hands by purchase or exchange."

The complainant herein does not claim contributory infringement, and the defendants do not claim that the acts done were in the nature of repair. Defendants claim that, as they "used only parts or mechanism taken from No. 79 machines originally made and sold, outright and unconditionally," they have merely added such portion of the complete manufacture to another machine.

Complainant's petition appears from the following statement taken from its brief:

"The complainant asks no extended monopoly by reason of any notice of license restrictions imposed upon the sale of the patented article. All that it asks is the full measure of the monopoly granted by the patent, such that in merely parting with the right to use the patented machine there shall be no encroachment upon the monopoly of manufacture, and no invasion of the complainant's exclusive right to make or unite the combinations of the patent in suit."

The forcible argument of counsel for defendants and the opinion of the court below are based upon a consideration of the rights acquired by the defendants in the No. 79 machines unconditionally purchased by them. In the disposition of the case we do not find it necessary to pass upon the questions thus presented, except in so far as

they relate to the No. 78 machine and the rights and limitations attached thereto.

It may be assumed that the unrestricted sale of a No. 78 machine "carried with it dominion over the article so sold," and conferred upon the purchaser and his vendees the right to "hold and deal with it the same as in case of any other description of property to him." Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. Ed. 1141; George Frost Co. v. Kora Co. (C. C.) 136 Fed. 467, affirmed 140 Fed. 987, 71 C. C. A. 19; Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. (C. C.) 40 Fed. 577, affirmed 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; Holiday v. Mattheson (C. C.) 24 Fed. 185. But the purchaser of the No. 78 machine acquired no right to infringe the patentee's right to manufacture said combination known as No. 79. When these defendants, therefore, supplied said attachment and added it to said No. 78 machine, and thereby converted it into a No. 79 machine by uniting to it the patented attachment which made up the complete combination of No. 79, they infringed said right of manufacture of the patented combination, with which complainant had not parted by the sale of a No. 78 machine.

It is immaterial whether this is considered as in the nature of contributory infringement, which would be made out if defendants supplied such attachments to owners of No. 78 machines with the intent that such owners should combine the attachment with the rest of the machine, or of actual infringement under the stipulated facts, because the defendants have themselves added the attachments to No. 78 machines owned by them.

The well-settled rule is that the purchaser of a patented article from the patentee acquires the absolute right to the unrestricted use of said article; that by the sale it passes beyond the limit of the monopoly. But it would be perversion of this rule to say that such a purchaser may use a portion of said article for the purpose of enabling the owner of a machine sold by the patentee, without said portion to construct a patented combination which he is not licensed to manufacture or use.

The decree is reversed, with costs, and the cause is remanded to the court below, with instructions to enter a decree overruling the plea.

HALL SIGNAL CO. et al. v. GENERAL RY. SIGNAL CO. et al.

(Circuit Court of Appeals, Second Circuit. April 30, 1907.)

No. 288.

1. INJUNCTION—PRELIMINARY INJUNCTION—SUFFICIENCY OF PROOFS.

It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case, and, unless the court is convinced with reasonable certainty that the complainant must succeed at final hearing, the writ should be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 309.]

2. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The showing on a motion for a preliminary injunction to restrain infringement of a number of unadjudicated patents, relating to electric rail-

way signals, *held* to present too many elements of doubt to warrant the granting of an injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 409.

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

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

On appeal from an order made by the Circuit Court for the Western District of New York granting a preliminary injunction restraining the infringement of five letters patent, granted to A. J. Wilson for improvements in electric railway signals. The bill alleges infringement of 53 claims of these patents, but the discussion on this appeal has been limited by stipulation of counsel to the consideration of 6 claims only. The operation of the injunction was suspended pending appeal.

Edmund Wetmore, Howard L. Osgood, J. William Ellis, and Macomber & Ellis, for appellants.

William Houston Kenyon and Henry D. Williams, for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge. It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied. Union Switch & Signal Co. v. Philadelphia R. R. Co. (C. C.) 75 Fed. 1004.

A record, containing 868 printed pages, composed of ex parte affidavits, patents for complicated electrical machinery and a great mass of other matter, much of it, apparently, having remote relevancy to the present issues, has been presented. To reach a clear and satisfactory conclusion upon many of the vital questions involved would, upon such a record, be difficult if not impossible.

The entire aspect of the case may be changed at final hearing and for obvious reasons the discussion of the issues involved should be restricted to the narrowest limits possible.

We have reached the conclusion that a preliminary injunction should not be issued and will briefly state the considerations which have led to this result.

First. The five patents in suit relate to a difficult, complex and abstruse subject, namely, the transmission of signals on railways by electricity. Because of its complicated character and the innumerable details involved it is peculiarly a case where the court should have the benefit of the opinions of those skilled in the art tested and clarified by cross-examination.

Second. The patents have never been adjudicated or judicially construed.

Third. The defendants assert that the patents are invalid for lack of novelty and invention and that the claims of three of the patents are not infringed.

The answer sets up 21 American and eight prior English patents and alleges four instances of prior use. It is also contended that if the patents are sustained the prior art renders a broad construction of the claims impossible.

We do not intend to pass upon these defenses further than to say that we cannot consider them as wholly devoid of merit. On the contrary we have examined the prior art sufficiently to be convinced that it is quite possible that at final hearing the court may feel constrained to limit the claims to a much narrower construction than is now asserted by the complainants. It is enough to say that the patents may emerge from the supreme test of the trial with some of the claims invalidated and others so limited as to avoid infringement.

Fourth. We think the complainants have failed to prove a case of acquiescence which may be regarded as a substitute for an adjudication. There has been no general long continued public acquiescence. The railroads are the complainants' only customers and for many years The Hall Company's only competitor was the Union Switch & Signal Company. In a technical sense, therefore, there was no public. It is not the case of a patented device going into long continued general use in circumstances which compel the conviction that infringements would have occurred were it not for a settled conviction on the part of those who might profit by infringing that the patent is valid.

It is true that the general policy of the Union Company was not to infringe, but we are not at all convinced that this course was adopted through fear of the Wilson patents.

The Union Company and the Hall Company were active rivals in business, the former advocating and installing the so-called normal safety system and the latter the normal danger system. Every consideration, not only of honesty in competition but of self-interest also, would induce the Union Company to exploit its own system, which it thoroughly understood and in the efficiency of which it had implicit confidence. To assert that its course, which was the natural one for honorable men to adopt, was due solely to the Wilson patents, is, we think, carrying the doctrine of acquiescence beyond the limits set by former adjudications.

Fifth. We are not convinced that the complainants will suffer irreparable damage if the cause be allowed to take the usual course. That the defendants are amply responsible is conceded and if the complainants' contention is sustained and the patents construed to cover broadly the "normal danger system" there should be no difficulty in recovering the full amount of profits and damages.

Sixth. The attitude of the court may be stated in a single sentence: We think the record presents too many elements of doubt to warrant the issuing of a preliminary injunction.

The order is reversed.

In re WENHAM.

(District Court, S. D. New York. May, 1906.)

1. BANKRUPTCY—EXEMPTION OF BANKRUPT FROM ARREST—CONSTRUCTION OF STATUTE.

Under Bankr. Act July 1, 1898, c. 541, § 9a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425], which provides that a bankrupt shall be exempt from arrest upon civil process, except "(1) when issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a state court having jurisdiction and served within such state upon a debt or claim from which his discharge in bankruptcy would not be a release," a bankrupt is exempt from arrest or imprisonment upon civil process issued from a Circuit Court of the United States on a judgment of said court rendered prior to the bankruptcy proceedings.

2. SAME—DEBTS RELEASED BY DISCHARGE—MISAPPROPRIATION BY AGENT.

A judgment obtained by a railroad company against a ticket agent for money collected by him for tickets sold and misappropriated to his own use is not one for a debt which is a liability for obtaining property by false pretenses or false representations, nor for a debt created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity within the meaning of Bankr. Act July 1, 1898, c. 541, § 17a, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], but is one from which the defendant would be released by a discharge in bankruptcy, and after his adjudication as a bankrupt he is exempt from arrest thereon.

Habeas Corpus to Test the Validity of Imprisonment of Bankrupt.

John J. Lordan, for petitioner.

Charles A. Hess and Jerome S. Hess, for respondent.

HOLT, District Judge. This is a writ of habeas corpus to test the validity of the bankrupt's imprisonment.

The bankrupt is imprisoned in Ludlow street jail under an order of arrest issued by the United States Circuit Court for the Southern District of New York on January 26, 1906, holding the bankrupt to bail in the sum of $40,000, and an execution against the person subsequently issued in said action. The action was brought against the bankrupt by the Canadian Pacific Railway Company. The complaint alleged that the bankrupt was a ticket agent of the Canadian Pacific Railway Company, and that, as such agent, he converted to his own use over $50,000, the proceeds of passenger tickets sold by him, and other moneys collected by him, which he should have accounted for to the railway company. Before the adjudication in bankruptcy judgment was entered against the bankrupt in said action for about $56,000, and since the bankruptcy an execution against the person has been issued upon the said judgment under which the marshal detains the bankrupt.

The question in this case is not whether the bankrupt has been guilty of reprehensible or fraudulent or criminal acts. The question is whether he is exempt from arrest under section 9a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3425]). That section provides as follows:

"A bankrupt shall be exempt from arrest upon civil process, except in the following cases: (1) When issued from a court of bankruptcy for contempt

or disobedience of its lawful orders; (2) when issued from a State court having jurisdiction and served within such State upon a debt or claim from which his discharge in bankruptcy would not be a release."

In the first place, in my opinion, the petitioner is exempt from arrest in this case, on the ground that he has not been arrested by a civil process from a court of bankruptcy, or from a state court. He is held under process issued from the United States Circuit Court.

In the next place, in my opinion, he is not held upon a debt or claim from which his discharge in bankruptcy would not be a release. Section 17a of the bankruptcy act (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]) provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, with certain exceptions. The only exceptions which are relied upon in this case are debts "which are liabilities for obtaining property by false pretenses or false representations," or which "were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." The evidence does not show that the bankrupt obtained any property by false pretenses or false representations. He made numerous false pretenses and false representations to the Canadian Pacific Railway Company by which he concealed the fact that he had converted money which was due to the company, but he obtained no money from the Canadian Pacific Railway Company by false pretenses or false representations. The money was all obtained from third parties. Nor were the debts created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity, in the sense in which that language is used in the seventeenth section of the bankruptcy act. The authorities establish that the phrase, "while acting as an officer or in any fiduciary capacity," qualify all the preceding words, "fraud, embezzlement, misappropriation or defalcation," and do not simply refer to the last word "defalcation," and that the "fiduciary capacity" referred to in this section relates to that of a trustee of an express trust. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, 12 Am. Bankr. Rep. 659; Chapman v. Forsyth, 2 How. 202, 11 L. Ed. 236; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; In re Harper (D. C.) 13 Am. Bankr. Rep. 430, 133 Fed. 970.

There may be some doubt, under the decisions, whether the term "officer" in this section is confined in its meaning to a public officer, as provided in the previous bankrupt act, or whether it applies to any officer, including an officer of a corporation. But the bankrupt was not an officer of the Canadian Pacific Railway Company. He was a mere agent—a ticket agent.

My conclusion is that the prisoner should be discharged.

THE EVA D. ROSE et al.

(District Court, E. D. North Carolina. February 25, 1907.)

SHIPPING—SUIT FOR NONDELIVERY OF CARGO—COSTS.

Where a vessel stranded on a voyage near her port of delivery, and on being released some days later started back with the intention of delivering the cargo back to the consignors, in violation of the contract of carriage, the consignees were entitled to sue the vessel in admiralty to recover the cargo and damages for its nondelivery, and a delivery of the goods to libelants pending the suit and a receipt for the same, releasing the vessel and master from claims for damages, do not relieve the vessel from payment of the costs where the receipt expressly provided that the settlement should not have that effect.

In Admiralty. On rehearing.

For former opinion, see 151 Fed. 704.

A. D. Ward, D. L. Ward, and Harry Skinner, for libelants.

W. D. McIver and H. C. Whitehurst, for respondent.

PURNELL, District Judge. Both respondent and libelants having asked that this cause be reopened and a further hearing granted, on the 18th day of February an order was entered reopening the cause and setting the same down for further hearing on February 22d, at 10:30 in the forenoon, when the same was heard; both libelants and respondent being represented by proctors and respondent Warren being present in person.

Attention is called to the clause in the agreement referred to in the former opinion in which it is said, "This paper writing, whatever it is called, seems to be an abandonment of all claims except for cost and some goods claimed to be short, which shortage the master denies," and the attention of the court is now called especially to the following claim in said paper writing:

"These goods are received at New Bern and all claims for freight and delay thereon from New Bern to the point of destination are waived except as hereinafter mentioned."

And afterwards, in a subsequent clause of this paper, appears this stipulation:

"And C. H. Fowler & Co. hereby release and discharge the said E. C. Warren and his vessel from all further claim against them, except those claims which are already set out in the libel proceedings now pending in the District Court of the United States for the Eastern District of North Carolina, all of which are to be unprejudiced by this delivery and acceptance, except that they make no further claim as to actual delivery of the goods herein specified, but does not prejudice their right to recover judgment for possession thereof and for cost, and such damages as are set out in their libel as though no delivery had been made."

This paper is signed by the master and the consignee. The effect of this paper on the pending libel is the question now presented. The court would hardly be asked or expected to give a judgment for the possession of goods already delivered, and this was the main purpose of the libel, to get the goods. It was not presented at the former hearing, but filed after the hearing, and there is some dispute among counsel as to the propriety of this paper being thus called to the attention

of the court. Into this contention the court will not enter further than to say as it affects pending litigation it should have been filed at the hearing and its effect discussed, that the court might intelligently pass upon the questions at issue. Whether affected by the paper or not, the court was entitled to all the facts at the hearing. The kernel being taken out, it is not fair to the court to ask that the mere shell be considered; but, treating the parties perfectly fair, this agreement that it should not affect the pending litigation as to cost constrains the court to consider the whole case from the first, and to hold the libel was properly filed in the District Court.

The contract was strictly maritime, and the court has jurisdiction. It was obligatory under the contract for the vessel to complete the voyage; and, while this obligation was waived by the consignees as to the goods received at Mawl Point, where the vessel was aground, it was not and could not be so waived as to merchandise (it appears now about $2,000 worth) consigned to other parties. And it appears the master agreed at Mawl Point to take these goods to New Bern and store them in a bonded warehouse, but unexpectedly put to sea, as was before found, to return them to the consignors, which without consent he should not have done. This action was a violation of the parol charter party, and a mistake as to his rights in the premises placed him in the wrong and justified the libel in rem. In the start, then, he was at fault.

The attachment and monition was issued September 22, 1906, and executed, according to the marshal's return, September 25th, and returned into court September 26th. The paper now filed by the master as exempting him from the cost, but providing as above stated, that it should not have this effect, was entered into November 26, 1906, when the vessel and cargo was in custody and after the cost had been incurred. There was some recrimination in the agreement about parties seeking to bring on litigation, intentions, etc., but the court cannot enter into these matters or be influenced by them, but must deal with the facts proved. Being at fault when the libel was filed, it seems the vessel and master, who was bailee, the names of the real shipowners not being disclosed, should pay the cost. The action of the master was the primal cause of the litigation. He may have been justified in his own judgment or his advisers, evidently laymen, but was not from a legal standpoint.

While, as said before in the former opinion, the agreement of parties seems to be an abandonment of all claims except for cost and some goods claimed to be short, which shortage is denied and as to this shortage there is no clear proof, the costs, which are considerable, should be paid by the vessel and her master and bailee. The master, who petitioned for a reopening and further hearing, now produces a receipt of the seamen, and there is some discussion as to who induced these seamen to intervene. Into this question again the court cannot enter. They filed under the rule intervening petitions, and under the rule were made parties. The receipt filed is dated after the former hearing and filing of the decree, and can in no way affect the question of cost on the intervening petitions. To pay these seamen was what the court decided the ship and master must do. He has done no more, and they are entitled to their legitimate cost, but no proctor's fee.

The claim for demurrage, disallowed heretofore, because not properly filed or made out, was not proved, but it is understood is abandoned and disallowance thereof acquiesced in on the rehearing, at all events it was not pressed and the former decree as to this is unchanged.

It is now considered, ordered, and decreed that the former decree herein be modified and amended to read that the libel herein be dismissed at the cost of the respondent, who will be taxed with the cost thereof, including the cost of the interveners, without proctor's fee as to intervening libels. Claim for damages is again disallowed and for demurrage.

In re B. D. GARNER & CO. et al.

(District Court, N. D. Alabama, N. D. May 15, 1907.)

No. 1,223.

BANKRUPTCY—TEMPORARY RECEIVER—PERISHABLE PROPERTY—SALE.

Under Bankr. Act July 1, 1898, c. 541, § 2, subd. 3, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421], authorizing the appointment of a temporary receiver "for the preservation of the estate," such receiver had power to sell perishable property in his hands in order to prevent loss thereof.

In Bankruptcy. On petition for a review of action of referee

Walker & Spragins, for claimant.

Cooper & Foster, C. E. Jordan, and H. A. Bradshaw, for receiver and petitioning creditors.

HUNDLEY, District Judge. In this cause, on the petition of John T. Ashcraft, who had been heretofore appointed receiver of a stock of goods claimed to belong to the bankrupts and found in the hands of Charles H. Price, a third person, the referee made an order for the sale of said goods as prayed for in the petition of the receiver. This order was granted upon proof offered that the goods were of a perishable nature and liable to greatly deteriorate by delay in awaiting the usual and final disposition of the issues in the case. The goods were seized upon an order made by the referee on a petition filed by the creditors; a bond of indemnity being duly made to Charles H. Price, the claimant, who was in possession of the property at the time of seizure. The referee gave notice to the claimant, Charles H. Price, of a hearing on the petition filed by the receiver, and Price went before the referee, by attorneys and in person, and made a special appearance for the special purpose of objecting to the jurisdiction and power of the referee's court to order a sale of the goods on the petition of the receiver, and moved the court for an order to vacate and annul the order of seizure made in this cause, and to direct the receiver to deliver the goods to himself, the said claimant, because no proper proceedings had been instituted by the trustee of this bankrupt estate to recover or subject said property to sale. It is not questioned by the claimant that the property is of a perishable nature and liable to deteriorate in value with time. The referee further ordered that the proceeds derived from the sale should be deposit-

ed by the receiver in his own name as receiver in a depository of this court, and that he should not deliver the proceeds of said sale to the trustees of said bankrupt estate without an order from the referee or a judge of this court.

The question here presented for adjudication is: Did the referee have jurisdiction, upon the evidence showing the deteriorating character of the goods, to properly grant the prayer of the receiver's petition and make an order of sale? The question as to the jurisdiction to seize the property is not raised on this hearing in any manner. Thus we have a case presented in which the property claimed to be the property of the bankrupt is within the lawful custody of the court, through its receiver duly appointed, and that this property is of a perishable nature and will greatly deteriorate if held together without a sale thereof, and also that great expense will be incurred in keeping it together. The argument is made by counsel for the claimant that, the receiver being only a temporary receiver under subdivision 3 of section 2 of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421]), the purpose of his receivership is solely to preserve the property until the petition in bankruptcy "is dismissed or the trustee is qualified." I cannot agree with this contention of counsel, because, on reading subdivision 3 of section 2 of the bankrupt act, it will be seen that the chief purpose for the authority therein granted is "for the preservation of estates." Granting that the bankruptcy court had the jurisdiction to take in possession the property of the claimant and place it in the hands of a receiver for the preservation of the estate, then it would seem clear to my mind that that court had jurisdiction to do whatever was necessary in fact to secure and effectuate such preservation. To permit the property to deteriorate and become worthless while in the hands of the receiver would surely not be to carry out the intent and purpose of that section of the bankrupt law. That the bankrupt court had full jurisdiction and authority under the premises to order a sale of the property for the purpose of preservation seems to my mind to be settled by ample authority. When the bankruptcy court in any case finds it absolutely necessary for the preservation of the estate to take possession of the property of the adverse claimant by means of a receiver or marshal under clause 3 of section 2 of the bankrupt act, then such seizure and determination of the issues thus between the receiver or trustee and the adverse claimant is a proceeding in bankruptcy, as distinguished from a controversy at law or in equity, and hence the bankruptcy court is authorized and empowered to proceed in a summary way, rather than by a plenary suit. In the case of Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, the Supreme Court reviews various cases bearing upon the question at issue and says:

"We think the result of these cases is, in view of the broad powers conferred in section 2 of the bankruptcy act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of the matter in controversy, that, when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held

by him or for him, jurisdiction extends to determine controversies in relation to the disposition of the same, and the extent and character of the liens thereon or rights therein."

As sustaining the conclusions reached in this cause, reference is also here made to the following cases: In re Rochford et al., 124 Fed. 182, 59 C. C. A. 388; In re Knopf (D. C.) 144 Fed. 245. It was within the jurisdiction of the referee to make the order of sale of the property, and the petition to review his action cannot be sustained.

The petition for review of the finding of the referee, and to set aside the same, is therefore denied, and his action in directing the sale of the property is affirmed.

UNITED STATES v. OUWERKERK.

(Circuit Court, S. D. New York. May 14, 1907.)

No. 4,136.

CUSTOMS DUTIES—CLASSIFICATION—EVERGREEN SEEDLINGS—"EVERGREENS."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650], the provision for "evergreen seedlings" is not restricted to such evergreen plants as the conifers and box, but extends to those that retain their verdure or greenness throughout the year; and seedlings of rhododendrons and laurels, that remain green constantly, are included in said provision.

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

For decision below, see G. A. 6,169 (T. D. 26,772), reversing the assessment of duty by the collector of customs at the port of New York on importations by P. Ouwerkerk.

The Board's opinion reads as follows:

WAITE, General Appraiser. The merchandise consists of a variety of trees and shrubs, returned by the appraiser as "nursery stock," and assessed for duty by the collector at 25 per cent. ad valorem under the last clause of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650]. The goods are claimed to be dutiable at $1 per 1000 plants and 15 per cent. ad valorem, under the same paragraph, as "evergreen seedlings." The relevant provisions of paragraph 252 are as follows:

"252. * * * Evergreen seedlings, one dollar per thousand plants and fifteen per centum ad valorem; * * * stocks, cuttings and seedlings of all fruit and ornamental trees, deciduous and evergreen, shrubs, and vines, manetti, multiflora, and brier rose and all trees, shrubs, plants and vines common ly known as nursery or greenhouse stock, not specifically provided for in this act, twenty-five per centum ad valorem."

The appraiser reports that most of the plants are well-known evergreen trees, of such common varieties as fir, cypress, cedar, box, etc., but that the plants of those varieties in the importation are in no sense seedlings, having been either grafted, budded, or grown from cuttings. There is direct conflict between the statements of the appraiser and the testimony of the importer; the latter declaring that the plants are evergreens grown from seed. The testimony of the importer, however, is uncorroborated, is not very full or satisfactory, and, in view of his interest in the case, cannot be regarded as supplying the necessary preponderance of evidence to overcome the effect of the appraiser's reports, which are carefully drawn and presumably based upon adequate investigation of the facts. We accordingly find the facts to be as

reported by the appraiser, so far as concerns the plants above referred to. In the Board decision in Re Rolker, G. A. 5,305 (T. D. 24,305), the provision for "evergreen seedlings" in said paragraph 252 was construed to apply to evergreens grown from seed, as distinguished from those propagated by cuttings, budding, or grafting; the latter class falling under the last subdivision of the paragraph. That ruling was never appealed from, and will govern here.

Three other varieties of plants are involved, designated respectively, "Aucuba japonica," "Rhododendron ponticum," and "Kalmia latifolia," which are conceded by the appraiser to be evergreen seedlings. As will be seen hereafter, these plants are species of rhododendron or laurel, or similar plants. The appraiser's reasons for returning them as nursery stock rather than as evergreen seedlings are perhaps best stated in the following excerpt from his report: "The term 'evergreen seedlings,' as employed in the tariff, is believed to refer to the same kind of trees that are commonly called 'evergreens' by the public, and which include the pine, cypress, fir, cedar, and other well-known trees, and in its application is confined exclusively to the conifers and box, and the common understanding of the word 'evergreens' has been followed by this office. Any other interpretation could not fail to result in confusion; for, if the term 'evergreen seedlings' were to apply to the seedlings of all evergreen trees and shrubs, it would cover orange and lemon trees, which are truly evergreen, araucarias, a variety of plants extensively grown under glass in this country and usually attaining a height of 18 inches, yet in its native place (Norfolk Islands) it is a ponderous evergreen tree 150 feet high and 20 feet in circumference, and many other plants."

It is believed the construction adopted by the appraiser places a narrower limitation upon the statute than the ordinary meaning of the language justifies. "Evergreen," used as an adjective, means "always green; verdant throughout the year" (Century Dictionary); or "retaining greenness or verdure throughout the year; not deciduous" (Standard Dictionary). As a noun the word is defined as "a plant that retains its verdure through all seasons, as the pine and other coniferous trees, the holly, laurel, holm oak, ivy, rhododendron, and many others" (Century Dictionary). In the provision for "evergreen seedlings," the word is doubtless used by way of contrast with "deciduous," as indicated in the provision for "fruit and ornamental trees, deciduous and evergreen." A deciduous plant is one which loses its leaves, etc., every year, especially in the autumn. The appraiser evidently thinks his action conforms to the trade understanding of the term. We hesitate to find, however, upon the facts reported by him, that a trade use of the term "evergreen seedlings," more restricted than its common use, existed at the time of the passage of the act, or was so well known as to impress itself upon the language adopted by Congress.

That the plants under discussion are evergreen in the commonly accepted sense of the term is apparent from standard authorities, if not from the record. Aucuba japonica, sometimes called the "Japanese laurel," is one of the best known species of aucuba, "a small genus of Asiatic evergreen shrubs of the dogwood family." "Aucuba," "Laurel," Standard and Century Dictionaries. English botanical works speak of aucuba as fine, hardy evergreen shrubs, thriving better than any others in the smoky atmosphere of dense cities. Paxton's Botanical Dictionary, p. 60; Nicholson's Dictionary of Gardening, vol. 1, p. 145; Lindley's Treasury of Botany, p. 110. Of rhododendrons the Century Dictionary says that "the leaves in the typical species, forming the section rhododendron proper, are evergreen," and, again, that they "are handsome shrubs, much cultivated for their evergreen, leather leaves," etc.; that "the pontic rhododendron (R. ponticum) is the most common species of European gardens, hardy only as a low shrub in the northern United States." The Encyclopedia Britannica says: "The varieties grown in gardens are mostly derived from the pontic species (R. ponticum) and the Virginian (R. catawbiense). These are mostly hardy in England. The common pontic variety is excellent for game covert from its hardiness," etc. The genus Kalmia is said to comprise "six species of ornamental hardy evergreen shrubs," of which Kalmia latifolia is the best known and most grown species. Nicholson's Dictionary of Gardening, vol. 2, p. 216. This species is widely

known in the United States as the American laurel ("Kalmia," Century Dictionary).

The appraiser does not deny that the plants referred to are evergreens in this broad sense, but states that the Aucuba japonica is cultivated in this country almost exclusively as a decorative shrub and grown under glass, and that if exposed to the winters of this climate it would perish. He admits that the Rhododendron ponticum is hardy in our usual winters, but maintains that neither that plant nor the Kalmia latifolia is hardy in all sections of the United States. In our judgment, however, inquiry as to whether a plant is hardy or not in a particular locality or under given climatic conditions is not the proper test to determine its tariff classification as an evergreen. It is sufficient if it fall within the general class of evergreen plants. The protests are sustained with respect to Aucuba japonica, Kalmia latifolia, and Rhododendron ponticum, and overruled as to all other merchandise.

The collector's decision is reversed to the extent indicated.

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

Hatch & Clute (Walter F. Welch, of counsel), for importer.

PLATT, District Judge. Decision affirmed.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(District Court, E. D. North Carolina. May 21, 1907.)

1. RAILROADS—EQUIPMENT OF CARS—SAFETY APPLIANCES—VIOLATION OF STATUTE—PENALTY—ENFORCEMENT—PLEADING.

An action by the United States against a railroad company to recover penalties for violations of the safety appliance act of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), is one of debt, and in such an action brought in North Carolina, where the pleading is governed by the state practice, it is not necessary that the complaint should allege a specific date in describing the violations.

[Ed. Note.—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.]

2. SAME—BURDEN OF PROOF.

In an action to recover penalties from a railroad company brought under section 6 of the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 53 [U. S. Comp. St. 1901, p. 3174]), as amended by Act April 1, 1896, c. 87, 29 Stat. 85, the burden rests upon the defendant to bring itself within the proviso, excepting from the provision of the act four-wheeled standard logging cars.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

3. SAME—PLEADING.

In such an action, it is not incumbent on the plaintiff to allege and prove that the defendant had not used due care or ordinary diligence in making an inspection or in repairing such defects as that inspection may have disclosed; the purpose of the statute being to make a railroad company liable unconditionally for its violation.

4. COMMERCE — RAILROAD REGULATION — SAFETY APPLIANCE ACT — CONSTITUTIONALITY.

The federal safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1905, p. 603], is within the constitutional power of Congress to regulate interstate commerce.

On Demurrer to Complaint.

Harry Skinner, U. S. Atty., and Luther M. Walter, Asst. U. S. Atty.

Junius Davis and Geo. B. Elliott, for defendant.

PURNELL, District Judge. A bill was filed asking for penalties, 45 in number of $100 under each for violations of the act of March 2, 1893, known as the "Safety Appliance Act" (Act March 2, 1893, c. 196, § 1, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act April 1, 1896, 29 Stat. 85 and Act March 2, 1903, c. 976, § 1, 32 Stat. 943 [U. S. Comp. St. Supp. 603]. The bill of complaint alleges that defendant is a common carrier engaged in interstate commerce, and is a corporation organized and doing business under the laws of the states of Virginia, North Carolina, and other states, having an office and place of business at South Rocky Mount in the state of North Carolina. Of the offenses made the basis of this suit, 41 were violations of section 2 of the act (defective couplings) and 4 were violations of section 4 (failure to have secure grab irons and handholds). The defendant has filed a demurrer to each count and sets up 9 specific grounds of demurrer. Only 3 general grounds were urged in support of the demurrer at the hearing:

First. That the complaint is defective, in that it alleges the violation "on or about" a particular date, and one other adverted to, to wit, that the act of Congress is unconstitutional, but this position was not vigorously insisted on. A pleading in a civil suit need not be as precise in naming dates as when the prosecution is by indictment. It is provided by federal statute that, as to matters of practice and pleading, the courts of the United States shall conform as near as may be to the practice and pleadings and forms and mode of proceeding to the state courts. Rev. St. 914 [U. S. Comp. St. 1901, p. 684]. It follows, therefore, that whether the petition is defective in the regard complained of depends upon the practice in the courts of North Carolina. Section 6 of the safety appliance act provides that the penalty for a violation of the act shall be $100, "to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violations shall have been committed." This is an action in debt. United States v. Southern Railway Company, 135 Fed. 122. The rule in North Carolina is that in cases of this nature the naming of a specific date is not necessary in stating the cause of action in the complaint. In Lumber Co. v. Railroad, 141 N. C. 171, 53 S. E. 823, it was held that in a suit to recover penalties against a defendant on account of discriminating in overcharges on shipments of logs it was sufficient to locate the time of shipments between the 15th day of November, 1898, and the 30th day of April, 1901, inasmuch as the defendant could ask for a bill of particulars. The defendant is clearly put upon its defense. The number of the car and nature of the traffic and the date given in each count sufficiently advise the defendant of the time of the violation, so that it can intelligently prepare its defense. This is sufficient.

Second. Complaint does not negative proviso in section 6. Another ground urged in support of the demurrer is that the complaint does not allege that the cars mentioned in the various causes of action were not four-wheel cars or eight-wheel standard logging cars. The Supreme Court of the United States in the case of Schlemmer v. B. R. & P. Ry. Co. (October term, 1906, decided March 4, 1907) 27 Sup. Ct. 407, 51 L. Ed. ——, says on that point, Justice Holmes delivering the opinion:

"A faint suggestion was made that the proviso in section 6 of the act that nothing in it shall apply to trains composed of four-wheeled cars was not negatived by the plaintiff. The fair inference from the evidence is that this was an unusually large car of the ordinary pattern; but, further, if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The word 'provided' is used in our legislation for many other purposes besides that of expressing a condition. The only difference expressed by this clause is that four-wheeled cars shall be excepted from the requirements of the act. In substance, it merely creates an exception which has been said to be the general purpose of such clauses. Baird Case, 194 U. S. 25, 36, 37, 24 Sup. Ct. 563, 48 L. Ed. 860, 865, 866. 'The general rule of law is that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it.' The rule applied to construction is applied equally to the burden of proof in a case like this."

Another ground urged in support of the demurrer is that the complaint does not allege that the defect was discovered, or could by reasonable inspection have been discovered, so that the car could have been repaired before it was hauled or moved, as alleged in the complaint. This precise question—that is, whether, in order to establish a violation of the safety appliance act, it is necessary or incumbent upon the plaintiff to show that the defendant had not used due care or ordinary diligence in making an inspection and in repairing such defects as that inspection may have shown to exist—is one of the most important which has yet arisen in the enforcement of the safety appliance act. If the contention of the defendant in this respect be correct, then a restriction has been placed upon the provisions of the act, which will seriously hamper the government in its efforts to enforce the provisions of the statute. The title of the act of March 2, 1893, is:

"An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving wheel brakes, and for other purposes."

By section 1 of the act it is made unlawful for a carrier engaged in interstate commerce by railroad to use a locomotive engine not equipped with power driving-wheel brakes and appliances for operating the train brake system. By section 2 it is made unlawful to use a car not equipped with automatic couplers. By section 4 it is made unlawful to use a car not provided with secure grab irons or handholds. By section 5 it is made unlawful to use a car whose drawbars do not conform to the standard height. By section 6 it is provided that the United States shall have a right of action to recover a penalty from the common carrier using, hauling, or permitting to be hauled or used on its line "any car in violation of any of the provisions of this act."

By section 8 it is provided that, whenever an employé is injured by "any locomotive, car, or train in use contrary to the provision of this act," he shall not be deemed to have assumed the risk occasioned by such use of the locomotive, car or train. In other words, whenever a carrier uses a car in violation of the provisions of the act, the United States shall have a right to the penalty of $100, and the injured employé shall be protected from the defense of "assumption of risk." There are therefore two penalties fixed upon the carrier. One is the $100 payable to the United States, and the other is the denial of assumption of risk as a defense when sued by an injured employé. The primary test as to whether the two penalties should be applied is the same in each instance, viz., Was the car used in violation of the provisions of the act? The United States can recover the penalty of $100 under all circumstances where the injured employé has the benefit of the denial of the doctrine of "assumption of risk" as a matter of defense by the carrier.

One of the first cases arising under the safety appliance act was that of an injured employé, decided by the Circuit Court of Appeals for the Eighth Circuit, wherein certain conclusions as to the provisions of the act were announced by that court. Johnson v. Southern Pacific Railway, 117 Fed. 462, 54 C. C. A. 508. The facts in that case were as follows: The defendant, Southern Pacific Railway Company, was an interstate common carrier by railroad, operating trains between San Francisco, Cal., and Ogden, Utah. In the course of its operations it had occasion to run as a part of the equipment of a certain passenger train a dining car which, at a certain station in the state of Utah, was left on a side track to be picked up and returned to its initial terminal by a west-bound train of the same company. For the convenient execution of the return movement, Johnson, a brakeman in the employ of the defendant company, undertook, under orders, to couple one of the defendant's engines to said dining car for the purpose of taking it to a neighboring turntable, to be there turned around and placed in position to resume its return journey. The engine was equipped with power driving-wheel brakes and also with a Janney coupler, and the dining car was equipped with a Miller coupler. Each of these couplers was a so-called "automatic" or "safety" coupler, which would couple by impact with couplers of its own type, but the two would not couple by impact with each other because of differences in construction or type. Johnson knew that the couplers would not couple automatically, and he undertook to make the coupling by using a link and pin. To make the coupling in such manner it was necessary for him to go between the ends of the engine and the dining car, and he did so. Two attempts to make the coupling failed, and in the course of the third attempt his hand was crushed so that it became necessary to amputate his arm above the wrist. He sued the company, his employer, for damages, alleging negligence on the part of the latter in that on the occasion in question it was using on its line "cars" not equipped as required by said statute, and that he, as an employé of said company, was relieved by the provisions of the eighth section of said statute from the doctrine concerning "assumed risks," while endeavoring, under orders, to make the coupling in question. The

trial court directed the jury to return a verdict for the defendant. The Circuit Court of Appeals, affirming the judgment of the trial court, held that under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and that the provisions of the statute in question did not have the effect of relieving him from this burden, as was contended.

It also decided, in the same connection, that the statute did not forbid the use of locomotives not equipped with automatic couplers; that both the engine and the car in question were equipped as the law directs, the one driving-wheel brakes and the other with automatic couplers; that the statute changes the common law and must be strictly construed, and that the general law is not to be abrogated by such a statute further than the clear import of its language requires; that it was also a penal statute, and its provisions should not be so broadened by judicial construction as to compel the punishment of an act not denounced by the fair import of its terms; that even, if the word "car" means or includes "locomotives," still the case does not fall within the prohibitions of the law because both the locomotive and the car were, in fact, equipped with automatic couplers. The statute contains no words requiring all cars used on an interstate road or used in interstate commerce on any particular road to be equipped with the same kind of coupling or with couplers which will couple automatically by impact with every other coupler with which it may be brought into contact in the usual course of business. A car "equipped with practical and efficient automatic couplers * * * which will couple automatically with those of their [own] kind fully and literally complies with the terms of the law, although these [such] couplers will not couple automatically with automatic couplers of all [other] kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind, as provided by the statute, although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use." Page 470 of 117 Fed., page 508 of 54 C. C. A. To review the judgment of the Circuit Court of Appeals affirming the judgment of the trial court in favor of the defendant company, at the instance of Johnson, the case was brought into the Supreme Court of the United States both on certiorari and by writ of error. While the case was pending in the Supreme Court, and before it had been argued there, Congress enacted and the President approved the act of March 2, 1903 (32 Stat. 943, c. 976), entitled "An act to amend an act * * * approved March 2, 1893," etc., by the first section of which it was declared "that the provisions and requirements of the act of * * * March 2, 1893, shall be held to apply * * * in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, * * * and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," with certain expressed

exceptions not important here. It must be noted that the act applies "in all cases" of coupling or attempted coupling. In this state of the law the Johnson Case came on for hearing before the Supreme Court and was argued by counsel on October 31, 1904. On the 19th day of December, 1904, the unanimous court, speaking through its Chief Justice, reversed the judgments both of the Circuit Court of Appeals and of the Circuit Court, and remanded the cause, with instructions to set aside the verdict and award a new trial. 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. In the course of its opinion the Supreme Court, after setting forth in extenso the provisions of sections 2 and 8 of the act of March 2, 1903, above referred to, and after reciting that the Circuit Court of Appeals had held, "in substance, * * * that the locomotive and car were both equipped as required by the act, as the one had a power driving-wheel brake and the other a coupler, that section 2 did not apply to locomotives, * * * and that the locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required, if section 2 applied to both," proceeds as follows:

"We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction. The intention of Congress, declared in the preamble and in sections 1 and 2 of the act, was 'to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes,' those brakes to be accompanied with 'appliances for operating the train brake system,' and every car to be 'equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' whereby the danger and risk consequent on the existing system was averted as far as possible. The present case is that of an injured employé, and involves the application of the act in respect of automatic couplers; the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words 'any car' of the second section were intended to embrace and do embrace locomotives. * * * Now, it was as necessary for the safety of employés in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be. * * * And manifestly the word 'car' was used in its generic sense. * * * Tested by context, subject-matter, and objects, 'any car' meant all kinds of cars running on the rails, including locomotives. * * * The result is that, if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car, but that the couplers on each, which were of different types, would not couple with each other automatically by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple. Nevertheless the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that, where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact by means of the couplers actually used on the cars to be coupled. 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. The point was that the railroad companies

should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars. If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow. * * * The primary object of the act was to promote the public welfare by securing the safety of employés and travelers, and it was in that aspect remedial, while for violations a penalty of $100 recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment. * * * Moreover, it is settled that, 'though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature.' * * * Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words 'coupled automatically by impact, and which can be uncoupled without the necessity of men going between the cars,' and cannot be sustained. * * * The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but whatever the devices used they were to be effectively interchangeable. * * * That this was the scope of the statute is confirmed by the circumstances surrounding its enactment as exhibited in public documents to which we are at liberty to refer. * * * In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with. * * *"

Referring to the act of March 2, 1903, amending the prior act of 1893, the court said:

"As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative and declaratory, and, in effect, only construed and applied the former act. * * * This legislative recognition of the scope of the prior law fortifies, and does not weaken the conclusion at which we have arrived."

The rules laid down in that case by Chief Justice Fuller are controlling in the disposition of the points raised by the defendant in this case. Such a construction must be given the statute as will accomplish the evident intent of Congress. The statute must not be frittered away by judicial construction. The court cannot read into the statute what Congress has omitted.

Other authorities unnecessary to cite appear in the reports. The case cited above is the last of the highest court of the land. It is in accord or confirmatory of many decisions in the District Courts cited in the brief, and is controlling.

The argument of the claim that the act of Congress is unconstitutional was not, as the court understood counsel, seriously insisted on. Only the opinions in U. S. v. Scott (D. C.) 148 Fed. 431, and Brooks v. Southern Pacific Co. (C. C.) 148 Fed. 986, were cited for the position when the court reminded or asked counsel if the contrary had not been decided. It is best for the court to consider and pass upon the question raised. I cannot concur in the views or argument that the act is in excess of power granted to Congress, and for that reason void. These opinions were on the first as to provision making it a criminal offense for any employer to require any employé to agree not to become or remain a member of a labor organization, etc.

As it is understood this question is now before the Supreme Court on appeal, it would seem unnecessary to discuss it further than to hold the act of Congress and the amendatory acts are not in violation of the Constitution as contended by defendants in this cause. Spain v. St. L. & S. F. R. Co. (C. C.) 151 Fed. 522.

The demurrer is overruled and a decree will be entered accordingly, with the usual leave to answer.

THE CITY OF PUEBLA.

(District Court, N. D. California. April 26, 1907.)

No. 13,512.

1. SALVAGE—RIGHT TO COMPENSATION—SERVICES NOT OF BENEFIT.

Where a steamer took a line from another which had become disabled at sea by the breaking of her propeller, but when it immediately parted went on her way, leaving the disabled vessel no better off than before, she is not entitled to share in the salvage award on the subsequent rescue of the disabled vessel by others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 30.]

2. SAME—AMOUNT OF COMPENSATION—TOWING DISABLED VESSEL AT SEA.

The passenger steamer Puebla, with 185 passengers on board, broke her propeller shaft on December 30th, when 35 miles off the Oregon coast. There was a heavy sea, and her few sails only enabled her to keep off the shore. During the next 24 hours she drifted 21 miles, and was then met by the steamer Chehalis going northward, which undertook to tow her to San Francisco, and did so, with the assistance of the steamer Norwood, which joined her the next day at her request. The time required to reach San Francisco was about 3½ days after the service commenced. The wind had moderated, and the Puebla was not in any immediate danger when taken in tow; but there was imminent danger of bad weather at that season of the year, although none was encountered during the towing. Her salved value with cargo and pending freight was about $310,000. The Chehalis was worth $100,000, and she had 8 passengers. The Norwood was worth $121,000. *Held*, that the Chehalis was entitled to an award of $10,500 and the Norwood $9,500, to be divided three-fourths to the owners and one-fourth to the crews.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 81. Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Frank & Mansfield, for libelants and intervener.

Page, McCutchen & Knight, for respondent.

DE HAVEN, District Judge. This is an action by the owners of the steamers Chehalis and Norwood, and the owner of the steamer Charles Nelson, as intervener, in behalf of themselves and the officers and crews of said steamers, to recover compensation for salvage service alleged to have been rendered by these vessels to the steamer City of Puebla. The case is this: On the 30th of December, 1905, the City of Puebla, a passenger steamer of 3,000 tons burden, on her voyage from Puget Sound to the city of San Francisco, when at a point 35 miles off the Oregon coast, a little north of the Columbia river, broke her propeller shaft, and was thus disabled so that she could not

use her steam power. There was a strong northwest wind and a heavy sea at the time; the few sails carried by her were immediately set, and with these her master was able to keep her off shore, but she could make little headway. About an hour after the accident she was overtaken by the Charles Nelson, and after some delay the Puebla, upon a second attempt, succeeded in passing a hawser to her; but it parted immediately, and the Charles Nelson proceeded on her way. The testimony of the master of the Charles Nelson as to the service rendered by that vessel is, in substance, as follows:

"The City of Puebla lowered a boat and ran another line to us. This line we got aboard and made fast. This occupied us four hours, owing to the heavy seas. We tried to tow them for about half an hour, but, the line being small and the seas so heavy, it parted. * * * After the last line parted, it was going on night, and our own ship in poor condition. Seeing no chance of assisting her any further, I motioned to the captain I would have to leave. I notified the Whittier of the condition of the Puebla and also notified the Pacific Coast Steamship Company's Queen."

This was all that was done by the Charles Nelson. Neither the Whittier nor the steamer Queen rendered any assistance to the Puebla. During the 24 hours following the accident, the Puebla drifted 21 miles to the southard, and only made 7 miles heading off shore to the westward, and she was then met by the steamer Chehalis bound north with passengers and freight, on a voyage from San Francisco to Gray's Harbor. The Puebla was flying signals of distress, and her master requested the Chehalis to tow his vessel to San Francisco. This the Chehalis consented to do, and the Puebla lowered her boat, and in a short time succeeded in passing a small line to the Chehalis, to which the latter bent her towing hawser, which was by this means taken on board the Puebla and made fast. The wind had moderated, the sea was not rough, and the Puebla was not in imminent danger at this time. The peril to which she was exposed was the probability of meeting with stormy weather, which at this season was very likely to occur, and which she was in no condition to withstand for any great length of time. Fortunately such weather was not in fact encountered during the time the Puebla was being towed into the port of San Francisco; but, if storms or adverse winds had been met, the service undertaken by the Chehalis would have been rendered difficult, and in some degree dangerous. Indeed, it may be said to be a fact so well known as to be a matter of common knowledge among seafaring men that, in towing a disabled vessel at sea, great care is required, even under favorable conditions of weather, to guard against the dangers incident to such employment. The Chehalis commenced towing the Puebla at 7:30 p. m. December 31, 1905, and at 4 o'clock p. m. on the afternoon of the next day she met the steamer Norwood bound north on a voyage from San Francisco to Gray's Harbor. The Chehalis with her tow was then only making three miles an hour, and her master signaled to the Norwood for assistance, which the latter was willing to render; but it was then so near dark that nothing could be done by the Norwood except to stand by during the night. This she did, and, at 8 a. m. on the following morning passed her hawser to the Chehalis, and the two vessels proceeded toward the port of San Francisco with the Puebla in

tow, where they arrived with their tow on the morning of January 4, 1906. The Puebla had on board at the time of the accident to her propeller shaft 185 passengers. In her salved condition she was of the value of $225,000. The value of her cargo and freight pending was $86,488. The steamer Chehalis was worth $100,000, and she had on board eight passengers. The steamer Norwood was of the value of $121,000.

1. Such being the facts, it is clear that the libel of the Charles Nelson must be dismissed. The claim which she makes is not, as argued in behalf of her owners, within the rule followed in the case of The Strathnevis (D. C.) 76 Fed. 855, and cases there cited, which under some circumstances allows one who has contributed to the success of a salvage service, finally completed by others, to share in the salvage award. It is undoubtedly the law, as stated in that case, that "when a vessel has been actually rescued from a situation of peril, all who have contributed at any stage of the rescuing service are entitled to a share of the reward"; and "when salvors are prevented by stress of weather, fog, or darkness, or other circumstances beyond their control, from rendering further assistance, and there has been no willful disregard of duty on their part toward the imperiled ship, there should be no forfeiture" of the right to salvage. But this rule can have no application, unless the vessel claiming the salvage reward rendered assistance at some stage of the rescuing service which in some way contributed to the final safety of the rescued ship. Salvage is defined as:

"The reward allowed for a service rendered to marine property, at risk or in distress, by those under no legal obligation to render it, which results in benefit to the property if eventually saved." Hughes on Admiralty, p. 127.

The Charles Nelson, as appears from the facts above stated, did nothing which resulted in benefit to the Puebla, nothing which either directly or indirectly contributed to the success of the salvage service which was afterwards undertaken and completed by the Chehalis and Norwood, and she is therefore not entitled to recover in this action.

2. It is not disputed that the Norwood and Chehalis are entitled to salvage compensation for the services rendered by them, and the only question is as to the amount which should be allowed. The principle upon which courts of admiralty proceed in this class of cases is well settled, and is stated by Mr. Justice Bradley in Murphy v. The Suliote (C. C.) 5 Fed. 99, in the following language:

"The amount of salvage that ought to be allowed for the services performed depends on several considerations, as: First, the extent and danger of the services; secondly, the risk to which the vessels and other property employed in the service were exposed; thirdly, the value of the property saved, and the risk of destruction by which it was imperiled."

In the case of The Grace Dollar (D. C.) 103 Fed. 665, the court said:

"The compensation to be allowed the salvor is measured by a liberal scale so as to encourage others to incur danger to themselves and property in going to the relief of vessels in distress, and surrounded by perils from which they might not be able to escape without assistance from others. But, while the compensation is to be liberal, it must not be extravagant, in view of the actual service rendered and the actual danger encountered."

The general rule as above stated is plain, but in practice it is not possible to accurately measure the value of a salvage service, and much therefore is necessarily left to the discretion of the court in fixing the amount of a salvage award; and in reaching its conclusion the court can derive but little assistance from reported cases. Each case depends upon its own particular facts, and in addition to this it may be said that what may to one judge seem a proper allowance may be either much more or much less than another would award upon substantially the same facts.

Upon consideration of the evidence, my conclusion is that the owners of the Chehalis are entitled to recover for themselves and the master and crew of said steamer the sum of $10,500, with interest from January 4, 1906, until paid, and the owners of the Norwood are entitled to recover for themselves and the master and crew of said steamer the sum of $9,500, with interest thereon from January 4, 1906, until paid; that said sums be apportioned as follows: Three-fourths to the owners, and one-fourth to the masters and crews of the vessels in proportion to their wages. The case will be referred for the purpose of ascertaining and reporting the several amounts to which the masters and members of the crews of said vessels are entitled. The libel of the Charles Nelson will be dismissed with costs, and the other libelants will recover costs.

Let such decree be entered.

STANDARD VARNISH WORKS v. FISHER, THORSEN & CO.

(Circuit Court, D. Oregon. May 13, 1907.)

No. 2,977.

TRADE-MARKS AND TRADE-NAMES—SUIT FOR UNFAIR COMPETITION—SUFFICIENCY OF BILL.

While the term "Turpentine Shellac," as applied to a wood filler or coating which consists principally of a mixture of turpentine and shellac, because of its descriptive character, cannot be appropriated as a technical trade-mark by one manufacturer, a bill by such manufacturer states a case for equitable relief on the ground of unfair competition, where it alleges that by reason of the long and extensive use of such term by complainant to designate its product it has acquired a secondary meaning and become associated in the mind of the public with its said product exclusively, and that defendant is using such term in connection with an inferior article of its own manufacture for the purpose of palming the same off on customers as the goods of complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78, 79, 86, 102.]

In Equity. On demurrer to bill.

The complainant has heretofore and for a long time been engaged in the manufacture of a preparation designed and used as a first or priming coat upon inside wood finish, commonly known as a first coater or wood filler. As a designation for the distinctive characterization of such product manufactured by complainant, it devised and appropriated the words "Turpentine Shellac," and employed and used them as a trade-mark, by printing them upon labels which were pasted upon all packages or cans containing the product. This adopted trade-mark was, in 1898, registered with the National Paint, Oil &

Varnish Association, and advertised in the Paint, Oil & Drug Review, of Chicago, Ill., with a view to giving the same publicity and advertising the preparation in the market; and later, in 1902, such trade-name was registered and recorded in the Patent Office of the United States. So the preparation, as the bill of complaint shows, has been by means of such trade-name widely and extensively and for a long time advertised and sold in the markets, both in the United States and in Canada; and by reason of the long use of such trade-name in that connection, and by association always with the name of the complainant, it has acquired a secondary meaning, aside from its primary signification, which has now become peculiar to the preparation of the complainant's manufacture only. With this as a premise, it is further alleged that the defendants, with a view to availing themselves of the good reputation of complainant's preparation in the market, have wrongfully appropriated and are making use of complainant's trade-name for advertising their own product, which is of greatly inferior quality and adaptability to that of complainant, and for foisting their own preparation upon the custom as and for that of the complainant; and thus that they are injuring the complainant in its business by unfair competition, and imposing upon and defrauding the public. The purpose of the suit is to have defendants restrained from using complainant's trade-name, and from further engaging in unfair competition with complainant, as it respects the marketing and sale of its preparation and product. The sufficiency of the bill of complaint is challenged by demurrer.

E. B. Seabrook and Beach & Simon, for complainant.
Dolph, Mallory, Simon & Gearin, for defendants.

WOLVERTON, District Judge (after stating the facts). The first point presented in support of the demurrer is that the term or designation "Turpentine Shellac" is not such a one as is capable of being appropriated and employed as a trade-mark; and, the second, that the bill of complaint does not state facts sufficient to show that the defendants are engaging in unfair competition in business as it relates to the complainant and the preparation in question.

Without discussing the subject of difference in detail, a few general observations will indicate the rules of law applicable. Not all words and devices are capable of being appropriated as trade-marks. Especially is this true of words which indicate a generic name, or which are merely descriptive of an article of trade—of its qualities, ingredients, or characteristics—and before they can be so appropriated they must, either of themselves or by association, point distinctively to the origin or ownership of the article to which they are applied. As is said by Mr. Justice Strong, in the case of Canal Company v. Clark, 13 Wall. 311, 323, 20 L. Ed. 581:

"The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association."

Mr. Justice Brown announces the same principle in the case of Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247:

"Words which are merely descriptive of the character, qualities, or composition of an article, or of the place where it is manufactured or produced, cannot be monopolized as a trade-mark."

So, again, in the case of Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 673, 21 Sup. Ct. 270, 273, 45 L. Ed. 365, Mr. Chief Justice Fuller says:

"And the general rule is thoroughly established that words that do not in and of themselves indicate anything in the nature of origin, manufacture, or ownership, but are merely descriptive of the place where an article is manufactured or produced, cannot be monopolized as a trade-mark."

Two words, each denoting a simple product within itself, are here employed in conjunction, and it is sought to appropriate the designation as a trade-mark to the exclusive use of the complainant in the advertisement and sale of its preparation in the markets. The preparation in question is very naturally called "Turpentine Shellac," as it consists principally of a mixing or combination of the two more simple ingredients, turpentine and shellac, and, of course, in its ordinary signification the name is merely descriptive of the compound. It can scarcely indicate origin or proprietorship, so that it is not a term or designation suitable for appropriation as a trade-mark in the technical sense. As a trade-name, it may be properly so employed, but within itself it is inapt for exclusive appropriation as a trade-mark. Beyond this, however, words or symbols naturally descriptive of the product, while not adapted for exclusive use as a trade-mark, may yet acquire, by long and general usage in connection with the preparation and by association with the name of the manufacturer, a secondary meaning or signification, such as will express or betoken the goods of that manufacturer only, and in this sense he will be entitled to protection from an unfair use of the designation or trade-name by others that may result in his injury and in fraud of the public.

The principle that one person or firm should not sell his goods as the goods of another person or firm lies at the bottom of the legal objection, and it is the making use of the trade-name, which by a peculiar and particular signification betokens the goods of a particular manufacturer, for the purpose of foisting the goods of another, especially if they be of inferior stamp or quality, upon the market as the goods of that manufacturer, that the law will not tolerate. Such a practice is unfair and injurious both to the proprietor or manufacturer and to the public. The doctrine is nowhere better stated than in two cases to which I will now allude. In Noel v. Ellis (C. C.) 89 Fed. 978, the court says:

"Can descriptive words be the subject of a valid trade-mark? According to the doctrine of trade-mark law, they cannot be. At the same time the courts have decided that the originator is entitled to certain proprietary rights in a name which he has used to designate a certain article, and for which he has built up a reputation and a business, and which he has given the public to understand is an article prepared by him, so that certain words which certainly contain elements of description have been declared by the courts to be valid trade-marks. Such is the case on 'Cottolene.'"

And in Scriven v. North, 134 Fed. 366, 376, 67 C. C. A. 348, 358:

"Courts cannot forbid the use of words, which, standing alone and in their ordinary signification, are common property, or of numerals, which all the world is free to use, or of labels and stamps of common form, in which no one can claim an exclusive use, even though it may be shown that careless persons may in some instances be misled; but if they are so collocated and stamped upon an article in manifest imitation of a form previously adopted by another as a means of distinguishing his goods, with the deceptive purpose to mislead, disguising one's own goods thereby, and inducing the public to be-

lieve that they are the goods of another, such conduct falls under the ban. The general principle that no man has a right to pass off his goods as and for the goods of another is broader than the rules applicable to strict trade-mark. In this country this principle is generally designated as 'unfair competition in business.' "

So it is that words which carry with them the truth of the assertion and correctly describe the article are not susceptible of being appropriated as trade-marks; but if these words, by long association with a particular person in the manufacture or sale of a particular article, have acquired a secondary meaning, that denotes in the mind of the public the association as well as the article of commerce, their original proprietorship will be protected against any unfair methods to appropriate the use of them by others in palming off their goods for those of the rightful manufacturer.

Without discussing the subject in particular, I am of the opinion that the bill of complaint states sufficient to require an answer of the defendant. It is very much like the case of Putnam Nail Co. v. Bennett et al. (C. C.) 43 Fed. 800, decided by Mr. Justice Bradley, on the circuit bench. There the bill averred that:

"The defendants, well knowing the premises, and that your orator alone possessed the right to bronze horseshoe nails as a trade-mark, and to sell the same under the trade-name, as above set forth, have willfully disregarded the same, and, intending to deceive purchasers and defraud the public and to injure your orator, have for some time past been engaged, and are still engaged, in the sale of horseshoe nails, not manufactured by your orator, but similar in appearance to those manufactured by your orator, which they have had bronzed and sold as bronzed horseshoe nails, under the name of 'Imperial Bronze,' or other names, all containing the word 'bronze'; and the said nails, so bronzed and sold by the defendants under the said name, have been and are of inferior quality to the nails bronzed and sold by your orator under their lawful trade-mark; and purchasers and consumers have been and are deceived and misled into buying the articles so bronzed and sold by the defendants in the belief that they were and are of the manufacture of your orator."

And the eminent jurist said of it:

"There is here a substantial fact stated—that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph 4 of the bill."

He goes further to speak of the nature of the trade-mark, but finally holds that the bill is sufficient to require of the defendants an answer thereto.

So, in the present case, I am of the opinion that the allegations of the bill are amply sufficient to require of the defendants an answer, that the whole matter may be spread upon the record and determined upon the merits of the cause.

The demurrer will therefore be overruled, and it is so ordered.

In re GEORGE O. HASSAM & SON.

FLINT WAGON WORKS v. BUTTLES.

(District Court, D. Vermont. May 27, 1907.)

BANKRUPTCY—CONDITIONAL SALES—VALIDITY.

Where conditions reserving title in the seller, printed on the back of contracts for the sale of wagons to a bankrupt, which the seller knew were to be resold in the course of the bankrupt's business, were not called to his attention at the time the contracts were made, and the bankrupt testified that he had no knowledge of such printed conditions until his attention was called thereto by his trustee in bankruptcy, the contracts never having been recorded, the title to the wagons passed to the trustee in bankruptcy as against the seller; such conditional provisions being fraudulent and invalid as against the bankrupt's creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 199.]

C. G. Austin & Sons, for petitioner.
Charles L. Howe, for petitionee.

MARTIN, District Judge. This case came on for hearing before me at Rutland, May 6th. I find that on September 27, 1905, the petitioner sold the bankrupts several wagons. This sale was by written contract upon the face of which was printed, in plain but small type, these words: "Read this order carefully before signing and see that it corresponds with the duplicate copy." And in another place, in like plain but small type, these words: "Subject to conditions printed on the other side of this order which are hereby agreed to"—being a printed blank contract, the place of sale, date, name of parties, and articles sold being written in, and signed George O. Hassam & Son, in the handwriting of George O. Hassam, Upon the back thereof is printed in fine, but plain, type, the following:

"The title to the goods shipped on this order, or any subsequent orders, is to remain in your name until paid for in cash, and should we through any cause suspend doing business, or become, or apparently become, embarrassed financially, any account or note you have against us shall become immediately due and payable, and we will deliver to whom you may direct, or place on cars if you so direct, any or all of your goods remaining on hand, free of charge of any kind.

"You agree to replace, free of charge, any axle, wheel or spring that may become unfit for use within one year from date of shipment, by reason of defective material or workmanship, and will repair or replace same upon return to you (by freight) and pay freight charges one way. We understand that you do not authorize any repairs to be made on your account, and will not recognize or pay such bills.

"We will look to the transportation company for any overcharge in freight or loss or damage to goods while in transit, and will not countermand this or future orders without your consent in writing.

"This and subsequent orders are subject to the approval of your office at Flint, Mich.

"Goods hereafter ordered will be on same terms unless others are agreed on in writing, but prices on future orders are subject to change without notice.

"Claims that goods are not in accordance with order will be made within five days after arrival of goods, or they will be considered waived.

"This contract embodies all agreements, conditions, stipulations and representations, and none other, be they verbal or otherwise, are to be recognized."

One wagon out of this sale, being No. 247, is now in the hands of said trustee. On the 19th of October of the same year, the petitioners made a like sale of sundry wagons to said bankrupts, using the same kind of a printed blank, with the same printing above quoted upon the face thereof, and the same conditions upon the back. Both of said contracts are referred to and made a part of these findings.

All the wagons embraced in the sale of October 19th are now in the hands of the petitionee except one No. 445 and one No. 421. For the wagons embraced in the order of September 27th, the bankrupts gave their promissory note, upon which payments were made, and of which there were two renewals. There is now due upon the last note given for said wagons $170 and some interest. The bankrupt, George O. Hassam, appeared and testified that his attention was not called to the fine printing on the back of either of said contracts; that the first knowledge he had was when his trustee in bankruptcy called his attention thereto; that the first time that he knew that the petitioner claimed these wagons was in March last, when Mr. Bedard, their sales agent, stated to him that they claimed the wagons by virtue of the printing upon the back of the contract. He further testified that the said Mr. Bedard, agent for the petitioner, made these contracts with him and left with him a carbon copy, and it was this carbon copy that the trustee was examining at the time he called his attention to the printing upon the back thereof. He further testified, under objection by the petitionee, that:

"Mr. Bedard, the selling agent of the company [meaning the petitioner], came to our place of business in Rutland and wanted to sell us wagons. We made several purchases of him and signed an order each time. Cannot state the number, but there were more than these two purchases. Presume the orders were all alike. I did the signing. Our attention was never called to the fine print on the back, and we never agreed to that, for it was never mentioned, and we never knew anything about it. We didn't know it was there. I looked over the writing to see that the right kind and the right number was inserted and the prices carried out as was agreed upon. I had a carbon copy. He read the different wagons and the prices, which I compared with my copy. The printing was not read."

On cross-examination the witness was inquired of as follows:

"Q. Didn't Mr. Bedard always deal with you honorably and uprightly? A. So far as I know, he did. Q. Do you claim that he deceived you? A. I don't say that. Q. Wasn't it your own fault that you didn't read the conditions on the back of the paper you signed? A. It may be, but I should think he ought to have called my attention to it."

Mr. Bedard was in court and heard this testimony, but did not take the stand as a witness. No claim was made that the facts stated by the witness Hassam were not true.

I find that the said Hassams' (the bankrupts') attention was not called to the conditions in fine print upon the back of the papers signed by them, that they knew nothing of it until their attention was called to it by the trustee, and that they did not assent or agree to the conditions stated thereon. These contracts were never lodged for record in the town clerk's office at Rutland, or elsewhere. At the time of the making of these contracts the bankrupts were dealers in

wagons, buying and selling. Sales were made to the public generally. Both parties understood that they were for sale by the said Hassams. All of the wagons embraced in the order of September 27th, except two, and one wagon embraced in the order of October 19th, as before stated, were sold by the said Hassams. This pretended lien was a secret one placed upon property intended for sale, and comes squarely under the decision of the Circuit Court of Appeals for this circuit in Re Garcewich, 115 Fed. 87, 53 C. C. A. 510.

The petitioner claims that the case of York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, is controlling of the case at bar. I do not concur in that view. That case arose on the statute of Ohio. The lien reserved was for machinery obtained by the Mt. Vernon Ice, Coal & Milling Company for the manufacture of ice, and designed for the use of, and not for sale by, said company. The opinion of the court was delivered by Justice Peckham. He therein states:

"The trustee, under such circumstances, stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt."

And he cites the case of Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, and quotes from the latter case these words:

"Under the present bankrupt act, the trustee takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities impressed upon it in the hands of the bankrupt."

It will be observed that the court in its opinion guards it by the words "unaffected by fraud." The whole trend of authorities is that a lien or mortgage placed upon goods obtained for sale by the vendee, and unrecorded, is a secret arrangement, is in law a fraud upon creditors, and cannot be enforced against a trustee of such a vendee who subsequently becomes a bankrupt.

In the case of Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577, relied upon by the petitioner, the mortgage was upon livery property, consisting of "horses, wagons, sleighs, vehicles, harnesses, robes, blankets," etc.; but it will be observed that the mortgage was duly recorded in the town clerk's office in St. Johnsbury, and the mortgagee took possession of the property before the mortgagor went into bankruptcy. While this mortgage was upon a shifting livery stock, it provided that it should rest upon after-acquired property in its stead. The record in the town clerk's office gave that notice. In the opinion of the court in that case, this language is used:

"There is no pretense of any actual fraud being committed or contemplated by either party to the mortgage. Instead of taking possession at the time of the execution of the mortgage, the defendant had it recorded in the proper clerk's office, and the record stood as notice to all the world of the existence of a lien as it stood when the mortgage was executed, and that the defendant would have the right to take possession of property subsequently acquired, as provided for in the mortgage. The bankrupt, therefore, was not holding himself out as unconditional owner of the property, and there was no

securing of credit by reason of his apparent unconditional ownership. The record gave notice that he was not such unconditional owner. There was no secret lien," etc.

In the case at bar there was an attempted lien, absolutely secret, not even made known to the vendee, and never intended to be brought to light unless the vendee should become insolvent. The vendee was put in possession of a large number of wagons, of which he was apparently the absolute owner. There was a secret attempt on the part of the vendor, should the vendee succeed in getting credit by having about him a large amount of unincumbered property, and should thereafter be unable to pay debts so incurred, to make time notes given for said property "immediately due and payable," and the vendee deliver to the vendor all goods remaining unsold, and all the while they should remain in the name of the vendor. I cannot conceive in what manner the vendor anticipated that the goods could remain in its name when possession was passed to the vendee, and no record made of the transaction. It has been repeatedly held that, when personal property is delivered to a vendee for sale, or to be dealt with in a 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 fraud upon the creditors of the vendee. In re Garcewich, supra; In re Carpenter, 11 Am. Bankr. Rep. 147, 125 Fed. 831; In re Howland, 6 Am. Bankr. Rep. 495, 109 Fed. 869; In re Rodgers, 11 Am. Bankr. Rep. 93, 125 Fed. 169, 60 C. C. A. 567; In re Butterwick, 12 Am. Bankr. Rep. 536, 131 Fed. 371.

In no case decided by the Supreme Court, to which my attention has been called, has the court upheld secret liens or mortgages upon goods designed for sale or so tainted by fraud as to creditors as this case appears to be.

The petition is dismissed.

THE MONTEREY.

(District Court, S. D. New York. May 31, 1907.)

1. COLLISION—STEAMER AND PILOT BOAT—DUTY OF STEAMER.
   A steamer approaching a pilot boat fulfills her entire duty by maintaining a reasonable speed and a fixed course after the vessels are so near together that a change might embarrass the pilot boat in her endeavor to approach.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 43, 44.]

2. SAME—NEGLIGENT NAVIGATION OF PILOT BOAT.
   The sinking of a schooner pilot boat at sea in the night by being run down by a steamer *held* due solely to the fault of the pilot boat in so changing her course as to cross the steamer's bow, and in leaving the wheel lashed while the pilot went below, leaving no lookout.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 50.]

In Admiralty. Suit for collision.

Carter, Ledyard & Milburn, for libelant.

Wing, Putnam & Burlingham, for claimant.

HOUGH, District Judge. This action is for collision between the schooner pilot boat Hermit and the steamship Monterey, shortly after 4 a. m. of December 15, 1906, and some few miles to the southward of the Sandy Hook Lightship. By the collision the Hermit became a total loss; the Monterey was uninjured.

The testimony has been wholly taken by deposition, and this decision is rendered without the court's seeing or hearing any witness, and therefore without the great advantage always gained therefrom.

I am of opinion that the wind at and before the time of collision was a light breeze, sufficient, however, to give the pilot boat a movement with the wind abeam, or nearly so, of about four knots per hour.

The direction of the wind is in controversy, but it is so obvious that those upon a sailing vessel must necessarily pay the stricter attention to the wind's direction that I have assumed that it was approximately southeast by south, as stated by libelants.

There was a very moderate sea, to which conclusion I am drawn by the admitted experiences of the shipwrecked crew after collision; when in a greatly overloaded yawl they evidently had no difficulty in making their way to the steamer, and pulling one of their number out of the water en route.

The speed of the Monterey at the time of collision was small; indeed, I think she had nearly stopped her way. This is shown by the ease with which the shipwrecked men in their yawl rowed to her, and also by the fact that, although the steamer struck the schooner full on the starboard, while the yawl was trailing alongside on the port, the shock of the blow was not sufficient to swamp the yawl or interfere with most of the schooner's crew stepping directly into it from the deck. The Monterey is 341 feet long, with a gross tonnage of 4,702; while the Hermit was but 80 feet long, with a tonnage of 70. And, if the larger vessel had not nearly stopped at the time of collision, I think it obvious that the Hermit would have been literally driven under the water, the yawl been swamped, and serious loss of life ensued.

The time of the collision can be very nearly fixed as at 4:03 to 4:05 by the Hermit's clock, and at 4:06 by the deck time of the Monterey. In my computations I have used the time of the Hermit's clock, and assumed that the Monterey's time was approximately two minutes faster. This has been done because the clock on the Hermit was favorably situated for observation by her navigators, and I perceive from the depositions no reason to impugn their honesty of intent in statements of time.

The evidence is singularly barren of estimates of distance, and such as are given do not seem valuable, for the night was very dark, though clear, so that lights could readily be seen, but the ships themselves were concealed from each other until collision was inevitable. I do not think that the estimate even of an experienced mariner as to the distance at which he sees a light alone can be relied upon.

It is obvious from the record, and is indeed admitted by both counsel, that this collision could not have happened without either (1) such inattention on the part of the Hermit as laid her course directly

across that of the Monterey; or (2) from an unlawful change of course and maintenance of high speed, on the part of the Monterey, after the pilot boat began her endeavor to approach the steamer.

I do not think the charges against the Monterey are sustained, and find the schooner solely liable.

1. The Fault of the Hermit.

While a comparison of the courses given from the two vessels leads to the belief that there was some divergence between the reading of the Hermit's compass and that of the standard compass on the Monterey, it is to me obvious that upon her own story the schooner must be condemned.

When the masthead light of the Monterey was seen Pilot Warner was in charge of the Hermit, lying hove to and heading east by south. He wore ship to head south by west half south, and steered along by the wind. He then saw the steamer's red light bearing about south by east a little easterly, and when she had burned a blue light he called the next pilot for duty (McCarthy) at 3:35 a. m.

For reasons entirely unexplained, McCarthy did not come on deck and take charge until 3:50; and, when he did, his vessel was still heading south by west half west on the port tack, the wind was from the same direction as first above noted, and he saw the red light. Thereupon he maintained his course for a period which he states by the clock as seven minutes, and then took a bearing of the approaching steamer, and found she bore south southeast easterly, still showing her red light only.

It does not appear that Warner and McCarthy compared their respective bearings of the Monterey; but McCarthy states that, when he took his bearing, he thought the Monterey to be about a mile to a mile and a half dead to windward, and steering about north.

A comparison of bearings would have shown that the steamer was broadening off the Hermit's port bow with considerable rapidity, and was therefore going at a good speed, and McCarthy's own observation should have told him that on her supposed course the Monterey would pass the Hermit (even if she had not worn) within rather less than two-thirds of a mile. Yet just when these facts were, or should have been, obvious, McCarthy decided to come up on the wind and sail to the eastward, in order to get still nearer the steamer before dropping his yawl; and he therefore gave the order to wear ship, hove his wheel hard aport, clamped it there, and selected this time to go down into the cabin, open the stove door, and pick up and repack his clothes, which the movement of the vessel had thrown upon the deck. This inopportune visit below occurred at 3:57 by his clock, and he feels sure that the collision happened not later than 4:03. He declares that before the collision he had time to get on deck and unclamp his wheel, which he says he continued to hold hard aport until collision was inevitable.

I cannot believe that in this effort he was wholly successful. He was bound to know that his vessel would wear with a continually increasing radius of maneuver as the wind bore more abaft, that eas-

ing the wheel would lengthen that radius, and that the then existing arrangement of the Hermit's sails tended to produce forereaching.

The testimony of the other men on the Hermit induces belief that while McCarthy was below there was no lookout; and, indeed, it is hardly too much to say that no one was in charge of the schooner. Except for jibing the booms, she seems to have been left to sail herself, and when the green light of the steamer appeared it is evident that the observers on the Hermit are rather arguing that they could not have sailed across the Monterey's course, than asserting that they did not. The maneuver was a delicate one at best, demanding close attention, as well as great skill, and I am convinced that the Hermit, by thoughtlessness on the part of the pilot in charge, and complete absence of proper lookout, was permitted to do that very thing.

2. The Faults Alleged Against the Monterey.

The difference in reading between the compasses of the two vessels is the probable reason why no diagram has been offered endeavoring to harmonize the courses stated in evidence. With the Monterey bearing south southeast a little easterly from the Hermit, some six to eight minutes before collision, and the Monterey steering north northwest (magnetic), there must have been some difference between the compasses seen, or collision would have been obviously probable to both in ample time to avoid it. As neither vessel says that this was the case, comparison of compass bearings must be abandoned, and the inquiry becomes this: Did the Monterey change her course at or after the time that McCarthy on the Hermit began to wear ship?

By the largest estimate (i. e., on the supposition that the clocks on the two vessels were synchronous) this space was no more than nine minutes, and whatever would have been the course indicated by the Hermit's compass had it been placed on the Monterey, or vice versa, I am convinced that the steamer did not change her course at any time after 3:53 by her own clock. On this point I attach great importance to the fact that the watches were changed on the Monterey at 4 a. m., and can see no reason to doubt the testimony of the quartermasters that the course was laid as north northwest (magnetic) several minutes before the relieving quartermaster appeared in the pilot house.

It is often looked upon as a venial offense in a seaman to swear by his ship; but it is not believable that the two quartermasters on the Monterey could have withstood cross-examination, if it had not been true that the course, maintained until collision was inevitable, had been established so long before 4 a. m. as to take from this litigation every element of danger by reason of any change of course on the part of the Monterey. Within the well-known rules relied upon by the libelants (City of Washington, 92 U. S. 31, 23 L. Ed. 600; The Columbia [C. C.] 27 Fed. 704; The Alaska [C. C.] 33 Fed. 107; The Champagne [D. C.] 43 Fed. 444), a steamer approaching a pilot boat fulfills her entire duty by maintaining a reasonable speed and a fixed course. That does not mean that the course shall be unchanged from the time when the vessels sight each other miles apart, but that it

shall not be so changed as to embarrass the pilot boat in her endeavors of approach.

At 3:57 a. m. (or say 3:59 a. m. Monterey time), the Hermit began to maneuver to approach the steamer. From that time I think the steamer was bound to maintain a steady course. She did so, and had been doing so for at least six minutes before.

The speed of the Monterey shortly before 4 a. m. was approximately 10 knots; her bottom was very foul, and she lost way quickly. Whether this was a convenient speed for taking on a pilot is immaterial, for, whether the Monterey's speed was low or high, she was entitled to assume that the Hermit would not cross her bow. When the green light of the schooner appeared, it was, by all the testimony, too late to do anything, and whatever was done, or sought to be done, by either party after that moment, was in extremis.

Let the libel be dismissed, with costs.

In re FRIEDMAN.

(District Court, S. D. New York. May 7, 1907.)

1. BANKRUPTCY—FRAUDULENT TRANSFER.

A bankrupt shoe dealer sold his entire stock, receiving $3,850 therefor, which was given to his wife. She testified that she did not understand the matter, and did not remember whether she received any money, though early on the morning after the sale she met her brother, told him of the sale, and shortly thereafter the brother deposited with a trust company $3,070, which he testified was obtained from his brother-in-law, W., in repayment of certain loans which neither were able to identify. Thereafter the wife's brother, on being served with a subpœna in bankruptcy for his examination, called on W., and gave him a check for $2,500 without solicitation, which check was immediately certified and paid. *Held*, that the transaction was a scheme to defraud the bankrupt's creditors, and that the fund would be ordered paid over to the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 274.]

2. SAME—SUMMARY PROCEEDINGS.

Where the proceeds of a sale of a bankrupt's business were found to be in possession of certain persons, who were a mere cover or receptacle for the property to conceal it and prevent it being reached by the bankrupt's creditors, it was recoverable by summary proceedings; the trustee not being required to resort to a plenary suit for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 447.]

On the night of March 17, 1907, the bankrupt, a shoe dealer, sold his entire stock, receiving therefor $3,850, which, it was alleged, was given to his wife, C. The latter testified she was suddenly called to the store, where she saw several strangers, but was so excited she was unable to understand what was transpiring, and she could not remember whether she received any money. Early the next morning she met her brother, L.—a Coney Island photographer, in a small way of business—at the Manhattan entrance of Brooklyn Bridge, by accident, as she testified; told him of the sale, and that her husband had gone away; whereupon L. returned to Coney Island to search for the bankrupt, and C. returned home. A notary public, who drew the bill of sale, testified that C. received the money. On March 19th, L. deposited in cash in a trust company at Coney Island the sum of $3,070, which he testified was obtained from W., his brother-in-law, in repayment of loans made at various times several years past, though the exact dates of such loans were unknown, as he kept no record, and that they were made in cash, although L. kept a bank account.

W. testified that he borrowed said moneys, but, however, could give no details, as he kept no record thereof, and further stated that he repaid the full amount in cash to L. on March 19th. On March 26th, after being served with a subpœna in bankruptcy for his examination, L. called on W., and gave him $2,500 by check, which L. testified he did not need and was willing to loan to W. again, though the latter had not requested such loan. The check was immediately certified, and W. received the cash.

Lesser Bros. (William Lesser, of counsel), for the motion.
Steuer & Hoffman (Max D. Steuer, of counsel), opposed.

HOUGH, District Judge (after stating the facts). The story of Celia Friedman is inherently preposterous, as well as demonstrably false. I am convinced that she received (contemporaneously with the sale) $3,850, and has since acted as the confederate of her hiding husband. Considering the relationship between Mrs. Friedman and Levinson, and the connection by marriage with Wiltchick, I am convinced that the three have been acting in concert to protect the proceeds of the Friedman fraud from creditors. The $3,070 deposited by Max Levinson in the Jenkins Trust Company he received from Mrs. Friedman. His tale of hidden affluence and sudden payments of moneys long lent without security is ridiculous. Wiltchick, as a man of substance, has been used as a convenient depository for moneys he could be relied upon not to steal from those who wrongfully intrusted the same to him, and he has now by his own statements $2,500 handed him by Levinson.

The order may pass against Wiltchick, requiring him to pay over $2,500; but he, if he prefers, may give bond in double that amount, with sureties to be approved, for the payment of $2,500, on demand to the trustee when appointed or elected.

A summary order for $570 may pass against Levinson, and a summary order for $780 against Celia Friedman.

No summary order will be made against the Jenkins Trust Company; but that company may be enjoined from permitting the account of Max Levinson with them to be reduced below $570, except by check drawn by Levinson, certified by the trust company and payable to the order of the temporary receiver herein.

On Application for Reargument of Motion against Celia Friedman, Max Levinson, and Samuel Wiltchick, to Compel Them to Turn Over Certain Moneys, and also on Application to Punish the Parties Above Named for Contempt in Failing to Turn Over.

The brief on the application for reargument is an able presentation of one side of a question that in my experience has never been more clearly presented than in this case. It may be admitted that the District Court on the bankruptcy side has no power summarily to try a question of title, if any real question of title exists. It may also be admitted that the same court has no power summarily to order the appropriation by a receiver or a trustee of property obtained from the bankrupt either by fraud upon him or in pursuance of his intent to hinder, delay or defraud his creditors, if any property was so obtained. But if property which had once been in the possession of the bankrupt is

found in the possession of any person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property which as between the bankrupt and such other person is still the property of the bankrupt, or if (to vary the simile) the person who holds property which was formerly in the possession of the bankrupt is but the alter ego of the bankrupt, then a summary order is proper, and no pretended instruments of transfer, no apparatus of conveyances, should prevail. The question is: Whose is the property? And if, according to the evidence, it be the property of the bankrupt, the bankruptcy court should order its restoration to the representative of the creditors and enforce that order by the most drastic means. If this be not done, creditors in most cases are utterly without remedy, for a plenary suit against persons who are in truth but receivers of stolen goods (or money) is but an expensive illusion.

In this case an unusually complicated scheme was pursued to hide the proceeds of the sale of the bankrupt stock. The complication of the method only renders more necessary the application of the rule which, I believe, exists.

The application for reargument is denied.

The opposition to the punishment of the persons proceeded against for contempt is really based upon a proposition perfectly sound in itself, but, I think, inapplicable to the matter in hand. A person who has no money should not be punished for contempt in failing to turn over money. But the very point of this proceeding is that it is the opinion of the court that the persons proceeded against have the money and do not tell the truth when they assert their inability to pay. Instances are numerous where this same objection was made in limine, and the court became satisfied in time, either that the parties incarcerated had spent the money, or intrusted it to still other persons who had made away with it, and thereupon the prisoners were released. But if any person into whose possession money is traced can avoid the legitimate consequence of the possession of that money by swearing that he no longer has it, or never had it, the administration of justice would become a farce.

The orders to turn over having been duly served, and the time limited for payment having expired, the persons proceeded against are adjudged to be in contempt, and the usual order will be made.

POLITZ v. WABASH R. CO. et al.

(Circuit Court, S. D. New York. February 18, 1907.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINDER OF UNNECESSARY PARTIES.

To a suit by a stockholder to have stock and bonds issued by a railroad company, to be exchanged for a prior issue of bonds, declared ultra vires and void, the company is the only necessary party defendant, and the joinder as defendants of directors or persons interested in the bonds to be retired will not prevent a removal of the cause by the company, where diversity of citizenship exists between it and the complainant.

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

On Motion to Remand to State Court.

Stephen M. Yeaman, for the motion.

Rush Taggart and Parsons, Closson & McIlvaine, opposed.

LACOMBE, Circuit Judge. Plaintiff is a stockholder of the Wabash Railroad Company. Among the obligations of that company are two series (A and B) of debenture bonds due in 1939. A plan has recently been proposed for retiring these bonds, by issuing and exchanging for them a certain amount of new 4 per cent. mortgage bonds and new preferred and new common stock. A stockholders' meeting was called in October last to consider the plan, and a majority of those present voted in favor of it, and for the issuance of the new bonds and stock necessary to carry out its provisions. At the same time 90 per cent. of the debenture holders voted in favor of the exchange. The complaint alleges that the plan has been carried out as to more than nine-tenths of the debenture bonds, and new bonds and stock to the requisite amount have been issued. The complaint sets forth the provisions of various state Constitutions and statutes, and avers that the "whole plan was and is illegal, unauthorized by law, in violation of law, and ultra vires," and that the bonds and stock issued pursuant thereto are unlawful and invalid. The complaint prays that the plan "be decreed and adjudged to be ultra vires," and that "all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged illegal, void, and of no effect."

The Wabash Railroad Company is a nonresident, and removed the cause on the ground that there is a separable controversy between it and the plaintiff, to which the other defendants (mostly residents of this state) are not necessary parties. These additional parties are (1) the individual directors; (2) the trust company which is the registrar of stock of the railroad company; (3) the committee which represents the debenture holders in carrying out the plan; (4) the trust company in which debentures are to be deposited pending exchange; (5) the trustees named in the mortgage to secure the new 4 per cent. bonds; and (6) a single individual holder of debenture bonds. It is manifest that complainant can obtain complete relief without the presence of these additional parties. When he shall, by action against the Wabash Company, have established the proposition that the new bonds and stock are void, he need not concern himself with the re-exchange of such as may have been delivered. They will not constitute valid obligations against the railroad, and therefore will not affect the value of his stock. Individual holders of such of the new securities as have been issued may be allowed to intervene at the discretion of the court; but their presence is not essential to the determination of the fundamental issues raised by the complaint. It is difficult to escape the conviction that these additional "parties" have been brought into the case with the sole purpose of preventing, if possible, the removal of the cause.

The motion to remand is denied.

AMERICAN BANANA CO. v. UNITED FRUIT CO.

(Circuit Court, S. D. New York. January 28, 1907.)

1. DISCOVERY—PRODUCTION OF BOOKS AND WRITINGS—FEDERAL STATUTE.
In a proper case a party may be required to produce books and writings under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583], in advance of trial, but such a direction should only be made when the situation is clearly such that in no other way can the ends of justice be properly subserved.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 107.]

2. EVIDENCE—REQUIRING PRODUCTION OF DOCUMENTS—CORPORATIONS.
An action to recover treble damages under the Sherman anti-trust act (Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]), is penal in character, but such fact does not preclude the court from requiring the defendant, when a corporation, to produce books or writings under Rev. St. § 724 [U. S. Comp. St. 1901, p. 583].
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1540–1558.]

At Law. Motion under section 724, Rev. St. U. S. [U. S. Comp. St. 1901, p. 583], to require the production before trial and deposit with the clerk for defendant's inspection of a great number of books and papers the property of defendant now in its custody and concerned with details of its business. The action is for treble damages under the Sherman anti-trust act.

Everett P. Wheeler, for the motion.
Henry W. Taft, opposed.

LACOMBE, Circuit Judge. Originally it was held that the provisions of section 724, Rev. St. [U. S. Comp. St. 1901, p. 583], were directed solely to securing the production of the books and writings upon the trial of the issues. Later authorities hold that in a proper case production in advance of trial may be required. Bloede Co. v. Bancroft Co. (C. C.) 98 Fed. 175; Gray v. Schneider (C. C.) 119 Fed. 474. Such a direction, however, should only be made when the situation is clearly such that in no other way could the ends of justice be properly subserved. The "trial" of an action at common law is to be had before a court and jury and questions as to the admissibility or inadmissibility of individual items of evidence can be ruled on intelligently and fairly only by the judge who is presiding at the trial and is fully informed as to all the circumstances which prior evidence has disclosed. It puts an unreasonable burden upon a court, already fully occupied, to sit in advance of the trial to oversee the clerk with whom papers are deposited and to be called upon summarily and at intervals to determine whether some particular letter or telegram is one which a plaintiff might fairly inspect, or is concerned with matters which are none of plaintiff's business. Sometimes no other course can be followed, but such is not the case here. The averments of the complaint, the statements in the affidavits, and the specifications in the notice of motion all show that the plaintiff is supplied with information amply sufficient to enable it to go to trial and undertake to make out its cause of action by there and then calling for such writings as it needs, provided that their

presence on the trial is secured by order made under this section. The section does not contemplate that plaintiff shall sit down at leisure in the absence alike of court and jury, and during days or weeks prepare and practically put in its side of the controversy, leaving defendant to meet the case thus made in the hurry of the trial.

As to the constitutional question. It seems entirely clear that this is a penal action. It is instituted by a person who claims to have been injured by the unlawful acts of defendant to recover, not only the damages which will compensate him for any loss he has sustained, but also a penalty of twice as much again, which represents no damages, but only a fine imposed for bad conduct. But, as was intimated in U. S. v. Am. Tob. Co. (C. C.) 146 Fed. 557, the decision in Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, has modified the rule heretofore applied when the books and papers sought to be dragged to light by the power of the state are the property of a corporation. It was held in that case that neither the provisions of the fourth amendment to the Constitution nor the principles enunciated in the case of an individual in the Boyd Case, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, constitute any protection to a corporation which is charged with abuse of its franchise. It would seem to make little difference whether the books and papers are called for under a subpœna duces tecum or under section 724; whether the charge is presented in an action brought by the state of its own motion, by the state on the relation of some one, or by a private person to whom the state has promised the fine it has prescribed as punishment of the offense in the event that such person shall succeed in proving the commission of that offense.

The motion is granted to the extent of requiring the defendant to get together all the books and papers enumerated with sufficient definiteness, and have them present at the trial. Defendant need be under no apprehension by reason of failure to produce any books and papers called for which do not exist. Proof that they did not exist, when notice of motion was served, will be sufficient compliance with the order. But it should comply with the terms of the order frankly and fully. It should have in court all the documents fairly within the enumeration and which would enable plaintiff to show defendant's past conduct touching the matters complained of. It will be no sufficient response to the order to state upon the trial that some contract, letter, or what not, manifestly material, is not at hand, but in Venezuela or elsewhere.

HULL v. BURR.

(Circuit Court of Appeals, Fifth Circuit. April 2, 1907.)

No. 1,639.

1. BANKRUPTCY—SUITS BY TRUSTEES—JURISDICTION OF DISTRICT COURT.
A trustee in bankruptcy is vested by the act of 1898 with all the rights and title of the bankrupt and of his creditors, and, when he seeks to enforce rights or to recover property in a district other than that of the court which appointed him, he stands in the position of those whose rights he has acquired, and can resort only to the same courts, state or federal, and is confined to the same remedies, subject to the exceptions made by Act July 1, 1898, c. 541, §§ 23b, 70e, 30 Stat. 552, 565 [U. S. Comp. St. 1901, pp. 3431, 3452], as amended in 1903 (Act Feb. 5, 1903, c. 487, §§ 8, 16, 32 Stat. 798, 800 [U. S. Comp. St. Supp. 1905, pp. 686, 690]).

2. SAME.
A District Court of the United States is without jurisdiction of a suit by a trustee in bankruptcy appointed in another district to recover property from one to whom it was conveyed by the bankrupt more than four months prior to the bankruptcy, and who took possession of it after the bankruptcy; the ground of recovery alleged being that the conveyance was in fact a mortgage, unless the defendant consents to such jurisdiction. Such an action is not one of which the District Court as a court of bankruptcy is given jurisdiction without such consent, by Bankr. Act July 1, 1898, c. 541, § 23b, or section 70e, 30 Stat. 552, 565 [U. S. Comp. St. 1901, pp. 3431, 3452], as amended in 1903 (Act Feb. 5, 1903, c. 487, §§ 8, 16, 32 Stat. 798, 800 [U. S. Comp. St. Supp. 1905, pp. 686, 690]).

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

3. SAME.
Bankr. Act July 1, 1898, c. 541, § 70e, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3452], as amended in 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690]), does not confer on a court of bankruptcy jurisdiction of a suit brought by a trustee thereunder to avoid a transfer made by a bankrupt, unless by consent of the defendant, which is made a condition to such jurisdiction in all suits by trustees by amended section 23b with the exceptions expressly mentioned therein.

4. SAME—COURTS OF BANKRUPTCY—ANCILLARY JURISDICTION.
Courts of bankruptcy have no jurisdiction except that conferred by statute; and Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], neither expressly nor impliedly provides for summary proceedings, or for auxiliary or ancillary proceedings, in another court of bankruptcy, in aid of the bankruptcy court which made the adjudication and has charge of the bankrupt's estate.

Petition to Superintend and Revise Proceedings from the District Court of the United States for the Southern District of Florida.

The respondent, Arthur E. Burr, filed in the court below the following petition:

"In the District Court of the United States in and for the Southern District of Florida.

"In the Matter of the Petition of Arthur E. Burr, Trustee in Bankruptcy of the Estate of the Port Tampa Phosphate Company, a Corporation, against Joseph Hull, of Savannah, in the State of Georgia.

"Your petitioner, Arthur E. Burr, trustee in bankruptcy of the estate of the Port Tampa Phosphate Company, a corporation, respectfully represents that, on November 9, 1905, a petition in bankruptcy was filed in the District Court of the United States for the District of Massachusetts, against the Port

Tampa Phosphate Company, a corporation duly established according to the laws of the commonwealth of Massachusetts; that thereafter, on the 27th day of November, 1905, the said Port Tampa Phosphate Company was duly adjudged bankrupt; that your petitioner was duly appointed trustee of the estate of said bankrupt corporation on the 27th day of December, 1905, and thereafter duly qualified; that your petitioner brings this petition in his capacity as such trustee in bankruptcy of said corporation.

"On or about May 27, 1905, said bankrupt corporation caused to be executed and delivered to the respondent, Joseph Hull, a deed of certain real estate and personal property then belonging to and owned by said corporation, and situated in the county of Polk, and state of Florida, to wit:

"The south half and the south half of the northeast quarter, and the southeast quarter of the northwest quarter of section thirty-four (34) in township twenty-nine (29) south, range twenty-three (23) east, Polk county, Florida; also," etc. (The description of the fixtures is omitted.)

"Said deed was caused by said corporation to be made, executed, and delivered to the respondent as and for security for certain money, at that time advanced, and for money to be thereafter advanced, to said corporation by the respondent.

"As a part of the same transaction, and at or about the same time, to wit, June 9, 1905, the said Joseph Hull and said bankrupt corporation executed and delivered a certain instrument and agreement of defeasance, wherein said Hull agreed to reconvey to the said bankrupt corporation all of the said above-described property upon the payment to the said Hull of certain sums set forth in said instrument. Your petitioner is informed and believes, and therefore avers, that said Hull duly recorded said deed to said property.

"On the 9th day of November, 1905, and for a long time prior thereto said bankrupt corporation was the owner of and in actual and legal possession of said property, both real and personal, and thereafter your petitioner by operation of law became vested with the title to all the property belonging to the bankrupt corporation on the 9th day of November, 1905, and came into legal possession thereof as of the said date. After said date, and after the filing of said petition in bankruptcy, the respondent well knowing all of the aforesaid facts, and that the said property was the property of the said trustee of the aforesaid corporation, on or about December 15, 1905, entered upon said real estate and took possession of said above-described personal property, and now holds the same, both real and personal property, and has refused to deliver or convey the same or any part of it to your petitioner.

"Said deed and instrument of defeasance constitute in law and equity a mortgage, and said property is now the property of your petitioner as such trustee, subject to a lien in favor of the respondent for the amounts loaned and advanced by him to said bankrupt corporation.

"Your petitioner is without information, and therefore cannot aver as to the amount of indebtedness due the respondent upon November 9, 1905, by said bankrupt corporation, for the reason that the amount thereof is entirely within the knowledge of the respondent; but your petitioner is informed and believes, and therefore avers, that the amount of said indebtedness due said Hull by said corporation at said time did not exceed the amount of twenty-five thousand dollars ($25,000).

"Said property is of great value, and is worth a large amount in excess of said indebtedness due said Hull by said corporation.

"Since said Hull took possession of said property on December 15, 1905, he has used and operated it, and mined a large amount of phosphate therefrom. Your petitioner is unable to state the exact amount received by said Hull from said use and operation aforesaid, as your petitioner is unable to obtain an accounting thereof from said Hull. * * *

"Your petitioner is informed and believes and avers that there is danger that said Hull may make a conveyance of said real estate to a bona fide purchaser for value.

"Wherefore your petitioner prays:

"(1) That this honorable court may issue forthwith a preliminary decree restraining and enjoining said Joseph Hull from conveying or transferring said real property until the further order of this court.

"(2) That said deed and instrument of defeasance may be declared to be a mortgage.

"(3) That all of said property, both real and personal, be declared to be the property of your petitioner as such trustee.

"(4) That an accounting may be had of the amount due said Hull by said bankrupt corporation on November 9, 1905; and that a further accounting may be had of the amount received by said Joseph Hull from the operation and use of said property since December 15, 1905; and that this court will determine the amount of the lien now held by said Joseph Hull.

"(5) That said Joseph Hull be ordered forthwith to convey and deliver to your petitioner all of said personal property taken by him from the possession of your petitioner, or to account for the value thereof.

"(6) That your petitioner may be authorized and empowered to sell at private sale all of said property either subject to the lien, if any, of the said Joseph Hull, or free from incumbrances, reserving to the said Joseph Hull the right to be reimbursed out of the proceeds of the sale of the said real estate.

"(7) That due and proper process be issued forthwith out of this honorable court to enforce its decrees and orders.

"(8) For such other and further general relief as to this honorable court seems meet.

"And that a writ of subpœna of the United States of America may issue directed to the said Joseph Hull, commanding him on a certain day to appear and answer to this petition, and to abide by and perform such orders and decrees in the premises as to this honorable court may seem meet and proper."

The petition was signed by petitioner's solicitor, and was duly verified.

The respondent, Joseph Hull, appeared, and filed the following plea to the jurisdiction:

"Now comes the above-named defendant, Joseph Hull, and appearing for the special purpose, and no other until the question herein raised is decided, of objecting to the jurisdiction of this court, doth object to this court entertaining the petition of Arthur E. Burr, as trustee in bankruptcy of the estate of the Port Tampa Phosphate Company, a corporation, against this defendant, or further proceedings thereon, because under the Constitution and laws of the United States a District Court of the United States is precluded from entertaining and adjudging any such matter or controversy as is by said petition set up; and prays judgment whether this court has jurisdiction, and asks to be dismissed with his costs."

The plea was signed by counsel and sworn to.

The court overruled the objection to its jurisdiction, and thereupon Joseph Hull filed his petition in this court to revise and reverse the decree of the District Court, alleging that "under the bankruptcy law of the United States any remedy the said Burr has must be pursued by proceedings at law or in equity in the state or federal court as they may have jurisdiction and otherwise than by summary proceeding in bankruptcy."

H. Bisbee and George C. Bedell, for petitioner.

E. R. Gunby, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. The sole question to be decided is whether or not the District Court had jurisdiction of the case presented by the petition of the trustee. The question must, of course, be answered by an examination of the relevant parts of the bankruptcy act of 1898. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. The second section of the act makes the District Courts of the United States courts of bankruptcy and confers on them jurisdiction. Clauses 3 and 7 of the section are relied on as conferring jurisdiction in this case.

By those subdivisions jurisdiction is conferred to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed, or the trustee is qualified * * *"; and to "(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The jurisdiction conferred by the seventh clause is limited by the words "except as herein otherwise provided." These words refer to section 23 of the act, which relates to the jurisdiction of the United States and state courts. We here insert that section, placing in italics the amendment of 1903:

"Sec. 23. (a) The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"(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.*" 30 Stat. 557, c. 541 [U. S. Comp. St. 1901, p. 3431], amended by Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 686].

Disregarding the amendment for the present, this section, as originally written, confers jurisdiction on the Circuit, not on the District, Courts of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse claimants of the bankrupt's property. But this jurisdiction is conferred to the same extent only as the bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and the adverse claimant. The trustee can sue, in such cases, only in the courts where the bankrupt could have sued if proceedings in bankruptcy had not been instituted. The petitioner who sued in the District Court in the case at bar sued as the trustee in bankruptcy of a Massachusetts corporation. The parts of the act quoted, if we construe the petition as presenting a controversy at law or in equity, as distinguished from a proceeding in bankruptcy, confers jurisdiction on such United States Circuit Courts and state court as would have had jurisdiction of such a suit by the corporation if there had been no bankruptcy proceeding. But the statute does not confer jurisdiction in such cases on a United States District Court, not even when it is the court of adjudication. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

The opinion of the Supreme Court in Bardes v. Hawarden Bank, construing the act as it stood before the amendment, seems to us conclusive of the proposition that the court of bankruptcy did not have jurisdiction of the case made by the petition, if the petition presents a controversy at law or in equity within the meaning of section 23 of the act.

Does the amendment of 1903 affect the case at bar? The amendment makes exceptions to the limitation on the jurisdiction of the District Courts, and thereby extends their jurisdiction; but the extension does not include cases like that presented by the petition of the trustee. The amendment confers jurisdiction on the District Courts in "suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e." Turning to section 60, we find that subdivision "a" defines a preference, and that subdivision "b" provides that the trustee may sue the person receiving a preference and recover the property or its value. Under the amendment, suit for that purpose may be brought in "any court of bankruptcy." The case at bar involves no question of preference. Examining section 67, subd. "e," we find that it relates to fraudulent conveyances by the bankrupt and conveyances made within four months prior to the time of filing the petition in bankruptcy. The amendment confers jurisdiction on any court of bankruptcy of suits to recover property so conveyed. The petition of the trustee in the case at bar contains no charge of fraud, and the deed and contracts in question were executed more than four months before the beginning of the bankruptcy proceedings. It follows that the amendment quoted has no application to this case. The case, when viewed as a controversy at law or in equity, not being affected by the amendment, must be governed by the principles announced in Bardes v. Hawarden Bank, supra, which denies the jurisdiction of the District Court.

2. The only other part of the act that might be referred to in this connection is section 70, subd. "e." We quote it here, placing the part of it added by the amendment of 1903 in italics:

"(e) The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. *For the 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.*" 30 Stat. 566, c. 541 [U. S. Comp. St. 1901, p. 3452], amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690].

Such jurisdiction as is conferred by this language relates to suits by the trustee to "avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided." The petition of the trustee in the instant case does not seek to avoid a transfer. It does not allege that the deed to Hull was made under circumstances that made it voidable at the suit of his creditors. In fact, it is not alleged in the petition that the corporation owed any debts at the date of its transfer to Hull. No charge of fraud against creditors is made. On the contrary, it is alleged that the deed to Hull was based on a large consideration, not less than $25,000. A careful consideration of the trustee's petition convinces us that it was not intended as a suit under section 70e, and that subdivision has not been cited by learned counsel for the trustee as conferring jurisdiction.

But there is another reason why section 70e cannot be relied on as

giving the court below jurisdiction in this case. Subdivision "b" of section 23 provides that trustees shall sue only in the courts where the bankrupt might have brought suit, if proceedings in bankruptcy had not been instituted, "unless by consent of the proposed defendant." This limitation is general in its terms, embracing all suits. Congress, by the amendment of 1903, excepted from this limitation certain suits which may now be brought in the bankruptcy courts without the consent of the defendant. The suits excepted are "suits for the recovery of property, under section 60, subd. "b," and section 67, subd. "e." The statute requiring "the consent of the proposed defendant" stands as enacted, with no other exception than the one named. If the exception had included suits for the recovery of property under section 70, subd. "e," then, clearly, suits under that subdivision could have been brought by the trustee in a court of bankruptcy without the consent of the defendant. It is stated by Collier, in his work on Bankruptcy ([5th Ed.] p. 266), that the amendment was at first so written, but that the Senate Judiciary Committee struck out "and section 70 subdivision e." The act, as it was passed by Congress, leaves suits under that subdivision still subject to the provision of section 23b, requiring the consent of the proposed defendant. Construing section 70e in connection with section 23b, it appears that the former conferred jurisdiction on courts of bankruptcy of suits to avoid transfers of his property made by the bankrupt which any creditor of the bankrupt might have avoided, but that, although jurisdiction of the subject-matter is conferred, it can only be exercised over the persons of the defendants by their consent. The reasons for this conclusion are clearly and ably stated by Judge Adams, in Gregory v. Atkinson (D. C.) 127 Fed. 183, 185.

Even if the trustee's petition was construed as presenting a case under section 70, subd. "e," the court of bankruptcy would not have jurisdiction without the consent of the defendant.

3. But it may be that the trustee's petition is subject to another construction. It is alleged that the bankrupt was, at the date of the bankruptcy proceedings, in possession of the real estate in question, and that the petitioner by operation of law became vested with the title to all the property belonging to the bankrupt corporation, and came into legal possession thereof; and that the defendant, Joseph Hull, after the petitioner's possession and right accrued, took wrongful possession of the property and refused to surrender it. If the petition be construed to be a summary proceeding to obtain the possession of the property—a "proceeding in bankruptcy"—and not a controversy at law or in equity, the question is: Would the District Court then have jurisdiction? Many cases have been cited that bear more or less on this question, and it may be conceded that, placing such construction on the trustee's petition, the District Court of the United States for the Northern District of Florida would have had jurisdiction, if it had been the court of adjudication. But the petition shows that the corporation was adjudicated a bankrupt by a United States District Court in the state of Massachusetts, which has charge of the bankrupt's estate and of its collection, distribution, and settlement. Cases cited by counsel that discuss the jurisdiction of

the court of adjudication that has charge of the collection, distribution, and settlement of the bankrupt's estate, are not responsive to the question raised by this case, and cases construing the bankruptcy acts of 1867 and 1841 are not controlling, because each of those acts contained a provision conferring on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law and in equity between the assignee in bankruptcy and an adverse claimant of the property of the bankrupt. The act of 1898 contains no such provision.

Courts of bankruptcy are created by statute, and they have no jurisdiction except that conferred by statute, either expressly or by implication. The second section of the bankruptcy act of 1898 makes the District Courts courts of bankruptcy, and creates their jurisdiction. There are 19 subdivisions of the section enumerating the powers conferred. The subdivisions 3 and 7, especially relied on by the learned counsel, have already been quoted. The section vests courts of bankruptcy with the jurisdiction described in its 19 subdivisions "within their respective territorial limits as now established, or as may hereafter be changed." There are many cases construing the present statute, so well known that it is useless to cite them, holding that the court which adjudges a person a bankrupt has the power and jurisdiction in summary proceedings to take possession by receivers or marshals of the property of the bankrupt situate and being within the territorial jurisdiction of the court. The circumstances under which this power will be exercised or refused by the court of adjudication need not be discussed here. The question here relates, not to the jurisdiction of a bankruptcy court which has adjudicated a person a bankrupt, but to the jurisdiction of a court of another district which is called on to exercise summary jurisdiction in aid of another court of bankruptcy which made the adjudication and has charge of the bankrupt's estate.

We find no provision of the act which expressly or impliedly makes provision for summary proceedings or for auxiliary or ancillary proceedings in another court of bankruptcy in aid of the bankruptcy court that made the adjudication and has charge of the bankrupt's estate. Congress, of course, could have adopted a scheme by which every District Court would be charged with the collection or administration of the bankrupt's property in aid of or ancillary to the jurisdiction of the court of adjudication, but we find in the act no hint of such intention. On the contrary, the act limits the jurisdiction of the bankruptcy courts, including even the one of adjudication, by providing that suits by the trustee—with the exceptions we have noted—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.

We are of opinion that the District Court erred in overruling the plea to the jurisdiction.

The trustee is vested by the act with all the rights and title of the bankrupt, as well as with the rights of the bankrupt's creditors, and, when he seeks to enforce rights or to recover property in another district outside of the territorial jurisdiction of the court which appointed him, he stands in the position of those whose rights he has

acquired, and can resort only to the same courts, state or federal, and is confined to the same remedies. In re Williams (D. C.) 120 Fed. 38; In re Williams (D. C.) 123 Fed. 321; In re Von Hartz, 142 Fed. 726, 74 C. C. A. 58; In re Granite City Bank, 137 Fed. 818, 822, 70 C. C. A. 316. This general rule is, of course, subject to the exceptions made by the amendment of 1903, which has been quoted in this opinion and shown not to be applicable to this case.

The petition for revision is allowed, the decree of the court of bankruptcy is reversed, and the petition of the trustee is dismissed.

PERKINS v. GIBBS et al.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1907.)

No. 2,475.

1. WILLS—NATURE OF ESTATE DEVISED—VESTED REMAINDER.

Where a testator devised and bequeathed his residuary estate to his widow for life or until her remarriage, with remainder to his son and daughter in equal shares, the latter took at once a vested interest in remainder in the real estate which was alienable under the laws of Minnesota.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1481.]

2. SAME—TRANSACTIONS BETWEEN DEVISEES—CREDITORS' SUIT—GROUNDS FOR RELIEF—SUFFICIENCY OF EVIDENCE.

A testator devised and bequeathed his estate in equal shares to his son and daughter, subject to a life interest in his widow terminable on her remarriage. All of such parties entered into a written agreement admittedly made in good faith for an amicable division of the estate, by which the widow and son, who were also executors, agreed to convey their interest in certain real estate to the daughter, and she was to convey her interest in other real estate to the son, and also to release her claim to any share of an indebtedness owing by him to the estate and to money which he had misapplied as executor. Later, when the son had become largely indebted and insolvent, he and the widow executed the conveyance to the daughter; the deed reciting that it was made in consideration and compliance with such agreement. The son obtained the property which he was to have by the agreement, and was not called upon to pay the amount which he owed the estate. *Held*, that the conveyance to the daughter was based on a good and meritorious consideration; also, on the evidence, that it was made as recited therein in good faith pursuant to the prior agreement, and not for the purpose of defrauding the son's creditors, as charged in a creditors' bill.

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

This was a creditors' bill brought by George F. Perkins against Clara J. Gibbs, Albert L. Gibbs, her husband, the Cloquet Lumber Company, and several other defendants alleged to have some interest in the lands in controversy, to set aside certain deeds made by the judgment debtor as fraudulent. The several defendants other than those just mentioned do not appear to have been served with process. Those mentioned for their answer denied the alleged fraud and asserted that the title held by defendant Clara J. Gibbs was valid, subject only to certain timber rights existing under defendant Gibbs in favor of the Lumber Company.

The facts as disclosed by the record are substantially as follows: Reuben Whiteman died in Dansville, Livingston county, N. Y., where he had long resided, in March, 1888, leaving a widow, Rebecca, a son, Alonzo, and a daugh-

ter, Clara. He left a will which was duly probated in New York and afterwards in St. Louis county, Minn. where the land in question is situated, by which, after making certain specific legacies, he devised and bequeathed the rest and residue of his estate, real and personal, to his wife for life, or until she should again marry, and the remainder after the expiration of the wife's estate to his son and daughter in equal parts. The wife married again in 1895. Her particular estate ceased, and the son and daughter were let into the full enjoyment of their vested estate in remainder. Whiteman's estate consisted of certain personal property, a paper mill in Dansville, N. Y., some land elsewhere in New York, and about 13,000 acres of uncultivated land in Minnesota and Wisconsin. The widow and son were made executors of the will, qualified as such, and proceeded under the supervision of the Surrogate Court of Livingston county, N. Y., until after January, 1890, with the administration of the estate. On January 25th of that year, when, so far as this record discloses, there were no unsatisfied creditors of the estate and when the widow, son, and daughter were solely interested therein, they all joined in a contract providing for a voluntary partition or division of the estate, according to the respective interests of the parties. That contract was made and executed by and between Alonzo J. Whiteman individually and as executor as party of the first part, Rebecca E. Whiteman individually and as executrix as party of the second part, and Clara J. Whiteman as party of the third part, and is in the following words:

"That for and in consideration of the mutual promises and agreements herein contained, and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, it is agreed:

"First. That the parties of the first and second parts shall and will execute and deliver to the party of the third part a good and sufficient deed or deeds, quitclaiming, releasing, and conveying all their individual right, title, and interest, and the estate and right of dower in Julia N. Whiteman, the wife of the party of the first part to the party of the third part, in and to all and singular the lands in the states of Minnesota and Wisconsin, now belonging to the estate of Reuben Whiteman, deceased, and comprising about twelve thousand nine hundred and forty (12,940) acres, and which are situated and described as follows: [Then follows a detailed description of the land and a mention of the time and place for delivery of deeds.] * * *

"Third. The party of the third part will also, at said time and place, upon accepting said deed or deeds, execute and deliver to the party of the first part a quitclaim deed for conveying and releasing all her right, title, and interest in the paper mill and the land whereon the same is built comprising less than twelve acres situate in Dansville in the state of New York, and which belongs to the estate of said Reuben Whiteman.

"Fourth. Upon the acceptance of said deed or deeds by the party of the third part at the time and place above specified, she will, by a proper writing, waive all objections to the allowance upon an accounting of said parties of the first and second parts, as executors of said estate, of the expenditures heretofore and before the 31st day of December, 1889, actually made by them, in the construction, alteration or completion of said paper mill, which expenditures amount to about sixty-five thousand dollars. * * *

"Seventh. A certain agreement in writing bearing even date with this agreement, and simultaneously delivered herewith relating to certain claims and obligations belonging to said estate, shall be deemed to be a part of this agreement, and it and this agreement shall be read together as one instrument."

The agreement last referred to was duly executed by the parties, and the body of it is in the following words: "Now, as a part of said agreement and to be construed and treated as such, and for the considerations mentioned in said agreement, it is agreed that upon the execution and delivery of the deeds to the party of the third part in said agreement bearing even date herewith and their acceptance by the party of the third part as provided in said agreement the parties of the first and second parts as such executors as aforesaid, shall cancel and deliver to said first party individually and he shall be deemed absolutely discharged from all liability to the estate of Reuben Whiteman upon the following notes and obligations, including in-

terest thereupon. * * *" Here follows a statement of notes and evidences of indebtedness of Alonzo J. Whiteman to the estate of Reuben Whiteman amounting to $45,594.26. The main agreement was filed for record in the office of the register of deeds of St. Louis county, Minn., on February 4, 1890. After that contract was made, and in August, 1890, the paper mill was destroyed by fire, and the insurance thereon, amounting to about $75,000 was collected by Alonzo. Afterwards, by a quitclaim deed bearing date December 4, 1890, and recorded May 12, 1891, in the office of the register of deeds for St. Louis county, Minn., Alonzo J. Whiteman and Julia N. Whiteman, his wife, and Rebecca E. Whiteman, the widow, conveyed such of the lands referred to in the contract of January 25th as were located in the county of St. Louis, Minn., to Clara J. Whiteman. The deed, after stating who the parties are, proceeds as follows: "Witnesseth: That the said party of the first part in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged and in consideration and in pursuance of a certain agreement made between the parties hereto and bearing date the 25th day of January, 1890, have bargained, sold, remised and quitclaimed," etc.

On January 2, 1891, after the quitclaim deed had been executed, Alonzo J. Whiteman, individually and as executor of the will of Reuben Whiteman, as party of the first part, and Clara J. Whiteman, as party of the second part, made a supplemental contract whereby, among other things, it was recited and agreed as follows: "Whereas, the parties hereto, together with Rebecca E. Whiteman, did on the 25th day of January, 1890, make and enter into a written agreement, which agreement provided among other things for the conveyance to the party of the second part by the party of the first part, of certain real estate situate in Wisconsin and Minnesota, and the conveyance by the party of the second part of certain real estate situate in the village of Dansville, N. Y., and, whereas, in partial execution of said agreement the party of the second part is about to execute and deliver to the party of the first part a * * * release of all her interest in the insurance moneys collected by the party of the first part from insurance companies on account of policies issued upon the buildings situate upon the real estate aforesaid in Dansville, which buildings were after the making of said agreement, destroyed by fire, and whereas the party of the first part and the said Rebecca Whiteman have executed and are about to deliver to the party of the second part conveyances of a portion of the said lands in Wisconsin and Minnesota, so contracted to be conveyed and are unable to convey certain portions thereof heretofore sold by them. * * * And the party of the second part agrees in consideration of the premises, that in case the covenants and agreements herein contained are faithfully performed by the party of the first part she will not during the life of the said Rebecca E. Whiteman, cause or in any way procure an accounting by the said party of the first part, and the said Rebecca E. Whiteman, in the surrogates court, or in any other court for or on account of their acts and doings as executors of the estate of Reuben Whiteman, deceased."

On January 23, 1892, pursuant to the provisions of the contract of January 25, 1890, requiring the executors as such to make a deed by way of further assurance of title to the land in question to Clara J. Whiteman, such a deed was duly executed and delivered to her by the executors.

After the burning of the mill Alonzo organized a corporation called the Whiteman Pulp & Paper Company, he being the owner of substantially all the capital stock, and on January 9, 1891, took a conveyance to that company from himself and his mother as executors of the land on which the mill had been located, together with the water power, engines, boilers, machinery, and all salvage from the recent fire. The corporation proceeded to repair and reconstruct the mill, and on April 6th and afterwards it borrowed money from the firm of Perkins, Goodwin & Co., of New York, who became its sales agent to dispose of its product. It gave that firm its notes indorsed by Alonzo and Rebecca, and secured their payment by pledge of much of its capital stock and by a chattel mortgage on personal property. It afterwards became financially embarrassed, owing over $100,000. The notes were not paid, Alonzo and Rebecca, the indorsers, were sued, and on March 29, 1892,

judgment was rendered against them in the Supreme Court of the state of New York for $10,083.07 in favor of the firm of Perkins, Goodwin & Co. Afterwards suit was instituted in the district court of St. Louis county, Minn., on the New York judgment against Alonzo, and on May 24, 1892, recovery was had against him in the sum of $10,271.90. In January, 1901, execution was sued out on that judgment, levy made on the title and interest of Alonzo in the real estate which had on December 4, 1890, been deeded to his sister Clara, as belonging to him. The same was sold on execution and purchased by complainant, George F. Perkins, who now brings this action to quiet and establish his title by declaring the quitclaim deed of December 4, 1890, and the executors' deed of January 23, 1892, to Clara to have been made to hinder, delay, and defraud the creditors of Alonzo and for that reason to be null and void.

On February 10, 1892, the Surrogate Court of Livingston county made an order on the petition of Clara revoking letters testamentary before that time granted to Rebecca and Alonzo and requiring them to file their final accounts. Hearing on the petition of Clara disclosed the fact that Alonzo had alone taken possession of the personal assets of the estate and, without any intervention or participation by his mother, Rebecca, had administered upon the estate. His complete final account was filed in February, 1895, showing that he owed the estate $227,000, one-half of which belonging to himself and the other to his sister, Clara. This balance consisted of $65,163.31, which Alonzo had improperly expended in improving the mill property which, by agreement between him and Clara, was his; $45,594.26, made up of the worthless claims against him which Clara, by the contract of January 25, 1890, had agreed to discharge; $74,250 insurance money which he had collected and appropriated to his own use and other items of indifferent value. Clara was then made administratrix c. t. a., and an order was made requiring Alonzo to turn over the balance found due from him to the new administratrix. Her final settlement made later discloses the fact that the total amount of all the personal property which ever came to her hands as administratrix was $4,812.57. That probably consisted of some items which she received from other sources than Alonzo. No part of the balance found due from him was ever turned over to the administratrix. Alonzo did not have it, and was hopelessly insolvent. In fact, the balance was substantially composed of worthless claims against Alonzo from whom, by reason of his insolvency, nothing could be collected, and other items, which as between himself and Clara belonged to him, namely, the insurance money and the expenditures upon the mill property. About the time this settlement was made, and on February 12, 1895, Alonzo deeded to Clara in full satisfaction of whatever claim she had against him as executor his interest in certain real estate situated in the counties of Livingston and Steuben, N. Y., the value of which is not shown, and transferred to her the remaining personal property belonging to the estate, which amounted to little or nothing.

From the foregoing detailed statement of the facts the substance may be gathered as follows: That in the adjustment from time to time of their rights in the residuary estate of their father, voluntarily made by Alonzo and Clara, the only parties interested, Alonzo received the deed to the mill property at Dansville, received the money collected from the insurance companies on account of the destruction of the mill by fire, was released from his personal obligation of about $65,000 for money improperly taken from the estate and expended in improving the mill property, and was released from his personal obligation to the estate amounting to $45,000; and Clara got the wild and uncultivated lands in Minnesota and Wisconsin and a deed to some lots of land in Livingston and Steuben counties, N. Y.

Alonzo testified that he was hopelessly insolvent in 1890 and 1892 when the quitclaim and executors' deed were made to Clara; that they were devised and executed without any consideration moving from Clara to him, but solely for the purpose of covering up his property and preventing his creditors from levying upon it in satisfaction of their debts; and that Clara participated and co-operated with him in the accomplishment of his purpose. Clara, on the other hand, explicitly denied that testimony given by Alonzo, and reiterated the statement that the deeds were made pursuant to

the contract of January 25, 1890, and in part performance of it. After hearing the evidence the Circuit Court dismissed the bill for want of equity, and the complainant appealed to this court for a reversal of that decree.

After hearing the case on the merits the Circuit Court found that complainant had no right, title, or interest in any of the lands in controversy, but that Clara J. Gibbs had a valid title thereto in fee simple, subject only to the right which she had conveyed to the lumber company, and entered a final decree enjoining complainant from asserting any claim adverse thereto.

Austin N. McGindley, for appellant.

William E. Hale (M. H. Boutelle, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

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

Counsel for the parties in their argument and brief have extended discussion over a vast field of learning in this case; but, after a careful consideration of the facts and applicatory law, we find that the rights of the parties are solvable upon propositions of law which are indisputable and of fact which rest within a narrow compass. Upon the death of their father, and by virtue of the probate of his last will and testament, Alonzo and Clara Whiteman, his children, succeeded to a vested remainder each in and to an undivided one-half of the real estate in question in Minnesota and in and to a certain paper mill and real estate on which the same was situated and other real estate in New York, subject only to a determinable life estate in their mother, Rebecca Whiteman. Her life estate depended upon a condition subsequent that she should not again marry. In Minnesota, as elsewhere, title to real estate does not vest in the personal representatives of a deceased owner, but does on the death of the owner descend to and vest in the heirs at law or devisees subject to the possible requirement of its being needed to satisfy the debts of the deceased. The record in this case discloses no reason for consideration of the rights of creditors of the deceased. Accordingly, in 1890, the land in question was owned as follows: Rebecca had a life estate subject to be defeated by her remarriage, and Alonzo and Clara had each a vested remainder in expectancy in an undivided one-half thereto. Sections 4369, 4371, 4372, 4374, Gen. St. Minn. 1894; Debenture Co. v. Dean, 85 Minn. 473, 477, 89 N. W. 848. Rebecca's life estate was undoubtedly alienable (sections 4164, 4316), but whether so or not is of no importance because it was terminated before this suit was instituted by her remarriage. Alonzo's and Clara's estates were vested in interest, if not in possession, and as such were alienable by them. Sections 4372, 4396, Gen. St. Minn.; Debenture Co. v. Dean, supra; Lawrence v. Bayard, 7 Paige (N. Y.) 70; Griffin v. Shepard, 124 N. Y. 70, 26 N. E. 339; O'Donnell v. Smith, 142 Mass. 505, 8 N. E. 350.

Being so owned and lawfully subject to sale and disposition the only question in this case is one of fact, whether the deed duly and properly executed by Alonzo and Rebecca acting as individuals purporting to convey their right, title, and interest in the land in question to Clara on December 4, 1890, and the deed made by the same par-

ties acting as executors in the exercise of powers conferred by the will of the testator conveying the land to Clara on January 23, 1892, were devised and intended by the parties as a scheme to hinder, delay, and defraud the creditors of Alonzo, or were they made pursuant to the provisions of the contract of January 25, 1890, to separate their holdings in common into individual estates.

As the quitclaim deed effectually conveyed all the rights of Alonzo and Rebecca to Clara, little consideration need be given to the subsequent executors' deed, except to say that it evidences a harmonious and persistent purpose to carry out the provisions of the original contract, even to the extent of making a useless deed as an unnecessary assurance of Clara's title just because the grantors had agreed to do so. It shows the good faith of the original agreement.

Complainant, the purchaser of the lands under execution issued on the judgment against Alonzo, contends (1) that Alonzo, when the deeds in question were executed, was in financial straits, embarrassed, and insolvent; that Clara knew of his condition, and voluntarily became a party to a scheme to cover up his property and protect it from the rightful demands of his creditors; that to that end and for that purpose she took and held title to it in secret trust for her brother, with an understanding that, when he should get a settlement with his creditors or otherwise be released from their claims, she would reconvey it to him on demand; and (2) that Clara gave no consideration for the conveyances.

Alonzo was complainant's only witness to the making of the alleged fraudulent compact between him and his sister, and Clara was defendants' only witness on that subject. Alonzo affirmed its existence, and testified that the deeds were executed pursuant thereto. She broadly denied both those propositions. He admitted that the agreement of January 25, 1890, was made for the purpose of dividing the father's estate between himself and his sister, but said nothing was ever done under it. She testified that such was its purpose, and that the conveyances in question to her were made in part performance of that agreement. The testimony of both these witnesses was given about 15 years after the events occurred concerning which they testified. Alonzo was then or soon after, in the New York penitentiary serving a sentence for some crime committed by him, and Clara, while emphatically denying the fraudulent purpose imputed to her, appears to have been quite oblivious to most of the details of the transactions about which she testified. About all she seems to know with any certainty is that she intrusted her matters to competent counsel and followed their directions. From these unreliable sources we confidently turn to those instruments of writing and unimpeachable records which abound in this case for the truth. Both sides concede that the agreement of January 25, 1890, was executed for the purpose of making a friendly partition of the then joint interests of the children in their patrimony. That instrument, so far as we can discover, had no sinister purpose whatsoever. It was a rational and reasonable one to make. It was recorded soon after its execution in the office of the register of deeds where the land in question was situate, as notice to all persons of the incipient

rights of the parties. The two deeds now assailed were in apparent partial execution of that agreement. The quitclaim deed recites on its face that it was made "in consideration and in pursuance of a certain agreement made between the parties hereto and bearing date the 25th day of January, 1890." The practically cotemporaneous agreement of January 2, 1891, made between Alonzo and Clara, recites that Alonzo and Rebecca "have executed and are about to deliver to" Clara a conveyance of a portion of the lands in Minnesota and Wisconsin as required by the agreement of January 25, 1890. The executors' deed, as already stated, affords corroboratory proof of the good faith and intentional observance of the requirements of the original agreement obliging the executors on certain conditions therein specified to make, execute, and deliver to Clara "a sufficient executor's deed or deeds for conveying and assuring to her the fee simple title of said lands and premises free from all incumbrances." That deed recites that it was made by the executors "in consideration of the sum of one dollar and other valuable considerations to them duly paid [by Clara] the receipt whereof is hereby acknowledged." In view of such indisputable proof found on the face of the deeds and their allied writing, we have no doubt that the conveyances in question were honestly made for the purpose originally intended by the parties. The testimony of Alonzo that he and his sister deliberately entered into a scheme to cover up and conceal his property from his creditors is out of harmony with the original intention of the parties, and in the light of the fact that Alonzo owed the estate $45,000, had devoted much of the personal estate to unlawful uses, had appropriated and converted to his own use the proceeds of the fire insurance policies on the mill property, and was then hopelessly insolvent, we cannot believe that Clara would have abandoned the original purpose which alone gave her any assurance of securing an equivalent for all or a part of her imperiled interest in the personal estate of her father merely for the purpose of creating a secret trust for the benefit of her brother and to enable him to swindle his creditors. The irrationality and unreasonableness of the story condemn it.

But it is said the conveyances in question were without consideration, and for that reason void as to creditors. The facts do not warrant any such conclusion. When the deeds in question were delivered to Clara, Alonzo had not only then actually received the full agreed consideration, but, according to his own admission, was hopelessly insolvent. By the original agreement of January 25, 1890, he was to get the paper mill in Dansville and the land employed in connection with it, worth according to the brief of complainant's counsel about $150,000. He was also to secure a release and discharge from a personal obligation against him in favor of the estate for about $65,000 occasioned by his appropriating as executor that much of the personal estate for the construction, alteration, and completion of the paper mill. He was also to get a release and discharge from liability for his personal indebtedness to the estate amounting to about $45,000. What did he actually get? The executors of the estate deeded to him the mill property, conveying to him the full legal title, which with the insurance money which he appropriated, amounting to about

$75,000, constituted all there was of the mill property. He has never been made to respond to the estate for the amount of $65,000 which he took out of its funds and misapplied in the improvement of his mill. Neither has he ever been made to pay his debt of $45,000 which was admittedly due from him. Such are the facts, and, by whatsoever method, instrument, or conveyance the result was brought about, he is now and for 15 years last past has been in the undisputed and undisturbed enjoyment of all his promised rights and immunities under that agreement. The answer made to this showing is that in 1895 Alonzo, in complying with the order of the Surrogate Court to make a final settlement of his accounts preparatory to turning over his estate to the administratrix c. t. a., charged himself with all the items of money just referred to, and thereby recognized an obligation to the estate for them. That fact for the purposes of this case is of no consequence. As between him and Clara, the items all belonged to him, and he had appropriated them to his own use; but, as between him and the estate, the orderly course of procedure required him to make a full statement of his accounts. It is no uncommon practice in administering the estates of deceased persons for an executor to make partial distribution before final settlement; but that does not excuse a full final statement of accounts with debits against him of the full value of the estate. The fact of a preliminary distribution can afterwards be shown as an exoneration of the executor to that extent. It is also said that Clara never executed a quitclaim deed to Alonzo for the mill property as agreed; but the executors executed that deed with her assent as shown by the proof. It thus appears that the contract of January 25, 1890, has been substantially executed on both sides. Each has received substantially what he or she was entitled to get. Whether it was executed in the exact way specified in the agreement or whether formal instruments were exchanged as thereby contemplated is for the purposes of this case immaterial. We are now dealing with the substance of things, the equities between the parties, and not with technical terms or technical requirements.

On the assumption which we have shown is reasonable, that the deeds in question were made to Clara in partial execution of Alonzo's obligation under the contract of January 25, 1890, a court of equity, if necessary, would undoubtedly have compelled Clara to perform her obligations thereunder. Accordingly, for the purposes of this case, we do not concede that it was necessary to show that Clara has fully performed. The equitable obligation existed, and it was sufficient consideration for the performance by Alonzo of his part of the contract, namely, the execution of the deeds in question. But, as this case involves an issue of fraud and determination of a mental attitude, we have, as we should have done, taken a comprehensive view of all the facts and circumstances surrounding the parties in any way related to the subject under consideration, and in doing so we have found that Alonzo actually received all the money and property to which he was entitled as consideration for the deeds in question, and has never returned and never could lawfully be made to return any portion of it to Clara. From these facts we unhesitat-

ingly conclude that the deeds in question are supported by an ample and meritorious consideration. We reach this conclusion in full recognition of the fact largely relied on by complainant's counsel that Alonzo on February 12, 1895, deeded to Clara his interest in some real estate in Livingston and Steuben counties, N. Y., in full settlement of her claims against him as executor as shown by his final settlement. That deed must be taken in connection with all the other facts of the case. It does not appear how much there was in the estate properly belonging to Clara after allowing to Alonzo all that as between him and Clara belonged to him under the agreement of January 25, 1890. That uncertain element might afford full consideration for the last mentioned deed. Neither does it appear how much the real estate last referred to was worth. The conveyance taken seriously and literally may, therefore, be in no wise inconsistent with the conclusion which we have reached. But, when it is considered that by reason of Alonzo's insolvency a technical accounting and settlement as between him and Clara was of no practical importance, we may properly attribute the deed of February 12, 1895, to a disposition to close up in some conclusive way an open account between the parties at a time when enforcement of legal rights would be unproductive of any good.

Counsel for complainant argue that the quitclaim deed was never in fact delivered to Clara, but was held by Alonzo for his own convenience, and placed on record, not by Clara, but by him, to serve his own unlawful purpose of cheating and defrauding his creditors. There is no satisfactory evidence of that character; but, on the other hand, complainant's contention is effectively denied by his own pleadings. In his complaint he avers that the deed was executed and delivered to Clara, "and that said defendant Clara J. Gibbs caused said deed to be recorded in the register of deeds office in and for said St. Louis county, Minnesota, on the 12th day of May, 1891." For the purposes of this case, therefore, we must find and hold as a fact that the deed was duly delivered to Clara before May 12, 1891, and by her for her own purposes caused to be recorded. The judgment under which complainant purchased the lands in question was not rendered until May, 1892, so that it never attached to the land in question as a lien until after Clara's deed was executed and recorded, and her rights established thereunder. Several other facts are argued by counsel as important and significant in the determination of this case. To all of them, in connection with the facts already discussed, we have given diligent consideration which results in a firm conviction that the deeds in question were executed for the honest purpose of making a friendly partition of the real estate of the ancestor, and constituted neither a secret trust in favor of the grantor nor conveyances without consideration. The conclusion reached by us on these questions of fact render unnecessary the consideration of defendants' contention that, even if the deeds were void as to creditors, complainant is barred from relief in equity by his laches in failing to institute this suit for 12 years or more after the alleged fraud was committed.

The court below reached the same conclusion we have reached on the issue of fact here involved, and its decree might properly have been a simple dismissal of the bill; but, as its finding that complainant did not have any right, title, or interest in the land in question and its injunctive order restraining him from asserting any such right, title, or interest adverse to the defendants accomplish the purpose and are not complained of for irregularity, the decree as rendered is affirmed.

WILSON v. CALCULAGRAPH CO.

(Circuit Court of Appeals, First Circuit. March 27, 1907. Rehearing Denied May 1, 1907.)

1. EVIDENCE—JUDICIAL NOTICE—RECORDS OF SAME COURT.
The rule applied that a court is entitled to take judicial notice of its own records, especially where the facts constitute a part of the same litigation.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 62–65.]

2. APPEAL AND ERROR—APPEALABLE ORDER—CONTEMPT PROCEEDING.
The rule applied that an order of a Circuit Court, adjudging the defendant in a suit for infringement of a patent in contempt for violation of an injunction granted therein, and imposing a fine for the benefit of the complainant, is civil in its nature, and constitutes a part of the proceedings in the case, and, where entered after final decree, is appealable to the Circuit Court of Appeals.

3. SAME—REVIEW—ASSIGNMENT OF ERRORS.
Held, that the ordinary rules in reference to the limitation after mandate of the powers of a court appealed from do not apply here, because no proposition with reference to them was made in the court appealed from; and consequently the Circuit Court of Appeals declined to revise a proceeding in the Circuit Court with reference to the violation of an interlocutory injunction, which proceeding occurred after the reception of the mandate dismissing the suit.

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

Frederick L. Emery (J. Stewart Rusk on the brief), for appellant.
Edwin J. Prindle (Benjamin Phillips, of counsel), for appellee.

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

PUTNAM, Circuit Judge. This appeal grew out of a bill in equity, filed by the Calculagraph Company against Wilson, the present appellant, alleging infringement of certain letters patent. On September 26, 1904, the Circuit Court entered in the original case a final decree in favor of the complainant, awarding an injunction and costs. From this decree an appeal was taken to us, with reference to which the citation was signed on November 10, 1904. On February 21, 1906, we entered a judgment as follows:

"The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to dismiss the bill, with costs; and the appellant recovers costs of his appeal."

Subsequently, and within the time fixed by our rule 29 (133 Fed. iv, 64 C. C. A. iv), the Calculagraph Company, the then complainant and the present appellee, seasonably filed a petition for rehearing, which it then might do as a matter of right in accordance with our rule and practice. This petition was denied on March 21, 1906, so that then a mandate issued on March 28, 1906. Meanwhile, after the appeal was taken, on February 2, 1905, the Calculagraph Company, the original complainant, filed a petition against Wilson, the original respondent, alleging a violation of the injunction contained in the final decree appealed from by a modified device, and praying for an attachment for contempt. A hearing was had on this petition in the Circuit Court on February 23, 1905, as the result of which an opinion was passed down on March 18, 1905. This opinion declared that Wilson was guilty of contempt, and closed as follows:

"We will not now pass upon the question of penalty, but leave it for a future decree. Let a decree therefore be entered. Defendant adjudged to be in contempt of both the preliminary and the final injunction in this case."

The final order was entered on April 25, 1906, as follows:

Order of Court.

April 25, 1906.

HALE, District Judge. Upon the return of the rule to show cause heretofore entered, and it appearing that service thereof had been had on the defendant, John C. Wilson, by delivering a copy thereof to the said John C. Wilson, and counsel having been heard in his behalf, the court finds that defendant is in contempt both of the preliminary and the perpetual injunction issued by this court in the case of Calculagraph Company v. Wilson, in equity, No. 1,749, and orders that the said defendant pay one hundred dollars fine and the costs of these proceedings, said costs being one hundred forty-five and $^{74}/_{100}$ dollars, said fine and costs to be paid into court for the use of the petitioner, the money to be paid within ten days, or defendant to be then committed until this order is obeyed.

By the Court: Benj. H. Bradlee, Deputy Clerk.

Thereupon Wilson appealed to us.

It will be noticed that the hearing on the petition for an attachment the preliminary order, and the final order, were all after the judgment was entered in the Court of Appeals, and the final order was also after the mandate issued.

The essential details with reference to the foregoing proceedings to not appear in the record before us, were not referred to in the assignment of errors, and have not been given in the briefs of the parties. They have been found after personal investigation by the court and an examination of the voluminous record on appeal in the original suit. We have no doubt that we are entitled to take judicial notice of our own records, especially where the facts constitute a part of the same litigation. Cushman Co. v. Goddard, 95 Fed. Rep. 664, 665, 37 C. C. A. 221, and authorities there cited. This reference is to our own opinion passed down on June 18, 1899, and it sufficiently states the rule without regard to later decisions in which the same rule has been stated.

In Re Jugiro, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510, it is said generally, at pages 295 and 296 of 140 U. S., pages 771 and 772 of 11 Sup. Ct. (35 L. Ed. 510), that a judgment of the Supreme Court confirming the judgment of the court below is effective from the time

of its entry, so that the court below could proceed without awaiting the issue of a mandate. In Burget v. Robinson, 123 Fed. 262, 265, 59 C. C. A. 260, decided by us on May 1, 1903, we queried whether that determination should not be regarded as peculiar to appeals under the habeas corpus act, which was the subject-matter under consideration, and whether ordinarily, in theory of law, the record is not supposed to remain in the appellate tribunal until there has been a remittitur in some form; so that perhaps it is not yet settled whether even the preliminary order of the Circuit Court in the proceeding before us occurred before or after the judgment of this court was perfected. Also, there is a question whether or not that preliminary order was effectual to any extent aside from the formal order entered on April 25, 1906. Also, under equity rule 93, which under the statute establishing this court is, at least until this time, our rule, and which only puts in form the law to the same effect as stated in Leonard v. Ozark Land Company, 115 U. S. 465, 468, 6 Sup. Ct. 127, 29 L. Ed. 445, there may be a question whether we should unqualifiedly apply to injunctions granted by the Circuit Court the quite peremptory decisions of the Supreme Court that, after a judgment of an appellate tribunal, the court below has no power to proceed except to execute the mandate which it receives. In re Gamewell Co., 73 Fed. 908, 910, 20 C. C. A. 111, decided by us on April 23, 1896.

It is evident that the proceeding of the Circuit Court now appealed against was civil in its nature, and not criminal, as explained in Bessette v. W. B. Conkey Company, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, in Re Christensen, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072, and lately in Doyle v. London Guarantee Company, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. ——, in which an opinion was passed down in the Supreme Court on February 25, 1907. If it had been criminal in its nature, it would, of course have been in law a separate proceeding, and not affected by our judgment in the original case. Being of a civil character, however, and whether to be regarded as interlocutory or as on the heel of the judgment of the Court of Appeals in the original case, it might be appealed against under the broad provisions of the statute establishing this tribunal. The appellee here—that is, the Calculagraph Company—has moved to dismiss this appeal on the ground that we lack jurisdiction over the same; but that it is in error with a proceeding of this character is so clear that we need not pursue this topic further.

Wilson, the appellant here, urges on us that, under the circumstances, the Circuit Court had no power except to give effect to the mandate, and that it therefore exceeded its authority in imposing a fine as it did. We have pointed out that not only does the record laid before us fail to show on its face the facts necessary to properly understand this proposition, but that no reference is made to it in any specific form by the assignment of errors. The record also fails wholly to show that this point was brought at all to the attention of the court below. We are unable to find that, aside from this, any proposition was argued before us by the present appellant, except to the effect that the fine imposed was excessive because the violation of the injunction was purely technical, and that the decision of the Court of Appeals, in reversing

the judgment of the Circuit Court in the original cause, deprived the whole proceeding of any foundation; but the totality of the assignment of errors on the present appeal was as follows:

"And now comes the defendant and claims an appeal in this cause, and assigns therefor the following errors, viz.:

"First. That the court erred in respect to the law and facts in the case in finding defendant in contempt of court.

"Second. That the court erred in ordering defendant to pay the sum of two hundred and forty-five and twenty-four hundredths (245.24) dollars, said sum comprising the sum of one hundred (100) dollars as a fine, and one hundred and forty-five and twenty-four hundredths (145.24) dollars, the amount of court costs to complainant of the proceedings in contempt, said sum of two hundred and forty-five and twenty-four hundreths (245.24) dollars to be paid for the benefit of the complainant.

"Third. That the court erred in ordering defendant to pay the sum of two hundred and forty-five and twenty-four hundreths (245.24) dollars for being in contempt of court."

The present appellee, the Calculagraph Company, has not discussed the effect of the judgment of the Court of Appeals and its mandate on the proceedings in the Circuit Court. We are not surprised at this by reason of the facts we have stated, namely, that the assignment of errors in no way called its attention thereto, and that the record in no way indicates that the topic was laid before the Circuit Court. The effect of the insufficiency of the assignment of errors in this particular is apparently of substantial consequence. Also, the record presents no facts which would enable the court to pass understandingly on the second assignment. It it true that there are, perhaps, some cases where all that the appealing party can do is to assign generally that the judgment or the decree below was erroneous, especially where it covers both fact and law; but here it was clearly within the power of the appellant to point out whether he relied on a claim that there was no infringement by the new device, or on a claim that the judgment and mandate of the Court of Appeals deprived the Circuit Court from entering the preliminary order of March 18th, or from entering the formal order of April 26th, or whether he claimed that the order of April 26th was something more than merely putting into form the preliminary order of March 18th, or that the judgment of the Court of Appeals was conclusive in his favor on the entire merits of the present litigation.

The amount involved here is comparatively small, and no gross injustice can be done by holding the present appellant to a reasonable compliance with our practice. Were it otherwise with reference to either the one or the other, we might be justified in noticing some of the questions now presented by the appellant, Wilson, although not properly assigned, or in permitting amendments of the assignment of errors and a reargument; but, under the circumstances, we feel that this is an instance where we may properly protect ourselves by an enforcement of our rules.

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

UNITED STATES v. SILBERSTEIN, CASTELL & CO.

(Circuit Court, S. D. New York. February 27, 1907.)

No. 4,092.

1. CUSTOMS DUTIES—CLASSIFICATION—PANNE VELVETS—PLUSH.
   Under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 386, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], enumerating "plush" and "velvets" as subject to different rates of duty, panne velvets are subject to the former classification.

2. SAME—COMMERCIAL USAGE—DIVIDING LINE BETWEEN PLUSH AND VELVET.
   No rule exists in trade or commercial usage declaring that fabrics having a pile of 3.5 millimeters or less in length should be regarded as velvets, and of over 3.5 millimeters as plush.

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

For decision below, see In re Kridel et al., G. A. 6,136 (T. D. 26,668), sustaining the importers' protests against the assessment of duty by the collector of customs at the port of New York.

The question is whether the merchandise, which consisted of so-called "panne velvets," was properly classified as "velvets," under Tariff Act July 24, 1897, c. 11, § 1, Schedule L. par. 386, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], or was dutiable under the provision in the same paragraph for "plush," as claimed by the importers and as was held by the Board. Subsequent to the rendition of the Board's decision above cited, another hearing on the subject was held, at which much additional evidence was introduced. But the majority of the Board held, in Re Stirn, G. A. 6,275 (T. D. 27,057), that the new evidence would not warrant a departure from the rule of the previous decision. The evidence in this latter case has, by stipulation in the Circuit Court, been consolidated with the record in the former case, so that in the present proceedings the court has had before it all the evidence which was before the Board in both the Kridel and the Stirn Cases. A full statement of each side of the controversy appears from the following extracts from the majority and dissenting opinions filed in the latter case:

"DE VRIES, General Appraiser. * * * Much testimony has been taken in addition to that taken at the time of the rendition of the decision in G. A. 6,136, and accompanies this record. Numerous witnesses having a general and uniform knowledge of trade designation appeared and testified in these cases, and the great preponderance of the testimony was that the merchandise known as 'panne velvets,' while it was bought and sold by that peculiar designation, is generally and uniformly classed by the wholesale trade as plushes. We therefore find that the merchandise * * * is generally and uniformly classed in the trade and commerce of this country as plushes. * * * An effort has been made to show that the determination of what is a plush and what is a velvet is dependent upon the particular length of the pile, whether it is greater or less than 3.5 millimeters in length. The witnesses by whom it was sought to establish this rule admitted that, while that was the rule followed in some places, it was not strictly adhered to. We are not satisfied from the evidence in these cases that there is a general uniform trade understanding in the wholesale or retail trade of this country that a pile fabric the pile of which is longer than 3.5 millimeters is a plush, and that a pile fabric the pile of which is shorter than 3.5 millimeters is known as a velvet. However commendable such a rule may be, and however desirable it may be to establish, in the determination of differences between provisions of a tariff law, a certain definite and uniform understanding in the trade, we are unable to say, from a fair reading of all the testimony in these cases, that such a rule obtains generally and uniformly throughout the wholesale trade in velvets and plushes in this country. It appears that the

rule was one adopted in France, and to some considerable extent has been followed among manufacturers in this country, but is not one which has obtained in the wholesale trade generally and uniformly throughout this country. Indeed, its general and uniform acceptance in France may be questioned seriously, when we examine the invoices before us in these cases and observe thereupon, as is true, that the so-called 'panne velvets' are, in the majority of cases, invoiced as 'peluche,' with some qualifying designation, which, in English, means plush; whereas, if the rule contended for were true, they could not be properly designated such even in France.

"HOWELL, General Appraiser (dissenting). * * * In the present case the record is materially different from the record in Kridel's Case. The importers have produced no testimony in this case further than such as was necessary to prove samples of the merchandise, but have rested solely on the record in the former case, which, at their request, has been incorporated in and made a part of this record. The government, on the other hand, has introduced the testimony of four witnesses—importers, manufacturers, and dealers in velvets and plushes in the markets of this country—and they all testified that since the introduction of panne velvets they have been, and are still, known definitely, generally, and uniformly in the wholesale trade of this country as 'panne velvets,' and that, having in mind the line drawn in the trade in this country prior to 1897 between velvets and plushes, they were within the class always dealt in as velvets. * * * Other witnesses might be quoted to show that the goods are known in the wholesale trade of this country as 'panne velvets,' but I think it is unnecessary to set out their testimony here, for it is stated in the prevailing opinion that 'the great preponderance of testimony was that the merchandise known as "panne velvets," while it was bought and sold by that peculiar designation, is generally and uniformly classed by the wholesale trade as plushes.' As it is agreed, then, that the testimony shows that the articles are bought and sold in this country as 'panne velvets,' that, in my judgment, establishes their commercial designation as belonging to the general class of velvets; and, since there is a tariff provision which embraces these articles by their commercial designation, this fixes their status for dutiable purposes, and it is quite immaterial how the goods may be classed when judged by some other standard. The fact that the articles are known as 'panne velvets,' rather than by the single word 'velvets,' is also quite immaterial; for the addition of the adjective cannot take the articles out of the general class to which they would otherwise belong. Heller v. United States (C. C.) 124 Fed. 299. Of course, if velvets were not provided for in the tariff, and plushes were, and the articles were shown to belong to the class of plushes, then they would unquestionably be dutiable as plushes; but, since there is an eo nomine provision for velvets, and these articles are commercially known as velvets, I fail to see how they can be properly classified as plushes. It is stated in the opinion in G. A. 6,136 that 'The term "panne" is a French term, and means "ironed" or "smoothed." The term "panne velvet" means "ironed or pressed velvet," and would seem to indicate a kind of plush which, by reason of its close resemblance to velvet, is at times difficult to distinguish from it.' It is quite true that the term 'panne velvet' means 'ironed velvet,' but an ironed velvet is never a plush. The two fabrics are entirely distinct, the plush having a longer pile, which gives it an appearance decidely different from a velvet. It is clearly shown by the testimony in this case that the chief distinction between plushes and velvets is the length of the pile of the fabric, and that the dividing line is about 3.5 millimeters; those fabrics having a pile above that length being plushes, and those having a shorter pile being velvets. The length of the pile of panne velvets is under 3.5 millimeters, and therefore, judged by this standard, they are velvets. In my opinion, the testimony is amply sufficient to justify the Board in adopting this standard, which has been the standard followed in France for some years, and is well recognized by manufacturers in this country as the line of demarkation between velvets and plushes. It is not necessary to show that in buying and selling these goods in the wholesale trade in this country the particular measurement of the pile of the fabric is mentioned; but it is sufficient to

show, as the testimony in this case does, that the commercial designation of the article is always the same, according as the pile of the fabric may be longer or shorter. This Board and the courts have frequently established lines of demarkation as convenient criteria to be followed by customs officials in determining the proper classification of goods of the same general character, but which, because of certain distinguishing features, have different trade designations, and are therefore subject to different rates of duty. In some instances the width of the goods has been the test applied, as in the cases involving the question of the proper classification of chiffon bands and veilings. Robinson v. United States (C. C.) 121 Fed. 204; United States v. Lahey, 83 Fed. 691, 28 C. C. A. 379; In re Forchheimer, G. A. 6,034 (T. D. 26,353). In other instances the price of the articles has been accepted as the criterian for determining their classification, as in the case of toy music boxes (Jacot v. United States, 65 Fed. 415, 12 C. C. A. 666), and harmonicas (G. A. 4,679; T. D. 22,096). Note, also, G. A. 5,697 (T. D. 25,355); G. A. 5,851 (T. D. 25,770); G. A. 5,948 (T. D. 26,095). My conclusion is that panne velvets are properly dutiable as velvets. If, however, the testimony is considered insufficient to establish the commercial designation of the articles as velvets, it is equally insufficient, in my judgment, to establish their commercial designation as plushes, and, as the articles are admittedly pile fabrics composed in part of silk, they are dutiable as assessed, in as much as such goods are made dutiable under paragraph 386 at the same rate as velvets."

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

Brooks & Brooks (Frederick W. Brooks, of counsel), for importers.

HOUGH, District Judge. A perusal of the testimony herein convinces me:

1. That it is highly desirable that an accurate line of demarkation be drawn between plush and velvet.

2. That the establishment of a rule declaring that all fabrics of the type under consideration having a pile of over 3.5 millimeters in length shall be regarded as plushes would furnish such accurate line of demarkation.

3. But no such rule exists in trade or commercial usage.

It results, therefore, that every case must be covered by opinion evidence, unsatisfactory as it is. The evidence here supports the conclusion of the General Appraisers, and their decision is therefore affirmed.

McNABOE v. COLUMBIAN MFG. CO.

(Circuit Court of Appeals, Second Circuit. May 31, 1907.)

BANKRUPTCY—PREFERENCE—STOLEN FUNDS.

The president of a bankrupt corporation, being the Eastern agent of defendant corporation, with knowledge of the bankrupt's insolvency on several occasions, misapplied funds belonging to defendant to the use of the bankrupt without defendant's knowledge or consent, and then, when the bankrupt's failure could no longer be suspended, he sold certain of the bankrupt's assets, and with the proceeds repaid defendant the money misappropriated, also without defendant's knowledge. *Held*, that the repayment of the money so stolen from defendant did not constitute a preference recoverable by the bankrupt's trustee.

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

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

The legal question here to be decided offers as a basis for adjudication very few and simple facts.

Within four months of the petition filed against the bankrupt herein the same man was at the same time the president of the bankrupt corporation, and an agent and director of an entirely different corporation. The bankrupt being already insolvent, this person on several occasions applied the funds of the corporation for which he was agent to the uses and purposes of the bankrupt, passing such funds through the bankrupt's bank account. Neither as agent nor director had he any authority to do what he did, and what he did do amounted in plain language to theft. The money under his control was in New York, and the headquarters of the corporation for which he was agent were in St. Louis, where also all its officers resided or had their place of business. When this man realized that bankruptcy of the corporation of which he was president was inevitable, he converted into cash a considerable portion of the bankrupt's assets, and repaid to himself as agent for the St. Louis corporation the amount which he had practically stolen. None of the officers of the defendant (the St. Louis corporation) had the slightest knowledge that their New York funds had either been taken or replaced until months after the bankruptcy was flagrant. The trustee in bankruptcy now asserts that the repayment of the stolen money constitutes a voidable preference under secion 60 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]).

It is admitted that, in order to constitute a voidable preference, either (a) the person receiving the preference; or (b) the person to be benefited by the preference, or (c) "his agent acting therein" shall have had reasonable cause to believe that a preference was intended by the payment or transfer complained of. Assuming that the performance above outlined comes within the purview of the bankruptcy act at all, it must be admitted that neither "the person receiving" the payment in question, nor the person "to be benefited thereby," had, or had reasonable cause to have, the guilty knowledge which is the basis of a voidable preference.

This whole claim rests upon the proposition that the man who took the money from the defendant was the agent of the defendant in respect of the repayment, and that, inasmuch as the payment constituted a preference under section 60a, the words "his agent acting therein" bring the matter within the prohibition of section 60b. It is candidly admitted in the able argument for the plaintiff that the rule which charges the principal with his agent's knowledge is subject to exception in cases where the agent is acting in fraud of his principal in the very transaction wherein he has knowledge or gets notice. As was said in De Kay v. Hackensack Water Co., 38 N. J. Eq. 161: "Where an officer of a corporation deals with the corporation in a matter in which his interest is opposed to the interest of the corporation, he does not in such transaction represent the corporation so as to make his knowledge the knowledge of the corporation." It is not, of course, argued that the person out of whose wrongdoing this claim arose was the agent of the defendant in permitting its money to flow into the coffers of the bankrupt; but it is strenuously urged that, when it came to repaying that money (by such repayment probably saving himself from criminal prosecution), the same man became once more the defendant's agent. But the whole transaction, including payment and repayment, was something of which the defendant had no knowledge whatsoever, and as to which the law expressly repudiates any imputation to the corporation of a dishonest director's knowledge. It does not appear to me to be possible for a person to be not the agent of a corporation in a swindle on that corporation, and to be the agent of the same corporation in effecting reparation thereof, when both swindle and reparation remain entirely unknown to the corporation affected. If this case had arisen under the act of 1867, it cannot I think be doubted that Lindsey v. Lambert Building Association (D. C.) 4 Fed. 48, would have required judgment for the defendant. The reasoning of that case is entirely satisfactory to me, and I fail to perceive that the

words of the present statute "or his agent acting therein" require a different decision.

In order to make those words applicable, the person whose knowledge is to be imputed to the defendant must be (a) an agent, and (b) he must be an agent authorized or empowered to act in respect of the preference, and (c) he must actually perform the duties of his agency in respect of the preference. How a man can have an agent empowered to act in a matter which could never arise without the commission of a flagrant moral wrong (if not a technical crime) by the alleged agent I cannot perceive; and to presume that a person appoints an embezzler to recover the amount embezzled is, I think, an application of the maxim regarding "setting a thief to catch a thief," which exposes the law to ridicule. The cases of Nisbit v. Macon B & T Co. (C. C.) 12 Fed. 686, and Crooks v. People's National Bank, 72 App. Div. 331, 76 N. Y. Supp. 92, 495 (affirmed 177 N. Y. 68, 69 N. E. 228), do not appear to me to affect this case. They both lack that element of secret dishonesty on the part of the person sought to be treated as an agent, which is, I think, the ruling consideration here.

I regard this case as suitable for the consideration of the appellate court, and have thought it sufficient, therefore, to indicate briefly the reasons which lead me to direct judgment for the defendant.

William S. Maddox, for plaintiff in error.

Charles E. Hill, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. In brief, the question presented for decision is whether a party who has had stolen money restored to him, he being in entire ignorance both of the theft and the restoration, has received a preference under the bankruptcy act?

We are so clearly of the opinion that he has not received a preference that we find it unnecessary to add anything to the discussion of the proposition found in the opinion of the judge of the Circuit Court.

The judgment is affirmed.

UNITED STATES v. TIFFANY & CO.

(Circuit Court of Appeals, Second Circuit. February 4, 1907.)

No. 22.

CUSTOMS DUTIES—COURTS—ACTION FOR DUTIES—SUSPENSION OF TRIAL.

In an action against an importer for unpaid duties, the Circuit Court has ample power to suspend the trial until the importer, by payment of the duties assessed, may put himself in position to try the question as to classification of the goods before the Board of General Appraisers.

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

For former proceedings in this case, see (C. C. A.) 151 Fed. 473, reversing (C. C.) 137 Fed. 971, as to an importation at the port of New York.

It was there held that, when an importer is sued for unpaid duties, he cannot defend on the ground that the duties were improperly assessed; that under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], the collector's decision is final, unless reversed on review by the Board of United States General Appraisers or the courts in the manner prescribed in said act, and that in order to secure such review the

duties should first be paid. The present proceedings have arisen on a motion in behalf of the importers for leave to apply to the Circuit Court for permission to amend the answer to the complaint of the government in the original action.

D. Macon Webster (Arthur M. King, of counsel), for importers.
J. Osgood Nichols, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The application to serve and file a supplemental and amended answer is denied, because we deem the application unnecessary, as the Circuit Court has ample power to grant such relief, and to suspend the trial until the importer, by payment of the duties assessed, may put itself in position to try the question as to classification before the Board of General Appraisers.

THE W. N. BAVIER.

THE H. M. WHITNEY.

(Circuit Court of Appeals, Second Circuit. April 13, 1907).

No. 157.

COLLISION—TOW AND MEETING STEAMER—IMPROPER NAVIGATION BY TUG.

A collision in East river between a canal boat, which was one of four in tow of a tug passing down on an ebb tide, and a steamer passing up on the Brooklyn side of the center of the channel, *held* due to the fault of the tug, which, after exchanging the proper passing signal of one whistle with the steamer and properly porting her helm for a time, starboarded it again when about the center of the channel, allowing her tow to sag to port with the tide and against the steamer. The steamer *held* not in fault because of her violation of the East river statute, which required her to keep in the middle of the channel, since it in no way contributed to the collision, nor because she did not go still further to starboard than she did; her change of course being sufficient for safe passage if the tug had continued to co-operate, as she had the right to assume would be done after the exchange of signals.

[Ed. Note.—Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

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

This cause comes here upon appeals from a decree of the District Court, Southern District of New York, which held both vessels in fault for a collision between the Whitney and libelant's canal boat Emergency, in tow of the Bavier, which happened in the East river opposite Wallabout Bay, and to the south of Corlear's Hook, August 16, 1904, at about 6 p. m.

Amos Van Etten, for the Bavier.
H. Putnam and Wing, Putnam & Burlingham, for the Whitney.
J. K. Symmers and Carpenter, Park & Symmers, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The Bavier had four boats in tow, made up in two tiers astern on a hawser of about 100 feet; the Emer-

gency being the port boat on the second tier. The entire distance from the tug's bow to the last boat was about 380 feet. As we have already held in The A. W. Booth, 138 Fed. 303, 70 C. C. A. 593, no fault can be charged against the Bavier because of the length of her tow; but she was bound to navigate with a degree of care commensurate with the risk thereby incurred. All the boats in the tow were light. They had no steering apparatus of their own, but were dependent on the direction of the hawser for their steering. The tug left Rivington street, bound for Fifty-First street, North river, with this tow heading up river, and rounded to until she headed down river; the tide being ebb. The steamship was bound up the river for Boston. The collision happened to the eastward of midchannel —about two-thirds of the way over towards Brooklyn, the district judge finds, and the clear weight of evidence supports that finding.

Accordingly to the story of the master of the Bavier, he was a little to the eastward of mid river when he saw the Whitney. He had brought his tug nearly into position, but his tow, under the influence of the ebb tide, which has a set towards Brooklyn, was tailing over more to the eastward. The Bavier was under a port helm. She was about off Jackson street, when he saw the Whitney coming up about off Gold street, and nearer to the Brooklyn shore than his tug was. The Whitney blew one blast, and he answered it with one. The navigation thus announced by both boats was proper. They were meeting in the first position (article 18, rule 1 [U. S. Comp. St. 1901, p. 2881]), and their courses were not on the starboard of each other. It was their duty to pass port to port. As soon as whistles were exchanged the master of the Bavier put his wheel harder to port, in order to pull his tow over out of the way. The distance between the two vessels was ample when whistles were exchanged, and, had he kept his port wheel, the Whitney cooperating, there was no reason why the steamship and tow should not have passed each other with a reasonable margin of safety. The disaster is sufficiently accounted for by his admission that after he had been heading well over to the New York shore, until "he thought his tow would go clear," he starboarded and headed straight down the river, although he admits that his tow was "a little to the eastward of the middle of the river." This was apparently at the very place where the course of the river changes nearly from S. W. to W. The natural result was that the tow, relieved of pull to the westward, swung down with the tide upon the Whitney.

The master of the Bavier evidently appreciated that his change of helm brought the vessels into collision; for he undertook to explain it by the presence of another vessel, which he alleges interfered with him. This was a New York, New Haven & Hartford car float, which was coming up about abreast of the Whitney. He says he pulled under the port wheel as near the float as he could, as near as he thought safe; that he did not want to pull across the float's bow, and therefore starboarded. A majority of the court are not disposed to credit this excuse. He admits that his tow was to the Brooklyn side of mid river, and the most he claims for his own position is mid river. We are of the opinion that he had not reached mid river;

but, for the purpose of the argument, it may be assumed that his statement is correct. He says that, when he first saw this craft, a tugboat (the Dunne) was coming up with a lumber barge on each side of her, about 75 to 100 feet off the New York shore, and that the car float, with her tug, was about 30 to 50 feet outside the Dunne; that there was easily 1,000 feet between the car float and the Whitney, and that the car float and tow did not come out over towards the Whitney, but "kept in to the New York side, where they belonged." If he himself were in mid river, he was at a considerable distance from the car float. Moreover, according to his story, he kept on a considerable time heading for the tug and car float in full sight of them, until he got within 50 feet, but received no signal from them, and blew them none. Appreciating the weakness of this excuse he also said that he starboarded in order to slew his tow, an excuse quite as unsatisfactory. We are of the opinion that he was in fault for not continuing under his port wheel until he had brought his tow to mid river.

A majority of the court are also of the opinion that the Whitney was not in fault. She was coming up the river well over towards the Brooklyn side, presumably on account of the ebb tide. But, if she were in fault for not navigating nearer the center of the river, under the East river statute (section 757, c. 410, p. 211, of the New York City consolidation act of 1882), such fault in no way contributed to the accident. The boats met in the first position, end on, or nearly so, and not on each other's starboard bow, and exchanged signals when at a sufficient distance to insure passing in safety, if both navigated in conformity thereto. As we have seen, the Bavier did not so navigate. After porting, she starboarded, and thus let her tow sag down, where it would not have been had she continued under a port wheel. The Whitney ported, and (except just before collision, when she starboarded to regain control lost by backing) kept changing her course to starboard. It is probably true that she might have gone still further to starboard without running into the Navy Yard piers, and might have passed to the eastward of the tow, even if the Bavier had not ported at all. But the vessels had exchanged signals, which indicated that the Bavier would haul to starboard, and the latter was seen to be hauling over towards New York. The master of the Whitney was entitled to suppose that she would continue to navigate accordingly, and, having himself ported sufficiently to make reasonably safe clearance, should not be held in fault because the other vessel, without giving any warning, suddenly ceased to cooperate. Vessels navigating according to the rules may fairly suppose that other vessels they meet will so navigate, unless something occurs (such as a failure to answer a signal received, or a failure to conform to a signal blown) to indicate that the contrary may be anticipated. Kennedy v. The Sarmatian (C. C.) 2 Fed. 911.

The decree of the District Court is reversed, with costs of this appeal to the Whitney against the Bavier, and cause remanded, with instructions to decree in favor of libelant against the Bavier for damages, interest, and costs.

THE BAY STATE.

THE WRESTLER.

(District Court, S. D. New York. May 21, 1907.)

1. COLLISION—RULE GOVERNING NAVIGATION OF EAST RIVER.
   The narrow channel rule of article 25 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) requiring steam vessels to keep to the starboard side of the fairway, does not apply to that part of East river between the Battery and Blackwell's Island, which is governed by the local rule requiring vessels to keep in the center of the channel.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 8.]

2. SAME—STEAMER AND MEETING TOW—VIOLATION OF EAST RIVER RULE.
   A collision in the East river south of Blackwell's Island between a steamer bound down the river and a carfloat in tow of a tug bound to dock 4 of the Long Island Railroad slips, *held* due solely to the fault of the steamer in attempting to cross the river to the Brooklyn side from the channel between Blackwells Island and Manhattan, without having obtained the consent of the tug, which was maneuvering to enter her slip, and in violation of the local East river rule, which required her to keep in the middle of the channel.

In Admiralty. Suits for collision.

Wheeler, Cortis & Haight and John W. Griffin, for the Wrestler.
Carver & Blodgett, for the Bay State.

ADAMS, District Judge. The River & Harbor Transportation Company, owner of the carfloat No. 6, brought an action to recover from the steamer Bay State the damages, estimated at $10,000, received on the port side from the latter in a collision between those vessels on the 6th of December, 1906, about 11:45 o'clock P. M. in the East River to the southward of Blackwells Island. The float was in tow on the port side of the tug Wrestler, also belonging to the same libellant. The tide was the last of the flood. The Boutell Steel Barge Company, the owner of the Bay State, brought a cross action to recover the steamer's damages in the collision, said to have approximated $3,500.

The Wrestler took the No. 6 in tow at Greenville, New Jersey, and was bound to the slips of the Long Island Railroad at Long Island City, where she was to be landed at dock No. 4. The sterns of the tug and of the float were about abreast. The tug had a right handed screw and was about 115 feet long. The carfloat was about 230 feet long and was loaded with 14 cars. The tug had a double pilot house, which was of a sufficient height to give those inside a good view over the cars, as well as all around. The tow proceeded on a regular course, which brought it to the eastward of the buoy opposite 10th Street, Manhattan. It then continued towards its destination, but before reaching it the float was struck by the Bay State on the port side about 75 feet from the stern, after the stem of the latter, owing to its overhang, had struck some of the cars and injured them. The Wrestler claims in the libel that when she was proceeding up the river, the Bay State came down in the channel west of Blackwells Island;

that when the Wrestler was off 37th Street, Manhattan, she ported and rounded with her tow towards the Long Island Railroad Slips; that shortly thereafter as the Bay State approached the buoy off 40th Street, Manhattan, the Bay State starboarded, opened up both of her side lights to the Wrestler and headed across towards the Long Island shore; that the latter immediately blew a signal of one whistle to the Bay State but received no answer; that thereupon the Wrestler, still keeping her engines ahead, blew alarm whistles; that the Bay State answered with one long whistle to which the Wrestler replied with one whistle; that nevertheless the Bay State continued to head for the Long Island shore and struck the carfloat on the port side about 85 feet forward of the stern, breaking the float, the cars thereon and injuring their contents.

The Wrestler's owner alleges as faults against the Bay State: (1) in that she starboarded and ran too far towards the Long Island shore and followed the Wrestler across, (2) in that she navigated on the wrong side of the channel, (3) in that she maintained excessive speed and did not stop and reverse or do so soon enough, (4) in that she failed to comply with the Wrestler's first whistle and (5) in that after herself blowing one whistle she failed to direct her course to starboard.

The Bay State was a whale back vessel, 265 feet long and 37 feet wide, with a right hand propeller. She was navigated from a bridge on the hurricane deck over the pilot house about 200 feet from the stem. She had a lookout stationed in the forward turret, which was 25 or 30 feet from the stem. The master and the mate were on the bridge. The steering apparatus was below the bridge and on this occasion it was being operated by the second officer, who received his orders by voice from the bridge through a wooden chute. An indicator on the bridge showed the movements of the wheel. The engine was located aft and signals were given for its operation by means of a small steam whistle, but loud for its size, located near the engine. The steamer alleges that she was proceeding from Boston to Norfolk, Virginia, and came through Long Island Sound on account of tempestuous weather outside; that on December 6th, 1907, she anchored near Riker's Island and having left there about 11 P. M. proceeded to go through the East River, having Blackwells Island on her port side; that at about 11:32 P. M. when about to overtake and pass a tug and tow in the channel between the Island and Manhattan, she slowed down for that purpose and passed it on her own starboard side; that when approaching Man of War Rock, several tows were seen coming up the river bearing about ahead and the speed of the Bay State was again checked until her engines were going dead slow; that about the same time the green side lights of the approaching tows being visible to those on the steamer, she starboarded a little to give them plenty of room to pass starboard to starboard; that the first two tugs and tows passed in safety in conformity with proper signals; that when passing the second tug and tow two whistles were blown by the steamer to the third tow, which proved to be the Wrestler, and were answered by her; that the vessels were then approaching each other green to green and if the Wrestler had held her course, she would have passed in safety; that shortly after the two whistles were

given by the Bay State and answered by the Wrestler, those in charge of the Bay State saw the green light of the Wrestler shut in and the red light appear, showing that the Wrestler was crossing the bow of the Bay State and heading toward the Brooklyn shore; that immediately the engines of the Bay State were put full speed astern in order, if possible, to avoid a collision; that after the engines of the Bay State had been reversed, one whistle was given by the Wrestler, almost immediately followed by two whistles, to which no answers were given by the Bay State; that the Wrestler kept on directly across the course of the Bay State at apparently full speed, without any change whatsoever and the engines of the Bay State were kept at full speed astern until the carfloat came under the bow of the Bay State and the collision occurred; at that time the Bay State was practically still in the water; that after the collision danger signals were given by the Wrestler and several other vessels came up to offer assistance.

The owner of the Bay State charges the Wrestler with fault, as follows: (1) in that she was navigating on the wrong side of the channel, (2) in that she changed her course and attempted to cross the bow of the Bay State, (3) in that she did not stop and reverse or attempt to do so, (4) in that she did not keep out of the way of the Bay State, (5) in that after answering by two whistles the two whistles blown by the Bay State, the Wrestler changed her course to starboard, (6) in that she did not have a competent lookout, pilot, master or crew and (7) in that she took no reasonable and proper measures to avoid the collision.

The place of collision is not very much in dispute. All claim that it was somewhat to the eastward of mid channel. The river at that point is about 2,700 feet wide between the ends of the piers and the place of contact was doubtless about 1,000 feet from the ends of the Brooklyn piers and about opposite the Long Island Railroad ferry slips. The Bay State's theory was that the Wrestler was proceeding on a course to go through the Blackwells Island channel, as the other tows had done, and suddenly changed it across the Bay State's course, her own navigation being based upon a contention that it was usual for westward bound vessels to cross over and follow the Brooklyn side of the river, which accounted for her own position. It was not a fact, however, that the Wrestler ever intended to go to the westward of the Bay State. It is plausibly argued by the Wrestler that she could not have passed the Bay State starboard to starboard and made her slip without going around Blackwells Island and the contention seems to be probable, but I do not depend upon it, but upon what took place between the vessels and the general situation. The Bay State contends that the Wrestler, when she was first observed answered a signal of two whistles from the Bay State, while the Wrestler's testimony is to the contrary effect. Her witnesses said that the Bay State was seen in the West Channel, when her range lights and port side light could be seen, and these lights continued to be seen until after the Bay State was off the Man of War Rock when suddenly both of her side lights became visible. This situation is confirmed by the testimony of the Bay State that after passing the buoy off between 40th and 41st Streets, Manhattan, she gradually turned to her port with a view of passing down the

Brooklyn side. The situation makes any such agreement as contended for by the Bay State highly improbable and as the Wrestler's witnesses are unanimous in contradicting it, it must be rejected. The Bay State's contention that when she was coming through the Blackwells Island channel she saw the Wrestler on her starboard hand is not reconcilable with the topography of the vicinty. A course along Blackwells Island, which the Bay State witnesses say she followed, if continued would place the Wrestler going through a pier in the vicinity of 27th Street, far to the westward of any probable course she would have taken and making it impossible for the witnesses to see the green light of the Wrestler a point or more on the Bay State's starboard bow, as contended for, until the vessels were very much nearer than is anywhere suggested in the testimony or could be inferred from it. It is obvious that when the Wrestler's lights were seen on the starboard bow of the Bay State, it was after the latter had swung to the port. She was then, not before, in a position to see lights below in the river on her starboard bow. I think the Wrestler's contention that until the time of the Bay State's change to port, the vessels were in positions to pass port to port should be sustained and that the Bay State was in fault in this respect.

There has been a great deal of discussion in the briefs upon the effect of the Narrow Channel Rule (Act June 7, 1897, c. 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]), requiring the vessels to keep to the starboard side of the river. This rule, however, does not apply to the East River in this locality, which is governed by the local rule, requiring vessels navigating between the Battery and Blackwells Island to keep in the centre of the river. This Act has recently been referred to by the circuit court of appeals in the case of Wilson v. The Steamtug W. N. Bavier and the Steamship H. M. Whitney (decided April 13, 1907) 153 Fed. 970, as being still in force. The court there said:

"A majority of the court are also of the opinion that the Whitney was not in fault. She was coming up the river well over towards the Brooklyn side, presumably on account of the ebb tide. But if she were in fault for not navigating nearer the center of the river, under the East River statute (section 757, c. 410, p. 211, of the New York City consolidation act of 1882) such fault in no way contributed to the accident. * * *"

Apart from the statute, however, any part of the river, where ferries are running, is within the reason of the rule. It was applied before the passage of the Act (The Favorita, 18 Wall. 598, 21 L. Ed. 856 [1873]; The Relief, 20 Fed. Cas. 525, No. 11,693 [1845]) and has been recently (The Hartford [D. C.] 125 Fed. 559 [1903], affirmed 135 Fed. 1021, 68 C. C. A. 668; Amer. Smelting & Refining Co. v. Steamers Maine and Manhattan [May 3, 1907] 153 Fed. 635). The same principle with respect to ferry slips has also been authoritatively sustained beyond the confines of the statutory limits in the river. The Steinway, 135 Fed. 344, 68 C. C. A. 14. Also in the North River. The Breakwater, 155 U. S. 252, 261, 15 Sup. Ct. 99, 39 L. Ed. 139. The part of the river where this collision occurred is within the rule requiring vessels going up or down the river to keep in the centre, if pos-

sible. It was applicable to the Bay State and authorized the Wrestler to manoeuvre for and approach her slip.

The original cause of trouble seems to have been the consent of the Bay State to the proposed course of a tow in the channel between Blackwells Island and Manhattan to pass to the left when article 25—the channel there being a narrow one and not subject to the East River Rule—required them to go to the right of each other. The Bay State was thus thrown into a position which, according to her own story, required her to keep on the left hand side of a narrow channel. Her officers apparently did not know of the burden of the East River rule requiring vessels to keep in the middle of the river and and she proceeded to cross to the left side there in violation of the governing rule, also of the Narrow Channel rule, which she supposed was in force there. Nothing would have justified such a method of navigating with respect to the Wrestler, except a consent on her part. Such consent was testified to but was far from being established. The preponderance of testimony was decidedly with the Wrestler's contention and the probabilities favored it.

I fail to see any fault on the Wrestler's part contributing to the collision. The testimony shows that all the whistles she contended for were given by each vessel.

There will be a decree for the Transportation Company against the Bay State, with an order of reference. The libel of the Steel Barge Company will be dismissed.

THE CLAN GRAHAM.

(District Court, D. Oregon. May 13, 1907.)

No 4,817.

ADMIRALTY—PROCEDURE—JOINDER OF CLAIMS IN REM AND IN PERSONAM.

Under admiralty rule 46, the court may permit the joinder in an action in tort for a personal injury of a claim in rem against a vessel and one in personam against stevedores, although the latter are neither master nor owner of the vessel, where the injury is alleged to have resulted from the joint negligence of both, and the joinder will best subserve the ends of justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 298.]

In Admiralty. On exception to libel.

Wm. M. La Force, Giltner & Sewall, and John Ditchburn, for libelant.

Wm. D. Fenton and A. M. Dibble, for Brown & McCabe.

WOLVERTON, District Judge. The libelee, Brown & McCabe, being a corporation and engaged in the business of stevedores, has excepted to the libel filed herein, on the ground that it improperly joins a suit in rem with one in personam. The suit is one in tort for the negligence of the libelees, whereby the libelant suffered injury to his person, for which he seeks to recover against both the vessel and Brown & McCabe; the latter being neither the master nor owner of the vessel.

By the admiralty rules adopted by the Supreme Court in 1845, from 12 to 20 inclusive, regulations are provided specifying in what of the instances therein noted the ship and master or owner shall be sued jointly, and in what they shall be proceeded against severally. These mentioned rules, however, have no application beyond the instances therein specified. In all other cases, not so provided for, the court is empowered, under rule 46, to regulate the practice in such manner as it may deem most expedient for the due administration of justice. The Director (D. C.) 26 Fed. 708. This was a suit upon a contract of affreightment and for breach thereof, whereof Judge Deady says:

"Whether brought against the master, owner, or vessel, there is no substantial difference, either in allegation, proof, or decree. The liability in either case grows out of the same facts, and the relief sought and obtainable is the same. The only difference is in the enforcement of the decree, and that is merely a difference in degree; the enforcement of the one given in the suit in rem being, in the nature of things, limited to the sale of the vessel proceeded against, while the one in the suit in personam may be enforced by an execution against the property of the defendant generally. This being so, every argument founded on convenience and economy is in favor of their joinder in one suit."

And so the joinder was sustained. The distinguished jurist refers to the case of The Clatsop Chief (D. C.) 8 Fed. 163, decided by himself, and from the opinion therein he makes the following quotation:

"My own impression of the matter is with Mr. Benedict, when he says [Ben. Adm. § 397] 'that whenever the libelant's cause of action gives him a lien or privilege against the thing, and a full personal right against the owner, then he may, by a libel properly framed, proceed against the person and the thing, and compel the owner to come in and to submit to the decree of the court against him personally in the same suit, for any possible deficiency.' It is a question simply of procedure, and should be determined mainly, if not altogether, upon considerations of fitness and convenience; and every argument drawn from this source is in favor of the joinder of the remedies in rem and in personam, whoever the person may be, and pursuing them in one libel, as one suit."

The observation is of general application, although in that case, being one of tort and governed by rule 15 relating to suits for damages by collision, the joinder was not permitted. In a later case in this court, namely, The City of Carlisle, 39 Fed. 807, 5 L. R. A. 52, the joinder against the ship and master was adjudged proper. That was also in tort, for negligence contributing to the injury of a member of the crew and for neglect and maltreatment of him after he was injured. Touching the cause, Judge Deady again says:

"The claim of the libelant, if established, is certainly a lien on the vessel; and a suit to enforce it may include a cause of suit against the master, arising out of the same facts."

And this by virtue of admiralty rule 46. See, also, The Zenobia, Fed. Cas. No. 18,208.

It will be noted that these are all cases against the ship and master or owner, and not against the ship and a person not the master or owner, jointly charged with the ship as being guilty of acts of negligence contributing to personal injury. Whether these can be joined is the exact question for determination. I have been cited to no case going

to the identical point. I find, however, that even in a case of collision, where the injury is the result of the negligent joint act of two vessels, both may be joined as libelees in one suit. The Washington and The Gregory, 9 Wall. (U. S.) 513, 19 L. Ed. 787. And, further, it is declared by Mr. Cole, in 1 Cyc. p. 848, that:

"There is no abstract incompatibility between proceedings in rem and proceedings in personam which forbids them to be joined in one action when based on the same cause, if such joinder is calculated to advance the ends of substantial justice."

Now, it would seem that the reasoning of Judge Deady, advanced in the case of The Director, supra, has as pertinent application here as there. The allegations as they relate to the ship and the defendant Brown & McCabe are, and must needs be, substantially the same, and the proofs and decree must also be essentially the same. The libel as it affects either arises from the same state of facts, and the relief obtainable is identical, except that the enforcement of the decree in one case will be against the ship, or the thing, while in the other it will be against the person, and execution will be satisfied generally out of the property of that defendant. I see, therefore, no reason why, in permitting the joinder, justice would not be as well subserved in the one case as in the other. Such joinder is not prohibited by the rules; and, parties guilty of a joint tort being liable either jointly or severally, the practice would be no innovation of the general rule obtaining at law. By analogy I am constrained to the opinion that both expediency and justice warrant its application in admiralty also.

The exception will accordingly be overruled.

CLEMENT v. LOUISVILLE & N. R. CO.

(Circuit Court, E. D. Louisiana, New Orleans Division. May 16, 1907.)

No. 13,748.

1. DAMAGES—PLEADING—EXEMPLARY DAMAGES.
   In a petition in an action against a carrier for refusal to deliver certain cars of lumber except on payment of charges alleged to be illegal, which places plaintiff's actual damages at $200, a mere allegation that plaintiff is entitled to $2,000 punitive damages states no case for the recovery of such punitive damages.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 420.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
   In suits for damages, federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover as much as $2,000, and the allegations as to the quantum of damages must in such case be regarded as merely colorable, and made solely for the purpose of stating a case apparently within the jurisdiction of the federal court as to amount.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 897.]

3. SAME—FEDERAL QUESTION—ACTION UNDER INTERSTATE COMMERCE LAW.
   An action by a shipper against a railroad company engaged in interstate commerce to recover damages because of an alleged discrimination in exacting a charge from one class of shippers, which is not required from another class, although the service is the same in both cases, is not

within the jurisdiction of a federal court, as one arising under the interstate commerce law, where it is not alleged that the charge is not in accordance with a schedule of rates duly published and filed with the Interstate Commerce Commission, nor that any application has been made to the Commission to correct such alleged discrimination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 841.]

At Law. On motion for new trial.

Dart & Kernan and Henry P. Dart, Jr., for plaintiff.
Denegre & Blair and Victor Leovy, for defendant.

SAUNDERS, District Judge. The plaintiff herein sues to recover from defendant $2,200 damages which the plaintiff alleges he has suffered through the refusal of the defendant to deliver three cars of lumber consigned over defendant's line to plaintiff in New Orleans. It is alleged that the defendant refused to deliver this lumber, unless the plaintiff, the consignee, would pay certain car service charges in addition to the freight charges due under the bill of lading. Plaintiff alleges, in substance, that the lumber was shipped to him under a local bill of lading, and that car service charges in New Orleans are made against shipments under local bills of lading, but are not made against shipments on through bills of lading for goods of the same sort, shipped at the same time, and carried in the same manner. He claims that the exaction of car service charges against shipments under local bills, while no such charges are exacted against shipments under through bills—the goods carried and the mode of carrying being the same—results in a discrimination by the carrier against consignees under local bills; and he alleges that the action of the defendant railroad in refusing to deliver the three cars of lumber mentioned in the petition, unless upon payment of said discriminatory car service charges, entitles him to recover from the defendant $2,000 punitive damages and $200 actual damages.

1. The petition contains no averment under which the claim for punitive damages could be sustained. The only clause in the petition relative to damages is as follows:

"Your petitioner avers that he has been damaged by the refusal of said Louisville & Nashville Railroad Company to deliver the aforesaid dogwood lumber to the steamship Cestrian in the sum of $2,200; that the refusal of the railroad company to make delivery caused the owner to be in default on his contracts, and has impaired your petitioner's standing and credit in this community with his clients in the sum aforesaid, for which your petitioner is entitled to $200 actual damages and $2,000 punitive damages."

It is obvious that under the above averments no punitive damages can be recovered. The only claim that can possibly be passed upon under this petition is that for $200 actual damages; and it is, to say the least, exceedingly doubtful if the plaintiff can recover even actual damages under his averments. He seems to base his actual damages solely on the assertion that, in consequence of the refusal of the defendant to deliver, the owner was unable to meet certain contracts he had made. Now, there is no averment that the carrier undertook the delivery of the lumber with reference to

these contracts, or was even informed of their existence. The carrier would not then be liable for damages the consignee or owner sustained through failure to meet them. The claim for damages caused to the plaintiff's "standing and credit in the community" by the nondelivery are clearly too remote to be recovered.

In suits for damages, federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover a sum of as much as $2,000. The allegations as to the quantum of damages must, in such cases, be regarded as merely colorable, and made solely for the purpose of stating a case apparently within the jurisdiction of the federal court as to amount. See Vance v. Vander Cook, 170 U. S. 472, 18 Sup. Ct. 645, 42 L. Ed. 1111; Transportation Co. v. Morrison, 178 U. S. 266, 20 Sup. Ct. 869, 44 L. Ed. 1061.

As the plaintiff is not legally entitled, under the averments of his petition, to recover in this case damages to the amount of $2,000, this court has not jurisdiction herein, unless it be true, as the plaintiff contends, that the controversy arises under the interstate commerce act, and that the federal Circuit Court had exclusive jurisdiction over all such controversies, regardless of the amount involved. That proposition will now be considered.

2. The plaintiff complains that the defendant discriminates against a class of consignees to which he belongs. The petition excludes the idea of any personal, individual discrimination against plaintiff. The substance of the charge is that a general rule imposes upon consignees, under local bills of lading, certain charges from which consignees under through bills of lading are exempt, though the carriage service is the same in both cases.

There is no allegation that the charge complained of is in violation of the tariff rates, which it is the duty of the defendant to submit to the Interstate Commerce Commission, and to post and act on when allowed by that body. The petition neither alleges nor denies that there was a duly filed and posted tariff of rates applicable to the determination of the freight charge herein complained of. As the defendant is, and is averred to be, engaged in interstate commerce, it is the defendant's legal duty to comply with the requirements of the Interstate Commerce Commission act. The petition does not suggest that this requirement has not been complied with, and the allegation that the discrimination is against all consignees under local bills of lading, and under rules of a car service association, irresistibly implies that the charge complained of was made under a tariff. In the absence of a positive charge, and of even an intimation in the petition that the defendant has violated the statute, by failing to post a tariff, I am bound to presume that the defendant has done what the statute requires, and has duly filed and posted its tariff, and that the charge complained of is made thereunder.

Assuming this to be the case, the plaintiff cannot maintain the present action in this court under the allegation of an unreasonable discrimination, until he has first applied to the Interstate Commerce Commission, and sought to obtain a correction of the tariff, if it is unjust and discriminating, from that body. T. & P. Ry. Co. v.

Abiline Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. ——.

If the charge is made according to a regular tariff, and that tariff does establish an unfair and illegal discrimination in making the charge herein complained of, then the proper and fair way to correct the discrimination is to correct it at the same time as to every one affected by it. This can be done only by proceeding before the Interstate Commerce Commission. When complaint is made to the Commission, it may decide that the charge is proper and should be allowed. An opposite conclusion might be reached in this suit. The result, then, would be to establish for a while an unfair discrimination in favor of this plaintiff.

I am convinced that the plaintiff cannot maintain the present suit, and the judgment of the court heretofore pronounced, dismissing the suit, is therefore maintained.

UNITED STATES ex rel. W. W. MONTAGUE & CO. v. AXMAN et al.

(Circuit Court, N. D. California. September 6, 1906.)

No. 13,658.

PRINCIPAL AND SURETY—UNITED STATES—BOND OF CONTRACTOR FOR GOVERNMENT WORK—RELEASE OF SURETY.

The giving of a note by a contractor for government work for the amount of an account rendered for materials furnished does not release the surety on his bond, given pursuant to Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523], from liability for such material; an action on the bond being based on the account, and not on the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 219–222.]

J. F. Cowdery and Robert Harrison, for plaintiff.

Charles A. Shurtleff and Lawler, Allen & Van Dyke, for defendants.

MORROW, Circuit Judge (orally). This action was to recover $5,470.98. This suit was commenced October 1, 1904. The same defense is made to this action, with respect to jurisdiction and the liability of the Coast Contracting Company, that was made in No. 13,441, and the views I entertain in that case dispose of its defenses in this case.

But this case differs from the other case in this respect: that the material was supplied commencing February 6, 1900, and the last debit is October 24, 1903; that on the last-named date an account stated was presented to the Contracting Company and has fixed the liability of the defendant Axman at the sum of $5,470.98. In this case a promissory note was given by Axman and the Coast Contracting Company on October 24, 1903, for the amount of the account stated, and it is claimed by the defendant that this note has released the sureties on the bond; but, as I have stated in the other case, this suit is brought upon the account, and not upon any other obligation.

It is not brought upon the promissory note in this case, and the giving and receiving of the note did not release the sureties on the bond.

Judgment will therefore be entered in this case for $5,470.98.

In re ANSLEY BROS.

(District Court, E. D. North Carolina. February 19, 1907.)

1. BANKRUPTCY—EXEMPTIONS—ALLOWANCE—CONCEALMENT.
   Where the bankrupts failed to make a full disclosure of their personal property, but the amount of the concealment could not be ascertained, the trustee should not allow their personal property exemptions until all of the personal property had been accounted for, except on the order of the court.

2. SAME—CONVERSION—DEDUCTION FROM EXEMPTION.
   Where the bankrupts converted $100, which was derived from the sale of goods between the time of the filing of the petition for adjudication and the time when property was taken into custody by the deputy marshal, such sum should be deducted from the bankrupts' exemptions.

3. SAME—EXEMPT PROPERTY—SALE.
   Where personal property which the bankrupts were entitled to claim as exempt was sold at the bankrupts' request that cash be allowed them, instead of the property, the bankrupts should be charged with their percentage of the difference between the proceeds of the property and its appraised value as against the amount of their exemptions.

4. SAME—PREFERENCES.
   Where, within a month prior to the filing of a bankruptcy petition, the bankrupts delivered certain goods to their father and another in part payment of unsecured debts, such payment was an invalid preference, and the trustee was entitled to recover the goods or their value from the transferees.

5. SAME—EXEMPTIONS—SALE.
   Const. N. C. art. 10, § 1, declares that the personal property of any resident to the value of $500, to be selected by such resident, is exempt from sale under execution for the collection of debt. *Held*, that such exemption is in property, and not money, so that, where a bankrupt resident of such state desires to claim his exemption in money, he must select property of the value of $500, which may then be sold, and the proceeds paid to him in cash.

In Bankruptcy.

Aydlett & Ehringhaus and Williams & Leigh, for creditors.
Pruden & Pruden, for bankrupts.

PURNELL, District Judge. The referee certifies as follows:

"(1) That the real property exemptions of the bankrupts do not enter into the controversy. (2) It is evident that the bankrupts have not made a full disclosure of their personal property, but the exact amount of such concealment cannot be ascertained from the evidence. (3) That the bankrupts have converted to their personal use the sum of $100, which they derived from the sale of goods between the time of the filing of petition for adjudication in this cause and the time when their property was taken in the custody of the deputy marshal. (4) That after the appraisement of the personal property of the bankrupts, they selected a small portion of their personal exemptions, and requested that the trustee sell the remainder and pay them their exemp-

tions in cash—that is, the balance due thereon—and such personal property in accordance with their request. (5) That within a month or so before the filing of the petition for adjudication, to wit, during the month of February or March, 1906 (the petition for adjudication having been filed April 13, 1906), the bankrupts delivered to their father, N. A. Ansley, $65 worth of goods on open account, and delivered to F. F. W. Cohoon $96 worth of goods on open account; said goods being given as part payment on debts, unsecured, which the bankrupts owed their father and Cohoon.

"Wherefore it is ordered, adjudged and decreed that: (1) The trustee shall allot to said bankrupts their real property exemptions and put them in possession of the same. (2) That the trustee shall not allot to bankrupts their personal property exemptions until all of their said personal property is accounted for, or until further order of the court. (3) That when the personal property exemptions are allotted, the trustee shall deduct therefrom the sum of $100, the amount of proceeds from sales which bankrupts have used since the filing of the petition for adjudication in this cause and the time when such property was taken in the custody of the deputy marshal, and as part of the personal property was sold from which bankrupts were to take their exemptions, such sale being at the request of said bankrupts, the trustee shall not allot to bankrupts from the cash derived therefrom sufficient to make up $500, but shall prorate and charge to bankrupts their percentage of difference between what the property sold was appraised at, and what it actually brought. (4) That the goods delivered to N. A. Ansley and F. F. W. Cohoon, as part payment of unsecured debts which they held against W. N. Ansley & Bro., or their value, be recovered by the trustee for the benefit of the creditors, if such recovery is possible."

The Constitution of North Carolina (article 10, § 1) does not contemplate or provide that a debtor shall be entitled to an exemption of $500 in cash, but expressly provides he shall be entitled to a personal property exemption of property of the value of $500. The words of the Constitution are as follows:

"The personal property of any resident of this state, to the value of five hundred dollars, to be selected by such resident, shall be, and is hereby exempted from sale under execution, or other final process of any court, issued for the collection of any debt."

This court has undertaken in several cases, following the state Constitution as construed by the Supreme Court of the state, in Re Richards, 2 Am. Bankr. Rep. 509, 94 Fed. 633, and in several other cases, to point out the only way in which a bankrupt can claim his personal property in money; i. e., that he must select it as provided in the article and section cited, and if, under the circumstances, it is deemed more advantageous to the estate and to his interest, by agreement the property so selected may be sold with the other personal property, and the proceeds of the sale of such property so selected be paid over to him in cash. In no event is the bankrupt entitled to more than $500 in value.

The referee seems to be attempting to follow the state law, and this court can see no error in the order entered. Hence the same is affirmed.

NAPIER v. WESTERHOFF et al.

(Circuit Court, S. D. New York. April 8, 1907.)

1. EQUITY—PLEADING—SUPPLEMENTAL BILL.
   New matter arising after the filing of a bill, and which is confirmatory of its allegations, may properly be set up by a supplemental bill, even though it might be proved under the original bill.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 584–586.]
2. DISCOVERY—SUPPLEMENTAL BILL.
   A discovery may be had on a supplemental bill, where the facts called for are within the knowledge of defendants, and are material and incidental to the relief sought in the suit.

In Equity. On demurrer to supplemental bill.

Olney & Comstock and J. Noble Hayes, for complainant.
Stern & Rushmore and Charles E. Rushmore, for defendants.

HAZEL, District Judge. This is an action for dissolution of the partnership agreement and an accounting. The defendants urge that the supplemental bill is wholly unnecessary, as there is nothing in fact to prevent complainant from making complete proof, not only of the acts threatened before the institution of the suit, but also as to the acts of the defendants which have occurred subsequent thereto. The asserted new matter or a portion of it could probably be introduced in evidence to support the original bill (Lyster v. Stickney [C. C.] 12 Fed. 609), but as such additional matter could have been pleaded in the original bill, if it had then existed and is now simply conformatory of the original bill, I can perceive of no serious objection to permitting it to be set forth in the supplemental bill (21 Ency. of Pl. & Pr. 9). Defendants do not claim that they will in any manner be prejudiced by the course of pleading adopted by the complainant. Indeed, the defendants are fully advised by the supplemental bill of all the allegations that they are to meet. The objection, therefore, that the asserted new matter may not be averred by way of supplement to the original bill is overruled.

It is further objected that the supplemental bill improperly includes a bill of discovery. The discovery sought is not in aid of any other suit at law or in equity, but is material and incidental to the relief sought and the facts as to which discovery is sought rest in the knowledge of the defendants. In these circumstances, I am of opinion that the authorities cited by the defendants are inapplicable.

The demurrer is overruled with costs, with leave to defendants to answer within 20 days.

Ex parte DRAYTON et al.

(District Court, D. South Carolina. May 23, 1907.)

1. MASTER AND SERVANT—FRAUDULENT BREACH OF CONTRACT BY SERVANT.
Cr. Code S. C. 1902, § 357, providing that any laborer working for a share of a crop, or for wages in money or other valuable consideration, under a contract to labor on farm land, who shall receive advances either in money or supplies, and thereafter willfully and without just cause fail to perform the reasonable services required of him by the terms of the contract, shall be liable to prosecution for misdemeanor and punished by imprisonment, etc., constituted an attempt to secure compulsory service in payment of a debt, which was not within the state's police power to create and punish offenses.

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.
Such section, being intended to cover agricultural laborers only, was invalid as a violation of the equality clause of the fourteenth amendment of the federal Constitution.

3. SAME—SLAVERY.
The act also authorizes the creation of a system of peonage or involuntary servitude, in violation of the federal Constitution, Amend. 13, declaring that neither slavery nor involuntary servitude, except as punishment for crime whereof the parties have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Petition for Writ of Habeas Corpus.

John P. Grace, for petitioners.
E. F. Cochran, U. S. Atty.
Wm. Henry Parker, for Clement.
J. Fraser Lyon, Atty. Gen., and W. St. Julien Jerrey, for the State.

BRAWLEY, District Judge. The above-named petitioners, negroes and twin brothers, then on the chain gang in Charleston county, applied to this court for a writ of habeas corpus, and the return of the sheriff of the county, duly filed, is "that he holds the within-named Enoch Drayton and Elijah Drayton under a commitment by Magistrate T. A. Beckett, Charleston county, on a charge of violation of contract."

It appears from the transcript of the testimony taken by the stenographer of this circuit that upon the trial before the above-named magistrate, R. Lebby Clement, of Wadmalaw Island, the prosecutor, testified that in the year 1906 the two men above named made contracts with him in which they agreed to do certain farm or agricultural work, for which they received part payment; that the work was to be done in January, 1907, they being then under another contract that kept them employed for the year 1906. Using Clement's own words:

"In January they failed to do the work. I swore out warrants before Magistrate Beckett for violation of agricultural contract, under section 357 of the Acts of 1904."

The act of 1904 (Laws 1904, p. 428) amends section 357 of the Criminal Code of the state of South Carolina of 1902, and makes it read as follows:

"Sec. 357. Any laborer working on shares of crop or for wages in money or other valuable consideration, under a verbal or written contract to labour on

farm land, who shall receive advances either in money or supplies and thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor, provided the prosecution shall be commenced within thirty days after the alleged violation and on conviction shall be punished by imprisonment of thirty days or fined in the sum of not less than fifty dollars nor more than one hundred dollars, in the discretion of the court, provided the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses, provided that such contract shall be valid only between the original parties thereto, and any attempted transfer or otherwise of any rights thereunder shall be null and void." Approved the 25th day of February A. D. 1904.

These men had been prosecuted in December, 1906, for violating a similar contract, and had served a sentence upon the chain gang for that offense. Act No. 242, p. 428, of the General Assembly of South Carolina, approved on the same day with the act above mentioned, provides that a conviction for the violation of the contract mentioned in section 357 "shall not operate as a release or discharge of such person from the performance of any part of said contract, which is to be performed subsequent to the date of the breach for which such conviction was had." The contract alleged to have been violated was not produced at the hearing, nor was there any definite testimony as to the amount due by the laborers; Clement's books of account, asked for by attorneys for petitioners, not being produced. No testimony whatever was offered as to the circumstances attending the alleged breach; the only witnesses examined being Clement, a magistrate, and one Seabrook, his constable, and the only alleged criminal act testified to was, in Clement's words, "they failed to do the work." Two affidavits of one Jacques that he had witnessed contracts between Clement and the defendants, which contracts were not offered in evidence, is about all that the record discloses which has any bearing upon the case. It thus appears that the crime for which these men were sent to the chain gang is the failure to work for Clement under contracts by which he had made certain advances to them, and they had agreed to work until the whole amount was paid.

The thirteenth amendment of the Constitution of the United States, declared ratified December 18, 1865, is as follows:

"Section 1. Neither slavery nor involuntary servitude, except as punishment for crime, whereof the parties have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Sec. 2. Congress shall have power to enforce this article by appropriate legislation."

The act of Congress of March 2, 1867 (14 Stat. 546, c. 187), declares that:

"Holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful, and the same is hereby abolished and forever prohibited, etc., etc.; and all acts, laws, etc., of any territory or state of the United States which have heretofore established, maintained or enforced or by virtue of which any attempt shall hereafter be made to establish, maintain or enforce, directly or indirectly, the voluntary or involuntary service or labour of any person as peons, in liquidation of any debt or obligation or otherwise, be and the same are hereby declared null and void," etc.

The Supreme Court, in Clyatt v. United States, 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726, defines "peonage" as:

"A status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. * * * That which is contemplated by the statute is compulsory service to secure the payment of a debt. * * * We entertain no doubt of the validity of this legislation or its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding."

The first question to be considered is whether the act of 1904, section 357 of the Criminal Code of South Carolina of 1902, is intended to secure compulsory service in payment of a debt. That appears to be its sole purpose and effect. It provides a coercive weapon to be used by the employer, and enables him to send to jail or the chain gang any person who may "fail to perform the reasonable service required of him by the terms of the said contract," and the learned Attorney General for the state, while asserting the validity of this act upon grounds hereinafter to be considered, does not contest the fact that such is its purpose and effect, and vindicates the same on the ground that such legislation is necessary owing to the peculiar conditions of agricultural labor in this state. The great body of such laborers, as is well known, are negroes, and it is claimed that, being without any financial responsibility, the ordinary remedies by judgment and execution for breaches of contract would be utterly futile. That such is the prevailing opinion is manifest in another act of the General Assembly of South Carolina, approved February 20, 1907, wherein it is provided that:

"Any person or persons who shall hereafter go into possession of any farming land of another, or shall enter into a written agreement or contract to go into possession of the farming land of another as a tenant or under a contract to farm and cultivate said land, and shall without just cause or excuse leave, desert or quit the land so leased or contracted for, shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five dollars nor more than one hundred dollars, or suffer imprisonment not less than five nor more than thirty days, in the discretion of the court."

It not being contested, then, that the purpose and effect of this legislation is to secure the performance by an agricultural laborer of the personal service required by his contracts, by visiting him with pains and penalties for its violation, the next question is whether such legislation is valid under the thirteenth amendment, which forbids slavery or involuntary servitude. On behalf of the state, it is contended that such legislation is a lawful exercise of those police powers which admittedly are reserved by the states; that it is a lawful exercise of such powers to denounce as crimes the violation of such contracts; and that persons convicted thereunder are within the exception, the language of the amendment being "involuntary servitude, except as a punishment for crime." Inasmuch as it is contended by the petitioners that this legislation is also in conflict with the fourteenth amendment, in that it denies them the equal protection of the laws, being applicable only to laborers working on the farm, and is not equal and uniform, the question will be considered as affected by the two amendments named. The pertinent clauses of this amendment are as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The police power is an inaccurate but convenient phrase used to designate that power inherent in every sovereignty to make laws essential to the public welfare; to promote the public health, safety, and morals; and to prevent and punish the commission of public offenses. It is incapable of exact definition or precise limitation, because of the infinite variety of circumstances affecting the relations and affairs of mankind in civilized society, where from necessity individual persons and property are subject to burdens and restraints in order to secure in a well-ordered government the general comfort, health, and prosperity of the state. Like every other power, the police power is subject to the Constitution, and cannot be used as a cloak for legislation which impairs rights or unduly restricts liberties guaranteed by it. Vast and comprehensive as is the field for the legislative exercise of the police power, it is not arbitrary or unlimited, but is fettered by the express and peremptory prohibitions of the Constitution, which is the supreme law of the land, and, wherever rights arising under that Constitution are claimed to be impaired, it is the duty of the courts to scrutinize such legislation and determine whether it really relates to the public welfare, whether it is enacted in the interest of the public generally, as distinguished from those of a class, and whether the means are reasonably necessary for the accomplishment of the public object, and not unduly oppressive on individuals, for a Legislature cannot under the guise of protecting the public interest impose unusual and unnecessary restrictions upon individual liberty or lawful occupations.

The Supreme Court, in Allgeyer v. Louisiana, 165 U. S. 589, 17 Sup. Ct. 431, 41 L. Ed. 832, in considering a statute claimed to be a violation of the fourteenth amendment, says:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling"—citing similar expressions in cases previously decided.

The right of every citizen to work where he will, and for whom he he will, to select not only his employer, but his associates, to follow any of the common avocations of life, is one of those inalienable rights formulated in the Declaration of Independence, and in the Bill of Rights, which provides that "all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness." This is now a part of the body and letter of the organic law of the republic, and is consistent with the thought and spirit of its founders.

Judge Cooley, on Torts (page 278), says:

"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."

And the same author, in his work on Constitutional Law (page 237), in speaking of the thirteenth amendment, says:

"It is therefore a just conclusion that any discrimination which narrows to one class, while leaving unrestricted to others the freedom of choice in em-

ployments, must be regarded as the establishment of involuntary servitude, and therefore forbidden."

The Supreme Court of the United States, in the Slaughter House Case, 16 Wall. 36, 21 L. Ed. 394, says:

"The word 'servitude' is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long terms as it has been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word 'slavery' had been used."

And Mr. Justice Field, in his dissenting opinion in the same case, says:

"It is, however, clear that the words 'involuntary servitude' include something more than slavery in the strict sense of the term. They include also serfage, vassalage, villanage, peonage, and all other forms of compulsory service for the benefit or pleasure of others."

In the Civil Rights Case, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, Mr. Justice Bradley, referring to a former decision of the same court, which had considered the extent of the rights, privileges, and immunities of citizens, which cannot rightfully be abridged by state laws, says:

"A long list of burdens and disabilities of a servile character incident to feudal vassalage in France, and which were abolished by the decrees of the National Assembly, was presented for the purpose of showing that all inequalities and observances exacted by one man from another was servitude or badges of slavery which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy; but these were servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent. Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth amendment, no less than to the thirteenth amendment, nor any greater doubt that Congress had adequate power to forbid any such servitude from being enacted."

Mr. Tiedeman, in State and Federal Control of Persons and Property (volume 2, § 204), says:

"Every man has a natural right to hire his services to any one he pleases, or to refrain from such hiring, and so likewise it is the right of every one to determine whose services he will hire. * * * The government therefore cannot exert any restraint upon the actions of the parties."

In Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, the court says:

"If an owner cannot be deprived of his property without due process of law, he cannot be deprived of any of the essential attributes which belong to the right of property without due process of law. Labor is property. The laborer has the same right to sell his labor and to contract with reference thereto as any other property owner. The right of property involves as one of its essential attributes the right not only to contract, but also to terminate contracts. * * * In view of what has been said, it cannot be doubted that the plaintiff in error, Charles Gillespie, had a right to terminate his contract, if he had one with Ritchie, subject to civil liability for any termination which should be unwarranted. One citizen cannot be compelled to give employment to another citizen, nor can any one be compelled to be employed against his will. The act of 1895, now under consideration, deprives the em-

ployer of the right to terminate his contract with his employé. The right to terminate such a contract is guarantied by the organic law of the state. The Legislature is forbidden to deprive the employer or employé of the exercise of that right. The Legislature had no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort, or welfare is not interfered with. The statute in question says that, if a man exercises his constitutional right to terminate a contract with his employé, he shall upon hearing be punished as for the commission of a crime."

Adam Smith, in his Wealth of Nations (page 1, c. 10, pt. 2), says:

"The property which every one has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property."

To compel one person to labor for another against his will is legalized thraldom. It would scarcely be contended that Clement could by force or threats compel these petitioners to work for him against their will in payment of their indebtedness. Any such attempt on his part would be a direct violation of the act of Congress of March 2, 1867, which forbids any attempt, directly or indirectly, to enforce involuntary service or labor in liquidation of any debt, and would subject him to a criminal prosecution and to the penalties denounced in that act, and the same act declares null and void the laws of any state or territory which have theretofore been enacted, or might thereafter be enacted, to enforce involuntary service or labor in liquidation of debts.

To sustain the validity of this statute, it is contended that the violation of a contract of the nature mentioned therein is a fraud; that the punishment of fraud is within the police power of the state; and that, inasmuch as the petitioners have been convicted and are serving a sentence for the offense denounced by the statute as a misdemeanor, their case falls within the exception of the thirteenth amendment, being a punishment for crime whereof the parties have been duly convicted. Much stress was laid in the argument upon an opinion of the Supreme Court of New Jersey, wherein it is said:

"I think it one of the most dishonest things a man can be guilty of to refuse to pay his honest debts, when he has the means to do so. Whatever is dishonest is fraudulent in foro conscientiæ. * * * Fraud and dishonesty are synonymous terms. * * * If he acts unjustly and unlawfully he acts fraudulently. An unjust man is a fraudulent man." Ex parte Clark, 45 Am. Dec. 396, 19 N. J. Law, 648.

And it is maintained that the failure to perform, after having received advances, etc., the reasonable service willfully and without just cause, is a malum in se, and the state has the right to penalize it in repression of fraudulent practices. It is unnecessary to consider whether a statute declaring it to be a misdemeanor to fail to pay debts, or to perform contracts generally, will fall within the general police powers of the state, for this statute is not of that character. It is directed towards a single class of citizens, which is arbitrarily singled out, and punished for failure to perform certain duties.

The Supreme Court in Gulf, etc., Railway v. Ellis, 165 U. S. 157, 17 Sup. Ct. 257, 41 L. Ed. 666, says:

"But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent, without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other. The rule of equality is ignored. * * * Unless the Legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit the penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained; but arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this."

And elsewhere in the same opinion (page 158 of 165 U. S., page 258 of 17 Sup. Ct. [41 L. Ed. 666]), the court says:

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations."

It will be observed that the statute nowhere declares that a laborer violating his contract shall be deemed guilty of a misdemeanor, and punished for such violation. It provides in terms that any laborer, etc., "who shall receive advances either in money or supplies and thereafter wilfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor." Its whole purpose is to coerce the laborer to perform the service required of him by the terms of his contract under penalty of prosecution and imprisonment if he fails to work. It is a legislative judgment enforcing involuntary servitude. It does not imprison the laborer because he refuses to pay the debt or return the advances, but because he does not continue in an involuntary servitude. Under the guise of police power, it compels one person to continue against his will to render personal services to another. If this act and others of cognate character are sustained, the state may by its criminal laws completely nullify and abrogate the main object of the amendment prohibiting slavery and involuntary servitude, and establish a complete system of peonage. That system, as it existed in New Mexico, is described by Davis, in his book, "El Gringo," as:

"But a more charming name for a species of slavery as abject and oppressive as any found upon the American continent. * * * Among the proprietors in the country, the master generally keeps a store, where the servant is obliged to purchase every article he wants, and thus it is an easy matter to keep him always in debt. The master is required to furnish the peon with goods at the market value, and may advance him two-thirds the amount of his monthly wages; but these provisions, made for the benefit of the peon, are in most instances disregarded, and he is obliged to pay an enormous price for everything he buys, and is allowed to run in debt beyond the amount of his wages in order to prevent him leaving his master. * * * One of the most objectionable features is that the master is not obliged to maintain the peon in sickness or old age. When he becomes too old to work any longer, like an old horse who is turned out to die, he can be cast adrift to provide for himself. These are the leading features of peonage, and in spite of the new name it bears the impartial reader will not be able to make anything else out of it than slavery."

Counsel for the state attempts to distinguish this act from the Alabama statute which the Supreme Court of that state, in Toney v. State, 67 L. R. A. 286, 141 Ala. 120, 37 South. 332, 109 Am. St. Rep. 23, declared unconstitutional. That act made it a penal offense for

a person who had contracted in writing to labor for or serve another for any given time, afterwards, without the consent of the other party, and without sufficient excuse to be adjudged by the court, to leave such other party or abandon such contract or leave or abandon the leased premises or land, and to take employment of a similar nature from another person, and they attempt to draw a distinction between the words "without sufficient excuse to be adjudged by the court," and our statute, which declares it a misdemeanor "wilfully and without just cause to fail to perform the service," etc. We cannot perceive any essential distinction between the words "without sufficient excuse," and the words "without just cause."

It is also claimed by counsel that the statute of South Carolina is substantially identical with section 4730 of the Code of Alabama of 1896, which Judge Jones, in his opinion on the Peonage Cases (D. C.) 123 Fed. 690, held to be constitutional. That section is as follows:

"Any person entering into a written contract for the performance of any acts or service with intent to injure or defraud his employer and thereby obtains money or personal property from such employer and with like intent and without just cause, and without refunding the money or paying for such property, refuses to perform such act or service, must on conviction be punished as if he had stolen it."

This Alabama statute, is will be seen, is of a general nature. It applies to all persons who enter into contracts with intent to injure or defraud, and declares that persons who obtain money with such intent shall be punished as if they had stolen it. The essence of this statute is the obtaining money with fraudulent intent, which in many of the states is declared a criminal offense. The essence of the South Carolina statute is the coercing of personal service in liquidation of a debt, and the cases cited by counsel arising in the state of Georgia, where a statute somewhat similar to that of Alabama was under review, illustrate the distinction. In Lamar v. State, 47 S. E. 958, 120 Ga. 312, the court says:

"If the act prescribes a punishment for a simple failure of a contractual duty, it is beyond the power of the General Assembly; but, if its purpose is to punish for fraudulent and deceitful practices, it is valid, even though the fraud or deceit may arise from the failure to comply with the contractual engagement. The right of the lawmaking power to declare fraudulent practices a crime does not seem to have been ever seriously questioned. It is reasonably clear that, in enacting the statute now under consideration, the legislative purpose was not to punish one simply for a failure to pay a debt, but was to punish the act of securing the money or property of another with a fraudulent intent not to perform the service, the promise to do which was the consideration for such money or property."

Other cases from the same state are to the same effect. Banks v. State, 52 S. E. 74, 124 Ga. 15, 2 L. R. A. (N. S.) 1007, where Lumpkin, Justice, says:

"On the face of it, the purpose of the act is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it was constitutional, otherwise it would not be so."

The same counsel seemed to consider a phrase of Mr. Justice Brown, in Robertson v. Baldwin, 165 U. S. 275, 17 Sup. Ct. 326, 41 L. Ed.

715, as furnishing some support for their view. The passage quoted is this:

"A breach of a contract for personal service has not, however, been recognized in this country as involving the liability to criminal punishment, except in the case of sailors and soldiers, and possibly some others, nor would public opinion tolerate a statute to that effect."

And the argument is that the phrase "possibly some others," followed by the words "public opinion," indicates that the Supreme Court recognized that there might be exceptions to the general rule forbidding involuntary servitude, and that wherever public opinion tolerated such exceptions the courts are bound to recognize that public opinion as the sole tribunal for the redress of any evils complained of.

In Robertson v. Baldwin, four seamen, who had been arrested in accordance with the provisions of section 4598 of the Revised Statutes, sought their release by habeas corpus on the ground that this section was in violation of the thirteenth amendment, and the court held that this amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which had always been treated as exceptional, such as the military and naval establishments, or to disturb the rights of parents and guardians to the custody of their minor children and wards, and reviewing the history of the maritime law, and the grounds upon which it rested, says:

"From the earliest historical period, the contract of a sailor has been treated as an exceptional one, and involving to a certain extent his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty beyond the ordinary civil remedies upon contracts that the sailor will not desert the ship at a critical moment or leave her at some place where seamen are impossible to be obtained, as Molloy forcibly expresses it, 'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel, while the master is seeking another crew, and abandonment of the voyage, and in some cases the safety of the ship itself. Hence the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board and for criminal punishment for desertion or absence without leave during the life of the shipping articles."

Counsel have with apparent seriousness attempted to maintain that the case of the petitioners here is analogous to that of sailors who had embarked on a voyage; that their continuance in the service of their employer was as essential to the safety of the crop as the service of sailors to the safety of the ship. In other words, that these men who had made a contract for service last year may be arrested and imprisoned in January, when probably there is not seed in the ground, and such arrest be vindicated by the immemorial usage which requires sailors to remain at their posts. It may be proper to say that the section of the Revised Statutes above referred to has been repealed since this opinion was filed, but the lack of analogy between the two classes is too apparent to require discussion.

The fact that there might be exceptions to the general language of the thirteenth amendment led the court to attempt to lay down some rule whereby in any given case it could be determined whether the involuntary servitude complained of falls within the inhibitions of the

Constitution, and, in answer to the question, where shall the line be drawn, the court says:

"We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview."

And from the whole opinion it is clear that a breach of contract for personal services was not regarded as falling within the exception, and manifestly the "public opinion," which the learned justice said would not tolerate a statute to that effect, was the public opinion of the country at large, which had made itself manifest in the amendment to the Constitution abolishing slavery with all its badges and incidents.

Another view has been presented with much earnestness, which demands consideration; and that is: While not denying the jurisdiction or the power of the federal courts to issue habeas corpus to one alleged to be restrained of his liberty by a state court in violation of the Constitution or laws of the United States, it is contended that we are not bound to exercise this power, that it is a matter of discretion, and that the accused should be put to his writ of error from the highest court of the state. It is a question of great delicacy, for the federal courts should, and generally do, assume that a state Legislature will not willfully disregard the Constitution of the United States, and that the state courts will perform an obligatory duty and administer justice in conformity with that Constitution, and, in the absence of special and urgent circumstances, the federal courts should never allow the writ of habeas corpus to be converted into a writ of error to review the actions of any of the tribunals which the state has organized for the administration of justice. Upon any question which is fairly debatable, and especially upon questions involving merely the rights of property, this court would be very reluctant to assume jurisdiction, and to declare an act of the Legislature unconstitutional. It has this very week refused to do so, where the counsel for a great corporation, in an argument of great cogency, has impeached the validity of an act of whose constitutionality it had grave doubts; but in a question involving personal liberty, where it has no doubts, and where the circumstances are urgent, it cannot refrain, from any consideration of delicacy, from the performance of a plain duty. The petitioners in this case are of the poorest and humblest class of citizens. It would be a mockery of justice to say to them: "You must carry your appeal from this unjust judgment, first, to the circuit court, then to the Supreme Court of the state, and, if necessary, by writ of error, to the Supreme Court of the United States." Their case has been brought here by a young member of this bar, himself belonging to a race that in the past has suffered through centuries of injustice and oppression, whose heart has been touched by the cry of the lowly, and who, apparently at his own cost, from sheer love of liberty and hatred of wrong, makes this appeal for the liberty to which they are entitled under every sanction of the Constitution and laws of their country. It were better that the granite walls which support this court of justice be crumbled into dust, than that its doors be closed to such appeal.

Another argument is presented not without its force, and not without its appeal to state pride, and to those race instincts, which, doubtless, for some wise purpose, are ineradicable; and that is: That the legislation complained of is a part of a system of local administration in matters of great concern to the industrial life of the state; that under our system of local self-government the power of the state in that sphere is supreme; and that the white people of the state, now charged with the responsibility of its government, being better acquainted with the negro, his capacities and limitations, can determine better than those outside of it what policy will best subserve his interest and their own. In much of this contention the writer of this opinion fully concurs. Other men's devotion to the state may require proofs. The marks of his are written in the lead of its enemies on his person. He believes as firmly today as in his younger days that local self-government is the foundation stone upon which rests the perpetuity of this republic, and belonging by birth and by the associations of a lifetime to that class of slave owners and land holders in whose supposed interest this legislation is enacted, and in whose many virtues he has a just pride, and fully conscious of the trials and difficulties which still encompass them, and having shared the adverse fortune which overwhelmed them all in a common calamity, it is not without profound sympathy that he has looked upon every effort made to surmount the unparalleled difficulties which eviron two races so dissimilar, bound to live on the same soil and under the same laws. The question presented does not permit of brief treatment, and the problem presented is possibly beyond any human solution. The one sufficient answer to the argument is that the question of human liberty is not one of merely local concern. It rests upon the Constitution of the United States, and no duty rests more imperatively upon its courts than to be watchful of the constitutional rights of its citizens, and to construe liberally all the provisions for the security of persons and the equality of rights, which is the foundation of free government.

If time permitted, it is believed that it could be demonstrated that this legislation is as economically unwise as it is constitutionally illegal. Our state, through public appropriations and private contributions, is now actively and earnestly engaged in promoting immigration. Those efforts will be unavailing so long as our statute books hold legislation tending to create a system of forced labor, which in its essentials is as degrading as that of slavery. Desirable immigrants from foreign lands look for a land of freedom, where labor is respected and protected, and all the allurements of soil and climate will be vain to tempt them to a state where they will be in competition with forced labor. Although in its practicable application this legislation affects the negro only, in its terms it is directed against all laborers on farm lands, and constitutes a menace surely calculated to repel the coming of white men. Communities which have attained the highest degree of prosperity have no such statutes, and we may be sure that intending immigrants will have pointed out to them all such discriminating laws.

The lot of the agricultural laborer is at best a hard one. He has been called "the brother to the ox." Unceasing toil, scant remuneration, and dreary isolation have a natural tendency to drive him to more

inviting fields. Manufacturing establishments, the railroads, lumber camps, and phosphate mines drain the best laborer from the fields of agriculture, and whatever may be the remedy for existing conditions, certainly the remedy is not to be found in statutes which chain him to the soil and force him to labor, whether he will or not. Human nature revolts at it, and he will escape it if he can. It is by improving his condition, and not still further degrading it, that the remedy may be found.

The statute in question violates the thirteenth and fourteenth amendments of the Constitution of the United States, and laws made in pursuance thereof, and is null and void.

The prisoners are discharged.

UNITED STATES v. BALTIMORE & O. R. CO. (five cases).

SAME v. BALTIMORE & O. R. CO. et al.

(District Court, N. D. West Virginia. April 19, 1907.)

Nos. 794–798.

1. CARRIERS—VIOLATION OF INTERSTATE COMMERCE ACT—REFUSAL TO MAKE SWITCH CONNECTIONS.

The provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], making it unlawful for any common carrier engaged in interstate commerce to give any undue or unreasonable preference or advantage to any particular shipper, or to subject any particular shipper to any undue or unreasonable prejudice or disadvantage in any respect whatever, if construed to apply to the affording of facilities for shipments, do not subject a railroad company to indictment under section 10 of the act for its failure or refusal to furnish switch connections to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable.

[Ed. Note.—Duties and liabilities of carriers as to furnishing facilities for transportation, see note to Harp v. Choctaw, O. & G. R. Co., 61 C. C. A. 414.]

2. INDICTMENT—DESCRIPTION OF OFFENSE—USING LANGUAGE OF STATUTE.

While the offense may be set forth in an indictment in the general language of the statute, it must be accompanied by a statement of all the particulars necessary to show the commission of the crime without uncertainty or ambiguity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 293.]

3. CARRIERS—DISCRIMINATION AGAINST SHIPPER—INDICTMENT FOR FAILURE TO FURNISH CARS.

An indictment against a railroad company, based on Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155], which charges generally that defendant did knowingly and unlawfully grant, give, and practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce, by failing and refusing to grant, give, and furnish to a particular coal company its proper and rightful share and quota of cars and motive power, which it was justly and of right entitled to receive from said defendant,

and by granting, giving, and furnishing to certain other coal companies and other persons, firms, and corporations more than their respective shares and quota of cars and motive power, to the undue and unreasonable prejudice and disadvantage of the first named company, does not allege a violation of that part of the section relating to the giving of an undue or unreasonable preference or advantage to any particular person, company, or locality, or to any particular description of traffic; nor does it sufficiently charge that defendant subjected any particular company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, where it alleges no facts showing the rightful share or quota of cars and motive power to which the coal company charged to have been so prejudiced was entitled, or that such company at the time charged was prepared to make shipments and tendered the same and made demand for cars and motive power for their transportation in interstate commerce.

On Demurrers to Indictments and Information and Motions to Quash.

Reese Blizzard, U. S. Atty., and Emmett M. Showalter, Asst. U. S. Atty.

John G. Wilson and John Bassel, for Baltimore & O. R. Co.

GOFF, Circuit Judge. For reasons appearing in the record of these cases, on account of the disqualification of the district judge, the questions raised by the defendant's demurrers and motions to quash have been argued and submitted to me for decision. The indictments mentioned, numbered from 794 to 798, inclusive, were duly returned by the grand jury on the 28th day of April, 1906, and the information referred to was by leave of court filed on the 24th day of October, 1906. Each of the indictments, as also the information, contains two counts. Indictment No. 794 reads as follows:

"United States of America, Northern District of West Virginia—ss.:

"In the District Court of the United States for the Northern District of West Virginia at the April Term Thereof, 1906, at Clarksburg.

"The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid on their oaths aforesaid present: That on the ——— day of ———, 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the West Virginia & Pittsburg Railroad, extending from Clarksburg, in Harrison county, to Buckhannon, in Upshur county, and that the said railroad was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means thereof interstate commerce, and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of the said railroad and its branches within the said district to points and places within and without the state of West Virginia; and on the day and year last aforesaid there was situate on or near the line of the said railroad the mines and works of the Red Rock Fuel Company, which said company was then and there the owner of about four thousand acres of land along and adjacent to the said railroad, which said land was then and there underlain with valuable coal of merchantable quality and quantity which said coal then and there existing under favorable and profitable mining conditions, and the said fuel company had then and there and theretofore already opened

its mines upon the said coal lands and erected its mining plant and equipped the same for the mining of coal near to and adjacent to the said railroad, and was then and there ready, able and willing to mine and produce, and to continue to mine and produce, the coal from the said mine in great quantities to be carried and transported to various markets outside the state of West Virginia by means of the said railroad, and had then and there already produced and mined great quantities of coal, to wit, at least seven hundred and fifty tons, and the same was then and there ready to be so carried and transported as aforesaid, and the said fuel company was then and there justly and of right entitled to have sidings, switches, turn-outs and connections to and with the said railroad company so to enable it, the fuel company, to have the coal then and there produced and mined, and to be produced and mined, by it carried and transported by the said railroad company to the markets outside of the state of West Virginia, and the said sidings, switches, turn-outs and connections were then and there necessary to enable it to have said coal so carried and transported; and the said fuel company then and there had made due and proper application and request for the said switches, sidings, turn-outs and connections to the said railroad company. And the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said railroad, and being then and there such common carrier engaged in the carrying and transportation of said interstate commerce by means of and upon and over the said railroad, did then and there knowingly and unlawfully practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce over, upon and by means of said railroad, by failing and refusing to grant and give and furnish the said Red Rock Fuel Company the said switches, sidings, turn-outs and connections, to the undue and unreasonable prejudice and disadvantage of the Red Rock Fuel Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present on another day, to wit, on the ——— day of ———, in the year 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Branch Railroad extending from Clarksburg, in Harrison county, to Buckhannon, in Upshur county, and that the said railroad was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means of interstate commerce, and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce from points along the line of the said railroad within the said district to points and places without the state of West Virginia; and on the day and year last aforesaid there was situate on or near the line of the said railroad the mines and works of the Red Rock Fuel Company, which said company was then and there the owner of about four thousand acres of land along and adjacent to the said railroad, which said land was then and there underlain with valuable coal of merchantable quality and quantity, which said coal then and there was existing under favorable and profitable mining conditions, and the said fuel company had then and there and theretofore already opened its mines upon the said coal land and constructed its mining plant and equipped the same for the mining of coal near to and adjacent to said railroad and was then and there ready, able and willing to mine and produce and to continue to mine and produce the coal from the said mine and said land in great quantities to be carried and transported to various markets outside of the state of West Virginia by means of the said railroad, and had then and there already produced and mined great quantities of coal, to wit, at least seven hundred and fifty tons, and the same was then and there ready to be carried and transported as aforesaid, and the said fuel company was then and there justly and of right entitled to have

sidings, switches, turn-outs and connections to and with the said railroad company, to enable it, the fuel company, to have the coal then and there produced and mined, and to be produced and mined, carried and transported by the said railroad company to the markets outside of the state of West Virginia, and that the said sidings, switches, turn-outs and connections were then and there necessary to enable it to have the said coal so carried and transported; and the said fuel company then and there had made due and proper application and request for the said switches, sidings, turn-outs and connections to the said railroad company. There was then and there situated the works and mines of various and divers other persons, firms and corporations on and along the line of railroads in the said district operated by said various persons, firms and corporations, to wit, the works and mines of the Southern Coal & Transportation Company, the Century Coal Mining Company, and the Fairmont Coal Company, and others to the grand jurors unknown, with the same and like conditions and circumstances then and there and theretofore as existed and surrounded the Red Rock Fuel Company then and there, and which last-named companies, firms and corporations have theretofore been given, granted and furnished switches, sidings, turn-outs and connections with the said railroads whereon each was situate to enable each of them, respectively, to have the coal so mined and produced by each of them carried and transported by the said railroad company over and upon and by means of the railroads so operated by it to markets outside of the state of West Virginia. And the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said railroad, and being and then and there such common carrier engaged in the carrying and transportation of the said interstate commerce by means of and upon and over the said railroad, then and there knowingly and unlawfully did practice, give and grant an undue and unreasonable preference and advantage in respect to sidings, switches, turn-outs and connections on its said railroad by giving, granting and furnishing to the said Fairmont Coal Company, the Southern Coal & Transportation Company, and the Century Coal Mining Company sidings, switches, turn-outs and connections then and there and theretofore and by refusing and failing under said same conditions and circumstances then and there existing to give, grant and furnish to the said Red Rock Fuel Company sidings, switches, turn-outs and connections to and with the said West Virginia & Pittsburg Railroad, which the said fuel company was then and there justly and of right entitled to, to the undue and unreasonable prejudice and disadvantage of the said Red Rock Fuel Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Indictment No. 795 reads as follows:

"United States of America, Northern District of West Virginia—ss.:

"In the District Court of the United States in and for the Northern District of West Virginia at the April Term Thereof, A. D. 1906, at Clarksburg.

"The grand jurors of the United States impaneled, sworn and charged at the term aforesaid of the court aforesaid on their oaths present: That on the ——— day of ———, 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Branch Railroad, extending from Grafton, in Taylor county, through the counties of Taylor, Harrison, Doddridge, Ritchie, and Wood, to the city of Parkersburg, in the county of Wood, and that the said railroad with its branches was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged in and was carrying and transporting over, upon and by means thereof interstate commerce; and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of

interstate commerce and other freights from points along the line of the the said railroad and its branches to points and places within and without the state of West Virginia; and on the day and year last aforesaid there was situate along the line of the said railroad and its branches and adjacent thereto the Pitts Vein Coal Company, the New York Mine Company, the Rosemont Coal Company, and the Fairmont Coal Company, and various and divers other persons, firms and corporations to the grand jurors unknown, each respectively engaged as shippers, and in furnishing for shipment, carrying and transportation interstate commerce and other freights over, upon and by means of the said railroad from points on the said railroad and its branches to points and places within and without the state of West Virginia. And the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said railroad, and being then and there such common carrier engaged in the carrying and transportation of interstate commerce and other freights by means of and upon and over the said railroad, did then and there knowingly and unlawfully grant and give and practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce over, upon and by means of the said railroad, by failing and refusing to grant, give and furnish to the Pitts Vein Coal Company its proper and rightful share and quota of cars and motive power which it was justly and of right entitled to receive from the said railroad company for the carrying and transportation of property in interstate commerce then and there proposed and intended by the Pitts Vein Coal Company to be shipped over, upon and by means of said railroad from points on the said railroad to points and places within and without the state of West Virginia, and by giving, granting and furnishing to the said New York Mine Company, said Rosemont Coal Company, and said Fairmont Coal Company, and to the other said firms, persons and corporations situate and being as aforesaid and to the grand jurors unknown, more than each of their respective proper and rightful share and quota of cars and motive power, and more than each were respectively and of right justly entitled to receive from the said railroad company as shippers, for the carrying and transportation of property in interstate commerce and other freights over and upon and by means of the said railroad from points on the said railroad and its branches to points and places within and without the state of West Virginia, to the undue and unreasonable prejudice and disadvantage of the Pitts Vein Coal Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second count: And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on another day, to wit, on the ——— day of ———, in the year 1905, the Baltimore & Ohio Railroad Company was and still is a corporation organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in the said district, and that the said railroad company was then and there engaged in the operation of a railroad commonly known as the Parkersburg Branch Railroad, extending from Grafton, in Taylor county, through the counties of Taylor, Harrison, Doddridge, Ritchie, and Wood, to the city of Parkersburg, in the county of Wood, and that the said railroad with all its branches was then and there wholly situate and being in the district aforesaid, and that in the operation of the same the said railroad company was then and there engaged and was carrying and transporting over, upon and by means thereof interstate commerce, and the said railroad company was then and there a common carrier, and as such common carrier was then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of the said railroad and its branches to points and places within and without the state of West Virginia; and on the day and year last aforesaid there was situate along the line of the said railroad and its branches and adjacent thereto the Pitts Vein Coal Company, the New York Mine Company, and the Rosemont Coal Company, and various and divers other persons, firms and corporations to the grand jurors unknown, each, respectively, engaged as shippers and in furnishing for shipment, carrying and transportation interstate commerce and

other freights over, upon and by means of the said railroad from points on the said railroad and its branches to points and places within and without the state of West Virginia; and the said Baltimore & Ohio Railroad Company being then and there engaged in the operation of the said Parkersburg Branch Railroad Company, and being then and there said common carrier engaged in the carrying and transportation of interstate commerce and other freights by means of and upon and over the said railroad, did then and there knowingly and unlawfully give, grant and practice an undue and unreasonable preference and advantage in respect to a division, allotment, apportionment and furnishing of cars and motive power owned, controlled and used by the said railroad company upon and over the said railroad by giving, granting and furnishing to the said New York Mine Company, the said Rosemont Coal Company, and the said Fairmont Coal Company, and to the said other unknown persons, firms and corporations situate and being and unknown, as aforesaid, more than each of their respective proper and rightful share and quota of cars and motive power, and more than each were respectively and of right justly entitled to receive from the said railroad as shippers, for the carrying and transportation of property in interstate commerce and other freights over and upon and by means of the said railroad and its branches from points on the line of the said railroad to points and places within and without the state of West Virginia; and by failing and refusing to grant, give and furnish upon due and proper request and application therefor to the said Pitts Vein Coal Company its proper and rightful share and quota of cars and motive power which it was justly and of right entitled to receive from the said railroad company for the carrying and transportation of property in interstate commerce, and then and there proposed and intended by said Pitts Vein Coal Company to be shipped over, upon and by means of said railroad and its branches to points and places within and without the state of West Virginia, to the undue and unreasonable prejudice and disadvantage of the Pitts Vein Coal Company, contrary to the form of the statute of such case made and provided, and against the peace and dignity of the United States of America."

Indictments 796, 797, and 798 are in effect similar to indictment No. 795; the only difference being as to the names of the different branches of the Baltimore & Ohio Railroad, and of the names of the coal companies located along the same, alleged to have been unreasonably discriminated against and in favor of.

The information reads as follows:

"The United States of America, Northern District of West Virginia—ss.:

"In the District Court of the United States in and for the Northern District of West Virginia, at the October Term Thereof, A. D. 1906, at Clarksburg.

"Reese Blizzard, the attorney of the United States of America for the Northern district of West Virginia, here comes and gives the court to understand and be informed: That heretofore, to wit, on the ——— day of ———, in the year of 1905, the Baltimore & Ohio Railroad Company was, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in said Northern district of West Virginia; and that the Grafton & Belington Railroad Company was, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of the state of West Virginia, and was then and there duly authorized and was doing business in said district; and that the said Baltimore & Ohio Railroad Company and the said Grafton & Belington Railroad Company were then and there engaged in the operation of a railroad commonly known as the Grafton & Belington Railroad, extending from Grafton, Taylor county, to Belington, in Barbour county; and that the said railroad and all its branches were then and there wholly situate and being in the district aforesaid; and that the said railroad companies then and there owned, possessed and had control of a large amount and number of cars, rolling stock and motive power, the exact

amount and number of which is to the said attorney of the United States unknown, and it then and there became and was the duty of the said railroad companies to make a fair and equitable distribution and apportionment of the cars, rolling stock and motive power so owned and possessed by them, among the persons, firms and corporations hereinafter mentioned, each of whom were then and there engaged as shippers and furnishing for shipment interstate commerce, as hereinafter stated; and that in the operation of the said railroad the said railroad companies were then and there engaged in and were carrying and transporting over, upon and by means thereof interstate commerce; and that the said railroad companies were then and there common carriers, and as such common carriers were then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places in the states of Ohio, Maryland, New York and other states of the United States to the attorney of the United States unknown; and that on the day and year last aforesaid there was situate along the line of said railroad and its branches, and adjacent thereto, the Philippi Coal Mining Company, the Century Coal Company, the Southern Coal & Transportation Company and various and divers other persons, firms and corporations to the said attorney of the United States unknown, each, respectively, then and there engaged as shippers and in furnishing for shipment, carrying and transportation, interstate commerce, over, upon and by means of the said railroad from points on the said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown; and that each of the said persons, firms and corporations were then and there producing and furnishing the said freights and interstate commerce for shipment under similar circumstances and conditions; and that the said Baltimore & Ohio Railroad Company and the said Grafton & Belington Railroad Company being then and there engaged in the operation of the said railroad, and being then and there such common carriers engaged in the carrying and transportation of interstate commerce and other freights by means of and upon and over said railroad, and it being then and there the duty of the said railroad companies to furnish to the Philippi Coal Mining Company its proper allotment and quota of cars and motive power for the shipment of freight and interstate commerce, the exact amount and number of which is to the said attorney of the United States unknown, did then and there knowingly and unlawfully grant, give and practice an unreasonable and unjust discrimination in respect of the transportation of interstate commerce over, upon and by means of said railroad, by failing and refusing to grant, give and furnish to the said Philippi Coal Mining Company its proper and rightful share of cars and motive power which it was justly and of right entitled to receive from said railroad companies for the carrying and transportation of property in interstate commerce then and there proposed and intended by it to be shipped upon, over and by means of the said railroad from points on the said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown, and by giving, granting and furnishing to the said Century Coal Company and said Southern Coal & Transportation Company and said other firms, persons and corporations, situate and being as aforesaid, more than each of their respective proper and rightful share and quota of cars and motive power, the exact number and amount of which is to said attorney of the United States unknown, and more than each were respectively and of right justly entitled to receive from the said railroad companies as shippers for the carrying and transportation of property in interstate commerce and other freights, over, upon and by means of the said railroad from points on the said railroad and its branches to points and places without the said state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown, to the undue and unreasonable prejudice and disadvantage of the said Philippi Coal

Mining Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

"Second count: And the attorney of the United States aforesaid here comes and gives the court to understand and be informed that on another day, to wit, on the ——— day of ———, in the year 1905, the Baltimore & Ohio Railroad Company was, and still is, a corporation, organized, existing and doing business under and by virtue of the laws of the state of Maryland, and was then and there duly authorized to and was doing business under and by virtue of the laws of the state of West Virginia in said Northern district of West Virginia; and that the Grafton & Belington Railroad Company was, and still is, a corporation organized, existing and doing business under and by virtue of the laws of the state of West Virginia in the said district; and that the said railroad companies were then and there engaged in the operation of a railroad commonly known as the Grafton & Belington Railroad, extending from Grafton, in Taylor county, to Belington, in Barbour county, and the said railroad with all its branches was then and there wholly situate and being in the district aforesaid; and that the said railroad companies then and there owned, possessed and had control of a large amount and number of cars, rolling stock and motive power, the exact amount and number of which is to the said attorney of the United States unknown, and it then and there became and was the duty of the said railroad companies to make a fair and equitable distribution and apportionment of the cars, rolling stock and motive power so owned and possessed by them, among the persons, firms and corporations hereinafter mentioned, each of whom were then and there engaged as shippers and furnishing for shipment interstate commerce, as hereinafter stated; and that in the operation of the said railroad the said railroad companies were then and there engaged and were carrying and transporting over, upon and by means thereof interstate commerce, and the said railroad companies were then and there common carriers, and as such common carriers were then and there engaged in the carrying and transportation of interstate commerce and other freights from points along the line of said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown; and that on the day and year last aforesaid there was situate along the line of the said railroad and its branches, and adjacent thereto, the Philippi Coal Mining Company, the Century Coal Company, the Southern Coal & Transportation Company and various and divers other persons, firms and corporations to the said attorney of the United States unknown, each, respectively, engaged as shippers and in furnishing for shipment, carrying and transportation interstate commerce and other freights over, upon and by means of the said railroad and its branches from points on the said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown; and that each of the said persons, firms and corporations were then and there producing and furnishing the said freights and interstate commerce for shipment under similar circumstances and conditions; and that the said Baltimore & Ohio Railroad Company and the said Grafton & Belington Railroad Company being then and there engaged in the operation of the said Grafton & Belington Railroad, and being then and there said common carriers engaged in the carrying and transportation of interstate commerce and other freights by means of and upon and over the said railroad, did then and there knowingly and unlawfully give, grant and practice an undue and unreasonable preference and advantage in respect to a division, allotment, apportionment and furnishing of cars and motive power owned, controlled and used by the said railroad companies upon and over said railroad, by giving, granting and furnishing to the said Century Coal Company and Southern Coal & Transportation Company and to the said other unknown persons, firms and corporations situate and being as aforesaid, more than each of their respective, proper and rightful share and quota of cars and motive power, the exact number and amount of which is to the said attorney of the United States unknown, and more than each were

respectively and of right justly entitled to receive from the said railroad companies as shippers for the carrying and transportation of property in interstate commerce and other freights over, upon and by means of said railroad and its branches from points on the line of said railroad to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown, and by failing and refusing to grant, give and furnish upon due and proper request and application therefor, to the Philippi Coal Mining Company, its proper and rightful share and quota of cars and motive power, the exact number and amount of which is to the said attorney of the United States unknown, and which it was justly and of right entitled to receive from the said railroad companies for the carrying and transportation of property in interstate commerce and then and there proposed and intended by said Philippi Coal Mining Company to be shipped over, upon and by means of said railroad and its branches to points and places without the state of West Virginia, to wit, to points and places within the states of Ohio, Maryland, New York and divers other states of the United States to the said attorney of the United States unknown, and which it was then and there the duty of the said railroad companies to furnish to the said Philippi Coal Mining Company, to the undue and unreasonable prejudice and disadvantage of the said Philippi Coal Mining Company, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

To each count of each indictment the defendant has demurred. The defendants named in the information move to quash the same. A demurrer has also been filed to each count of the information. These prosecutions are based on sections 3 and 10 of the Interstate Commerce Act of February 4, 1887, chapter 104, 24 Stat. 380, 382 [U. S. Comp. St. 1901, pp. 3155, 3160], and acts amendatory thereof. Said third section makes it unlawful for any common carrier subject to the provisions of the interstate commerce act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality; it also makes it unlawful for any such common carrier to make or give any undue or unreasonable preference or advantage to any particular description of traffic in any respect whatsoever; and it also declares it to be unlawful for such carrier to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Which of these offenses does indictment No. 794 charge the defendant with having committed? Was it the intention of Congress, by the language used in said section 3, to render the defendant liable to a criminal prosecution for its failure or refusal to make the switch connections referred to in this indictment? It is at least questionable, but I do not find it necessary to determine that point, for, should I answer the question in the affirmative, I would still be compelled to sustain the demurrer to the indictment and to each count thereof, for the reasons I shall now state. In substance, the count alleges that the defendant did knowingly and unlawfully practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce over, upon, and by means of its railroad, by failing and refusing to grant, give, and furnish the Red Rock Fuel Company switches, sidings, turn-outs, and connections, to the undue and unreasonable prejudice and disadvantage of said company. The act of June 29, 1906, clearly refers to the state of facts described in this in-

dictment; but that statute is not applicable, as it was enacted subsequently to the commission of the alleged offense. That act requires all railroad companies, upon the application of any shipper tendering interstate traffic for transportation, to construct, maintain, and operate upon reasonable terms a switch connection with any private side track which may be constructed to connect with said railroad, where such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance of the same; and further requires the common carrier to furnish cars for the movement of such traffic, to the best of its ability, without discrimination in favor of or against any such shipper. It also provides that, if the common carrier shall fail to install and operate such switch or connection, the shipper may apply to the Interstate Commerce Commission to have such matter investigated, the practicability of such connection determined, and the reasonable compensation that should be paid therefor ascertained. This provision of the act of June 29, 1906, seems to have been intended to cover conditions not provided for by previous legislation, and the care with which it is drawn at least indicates the character of the facts which should exist in all cases where switch connections are asked for, at the same time furnishing the substance of the allegations that an indictment charging an offense of this character should contain. Now, if it be conceded that section 3 of the act of February 4, 1887, may be construed to require railroad companies to furnish switch connections in order to prevent any particular person or company from suffering undue and unreasonable prejudice and disadvantage in the conduct of his or its business, still would it not be absolutely essential in an indictment drawn under it, alleging such undue and unreasonable prejudice and disadvantage, by refusing to make switch connections, to charge that such connections could have been reasonably and safely made, that they were practicable, and that they would have furnished the traffic to justify them from a business point of view, and also that the person or company asking for said connections was able to, and had offered to, pay the reasonable portion of the charges and expenses necessarily connected with the making and maintaining of such connections properly and usually paid by such person or company under similar circumstances? The allegation that the Red Rock Fuel Company was justly and of right entitled to have sidings, switches, turnouts, and connections to and with the defendant's railroad does not, as is claimed by counsel, obviate the necessity of alleging that, when said company made application and request for such switches, sidings, turn-outs, and connections, they could be reasonably and profitably made, and that the company so asking for them was able and willing to provide its due share of the reasonable cost connected therewith, as has been the custom existing between such companies and common carriers. So it follows that, even if the statute referred to is applicable, nevertheless the indictment is defective in both of its counts. Besides, the second count of this indictment is bad, because of oversight or clerical error in the description of the railroad to and with which the sidings, switches, turn-outs, and connections were desired and refused: the name of the West Virginia & Pittsburg Railroad being used in said

count, instead of that of the defendant. The demurrer to indictment No. 794 will be sustained.

I do not find it necessary to discuss and dispose of a number of the questions raised and argued by counsel, relating to the demurrers to the counts of the remaining indictments, and to the information, as the conclusion I reach obviates the necessity of doing so. Nor will it be necessary to consider each count separately as concerning the points I do dispose of. The action I take regarding one applies directly to each and all of the remaining counts of each of the prosecutions referred to.

All of the counts charge that the defendant did knowingly and unlawfully grant, give, and practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce, by failing and refusing to give, grant, and furnish to a particular coal company its proper and rightful share and quota of cars and motive power, which it was justly and of right entitled to receive from said defendant, and by giving, granting, and furnishing to certain other coal companies, and other firms, persons, and corporations, more than their respective share and quota of cars and motive power, to the undue and unreasonable prejudice and disadvantage of the particular coal company first mentioned. These counts do not allege a violation of that part of said section 3 relating to the making or giving of any undue or unreasonable preference or advantage to any particular person, company, or locality. If such was intended, the count is clearly bad, for it does not allege such preference, but sets out the giving and granting of "an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce," by failing to give one company its proper share of cars, while it gives the other companies more than their share of such cars, to the undue and unreasonable prejudice of the former company. It is not claimed that these counts are founded on that part of the section that inhibits a common carrier from making or giving any undue or unreasonable preference or advantage to any particular description of traffic. This part of the section relates to the property transported, and does not apply to either the method of transportation or the rate charged therefor.

Do these counts, then, charge that the defendant did subject any particular company or person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever? There seems to have been an effort to include in each of these prosecutions all of the descriptive words used in referring to the various offenses created by the said third section of the act of February 4, 1887, as if thereby, most assuredly, an offense of some character would be alleged. There is certainly much in the various counts that could with propriety, and under the rules of good pleading, have been omitted. I am, however, unable to sustain the contention of counsel for defendant that each of said counts allege two separate offenses. On the contrary, it is with much tribulation, and with great doubt, that I reach the conclusion that one separate offense is particularly referred to, though I am quite sure that the facts relating thereto are not fully and sufficiently set out.

As I construe and conclude to read the first count of indictment No. 795, the defendant is alleged to have subjected the Pitts Vein Coal Company to an undue and unreasonable prejudice and disadvantage, by giving an unreasonable discrimination relative to the transportation of property in interstate commerce, by refusing to furnish said company with the cars due it, and by furnishing other companies with more than the cars due them. In reaching this conclusion, I necessarily regard the redundancy of language to which I have referred as surplusage, treating it as entirely unnecessary, and not of itself vitiating the count. The indictments I now consider, as well as the information, are, I conclude, drawn under the last clause of section 3 of said act of February 4, 1887, which, as I have said, makes it unlawful for a common carrier to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. But, while they are founded on this provision of the statute, do they with sufficient clearness, and with the particularity required in criminal procedure, describe the offenses intended to be alleged? The district attorney, claiming that the offense has been charged in the language of the statute said to be violated, insists that therefore it is sufficient. It is true that if the language of a statute, according to the natural import of the words used in it, is fully descriptive of the offense, then ordinarily it is sufficient in alleging the commission of the crime created or punished by it. Potter v. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. The rule that an indictment for a statutory misdemeanor is sufficient, if the language of the statute is used in charging the offense, is limited to cases where such words fully set forth all the assignments necessary to constitute the offense intended to be punished, without uncertainty or ambiguity. Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830. The indictment should leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, so that the defendant may not only know what he is called upon to meet, but also that a plea of former acquittal or conviction can be shown with accuracy by the record. United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516. While the offense may be set forth in the general language of a statute, nevertheless it must be accompanied by a statement of all the particulars required to constitute the crime. Potter v. United States, supra; United States v. Benson, 70 Fed. 591, 17 C. C. A. 293; Peters v. United States, 94 Fed. 127, 36 C. C. A. 105; Jackson v. State, 91 Wis. 261, 64 N. W. 838.

Does the language used in this statute and in this count fully inform the defendant of the special offense with which it is charged? Does it enable the defendant to prepare its defense? The count fails to give the particulars of the alleged "unreasonable and unjust discrimination," and of the "undue and unreasonable prejudice" set forth in it. Such particulars are matters of real substance, and not of mere form. What was the proper and rightful share and quota of cars and of motive power that the Pitts Vein Coal Company was

entitled to? What was the proper and rightful share of cars and motive power that the New York Mine Company, the Fairmont Coal Company, and the other companies mentioned were entitled to? It is alleged, in effect, that the Pitts Vein Coal Company received less than its share, and that the other companies received more than their shares. To sustain this count the prosecution must show these respective quotas, and must, in order to convict the defendant, prove the capacity of each mine for output of product for shipment, in order to demonstrate that the one had less, and the other more, than their respective shares of cars and motive power. The grand jury must have had before it testimony tending to show the capacity and rating for output and shipment of the company discriminated against, as well as the like capacity and rating of the companies favored, else how could it allege that the one received less, and the others more, than their respective share of cars and motive power? In the absence of such evidence, how could the indictments have been returned? The presence of witnesses familiar with the capacity of each mine could have been easily obtained, and likely they were duly examined before the jury. Such matters, relating as they do to the very substance of the offense charged, should have been set forth in the indictment, for the defendant was entitled to be advised concerning them, in order to prepare for its defense. An allegation that such information "is to the jurors unknown" would be tantamount to admitting that there was not sufficient testimony on which to found an indictment, and that a conviction could not be secured if one were returned. It is likely true that the pleader would be unable to give the exact number of cars or the motive power the coal company was entitled at different times to receive from the railroad company; but it is certainly true that the percentage of cars and power that each company should have received, by virtue of its capacity and rating, could have been and should have been alleged, for such capacity and such rating must have been ascertained before a shortage of allotment could have occurred. The facts that I have thus referred to are necessary to constitute the offense created by the statute, and the mere conclusions of law alleged in the count will not suffice.

In the Cruikshank Case, 92 U. S. 542, 557, 23 L. Ed. 588, the Supreme Court of the United States, speaking through Mr. Chief Justice Waite said:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amendment 6. In United States v. Mills, 7 Pet. 142, 8 L. Ed. 636, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged,' and in United States v. Cook, 17 Wall. 174, 21 L. Ed. 538, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch. Cr. Pr. & Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection

against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

It does not follow as a matter of course, and as matter of law, that because the Pitts Vein Coal Company is located along the roadbed of the Baltimore & Ohio Railroad Company, or of one of the companies it controls and operates, and because it was at some time ready and willing to mine and ship coal as interstate commerce, that it was the duty of the Baltimore & Ohio Railroad Company to furnish said coal company with cars and motive power at all times. The coal company may be ready, willing, and able to provide shipments for such cars at one time, and still be incapacitated for so doing at other times. Such, in fact, is frequently the case with many shippers of property for interstate commerce, and hence it would be useless and needlessly expensive for the common carrier to provide for such shipments, unless it had been duly advised that the shipper was prepared to ship, and required cars and power for that purpose. In my judgment the count should allege that the Pitts Vein Coal Company was at the time charged prepared to make such shipments, and that it in due time made demand on the railroad company for cars and motive power, tendering at the same time for shipment its coal for transportation as interstate commerce.

For the reasons indicated, I find it to be my duty to hold that all of the counts of each indictment, as well as both of the counts of the information, are defective.

Hence it follows that the defendants' demurrers will be sustained.

THE WESTHALL.

(District Court, E. D. Virginia. March 2, 1899.)

1. COLLISION—BURDENED VESSEL—STEAMER AND TUG WITH TOWS.
   As between a steamer and a tug with a cumbersome tow, the latter has the right of way, and upon the steamer is imposed the responsibility of exercising extra precaution to avoid collision.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 75.]
2. SAME—DEFENSE TO LIABILITY.
   Precautions required by law to be taken when there is risk of collision must be taken in time to be effective against such risk, or they will constitute no defense to liability if collision occurs.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 15.]
3. SAME—TOW ON WRONG SIDE OF CHANNEL.
   The fact that a tug with a large tow was on the wrong side of the channel, if admitted, would not prevent a recovery for a collision with a meeting steamship which, having the tug and tow in full sight in the daytime for a distance of 2½ miles, violated her plain duty to keep out of the way, as she might readily have done.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 34.]
4. SAME—CONTRIBUTORY FAULT—EVIDENCE TO ESTABLISH.
   Where the vessel on which rested the burden to avoid a collision was chargeable with faults sufficient in themselves to account for the colli-

sion which occurred, she cannot escape liability on the suggestion of possible faults on the part of the other vessel, which is entitled to the benefit of all reasonable doubts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 42.]

5. SAME—EVIDENCE CONSIDERED—STEAMER AND MEETING TOW.

A tug with seven barges in tow passing down Elizabeth river in the daytime found it necessary to cross to the western side of the channel in order to take her tow to an anchorage on the Newport News flats, and had passed entirely out of the deep-water channel with all of her tows, except the last, which was still from 125 to 150 feet in the channel, when it came into collision with the steamship Westhall passing up the channel. The channel was at the place 500 feet wide, and the tow had been in view of the Westhall for a distance of 2½ miles. The wind was from the west, and the tide flood, which somewhat retarded the movement of the tow to the westward. *Held*, that it was the duty of the Westhall to either stop at a safe distance until the barge was clear of the channel or to keep to the eastward, as she could easily have done, and that she was solely in fault for the collision.

In Admiralty. Suit for collision.

Whitehurst & Hughes, for libelant.

J. Parker Kirlin and Robert M. Hughes, for respondent.

WADDILL, District Judge. On the morning of the 3d day of April, 1896, about 9:30 o'clock, as the libelant's steam tug Peerless was proceeding down the Elizabeth river with seven barges in tow, the tow being some 1,320 feet in length, the respondent's steamer Westhall, an ocean-going steamship, collided with the E. E. Jackson No. 4, the rear barge in the tow.

The contention of those in charge of the tug and tow is that it became necessary and desirable, by reason of the condition of the wind, for the tow to cross from the eastern to the western side of the channel at a point between Grany Island Light and Boush's Bluff, with a view of coming to anchor on the Newport News flats, and after the tug had passed Boush's Bluff, and was herself far over to the westward of the channel with all the seven barges, save one, outside of the channel on its western side, and to the westward of the buoys, that the Westhall, upon proceeding down the channel from Newport News to the mouth of the Elizabeth river, and thence up the river, and having observed the presence of the tug and tow a distance of two and a half miles away, with nothing to obstruct the channel or disturb the navigation of the ship, she, without giving proper signals either of danger or to pass, ran into and upon the rear barge, causing the injury sued for; whereas the respondent contends that the Westhall was free from fault, that she left the elevator at Newport News at 8:20 on the morning of the collision for Lambert's Point, under charge of a Virginia pilot, and with a proper and efficient lookout, drawing 23 feet 2 inches of water, the wind blowing a fresh gale from the west, and, after turning into the channel of Elizabeth river off Sewell's Point at can buoy No. 4, the navigators of the steamer observed ahead the tug and tow at a distance of 2½ miles away, which were taking up most of the channel, the tug being far to the westward, headed between north and west, making it impossible for the steamer to pass on the western side of the channel, so she kept on cautiously,

frequently stopping or slowing down, keeping only steerage way, with the intention of passing to the eastward of the barges, but that, on approaching nearer, it became evident that the tug and tow were taking practically the entire deep water channel for a ship the size of the Westhall. She thereupon stopped at a distance of some three lengths of the ship from the barges and starboarded to get as far as possible out of the way, which maneuver caused her to ground on the eastern side of the channel, when the Jackson drifted down and struck her on the starboard bow, thereby causing the injury. Considerable evidence was taken by the parties, respectively, and the usual conflict in collision cases was increased by the large number of witnesses examined from the crews of the ship and of the tug and tow; and, while in many particulars the conflict was irreconcilable, still they differed largely about immaterial and unimportant matters, or upon points as to which persons viewing the same object would naturally differ, but the court was fortunate in having the benefit of the testimony of a number of disinterested witnesses who either saw, or were so recently at the scene of the collision, or so familiar with its surroundings, as to be able intelligently to speak of the facts.

The conclusions reached by the court upon a full review of the entire evidence, and after hearing arguments of counsel, are that the collision did not occur as contended for by the respondent; that is to say, by the obstruction of the entire channel, by the barges, the running aground of the steamship, and the collision therewith by the rear barge while aground. This theory is at utter variance with the evidence, or certainly any considerable part of it, and is demonstrated not to be true beyond peradventure by the physical facts and circumstances of the case. The blow of the collision shows that it could not have so occurred, as the injury to the barge could never have happened by the coming into collision of the starboard quarter of the barge with the starboard bow of the steamship, the latter lying still, as contended for by the respondent, and the barge drifting against it. Indeed, not only does the libelant's evidence show that it did not and could not have so happened, but one at least of the respondent's witnesses, Capt. William J. Bartlett, a man of experience and intelligence, and in no way interested or connected with the case, and himself master of an ocean tug with a large tow at the time near the scene of the accident, testified in effect that it could not have so happened; that the tide was then as it had been for some time, running flood; that the tug was moving the tow gradually out of the channel to the westward, and that the tide would have swept the barge up the river, and from the Westhall, instead of against it; and that it was impossible for it to have drifted with the wind and tide as they were down on and against the steamship. He also testified that some time before reaching the scene of the collision, and as far away as Boush's Bluff, he observed the rear barge then a little to the east of midchannel, and it was gradually moving to the westward of the channel; that after the collision, before the tug had gone to the aid of the injured barge (which the evidence shows to have been from five to eight minutes), and before the steamer had gone forward, he with a large tow, consisting of a barge 328 feet long, and drawing 23½

feet of water, lashed to his starboard side, passed between the barge and steamship, and proceeded down the river; the steamship being at the time on the eastern side of the channel. It is quite evident that the collision occurred by the stem of the steamship while moving coming into collision with the starboard quarter of the barge, and not by the latter's drifting into the steamer after she had run aground. Under the law, it would be difficult for the Westhall to escape responsibility for this collision, assuming it occurred as contended for by her. If the channel was entirely blockaded, as she insists, with a large unmanageable tow extending from its western border to and over its eastern side, with the tug endeavoring to move the same out of the channel, and impeded by the wind and tide, there was no excuse for the steamer's running into the barge. The tow's plight was apparent, and the steamer should neither have run into nor approached the same in such close proximity as to be unable to avoid the collision. The tug and tow was the incumbered vessel. The steamer was entirely free, and under the circumstances should have kept out of the way. "A tug with vessels in tow is in a very different condition from one unincumbered. She is not mistress of her motions. She cannot advance, recede, or turn either way at discretion. She is bound to consult their safety, as well as her own. She must see that what clears her of danger does not put them in peril." The Syracuse, 9 Wall. 675, 19 L. Ed. 783; Marsden, Coll. (4th Ed.) 185, 186. The reason for not requiring the same strictness of compliance with the rules of navigation by those in charge of a tug and tow as of those navigating an unincumbered steam vessel is manifest, and as between a steamer and a tug with a cumbersome tow the latter has the right of way, and upon the steamer is imposed the responsibility of exercising extra precaution to avoid collision. The Alleghany, 9 Wall. 522, 525, 19 L. Ed. 781; The Mayumba (C. C.) 21 Fed. 476; The Fred W. Chase (D. C.) 31 Fed. 94; The Rose Culkin (D. C.) 52 Fed. 328; The Lucy (C. C. A.) 74 Fed. 572, 20 C. C. A. 660; Spencer on Coll. 264, 275, 276. It will not do to say that the Westhall did what she could after the emergency became imminent. If she delayed unduly to avoid this collision, and such failure brought it about, she is liable. The obstruction was seen in the channel for a distance of 2½ miles, and, while it is true the claim is made that the steamship from time to time checked her course moving up the channel, still to have gone within 1,000 feet of the barges across the channel—that is to say, so close that, when she undertook to stop and starboard her helm, the collision was inevitable from the barge running into it—under the circumstances of this case was inexcusable. Not only did the Westhall proceed up the river for over a mile and a half in the face of an apparent danger, which was entirely removed within five minutes after the collision, but she approached recklessly near to the obstruction in her way before taking the necessary and proper precautions to avoid the collision. The steamship should have done more than merely shape her course, or slacken her speed so as possibly, or even probably, to avoid the collision with the tug and tow claimed by her to be unmanageable. She should have allowed sufficient margin for safety, taking into consideration all of the impending contin-

gencies of navigation; and for loss occasioned by her failure so to do she is clearly responsible. Mars. Coll. at Sea (4th Ed.) 377, 384; The America, 2 Otto, 432, 23 L. Ed. 724; The Saratoga (D. C.) 1 Fed. 730; The Chatham, 52 Fed. 399, 3 C. C. A. 161; The Owego (D. C.) 71 Fed. 537, 544.

The Westhall's contention is that at the time she starboarded she could not then have reversed, as that would have tended to throw the head of the steamship to starboard, and more than likely have increased the chance of collision; but this in no manner accounts for the failure sooner to stop, and, if needs be, to have reversed and backed away from the so-called obstruction floating down the river. No pretense is made that the engines were reversed. Under Navigation Rule No. 21 (Rev. St. § 4233 [U. S. Comp. St. 1901, p. 2898]), upon the risk of collision arising, the steamship should have slackened her speed, and, if necessary, have stopped and reversed, and the fact that she delayed doing so until, upon starboarding her helm to avoid the collision, it was found too late to reverse, will not avail either to relieve from responsibility or to cause others to share the losses arising from such failure. The Reading (D. C.) 43 Fed. 400; The Portia, 64 Fed. 811, 72 C. C. A. 427; The Berkshire, 74 Fed. 906, 21 C. C. A. 169; The Maverick (D. C.) 75 Fed. 845; The Westover, 5 Hughes, 133, 2 Fed. 91. "The precautions required by law to be taken where there is risk of collision must be taken in time to determine that risk. An alteration of the helm, or other step taken in pursuance of the regulations, is no defense, unless it be shown that such precaution was taken at the proper time. To be effectual, precautions must be taken seasonably. If taken at an improper time, they are not a compliance with the regulations, and are no defense. If you adopt a measure at an improper time, it does not take away the culpability of not having done it before and prevented the accident." Mars. Coll. at Sea (4th Ed.) 384, and cases cited. Capt. Bartlett, respondent's witness, shows that there was no difficulty in the steamship stopping and waiting for this obstruction in the channel to get out of the way, as he did with the ocean tug and the large tow it had, as above mentioned. And another of respondent's witnesses, Capt. Cunningham, in charge of the steamship, testifies that there was no difficulty in stopping the steamship at the entrance to the channel.

Coming to the question of how the collision occurred, and the responsibility therefor, the court will consider the position of the barges relative to the channel at the time of the collision. It seems clear that they were not only not across the channel, or to the eastward thereof, but that they had been to the western side for quite a while prior to the time of the collision, and that at that time all of the barges, save one, were out of the channel, and that it, with its hawser, extended in the channel possibly some 125 or 150 feet on the western side. This is apparent from the fact of the position of the barges immediately after the collision, as testified to by the witnesses on both sides. It is settled almost beyond dispute that the barges, other than the injured one, were anchored outside of the channel and to the west of the buoys, and that the tug and tow had, with the exception of the rear barge, pulled out of the channel heading across the flats previous

to the time of the collision. Indeed, those in charge of the steamship observed the movement and the course of the tug and tow when coming into the channel. The master of the steamship and the pilot both testified that their ship bore to the westward side of the channel in coming up from the mouth of the river, keeping some 50 feet to the east of the buoys until within about 3 lengths of the ship, or 1,000 feet from the barges at the time the steamship starboarded, as above mentioned, and, in this connection, it should be mentioned that the pilot, Cunningham, of the Westhall, seemed to have been under the impression that the deep-water channel at the point of the collision was only 100 feet wide, whereas, in fact, it was 500 feet, and this circumstance may account largely for the conduct of those in charge of the ship, though they will not be excused either for not knowing the width of channel or for going into dangerous proximity to the obstruction before taking the proper precaution to avoid it. The channel was 500 feet wide, and the barge in collision extended into it on the western side only some 125 or 150 feet; and it follows that, if the Westhall had starboarded earlier, she could easily have passed under the stern of the rear barge without the slightest danger of collision, just as other ocean steamships passed the same tug and tow before it was so far to the western side of the channel, and, indeed, before it had pulled out of the channel at all. The evidence is that between Boush's Bluff lightship and buoy No. 10, four steamers, inward bound, three of them ocean steamships, passed this tug and tow starboard to starboard, without difficulty, each passing on the eastern side of the channel, the tow being at the time close to the western side, preparatory to making across the Roads for the Newport News flats. If, as stated by Pilot Cunningham, he considered this channel was only 100 feet wide, it readily accounts for the steamer's proceeding so closely to the western side of the channel, and therefore the greater endangering of a collision, and, if the Westhall kept within 50 feet of the buoys and within the center of a supposed 100-foot channel, the question of how this collision happened is an easy one to solve, and not necessarily inconsistent with her running aground. If the steamship was in the center of a 100-foot channel, and within 1,000 feet of a barge lying immediately across it, as this barge would have been (instead of at that distance from the center of a 500-foot channel), it but accentuates the necessity for her earlier starboarding, and shows why that maneuver was made too late by reason of the close proximity of the moving barge, which came in collision with the stem of the steamship still in motion, and which continued on her course across to the eastern side of the 500-foot channel, and grounded, leaving the injured barge still further to her starboard side and near to the buoy, where Capt. Bartlett said it was. In the judgment of the court this is the way the collision occurred, and is an entirely reasonable explanation of it. It places the fault upon the steamship, whether the channel was blockaded in part or in whole. If it was entirely blockaded, as contended for by the respondent, the master of the steamship should not have run his ship into a cul-de-sac. If the channel was blockaded only to the extent of 125 or 150 feet, there was ample

room to pass as others did, in perfect safety. Indeed, if the steamship had kept in the center of the channel, she could easily have passed, and, in no event, under the circumstances, should she have approached this incumbered vessel in such close proximity as not to have been able to avoid collision with it.

Counsel for the respondent insisted in argument that libelant should not recover because the tug and tow were on the wrong side of the channel. Under the circumstances of this case, the court cannot so hold, even conceding that the present rules of navigation as to the right of the road existed, and that the tug and tow should have kept to the eastern side of the channel. The court does not think that on that account the libelant should be disentitled to recover full damages. At the time the tug and tow crossed to the western side of the channel, and proceeded down from Boush's Bluff to a point near buoy No. 10, where they turned out of the channel, there was no obstruction in their way, and no reason either at the time they crossed to the western side of or at the time they moved out of the channel (whether it was upon the western or the eastern side of it) why they should not have taken the course they did to make the proposed anchorage. At the time the tug hauled out of the channel it was 1⅜ miles from the Westhall, in full view, in broad daylight, and at the regular place for leaving the channel to go where it was going, and had under the circumstances a perfect right to do what was contemplated, and there was neither danger therefrom or objection thereto to those in the proper discharge of their own duty. Certain it is, being on the western side of the channel at that time in no material way enhanced the danger of collision, and, instead, lessened the same. If it was necessary for the tow to cross to the western side of the channel, the sooner it did so the better, with a view of avoiding this collision; and the fact that it traveled along the western side from Boush's Bluff down to buoy No. 10 before turning out in no manner contributed to the collision. The fact of being on the wrong side of the channel of itself would not prevent a recovery in this case, as it would certainly not justify the steamship in violating her plain duty to keep out of the way, having the tug and tow in full sight, and being able to do so. The Saratoga (D. C.) 1 Fed. 730, 733; The America, 92 U. S. 438, 23 L. Ed. 724.

The Westhall on the occasion in question was the vessel on whom rested the burden to avoid the collision; and, she having been found guilty of faults sufficient in themselves to account for the collision, the burden is upon her to show that her negligence not only did not produce, but could not have contributed to, the collision, and under these circumstances she cannot escape liability by the suggestion of possible negligence on the part of the tug and tow. All reasonable doubts as to the vessel at fault must be resolved in favor of the tug and tow, and they held not contributing to the collision, unless their negligence is clearly established. The City of New York, 147 U. S. 73, 85, 13 Sup. Ct. 211, 37 L. Ed. 84; The Ludvig Holberg, 157 U. S. 60, 15 Sup. Ct. 477, 39 L. Ed. 620; The Oregon, 158 U. S. 186, 197, 15 Sup. Ct. 804, 39 L. Ed. 943; The Delaware, 161 U. S. 459, 16

Sup. Ct. 516, 40 L. Ed. 771; The Portia, 64 Fed. 811, 12 C. C. A. 427; The Mexico (D. C.) 78 Fed. 653.

The court's conclusion is that the steamship is solely responsible for the collision, and a reference to a master may be had to compute the damages arising therefrom, unless the same can be agreed upon.

THE DROTTNING SOPHIA.

REDERIAKTIEBOLAGET NORDSTJERNAN v. GANS et al.

(District Court, S. D. New York. April 29, 1907.)

SHIPPING—CHARTER PARTY—DEAD FREIGHT.

Where a provision is made in a charter party that it shall be superseded by the bills of lading, and an adjustment is made between the charterers and the master before the sailing of the vessel and bills of lading are signed showing that no dead freight is due, it cannot be afterwards recovered by the owner from the charterers.

In Admiralty.

Convers & Kirlin and Charles R. Hickox, for libellant.

Wheeler, Cortis & Haight, for respondents.

ADAMS, District Judge. This action was brought by the Rederiaktiebolaget Nordstjernan, a Swedish corporation, owner of the steamship Drottning Sophia, to recover from John H. Gans and Henry Wehner, doing business as H. Vogemann, charterers of the said steamer, certain dead freight claimed to be due under contract dated October 11, 1905, amounting to $1165.28. The charter provided that the vessel should be furnished with a full and complete cargo of heavy grain, with the option on the charterers' part of loading other merchandise in lieu of a like quantity of grain, the total freight to be equal to what it would amount to under a full cargo of heavy grain. The defense is based upon certain provisions of the charter as follows:

"Captain to call at Broker's office, as requested, and sign Bills of Lading, as presented, without prejudice to this Charter Party, and deficiency to be paid at Port of Loading in cash, less insurance, and any surplus over and above estimated freight to be settled there before the Vessel clears at the Custom House, by Captain's draft in Charterers' favor, upon Consignee, payable five days after arrival at Port of Discharge. * * *

It is also mutually agreed that this contract shall be completed and be superseded by the signing of Bills of Lading on the same form as in use by regular line steamers from loading port to port of destination; or, if port of destination be one to which there is no regular line of steamers from loading port, this contract shall be superseded by the signing of Bills of Lading in the form customary for such voyages for grain cargoes, which Bills of Lading shall however contain a clause for providing for discharging as fast as vessel can deliver during ordinary working hours, any custom of the port to the contrary notwithstanding. * * *

Charterers' liability under this Charter to cease on cargo being shipped, but the Vessel to have a lien thereon for all freight, dead freight, demurrage or average."

The testimony shows that the steamer's loading was completed at Norfolk, Virginia, on the 18th of November, 1905, when she was loaded down to her marks. The master testified that he contended with the

charterers' representative that he was entitled to dead freight but that is denied and is not credible in view of the opposing testimony, fortified as it is by the provision in the bill of lading quoted below. She was laden with grain in the holds and logs on deck. When it appeared that the grain to be taken in the holds would, in connection with the logs already on deck, fully load the vessel, the underwriter's surveyor stopped the further loading of logs, of which the charterers had an ample supply ready for shipment, and ordered her to the elevator for the grain. She then had space for more cargo on deck which it would have been profitable for the charterers to ship from their supply on hand but they were not permitted to load more as the steamer would be down to her marks, even taking into consideration the additional buoyancy of deep sea water.

When the vessel was ready to sail, she issued a bill of lading to the respondents, containing the following clause in the margin which was signed by the master, apart from his signature to the document:

"Freight and all other conditions as per Charter Party.
No dead-freight due steamer, payable before delivery of cargo at port of discharge. Seven days have been used for loading cargo and all conditions of the Charter Party have been fulfilled at this port."

The master added to the bill of lading at the bottom: "Loaded mixed not responsible for separating." The master also signed a statement, dated November 18, 1905, showing a balance of freight due the charterers of £1822.1.5 and a draft of the same date on the owner in favor of the charterers for that sum. The bill of lading was also dated the same date.

In his testimony, the master claims that he could not effectually protest because it was late at night when he signed the bill of lading and no lawyer was available to prepare the document but to assert that professional assistance was necessary for such a purpose is almost absurd, especially in view of the fact that he made a note on the document, quoted above, to preserve the owner's rights with respect to the loading, which seems to have been done in his own handwriting.

It appears to be clear that the master and the charterers believed that the vessel was fully loaded, although at other times she may have carried more cargo. The master testified that just prior to departure he was obliged to fill one of the water ballast tanks and his statement in this respect is supported by that of the engineer. The respondents on the other hand claim that the tank was full all the time, through some neglect on the vessel's part. This, however, is not supported by testimony. In any event the charterers evidently considered that a full cargo had been furnished and the documents supported them in this view.

The libellant urges that the cargo furnished occupied all the cargo space in the vessel but probably did not weigh as much as the charterers anticipated and that there was really a deficiency of cargo and hence the libellant was entitled to dead freight and on the general question of the charter being a controlling instrument where it differs from a bill of lading, cites The Chadwicke (D. C.) 29 Fed. 521. Such case expresses the general law but is not applicable here because, on the point

in question, there is no conflict, the charter party having provided that it should be superseded by the bills of lading. This case is governed by its own facts and I have no doubt the master was authorized to adjust the question of dead freight and it did so prior to departure adversely to the libellant's contention here. It is somewhat similar to Barber v. Vlasto (D. C.) 104 Fed. 101, and the West Hartlepool Steam Nav. Co., Ltd., v. Vogemann (D. C.) 134 Fed. 1008, where the recovery of dead freight was not allowed.

The libel will be dismissed.

THE WILLIAM J. QUILLIN.

(District Court, S. D. New York. April 5, 1907.)

COLLISION—VESSEL LYING AT PIER—PROJECTING ANCHOR.

A schooner lying in a slip, with her anchor projecting slightly beyond the rail toward the stem, but not so as to protrude beyond her side at the widest part, *held* not liable for an injury to a barge by collision with such anchor while being pushed past the schooner by a tug, where the anchor could plainly be seen and would not have touched the barge if care had been taken by the tug.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 101.]

In Admiralty. Suit for collision.

Amos Van Etten and H. H. Flemming, for libellants.

Hyland & Zabriskie, for claimant.

ADAMS, District Judge. The schooner William J. Quillin was lying at a wharf on the south side of a slip bounded by piers 4 and 5 of the Delaware, Lackawanna & Western Railroad Company at Hoboken, New Jersey, on the 5th day of March, 1905, and the barge John J. Luby, belonging to the libellants, was being pushed, about 3 o'clock in the afternoon, past the schooner by the tug Ira M. Hedges, to obtain a berth further in the slip, when the top of the barge's cabin on her port side came in contact with a projecting anchor stock on the starboard bow of the schooner and was damaged. Action was brought by the owners of the barge against the schooner on the ground that she was in fault in permitting her anchor to extend beyond the line of the vessel. The action was defended upon the claim that another schooner was lying on the other side of the slip, thus restricting the space between the two schooners, and the anchor of the Quillin was perfectly visible to any one entering the space carefully and the Quillin was not in fault as she carried her anchor in the customary place.

The testimony shows that the Quillin was a four masted schooner 37 feet 4 inches beam with her anchor fastened to the cathead near the bow, where the vessel was 25 feet 8 inches wide, and resting upon the starboard rail, with the lower stock against the side of the vessel and the other about 2½ feet out from the end of the cathead, which was 3 feet and 8 inches from the side of the vessel. The schooner on the opposite side of the slip, which was 110 feet wide, was somewhat larger than the Quillin and the space between them allowed but 34 feet, of which the Luby occupied 26 feet in passing, leaving but 4 feet on each side of her if she were navigated exactly between them.

When the tug arrived, with the barge on her starboard side, it was seen that there was not room enough for them to pass side by side and the tug, dropping astern, pushed the barge ahead of her. When the anchor was reached, the upper and protruding stock struck the barge's cabin. If the barge had been kept perfectly straight in passing along the schooner's side, she would not have touched the anchor stock as the narrowing of the vessel towards the stem left only a width of 25 feet 8 inches on deck at the cathead and its projection, 6 feet 2 inches including the cathead, was not sufficient to cause the stock to protrude beyond the side of the vessel at her widest part.

The navigation of the barge was in charge of the tug and the projection of the anchor over the side should have been seen and guarded against. I have no doubt that the primary fault was that of the tug for proceeding ahead in such a careless manner. The tug, however, is not in the action and if the schooner was in fault the libellants are entitled to a decree against her as a joint tort-feasor.

There has been an attempt on the part of the libellants to show that leaving an anchor projecting even to the extent that this one protruded beyond the side of the vessel was negligence but I find no such preponderance of testimony to that effect as would warrant imposing these damages upon the schooner. She was in a protected place and there would have been no danger to a vessel going further up the slip if ordinary care had been exercised. It is not a case like The Overbrook, 142 Fed. 950, 74 C. C. A. 120, where there was a dangerous exposure of an anchor through the vessel to which it belonged allowing it to hang over the outside, without necessity, in a thoroughfare, so that it became by its immersion in the water an obstruction to navigation. The danger was recognized by the master of the vessel and it was held a fault to have the anchor exposed to collision, as it was under the circumstances. The anchor in the case under consideration was in plain view and though it would have been more prudent to have had it inboard, it does not seem a case in which the vessel should be held.

Libel dismissed.

MEMORANDUM DECISIONS.

AMERICAN FINE ART CO. v. SIMON. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 215. In Error to the Circuit Court of the United States for the Western District of New York. Judgment was entered upon a verdict in favor of the defendant. The cause has been twice tried. The first trial also resulted in a verdict for the defendant, but a new trial was ordered by this court because of error in the admission of testimony offered by the defendant upon an erroneous issue of fraud. The opinion on the first writ of error is reported in 140 Fed. 529, 72 C. C. A. 45. W. H. Hotchkiss, Theodore Kronshage, Hotchkiss & Bush, and Kronshage, McGovern & Fritz, for plaintiff in error. Adelbert Moot, Charles Diebold, Jr.,

and Moot, Sprague, Brownell & Marcy, for defendant in error. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The facts are sufficiently stated in our former opinion and need not be repeated here. We endeavored to construe the contract in its entirety for the guidance of the court on the new trial which was ordered. That construction was reached after careful consideration, and we have no reason to believe that our interpretation is incorrect. In speaking of the obligation of the plaintiff under the contract Judge Townsend says: "Defendant, on his part, merely contracted to make a contract if he should thereafter see fit to do so. So far as he was concerned, there was no enforceable existing contract. The occurrence in future of an uncertain event after the signing of the written contract was a condition precedent to the giving of any order. The contract provided that, even if he approved a design, he was at liberty to decrease the amount specified in the contract, and that, if the parties failed to agree as to price, he was not bound to take any work of that design. There was, therefore, originally merely a unilateral contract, binding only upon the plaintiff, and there was no ambiguity or uncertainty as to its provisions." On the second trial the court excluded all evidence of fraud, which we thought was improperly admitted on the first trial, and submitted to the jury in a clear and impartial charge the question of fact arising on the contract, namely: Did the defendant so accept and approve the designs, etc., that such acceptance and approval constituted orders according to the terms and conditions of the contract? There was a sharp conflict of testimony upon this issue, but the jury answered the question in the negative. Their verdict was not against the weight of evidence, and must be accepted as establishing the fact that the approvals of the defendant were given to facilitate the copyrighting of the designs, and were not orders for work. The charge fairly presented the issue as follows: "If you believe from the evidence that the signatures of the defendant to the designs submitted to him were not, as claimed by him, to carry out the contract mentioned in the complaint, but were in fact merely to authorize copyrighting, then the plaintiff cannot recover in this action; for in that event it proceeded to lithograph the finished designs without any orders or directions to do so by defendant, and accordingly the loss or damage is that of the plaintiff. * * * As I stated in the beginning of my charge, the question presented to you is in a very narrow range. It is simply whether these approvals of Mr. Simon, that were given in the manner stated, were for the purpose of ordering the work, or whether, as the defendant claims, they were for the purpose of copyrighting, and that question, as I have already intimated, must be left to you." We have examined the other exceptions of which error is predicated, and are convinced that none of them is well taken. We think the trial was fairly conducted throughout, the record disclosing no error which would justify a third trial of the issue. The judgment is affirmed, with costs.

CLEMENT v. WILSON. (Circuit Court of Appeals, Second Circuit. May 10, 1907.) No. 281. In Error to the Circuit Court of the United States for the District of Vermont. Alexander Dunnett and Wm. B. C. Stickney, for plaintiff in error. Max L. Powell, for defendant in error. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Judgment affirmed. See 126 Fed. 808.

HANOVER NAT. BANK OF CITY OF NEW YORK v. SUDDATH. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 264. In Error to the Circuit Court of the United States for the Southern District of New York. A judgment for $3,802.29 was entered in the Circuit Court for the Southern District of New York, upon a verdict directed by the court in favor of de-

fendant in error, who was plaintiff below. Percy S. Dudley, for plaintiff in error. Edward B. Whitney, for defendant in error. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This action was before us upon a previous writ of error. Van Zandt v. Hanover Nat. Bank (C. C. A.) 149 Fed. 127. The present record, mutatis mutandis, is identical with that on the former review. The only differences relate to immaterial changes occasioned by the lapse of time. The facts are the same, and no reason has been advanced which induces us to change our view of the law. The judgment is affirmed.

HANOVER NAT. BANK OF CITY OF NEW YORK v. SUDDATH. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 265. Appeal from the Circuit Court of the United States for the Southern District of New York. Percy S. Dudley, for appellant. Edward B. Whitney, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This is an equity action, brought by the Hanover National Bank against William F. Suddath, as receiver of the American National Bank of Abilene, Tex. The relief prayed for is: First, that an accounting be ordered to ascertain the amount due to the complainant, and that the amount so found may be set off against any amount found to be due from the complainant to the defendant; second, that the defendant be enjoined from the further prosecution of any action at law based upon the notes referred to in the bill. The facts sufficiently appear in the opinion of this court in Van Zandt v. Hanover Nat. Bank, 149 Fed. 127. It is manifest that if the Hanover Bank was unauthorized to use the notes sent to it by the Abilene Bank, except for the specific purpose mentioned in the letter of instructions transmitting them, this action cannot succeed. The mere fact that property of the Abilene Bank was temporarily in the hands of the Hanover Bank did not give the latter a right to apply that property in payment of the former's overdraft. The Hanover Bank was under no legal obligation to pay the checks of the Abilene Bank, when that bank had no balance on deposit with which to meet the checks. The Hanover Bank, in paying these checks and thus creating an overdraft, undoubtedly acted from the most praiseworthy motives; but the failure of the Abilene Bank on the succeeding day subjected its property, wherever situated, to the payment of the claims of its creditors. In the Van Zandt Case this court said: "The notes in controversy were never deposited by the Abilene Bank with defendant, nor did they come into its hands as collateral security within the commonly accepted meaning of these terms. They were temporarily in the hands of the defendant under an option to purchase them. We conclude that they did not come within the terms of the pledge, and that the defendant did not obtain a lien upon them. If the check drawn by the Abilene Bank upon the defendant, which caused the overdraft of its accounts, had been drawn with knowledge of the defendant's refusal to discount the notes, a different question would be presented; but it is fair to assume that this check was drawn in the expectation that before its presentation the notes would have been discounted and the proceeds credited to the Abilene Bank." The decree is affirmed.

THE STAMFORD. (Circuit Court of Appeals, Second Circuit. May 10, 1907.) No. 284. Appeal from the District Court of the United States for the Southern District of New York. Harrington Putnam, Henry E. Mattison, and Wing, Putnam & Burlingham, for appellants. James J. Macklin and La Roy S. Gove, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree (148 Fed. 509) affirmed, with interest and costs.

THE VIOLETTA. THE SCOWS 8, 20, AND 7. (Circuit Court of Appeals, Second Circuit. April 30, 1907.) No. 224. Appeal from the District Court of the United States for the Southern District of New York. A decree of the District Court held the tug and the barge Thomas L. Parker both in fault for a collision between the latter and a mud scow in tow of the tug. The opinion below is reported in 141 Fed. 690, and sets forth the facts quite fully. E. G. Benedict and Benedict & Benedict, for appellant. Frederick M. Brown and Butler, Notman & Mynderse, for appellees. Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. As the barge has not appealed, the only question before us is as to the fault of the tug. It is sufficient to say that we concur in the findings and conclusion of the District Judge. The suggestion that the barge, after she left the tow and until she finally swung to her anchor, was a steam vessel—i. e., "a vessel propelled by machinery"—and required to navigate accordingly, although she had no motive power, nor means to regulate her course and speed, except by anchoring, does not commend itself. We find the evidence of the master of the tug unsatisfactory, and not consistent with the blue print submitted as indicating his course. It seems entirely clear that for some time after he started, and after the barge had cast off from the tow, he failed to keep a careful lookout. There was no one else on board who was standing lookout. We are not convinced by appellant's argument that observation of the movements of the barge would have failed to advise the observer that she was a barge dropped by her tow on anchorage ground and about to anchor; and perceiving that, a careful navigator would not have persisted in swinging to the southward, but would have adhered to what he says was his original and usual intention "to get on the New York shore [or, rather, on the New York side of anchorage ground] before straightening down at all." The decree is affirmed, but without interest from date of appeal, and with costs of this court to the barge Parker.

WEST DISINFECTING CO. v. P. M. FRANK DISINFECTING CO. (Circuit Court, S. D. New York. February 21, 1907.) Motion to Punish for Contempt. See 146 Fed. 388. W. H. Kenyon, for the motion. Louis C. Roegener, opposed.

LACOMBE, Circuit Judge. In view of the offer made in open court on behalf of defendant forthwith to substitute articles of the design marked "Defendant's Exhibit Flat-Bottom Casing" for those marked "Complainant's Exhibit New Frank Casing," the motion is denied, with leave to renew as to any of said "New Frank Casings" found in use after 20 days from the entry of this order.

END OF CASES IN VOL. 153.