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CASES ARGUED AND DETERMINED

IN THE

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

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

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155 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. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. WALTER C. NOYES, Circuit Judge [1].....New London, Conn.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....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.
Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.

[1] Appointed September 18, 1907.

Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
Hon. NATHANIEL EWING, District Judge, W. D. Pennsylvania.....Pittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Bramwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....Montgomery, Ala.
Hon. OSCAR R. HUNDLEY, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. CHARLES SWAYNE, District Judge, N. D. Florida [2].....Pensacola, Fla.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida [3].....Pensacola, Fla.
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. 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.

[2] Died July 5, 1907.

[3] Appointed September 4, 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.
Hon. W. H. MUNGER, District Judge, Nebraska.....Omaha, Neb.
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.
Hon. JOHN A. MARSHALL, District Judge, Utah.....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. 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 S. DEITRICH, District Judge, Idaho.....Boise, 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.

CASES

ARGUED AND DETERMINED

IN THE

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

NELSON et al. v. MEEHAN et al.

(Circuit Court of Appeals, Ninth Circuit. June 7, 1907.)

No. 1,376.

1. APPEAL AND ERROR—APPEALABLE ORDER—ALASKA CODES.

An order made by a district court of Alaska setting aside a prior judgment of such court and granting a new trial is not appealable under Alaska Codes, pt. 4, c. 51, § 504, which gives the right of appeal from a "final judgment or order," but such order may be reviewed on appeal by the Circuit Court of Appeals for want of jurisdiction in the court to make it.

[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. of New York v. Madden, 17 C. C. A. 238; Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482.]

2. JUDGMENT—VACATION FOR FRAUD—POWER OF COURT AFTER TERM.

A court of equity has power to vacate its own decree at any time during the term at which it was entered on the ground that it was procured by means of the perjured testimony of the prevailing party, notwithstanding the fact that it has been affirmed on appeal; but in the absence of a statute conferring it, such power does not extend beyond the term. In such case, fraud to confer jurisdiction must consist in something extrinsic or outside of the matter which was actually tried or so in issue that it could have been tried in the suit in which the decree assailed was entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 666-668.]

3. SAME—ALASKA STATUTE.

Alaska Code Civ. Proc. § 93, which authorizes a district court to relieve a party from a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, does not confer power to vacate a judgment after the term on the ground that the issues were erroneously decided because of perjured testimony, the motion being based on affidavits going to the identical issues tried before.

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

Miller, West & De Journel, N. V. Harlan, and West, De Journel & O'Neill, for appellants.

John L. McGinn, Martin L. Sullivan, McGinn & Sullivan, J. C. Campbell, W. H. Metson, F. C. Drew, and F. P. Deering, for appellees,

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

HUNT, District Judge. O. A. Nelson and G. N. Hensley brought an action against Matt Meehan and T. Larson in December, 1903, in the United States District Court for the territory of Alaska, to compel the specific performance of a contract by which Meehan and Larson agreed to give to the plaintiffs a one-half interest in a certain mining claim if the plaintiffs would sink thereon three holes to bed rock. The cause was tried by the court, and it was found that the plaintiffs had fulfilled the terms of the contract by sinking three holes to bed rock, and that as a conclusion they were entitled to have conveyed to them by the defendants the half interest specified in the contract. Thereafter, and on August 17, 1904, a decree was entered in favor of the plaintiffs in accordance with the findings of the court. Defendants moved for a new trial upon the grounds of insufficiency of evidence to justify the decision and errors of law duly excepted to upon the trial. This motion was overruled upon August 17, 1904. The defendants appealed to this court, and upon May 8, 1905, the decree of the District Court was affirmed. Meehan v. Nelson, 137 Fed. 731, 70 C. C A. 165. The mandate of the Circuit Court of Appeals was filed in the District Court of the proper district in Alaska on June 13, 1905; thereafter, on July 26, 1905, the defendants filed in the District Court a motion for an order vacating and setting aside the judgment and decree theretofore rendered by the District Court on August 17, 1904, which had been affirmed by this court, as heretofore stated. This motion was based upon the ground that the judgment and decree of the court had been founded upon the testimony of O. A. Nelson, one of the plaintiffs in the cause, and that he had willfully and corruptly sworn falsely by stating that he had sunk the three holes to bed rock and performed the conditions of the agreement which was made the basis of the suit in specific performance, that the court had been deceived, and that appellees did not discover the true condition of affairs until after the affirmance of the decree of the lower court by the Court of Appeals. The defendants accompanied their motion to vacate with a number of affidavits wherein affiants swore that hole No. 3 sunk by Nelson and Hensley did not go to bed rock as required by the terms of the agreement heretofore referred to, and that the gravel under the bottom of the No. 3 shaft to bed rock had never been removed. On July 29, 1905, the plaintiffs appeared specially and only for the purpose of objecting to the jurisdiction of the court to entertain or pass upon the motion filed by the defendants. On August 14, 1905, the court overruled the objections to the jurisdiction of the court to entertain the motion. After the court overruled plaintiffs' objections to the jurisdiction of the court, plaintiffs, meeting the issue made by the affidavits of defendants, filed a number of counter affidavits tending to show that the holes had been sunk to bed rock, and that after a winter has elapsed since ground has been disturbed it is very difficult to tell by looking at gravel in a drift which is gravel in place and which is gravel that has been disturbed or caved in; that a shaft generally caves in, and that during

the winter following this process of caving the whole mass freezes and forms a compact cohesive body which it is almost impossible to distinguish from gravel in place. After the submission of these affidavits by both sides, and with the consent of the parties to the litigation, the presiding judge made a personal inspection of the property, and it was his opinion that the Nelson and Hensley shaft No. 3 was not sunk to bed rock, that its lowest point was at least 5 feet 6 inches from bed rock, and that Nelson had deliberately committed perjury upon the trial of the case. The court, therefore, on September 16, 1905, ordered that the judgment and decree entered upon August 17, 1904, be set aside, and that the defendants be granted a new trial. The plaintiffs now prosecute this appeal from the order of the District Court so made and entered.

Questions of jurisdiction are presented by appellants and respondents. Appellants contend that there was no jurisdiction in the lower court to set aside and vacate the decree made in favor of Nelson and Hensley and to grant a new trial, inasmuch as it appears that the matters presented in the Meehan and Larson motion to vacate the decree and to grant a new trial are the identical questions that were tried and decided in the former suit hereinbefore referred to; hence that it was not within the power of the lower court, after the expiration of the term in which the decree was rendered, to vacate its decree merely because it was founded upon perjured testimony. On the other hand, the respondents challenge the jurisdiction of this court by a motion to dismiss the appeal, for the reason that the judgment or decree of the lower court vacating the former decree and granting a new trial is not a final judgment or decree from which an appeal may be taken under section 504, pt. 4, c. 51, of the Codes of Alaska. Section 504 of the Alaska Codes, so far as applicable, provides that an appeal and writ of error may be taken and prosecuted from a final judgment or order of the District Court of Alaska to the United States Circuit Court of Appeals for the Ninth Circuit where the value of the subject-matter exceeds $500. A judgment is defined by the Codes of Alaska (section 234, Carter's Annotated Codes) as "the final determination of the rights of the parties in the action." In Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73, the Supreme Court said that a judgment or decree, to be final within the meaning of the acts of Congress giving to the Supreme Court jurisdiction on appeals and writs of error, "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but execute the judgment or decree it had already rendered." An order granting a new trial continues a case for further proceedings; it does not finally determine the rights of the parties, but suspends the finality of the original judgment entered until the issues are tried and decided anew. Black on Judgments, § 34. These definitions of what constitutes a final judgment that may be appealed from exclude an order vacating a judgment and granting a new trial made in the same cause. It therefore follows that our inquiry must be limited to the question whether or not the District Court had power to make the order it did. If it had that power, whether it was wisely or unwisely exercised, is not for us to decide,

and respondents' motion to dismiss the appeal for lack of jurisdiction of this court would have to be sustained. If, conversely, the court acted in excess of its authority when it made the order appealed from, this court has jurisdiction of the appeal; and plaintiffs' objections to the jurisdiction of the lower court are sound.

This being a suit in equity, the District Court had full power to amend, correct, or vacate its decree at the same term in which it was made, if it was discovered that error had been committed or that fraud had been perpetrated upon the court by either of the parties or their agents, or if for other satisfactory reason the court in its discretion believed that it was just that the decree should be vacated or amended or reformed. Doss v. Tyack et al., 14 How. 297, 14 L. Ed. 428. Control of the court over its own judgments during the term at which they are rendered is spoken of by Justice Miller as of "everyday practice." Bassett and Harger v. United States, 9 Wall. 38, 19 L. Ed. 548. And later the same learned justice, speaking for the court in Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, said:

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however exclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court."

The fact that an appeal was taken and that the decree was here affirmed did not necessarily take away the power of the lower court to vacate the decree during the term, if a fraud had been practiced. When the mandate of this court was filed affirming the decree the suit was again in the District Court. The rule is that a lower court is bound by the decree of the appellate court, and its duty is to put the decree into effect according to the mandate, and there is no authority to give further relief. But if during the term there is a showing, whether by motion or otherwise, of fraud or other wrong practiced by the prevailing party, the lower court has power to vacate a decree and grant a new trial notwithstanding an affirmance by a higher court. This would seem to be so because, so long as the term of court lasts in which the decree was made and entered, the decree remains subject to the judicial power of the court; and if during such term it is annulled, such annulment vacates what has been done, and the decree stands as if no appeal had been had. In Goddard v. Ordway, 101 U. S. 745, 25 L. Ed. 1040, an order allowing an appeal was granted and entered on the minutes of the court, and subsequently, during the term, this order was set aside and vacated at the instance of the party in whose favor the appeal had been granted. The Chief Justice, speaking for the court, said:

"We are unable to see how the allowance of an appeal differs in this respect from any other judicial order made in the cause. If the one is subject to revocation or amendment while the term continues, so, as it seems to us, must be the other." Ex parte Fuller, 182 U. S. 562, 21 Sup. Ct. 871, 45 L. Ed. 1230.

This brings us to the point where we must ascertain whether the order vacating the decree was made during the term at which the decree was rendered. Counsel for appellants have predicated assign-

ments of error upon the ground that the defendants' motion to vacate was not filed until after the commencement of a term of a court succeeding the one whereat the decree was made. Their brief, too, is prepared upon an assumption that such was the fact. Respondents' counsel, however, address our attention to the omission of the record to sustain the statement that the term at which the decree was rendered had closed. The transcript in the original appealed case shows that the trial was had in August, 1904, at a special term of the District Court held at Fairbanks, but there is nothing in that record that indicates an adjournment of such special term; while the record on this appeal shows affirmatively that at different times in April, 1905, the parties were before the court in the matter of a receivership asked for by plaintiffs. The only evidence of when there was any adjournment of court for the term is found in an order made by the judge at Fairbanks on August 4, 1906, wherein nunc pro tunc he extended the time for the plaintiffs to prepare and have signed their bill of exceptions to the order vacating the decree, in which order it is recited that "the final order in setting aside the judgment in the above-entitled cause was not made and signed until the sixteenth day of September, 1905; that the court adjourned sine die on the same day, and that the judge of said court left the Third division of the territory of Alaska immediately thereafter," etc. This is evidence of the adjournment of the term after the court had vacated the decree, but it in no way sheds light upon what term was so adjourned. Inasmuch as the District Courts of Alaska are courts of general jurisdiction, our determination of the point must be guided by those usual rules which, in the absence of a showing to the contrary, presume that courts have proceeded within the general scope of their powers, and that their orders and judgments have been given with authority. Fowler v. Equitable Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; Stockslager v. United States, 116 Fed. 590, 54 C. C. A. 46. Resting our decision, therefore, upon the ground that the court had jurisdiction during the term at which it made the decree in specific performance to vacate the same, and that its order of vacation was presumably made during the same term, defendants' motion to dismiss the appeal for the reason that it is not an appealable order is sustained.

If the record had disclosed that the motion to set aside the decree and the action of the court vacating the same and granting a new trial were had at a term subsequent to the special term whereat the cause was heard, our conclusion would have been that the court exceeded its authority, and that the proper order would be to remand the case with directions to set aside the order vacating the decree and granting a new trial, to dismiss the defendants' motion to vacate, and to enforce the original decree of specific performance. We express this opinion now because it may be that appellants' positive statement in their assignment of errors and brief to the effect that the motion to vacate was made and action thereon were had at a subsequent term and their assumption that such is the truth will be proved by indisputable record facts, and because the briefs discuss the case from such a standpoint, and because if plaintiffs are correct in their assumption it is to the interest of all parties that the litigation should

be ended without another appeal. Our reasons for believing that defendants would not be entitled to the relief sought at a subsequent term of the court are briefly these: As we have shown, the rule is that during the term at which a decree is rendered the court which pronounces it may vacate or annul it or amend or modify or reform it. But the power of a court of equity to vacate or annul its own judgment or decree does not extend beyond the term at which the decree was pronounced. Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467. There is a practice in some states whereby a judgment may be vacated after the term for perjury by the successful party, but generally, if not always, this is under authority to be found in some statutory provision which has expressly conferred ample yet prescribed control over the judgment or decree of the court whereby it may be so vacated. Nebraska has such a statute (section 602, Code of Civil Procedure); so has Washington (section 5153, Ballinger's Ann. Codes & St.). Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797. The statute of Alaska, as we shall see, contains no such provision. Bills of review or proceedings analogous to bills of review may also be brought to vacate decrees for fraud or collusion or lack of jurisdiction, but they also are exceptions based upon the principle that a judgment or decree may be vacated after the term in cases where the cause relied on to set it aside affects the validity of the judgment. Ex parte Sibbald v. United States, 12 Pet. 488, 9 L. Ed. 1167. Doubtless a motion upon notice may be regarded as good practice.

It has been earnestly insisted by counsel for the appellees that the District Court had an inherent power to vacate the decree even after the term had expired, because the fraud in the judgment vacated rested upon the perjured testimony of the prevailing party, and upon such perjured testimony alone. But we believe that the great weight of authority is against this contention, and that the acts for which a court of equity will on account of fraud annul a judgment or decree between the same parties after the term has ended have relation to frauds extrinsic or collateral to the matter tried, and not to a fraud in the matter on which the decree was rendered. The leading case of United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93, establishes this precise doctrine. After a careful review of the authorities, English and American, Justice Miller used this language:

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife than any compensation arising from doing justice in individual cases."

In Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929, Chief Justice Waite cited the Throckmorton Case, saying that it had been settled that the fraud in respect to which relief will be granted where a decree is sought to be set aside after the decisions of a judicial tribunal must be such as has been practiced upon the unsuccessful party and prevented him from exhibiting his case fully, and that false testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. More than 12

years after the Throckmorton Case and Vance v. Burbank, supra, the Supreme Court, in 1891, decided Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, which is not infrequently relied upon as modifying the doctrine of the two earlier cases cited. Evidently the court itself did not intend the decision to be a modification, inasmuch as the opinion refers to the Throckmorton Case to sustain the rule that while generally a defense cannot be set up in equity which has been fully and fairly tried at law, still equity will regard an application to grant relief against a judgment which it is against conscience to execute, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law but was prevented from so doing by fraud or accident, unmixed with any fraud or negligence in himself or his agents. The implication from the court's discussion seems to be that where there has been a trial and judgment after full opportunity was given for the introduction of evidence, and no extrinsic or collateral fraud has occurred, the general rule should prevail. In Bailey v. Sundberg (decided by Judges Wallace and Lacombe in 1892) 49 Fed. 583, 1 C. C. A. 387, it was held that if, on a libel in rem for collision, the master of the libelee, though not a formal party, took an active part in the defense, a dismissal on the merits rendered the questions res adjudicata as against a subsequent libel in personam against him. In Graver v. Faurot (C. C.) 64 Fed. 241, decided in 1894, an action was brought to set aside on the ground of fraud a decree rendered in a state court. Defendant demurred to the bill. The fraud charged was perjury by Faurot and the deception of the court. Judge Jenkins said the question was "sharply presented" whether a judgment can be attacked for fraud and the prevailing party deprived of the benefit thereof when he has obtained that judgment by perjury in his answer or upon the trial. Referring to the Throckmorton and Marshall v. Holmes Cases, supra, the learned judge said he could not distinguish between the two cases, but followed the Throckmorton Case because the later case cited it with approval, and because the fraud in the case before him was not extrinsic, but was in issue in the primary suit. An appeal was taken, and the Circuit Court of Appeals of the Seventh Circuit (76 Fed. 257, 22 C. C. A. 156) reversed the case upon the ground that it was not one within the spirit or reason of the decisions of the Supreme Court cited, inasmuch as there never was a trial in Graver v. Faurot, the complainant having failed to reply to the answer, and the case having been submitted with the answer as conclusive proof. The court points out that there was no conflict or weighing of evidence, but decree went as a matter of course; and the decision turned upon the point that the case was one of fraud that was extrinsic and collateral, distinct from and antecedent to the use of the answer at the hearing. The judges referred to a possible inconsistency between the decisions of the Supreme Court, but distinguished the case before them from both. In Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, decided in 1895, after reargument, the Supreme Court, by Justice Gray, used this language:

"It has often indeed been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in

false and fraudulent documents or testimony submitted to that tribunal and the truth of which was contested before and passed upon by it."

—citing the Throckmorton Case as first among those establishing the doctrine announced.

This opinion, it will be observed, was delivered just before the case of Graver v. Faurot, 76 Fed. 257, 22 C. C. A. 156, was decided by the Court of Appeals, but evidently it was not brought to the attention of the latter court. A few years later (1898) the Court of Appeals of the Second Circuit decided United States v. Gleeson, 90 Fed. 778, 33 C. C. A. 272. That was a suit to vacate and annul a judgment on the sole ground that defendant induced the court to make its judgment solely by his own false and perjured testimony. But the court followed the doctrine of the Throckmorton Case as reiterated in Hilton v. Guyot, supra, and by the rule of stare decisis affirmed the decision of the Circuit Court sustaining a demurrer to the bill. Marshall v. Holmes, supra, was there called to the court's attention, and they answered the suggestion of a possible modification of the Throckmorton Case in this way:

"Precisely the same question—as to the effect of Marshall v. Holmes upon U. S. v. Throckmorton—was before us in the case of Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583. In that cause the libelant, who had been defeated in an action in rem against a steamship, brought a new action in personam against her owners. This court held that the decree in the earlier suit precluded Bailey from a re-examination of the same questions in the later suit. Subsequently he amended his libel, charging that, without negligence or laches or other fault on the part of the libelants, the respondent, by his false evidence given in the action in rem, enabled the claimants of the steamship to obtain the judgment therein, which judgment was set up as res adjudicata. Exceptions to this amendment were sustained by the District Court, and the libel dismissed. Upon appeal to this court the decree of the District Court was affirmed upon the authority of U. S. v. Throckmorton, no opinion being written. The libelant thereupon twice appealed to the Supreme Court for a certiorari, upon briefs which presented with very great fullness the apparent conflict between the two cases in 98 U. S. (25 L. Ed.) and 141 U. S. and 12 Sup. Ct. (35 L. Ed.) and urged upon the consideration of the court that the judges in the Second Circuit were following the earlier, rather than the later, decision. Both applications were denied. 145 U. S. 628, 12 Sup. Ct. 259; 154 U. S. 494, 14 Sup. Ct. 1142. Until the attention of this court is called to some decision of the Supreme Court, other than Holmes v. Marshall, criticizing or limiting the doctrine of U. S. v. Throckmorton, it would seem that the principle of stare decisis should preclude its entertaining a bill which seeks to vacate or annul a judgment solely on the ground that such judgment was procured by means of the perjured testimony of the party whom it benefits."

Again, in the later case of United States v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563, decided in 1901, the Supreme Court, through Justice Peckham, reaffirmed the general principle of the Throckmorton Case, supra, holding that false representations were not such a fraud as a court of equity will relieve against by setting aside a judgment in a case where such representations were made.

A still later decision is Bailey v. Willeford (C. C.) 126 Fed. 803, where Judge Simonton interpreted the rule of the Throckmorton Case as did the Court of Appeals in U. S. v. Gleeson, supra, and his decision was affirmed in 1905 by the Court of Appeals of the Fourth Circuit. Bailey v. Willeford, 136 Fed. 382, 69 C. C. A. 226. It will be seen from these cases that the doctrine upheld by the federal courts

continues to be in accord with that pronounced in the Throckmorton Case, supra, which refuses relief unless the fraud complained of is extrinsic to the matter tried in the primary suit.

Turning to the decisions of the Appellate Courts of several of the states, we find the same general established rules. In Ross v. Wood, 70 N. Y. 9, the Court of Appeals denied relief where it was sought to set aside a judgment upon the ground that it was obtained by false testimony. In Dringer v. Receiver, 42 N. J. Eq. 573, 8 Atl. 811, the Throckmorton Case is approved, and it was held that, where fraud is relied on to annul a judgment, the fraud, in order to confer jurisdiction, must consist in something extrinsic or outside of the matter which was actually tried, or so in issue that it could have been tried in the suit in which the judgment assailed was entered. The Supreme Court of California in Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, in an opinion by Chief Justice Beatty, very clearly announces that a decree will not be vacated merely because it was obtained by perjured testimony. The court said:

"The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceedings, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy."

In Friese v. Hummel, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610, the case of Pico v. Cohn was approved and followed. In Camp v. Ward, 37 Atl. 747, 69 Vt. 286, 60 Am. St. Rep. 929, the Supreme Court of Vermont refused to grant relief in equity where it was alleged the judgment was obtained by perjured testimony. In McDougall v. Walling, 58 Pac. 669, 21 Wash. 478, 75 Am. St. Rep. 849, the Supreme Court of Washington followed the Throckmorton Case, supra, and Pico v. Cohn, supra, notwithstanding an express statutory provision of that state to the effect that the superior court may vacate a judgment for fraud practiced by the successful party in obtaining it; the court holding that perjury does not constitute such fraud as will authorize a judgment to be set aside except under circumstances that deceive the opposite party as to the nature of the testimony, and relieve him of the implication of want of diligence in discovering its falsity. In Maryland Steel Co. v. Marney, 46 Atl. 1077, 91 Md. 360, the Court of Appeals of Maryland laid down the same rule, expressly declining to recognize any distinction between the instances where witnesses have perjured themselves and where the successful party has been guilty of subornation of perjury.

It would be useless to cite further authority. The cases we have collected demonstrate that the trend of modern decision sustains the reason of the Throckmorton Case as founded upon wisdom in the policy of the law, whereby, after a fair trial and submission of a controversy and after motion for a new trial has been denied, and after an appeal to a superior tribunal and a review have been had, a judg-

ment will not be vacated, at a subsequent term, merely because it was based on perjured testimony by a party. Defendants cite Munro v. Callahan, 75 N. W. 151, 55 Neb. 75, 70 Am. St. Rep. 366. The decision in that case was justified upon an express statute of the state authorizing a judgment to be vacated, after the term at which it was rendered, for fraud practiced by the successful party, and perjury was regarded as within the fraud contemplated by the Code provision. The discussion by the court seems to go farther than the point decided and to sustain the defendant's position. But in so far as it conflicts with the rule of decision by the federal courts, we cannot agree with it. Edson v. Edson, 108 Mass. 590, 11 Am. Rep. 393, was not a case involving intrinsic fraud or fraud upon the trial. The court, taking the facts alleged in the application to set aside the decree of divorce, distinguished the case in this way:

"These set forth a case in which it is clear that a party has procured a judgment of this court in his favor by the perpetration of a gross fraud, by means of which he induced this court to take cognizance of a case at a term of the court in a county in which it could not legally exercise jurisdiction over the parties, and to hear and determine it without giving to the adverse party any due or legal notice of the proceedings, or any opportunity to appear and be heard in the suit. The question to be determined is, whether a judgment so obtained can be re-examined and set aside by the party aggrieved by the fraud, or whether it is to be taken as forever binding and conclusive on the rights and obligations of the parties."

The reasoning of the court is similar to that in Graver v. Faurot, supra. Nugent v. Met. St. Ry. Co., 61 N. Y. Supp. 476, 46 App. Div. 105, also cited by respondents, was decided upon a motion for a new trial based upon a discovery made by the losing party that the judgment and verdict had been obtained by means of a conspiracy between plaintiff and one of her attorneys and several witnesses. That a judgment will not be vacated merely because it is based upon or procured by perjured testimony was conceded by the court, but it was shown that the case was taken out of the general rule by the added fraud of a conspiracy. Holton v. Davis, 108 Fed. 138, 47 C. C. A. 246, decided by this court, does not conflict with the established rules. There the bill alleged a conspiracy between one of the parties and outside persons and the carrying out of the conspiracy and a fraud upon the court. The facts pleaded were relied upon as showing extrinsic and collateral fraud, and as the court cited the Throckmorton Case it is not to be inferred that it intended to go beyond the correct rule to be deduced therefrom.

Defendants contend, however, that power to vacate the judgment existed under the Alaska Codes. It is therein provided that a District Court may in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment or order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 93, Alaska Code Civ. Proc. Defendants have failed to make a satisfactory showing under any of the enumerated grounds of this statute. The issue tried in the original suit was narrowed to whether the plaintiffs sunk hole No. 3 to bed rock. Their verified complaint alleged that they had, and defendants by their answer denied that

they had; so that the controversy, as was stated by Judge Hawley in the opinion of the court in Meehan v. Nelson, supra, was "confined solely to hole No. 3. Was it sunk to bedrock?" Defendants went into the trial of the cause knowing precisely what plaintiffs would have to swear to to prevail, and they met the issues presented, but were defeated. They were not surprised, there was no inadvertence or mistake, and they are not to be relieved now if they omitted to produce evidence they might have procured. Having tried the merits of their suit, if the term is over, they are estopped by the conclusion of the court. The affidavits filed in support of and against the motion to vacate are a continuation of conflicting testimony upon the identical issues tried before. It is said, however, that the statute of Alaska (section 93) is taken from Oregon, and that it has been construed by the Supreme Court of that state in a way favorable to appellees in Thompson v. Connell, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818. That decision, however, does not sustain the contention that perjury alone committed upon the trial of a case by the prevailing party is a ground for relief under a statute like section 93 of the Alaska Code. The facts relied upon in that case were that defendant and another person, with intent to deceive plaintiff and induce him not to employ an attorney in the original suit, represented that Connell would extend the time for answering and that a settlement was contemplated by which plaintiff would be discharged from his alleged liability, and that plaintiff relied upon the representations so made and did not employ an attorney or appear in the case, but that defendant, conspiring to take advantage of him and to defraud him, caused judgment to be rendered against him without his knowledge or consent and contrary to the agreement. These facts were held to constitute "surprise" under the statute. The decision is in no way authority in the present case.

So if it is a fact that the term of court at which the decree was rendered had expired before the motion to vacate was filed, then the case is but one where the litigants have had their day in court, and have been afforded full opportunity to try the merits of their controversy. They had a fair trial. The defendants lost. They were given the right of appeal and availed themselves of it. Again they were unsuccessful; and no fraud extrinsic or collateral to the matter tried being shown, and no statutory ground for vacating the decree appearing, it will not do for them now to seek to retry the issues already passed upon. The litigation should be ended.

For the reasons already given, the appeal is dismissed.

GREAT LAKES TOWING CO. v. MILL TRANSP. CO.

(Circuit Court of Appeals, Sixth Circuit. July 30, 1907.)

No. 1,662.

1. SHIPPING—RIGHT TO LIMITATION OF LIABILITY—CONSTRUCTION OF STATUTE. Section 18 of Act June 26, 1884 (23 Stat. 57, c. 121 [U. S. Comp. St. 1901, p. 2945]), which provides that "the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities

that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending," and Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], are in pari materia, and to be construed together. The provision of the older act by which the limitation of liability therein provided for is confined to things "done, occasioned or incurred without the privity of knowledge of such owner or owners," also qualifies the latter act, which was not intended to apply to liabilities of the owners of vessels for the consequences of their personal faults or upon obligations personally contracted by them.

[Ed. Note.—Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

2. SAME—WRECKING SERVICE PERFORMED UNDER CONTRACT.

A towing company entered into a contract with the managing agent of petitioner, which was the owner of certain vessels on the Great Lakes, by which it agreed to perform all towing and wrecking service required by such vessels during the season at certain stated prices. One of petitioner's vessels having stranded, the towing company was called on pursuant to said contract, and sent a tug with wrecking apparatus to the assistance of such vessel, where it spent several days in pumping and attempting to get her afloat, but unsuccessfully, and she was lost. *Held*, that section 18 of Act June 26, 1884 (23 Stat. 57, c. 121 [U. S. Comp. St. 1901, p. 2945]), did not entitle petitioner to a limitation of liability for the services so rendered by the towing company under its contract to the value of the salvage recovered from the wreck.

3. PRINCIPAL AND AGENT—CONTRACT MADE BY AGENT—ADOPTION BY PRINCIPAL.

If a principal not disclosed by a contract made by and in the name of his agent subsequently claims the benefit of it, the contract thereby becomes his own to the same extent as if his name had originally appeared as a contracting party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 502, 503, 645.]

4. SHIPPING—PERSONAL LIABILITY OF SHIPOWNERS—CONTRACTS MADE BY MANAGING AGENT.

The contracts of a managing agent of a steamship company, within the sphere of his authority, are the actual contracts of the owner and not of the vessels to which they relate, as in case of contracts made by a master on a voyage or in foreign ports.

Appeal from the District Court of the United States for the Eastern District of Michigan.

H. D. Goulder, for appellant.
G. L. Canfield, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The controversy in this case arose upon a petition of the appellee, the Mills Transportation Company, for an order limiting its liability for services rendered by the appellant in endeavoring to rescue the steamer Newago, a vessel belonging to the appellee, which had been stranded upon a reef in that part of Lake Huron, known as the Georgian Bay. The accident to the Newago occurred on November 17, 1903. Prior to this accident, and on July 9, 1903, the appellant addressed to H. McMorran, who was the managing agent for the appellee of the Newago and other of its vessels, as well as of other parties for other vessels, the following proposition:

"The Great Lakes Towing Company.

"Cleveland, Ohio, July 9th, 1903.

"To H. McMorran, Pt. Huron, Mich.:

"We hereby propose to furnish all the towing and wrecking services required by the boats under your management during the balance of the year 1903, ———, at points covered by the Great Lakes towing tariff for 1903. on the following terms:

"In consideration of your agreeing to have all of the boats under your management employ the tugs and wrecking appliances owned or specified by us during the balance of the year 1903, ———, at points covered by The Great Lakes Towing Tariff we will allow the following discounts from said tariff:

"Harbor Towing. At Chicago and Tonawanda 35 per cent. discount from said tariff, and at all other points 30 per cent. discount from said tariff, with a further discount in both cases of 10 per cent. for cash on all bills paid within the month following that in which the service is rendered.

"Wrecking or Bottom Work. A discount of 20 per cent. from said tariff, and a further discount of 5 per cent. for cash if bills are paid within the month following that in which the service is rendered.

"Soo. For landing stern barge at the Soo the rate to be $5.00 flat, without discounts, for each service.

"Lake Towing. When barges are transferred from port to port, where there is a lake tow, no charge to be made for the in tow.

"Maximum Rate. The maximum rate for and in and out tow at any port where only the one cargo is handled shall not exceed seventy-five dollars ($75.00) net each.

"All charges for labor, meals and other items representing cash advances shall be net, and payable on demand.

"These rates only apply to vessels actually engaged in the lumber trade, and refer only to boats of twelve hundred thousand capacity and under.

"We will endeavor to have tugs of suitable power on hand at all times to provide a first-class service, but shall not be held liable for damages in case we are not able at any time to furnish such service. In case, however, at any time, for any reason, we are unable to have tugs on hand to serve your boats, you are at liberty to engage any other tugs to serve you for that time, but without the right to charge us any difference in price.

"The vessels towed shall furnish good and sufficient lines.

"The Great Lakes Towing Company,
"By C. H. Sinclair, G. M."

This proposition was on its receipt accepted in the following language thereunder written:

"The undersigned, H. McMorran, mang. owner, manager of boats named below, hereby accepts the above proposition, for said boats and for the consideration named therein, agrees to cause said boats to employ the tugs, lighters and wrecking outfit owned or specified by The Great Lakes Towing Company, at points named in said The Great Lakes Towing Tariff, on above named terms, at all times during the balance of the year 1903 when they require such service. H. McMorran.

"Steamers.

"Steamer Gogebic,
"Steamer Newago,
"Steamer Pawnee,
"Steamer Britannic,
"Steamer Mary Groh,
"Steamer M. Ross.

"Consorts.

"Schr. Checotah,
"Barge M. E. Orton,
"Barge J. R. Edwards,
"Barge W. A. Young,
"Schr. Thos. Howland."

The vessels named in this list belonging to the Mills Transportation Company were the Gogebic, the Newago, and the Checotah.

Upon the happening of the accident to the Newago, her captain forthwith telegraphed to his principal, the Mills Transportation Company, that the Newago was ashore on Devil's Island Shoal leaking badly, and asking that a wrecking outfit be sent. The Mills Transportation Company were aware of the contract of the appellant with McMorran, and on receipt of the telegram above mentioned communicated with McMorran, who was then at Washington, but had left subordinates in his office at Port Huron. Through these subordinates, the request for the assistance of a tug and other wrecking outfit was made to the appellant, which thereupon dispatched the Favorite and wrecking apparatus to the scene of the disaster; and the appellee notified the captain of the Newago by telegram that this had been done. On arrival the Favorite found the Newago difficult of access, being in a place of great danger. But the Favorite stood by and endeavored for several days to rescue the steamer. Its efforts were unsuccessful, and the Favorite was finally discharged from further service. The Newago was lost and only about $156 in value of her remnants were saved. Subsequently the appellant presented to the appellee a bill for the services thus rendered as follows:

Dec. 3, 1903.

Steamer Newago, to the Great Lakes Towing Co., Dr.

For tug services at port of ————, Str. Favorite.

1903	From	to	Tug Favorite.	
Nov. 17 to 27 inclusive. To services rendered while steamer was ashore Devil's Island Shoal 10 days at $350.00 per day.....				$3,500 00
To use 2-12" steam pumps 10 days each, 20 days at $50 per day..				1,000 00
				$4,500 00

But the personal liability of the appellee for the bill was not admitted. We do not understand that the bill itself was objected to, but it was contended that there was no personal liability of the owner therefor, and that recourse was available only against the vessel of which the remnants above mentioned were the only parts in esse.

In this state of affairs the appellee filed its petition for the limitation of its liability. The remnants were appraised and a bond given by the petitioner for the sum of $250. The appellant appeared and filed its answer in opposition to the limitation prayed for in the petition, and its claim with a prayer for a decree for payment of the same. The court below held and decreed in favor of the petitioner that its liability be limited as prayed. Upon these facts we think the court below was in error.

By Act March 3, 1851, c. 43, 9 Stat. 635 (section 4283, Rev. St. [U. S. Comp. St. 1901, p. 2943]), it was enacted that:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

And by section 18 of the act of June 26, 1884 (23 Stat. 57, c. 121 [U. S. Comp. St. 1901, p. 2945]), it was further enacted that:

"The individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his indvidual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: Provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship owners."

In a number of cases it has been held, and we have no doubt correctly, that these two provisions, relating as they do to the same class of persons and to the same subject, should be regarded as regulations in pari materia, and should be construed as parts of an entire scheme. We refer to this rule of construction of statutes in pari materia, because, as will be noticed, the words "done, occasioned or incurred, without the privity or knowledge of such owner or owners," which are contained in the act of 1851 are not employed in the act of 1884; and from this circumstance counsel for the appellees argues it was intended by the use of the words "debts and liabilities" in the later act to mean all debts and liabilities incurred on account of the vessel, whether with or without the privity or knowledge of the owner; whereas, if the act of 1884 were put to follow the act of 1851, so as to further provide for the application of the provision of the act of 1851, to the case of each individual shareowner of the vessel, and then sum up by declaring that all the liabilities of the owners on account of the vessel shall not exceed the value of the vessel and pending freight, the result would be that the condition of privity or knowledge of the owner would be carried along into the subsequent section. Another reason for thinking that the eighteenth section of the act of 1884 was intended as an extension merely of the relief provided by the act of 1851 is found in the fact that the act of 1851 contains provisions for the procedure in applying the limitation. One of these is by paying into court the appraised value of the ship and pending freight, the other by surrendering the vessel and freight. The owner of the ship might adopt either of these. The Scotland, 105 U. S. 24, 26 L. Ed. 1001. These privileges are analogous to those which the owner has in ordinary seizures, when he may give bond and release the vessel, or he may suffer the vessel to be condemned and sold. But the act of 1884 provides no procedure for administering its provisions. And this, we think, furnishes an inference that the act of 1851 was regarded as the basic law, to which section 18 of the act of 1884 was intended to be supplementary. And the provision of this alternative mode of procedure suggests a query whether this legislation does not contemplate that the liability of the ship is to be presupposed, and such a liability would not exist in case the owner had personally contracted the debt, and had not stipulated for a lien, either expressly or by fair implication. The St. Jago de Cuba, 9 Wheat. 409, 6 L. Ed. 122; The Grapeshot, 9 Wall. 129, 136, 19 L. Ed. 651; The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710; The Havana, 35 C. C. A. 148, 92 Fed. 1007. But we think there are other reasons of sufficient weight to lead to the

conclusion that the act of 1884 was not intended to have application to liabilities of the owners of vessels for the consequences of their personal faults or of obligations personally contracted by them. The purpose of Congress, was, as we think, to relieve the shipowner from the consequences of those extraordinary risks which were imposed without limitation by the law of the admiralty as that law had been interpreted in this country. And by extraordinary risks we mean those risks arising from the conduct of, and contracts made by, those who are beyond the personal supervision and control of the owner and yet have legal authority to bind him to answer for their conduct or contracts; or, to express the thought in another way, that the liabilities intended by this legislation were those peculiar to him as a shipowner and had been imputed to him because of his relation to the ship, and not those liabilities, whether for torts or from contracts, which spring from his own personal conduct or stipulations. It seems to us altogether unlikely that Congress intended to qualify the power of an owner to make contracts in relation to his ship which by the universal law would be valid if made about any thing else and would be enforced in the courts in common-law actions. It would be an anomaly that a party competent to do business should be unable to make a valid contract about his own affairs, or be given such an immunity as to make his stipulations of uncertain value. Such a doctrine would be inconvenient in the last degree to the owners of vessels and the interests of commerce. If in every case the party who should undertake to render assistance to other vessels on request of the owner should be dependent on the proceeds of the vessel for his compensation, he would be likely to consider the chances, and the sorer the need of the services the less likely would the owner be to secure them. Instead of relieving him of a burden, he would be burdened with the disability of pledging his personal credit for the securing of the needed assistance. Besides, the history of the law upon this subject furnishes an argument in favor of the construction we think should be put upon the statute. It is succinctly stated by Mr. Justice Bradley in Butler v. Boston Steamship Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017. From an early period the maritime law of the commercial nations of the continent of Europe had accorded to the owners of ships this limitation of liability to the value of the ship and freight earned; but this limitation was not allowed when the liability was incurred with the privity or knowledge of the owner. The maritime law of the continent was not accepted by the English courts, and was rejected by the courts of this country. The acts of 1851 and 1884 have established in the United States the rules of the general maritime law upon this subject, and in almost the identical language in which those rules have been expressed in the Codes and text-books of the countries in which the general law had been embodied. As Mr. Justice Bradley said, in reference to the divergence in this country from the general maritime law, and the return thereto by the enactment of the statutes here for the relief of shipowners, "We have rectified that." And we are convinced that the general understanding of the courts of this country is that the statutes here enacted have restored the old rule for the like occasions, namely, when the liability of the owner has occurred without his own

participation in the cause or creation of the liability. The suggestion of Mr. Justice Bradley in Butler v. Boston & Savannah Steamship Co., although not necessary to the decision of that case, seems to have been generally adopted as indicating the proper construction. Indeed, prior to that decision, the statutes, including that of 1884, had received that construction by Judge Brown in the Southern District of New York in the Amos D. Carver (D. C.) 35 Fed. 665, Force v. Providence Ins. Co. (D. C.) 35 Fed. 767, and Miller v. O'Brien (D. C.) 35 Fed. 779. And in later decisions that learned and distinguished judge maintained the doctrine he had previously declared. Laverty v. Clausen (D. C.) 40 Fed. 542; Gokey v. Fort (D. C.) 44 Fed. 364; Douse v. Sargent (D. C.) 48 Fed. 695. It was also approved by Judge Nelson in the district of Massachusetts in McPhail v. Williams (D. C.) 41 Fed. 61, and in Whitcomb v. Emerson (D. C.) 50 Fed. 128, and by Judge Webb in the district of Maine in the Giles Loring (D. C.) 48 Fed. 463.

In the case of Whitcomb v. Emerson, supra, and in Warner v. Boyer (D. C.) 74 Fed. 873, decided by Judge Butler, the statute of 1884 was held to relieve part owners from the consequences of contracts made by other part owners; and this upon the ground that shares are separately owned and so dealt with by the statute, and hence the non-participating owners were entitled to be relieved in respect of their shares. This is in entire accordance with the rule. Judge Butler in deciding the case last cited seems to have entertained the view that the acts of 1851 and 1884 were to be construed independently and not as in pari materia, but his actual decision was notwithstanding rested upon a principle which we regard as sound.

In the Circuit Courts of Appeals a like interpretation has been given to these statutes. In the case of The Republic, 61 Fed. 109, 9 C. C. A. 386, it was held by the Court of Appeals for the Second Circuit that the shipowner was not entitled to the limitation in respect of a loss which arose from the defective condition of his ship of which he was ignorant because of his own negligent examination of the vessel. The court said by Judge Wallace, referring to the eighteenth section of the act of 1884, "The section does not purport to repeal any pre-existing law, but is legislation in pari materia with the act of 1851" —and adopts the construction of Judge Brown in the cases above cited. This was a case of the negligent performance of a duty, and not a willful act of the owner. It would certainly be incongruous with this decision to hold the shipowner entitled to relief against his own contract. In the case of The Faxon, 75 Fed. 312, 21 C. C. A. 366 (the Circuit Court of Appeals for the Ninth Circuit), the limitation sought was for a loss occasioned by the explosion of the boiler of the vessel. The court recognized the distinction which had been made in previous cases between liabilities arising from causes within the knowledge or privity of the owner and those which are imputed to him because of his relation to the ship, but held that the owner was in that case entitled to the limitation for the reasons that the defect in the boiler was not one apparent to the owner, that it had been inspected by the government inspectors and repaired in accordance with their directions by a skilled marine engineer. The court was of opinion that the owner

had discharged his duty in respect of the condition of his vessel, and that, therefore, there was on his part no pesonal fault.

Another case in which this question was involved and which is much relied on by the appellee is Gilchrist v. Chicago Ins. Co., 104 Fed. 566, 44 C. C. A. 43, a case decided by the Circuit Court of Appeals for the Seventh Circuit, the opinion being by Mr. Justice Harlan. But an analysis of the opinion shows that it was decided upon the same construction of the statute of 1884 as had been made in the earlier cases. The vessel was stranded in Lake Huron on May 6, 1894. Underwriters had issued policies of insurance on the vessel which contained a provision that, "in case of loss or misfortune, the insured should give prompt notice to the insurer of the disaster and among other things make all reasonable exertions in and about the defense, safeguard and recovery of said vessel," and stipulated that the underwriters would contribute to the expenses. On the occurrence of the accident the master of the vessel summoned the libelant who went with tugs and wrecking apparatus to the rescue of the vessel, and finally, on May 18th, got her afloat; but on the next day she went down in a storm, only some remnants being saved. Thereupon the owner abandoned the vessel to the insurers as a total loss. While the libelant was engaged in rescuing the vessel an agent of the underwriters was sent to assist in the work. He remained some days, giving directions and approving what the master had done. A libel in personam having been filed by the owner of the wrecking outfit against the owner of the vessel and the underwriters, defense was made by the underwriters that they had never employed the libelant, and were not responsible for his services. They also severallly filed petitions for the limitation of their liability. Some of the facts here stated more fully appear from the report of the case in the court below. Gilchrist v. Godman (D. C.) 79 Fed. 970. Upon these facts the Court of Appeals held that at the time when the services were rendered the underwriters were the owners of the vessel, but solely because of the retroactive effect of the subsequent abandonment, which related back to the time of the disaster and vested the ownership in them as of that date, and that each of them was to be charged ratably with the payment of the libelant's claim; but that they were severally entitled to the benefit of the limitation of the act of 1884. The reason for this is thus stated in the opinion (page 573 of 104 Fed., and page 50 of 44 C. C. A.):

"The liability of the underwriters in the present case arises, not from any personal contract by them with the libelants, but from the rule of law which in the case of a valid abandonment, makes the insurer the owner of the vessel from the time of the original disaster."

It is evident that the learned justice recognized that the consequence would have been otherwise, if the underwriters, had made a personal contract. This inference is confirmed by his further statement that:

"The fact that the libelants might have looked to her [one of the defendants] as the original owner upon her personal contract made with them through her agent does not relieve the underwriters from the liability arising out of their becoming the owners of the entire property from the date of the disaster."

The substance of the decision was that the underwriters' liability was one which must be imputed to them because they were the owners, yet that this liability was subject to limitation because of the fact that it did not arise upon any personal contract made with them. The case is therefore in harmony with the other cases we have referred to.

In the First Circuit the question arose in Quinlan v. Pew, 56 Fed. 111, 5 C. C. A. 438, where it was held by the Circuit Court of Appeals that the owner was entitled to the relief where the liability arose from the neglect of the master to inform the owner of a defect in the fittings of a pennant of which defect the owner had no knowledge, but the whole course of the discussion by Judge Putnam shows that actual knowledge by the owner would have led to a different result. And, inasmuch as the accident happened some years after the enactment of 1884, it must be assumed that the court held that in this respect the qualification of the right to a limitation of liability contained in the act of 1851 was intended by the act of 1884.

These statutes have since been several times referred to in opinions by the Supreme Court, but in none of them has the question now before us been considered. We have the impression that the absence of any such question in the Supreme Court is due to the fact that counsel have generally regarded the rule as settled upon the suggestion of Mr. Justice Bradley in Butler v. Steamship Co., supra, by the general concurrence of the courts. The only discordant note is a passage in the third edition of Benedict's Admiralty, published soon after the enactment of the statute of 1884, wherein it is said in section 565 that the language of the act of 1884 would seem on its face to have removed the necessity of averring in the petition for limiting liability that the liability had been incurred without the knowledge or privity of the owner; that is, of the petitioner. And it is said that at the least the obvious construction of the act is that such privity or knowledge is not material. "But," it is said, "it has been decided in the lower courts that these words do not include the liability of the owner on his personal contract," referring to the cases of the Amos D. Carver, McPhail v. Williams, and The Loring, supra. Perhaps if other legislation upon the same subject, the history of the maritime law, the doctrines of the common law of contracts and the inconvenience to the public from so broad and unlimited an interpretation of the statute were all to be ignored, the construction contended for by the author would be legitimate, but that would be to disregard some of the most fundamental rules for interpreting the meaning of statutes.

Counsel for appellee invokes another rule of construction, and points to the language contained in the proviso at the end of section 18 of the act of 1884, which is:

"Nor, shall the same apply to wages due to persons employed by said ship-owners."

And says that the primary and usual office of a proviso is to except something out of a statute which would otherwise be within it. Undoubtedly this is a general rule of construction. But it is not universal,

and a proviso or an exception may be used for another purpose. The case of Baggaley v. Pittsburg Iron Co., 90 Fed. 636, 33 C. C. A. 202, decided by this court, is an illustration, where it was pointed out that an exception might be used from an excess of caution. And see what was said by Mr. Justice Story in Minis v. United States, 15 Pet. 445, 10 L. Ed. 791. No doubt the principal object of this exception was to protect the crews of vessels in respect of their wages, which has always been a matter of solicitude in legislation and of the courts. It is well known that they are hired sometimes by the owner of the vessel or his managing agent, and sometimes (and more generally in former times) by the master. Section 18 without this proviso would include wages due to seamen employed by him on his ship whether the contract of hiring was made by him, his manager, or the master. And we think it was intended by this exception to guard against an interpretation of the act which would affect the wages of employés by whomsoever hired. By "employed" is not meant those only who were hired by him personally. Of course, there would be no reason in such discrimination. If this was the intention of the exception, it throws no light upon the particular question of construction we are considering.

It is contended, however, that the liability in this case did not arise from any personal contract of the Mills Transportation Company. The principal ground on which this contention is urged is that the contract does not mention the company, that on its face it is the contract of Henry McMorran and the towing company. That it was made by him in a representative capacity for some one is clear. In respect of the Newago he was managing agent for the Mills Transportation Company which owned that vessel. And when these facts appear it is evident that he was making the contract for the company.

Story on Agency, § 160a; Mechem on Agency, §§ 769, 772; Higgins v. Senior, 8 Mees. & W. 844; Ford v. Williams, 21 How. 287, 16 L. Ed. 36; Higgins v. McCrea, 116 U. S. 671, 680, 6 Sup. Ct. 557, 29 L. Ed. 764; Barrell v. Newby, 127 Fed. 656, 62 C. C. A. 382, and the numerous authorities cited by Mechem in the notes to section 769, supra. It is not material that he also contracted for other parties. It was not by that circumstance any the less the contract of the Mills Transportation Company. The maxim, "Reddendo singula singulis," applies. That he had authority to make such a contract for that company cannot be doubted. In 25 A. & Eng. Encl. of L. 886, it is said:

"The owners of a ship generally appoint some person usually one of their number to be her manager. This person is called the 'ship's agent' or 'husband.' He is the general agent of the owners in relation to the ship, and may be appointed orally or in writing."

The third paragraph of the petition, after setting out the proposition and acceptance of July 9, 1903, alleges that they "constituted an agreement binding upon the Great Lakes Towing Company to render such towing and wrecking services as might be required by said vessels."

But it is unnecessary to determine whether the contract would bind that company in the absence of any proof that it had adopted it as its own. It was admitted by counsel that the services of the appellant

were requested and performed upon the footing of this contract. And, indeed, it is alleged in the appellee's petition:

"That in compliance with said request and under the agreement contained in said Exhibit A (which is the contract) hereto annexed the said Great Lakes Towing Company did send the tug Favorite with certain steam pumps aboard for the purpose of assisting said steamer."

If a principal not disclosed by a contract made by and in the name of his agent subsequently claims the benefit of it, it thereby becomes his own to the same extent as if his name had originally appeared as a contracting party.

The Mills Transportation Company, being a corporation, could act only through some agency. McMorran was the manager, and was vested with authority to make such contracts as this in behalf of the owner of the vessel, and the contract was the personal contract of the corporation, not in consequence of any principle peculiar to the maritime law, but by virtue of the common-law rules of agency.

But it is then said that the contract was made in behalf of the ship, and so was not the contract of the owner. This, however, rests upon an untenable theory. The contracts of the manager are the actual contracts of the owner, and are not of the same character as the contracts of the master made on a voyage or in foreign ports and which are imputed to the owner from the necessities of commerce. The acts of the managing agent within the sphere of his authority are as much the acts of the owner as if done by the owner himself. Only upon this theory could a corporation make what, for the purpose of making a distinction, is called a personal contract, that is to say, one which the owner himself or itself has made. Most of the cases which have been referred to were cases of negligence or some other tort of the owners, but, if as we suppose we should hold liabilities arising from contracts are included by the 18th section of the act of 1884, it must, we think, be admitted that, as the statute ranks them together and makes no distinction as regards the ground of liability, if negligence on the part of the owner deprives him of the right to a limitation, surely his voluntary creation of the liability ought with greater reason to bar his right to the limitation.

If it were an original question, we should have much doubt whether the act of 1884 was really intended to accomplish more than to make the provision for limitation by the act of 1851 applicable to cases of owners of the title of shares of the whole property in ships. But a further purpose in Congress has been recognized by other courts of co-ordinate jurisdiction, and we have deferred to that view.

The petition for the limitation of liability in this case misconceived the nature of the liability which the petitioner had incurred and which the towing company was seeking to enforce. The petition, after stating the rendering of the services under the contract and the loss of the vessel, proceeds to state as a ground for limitation that the stranding and loss of the vessel "were not done, occasioned, or incurred with the privity or knowledge of your petitioner or of any of its corporate officers, and your petitioner claims the benefit of the limitation of liability provided by" the statute. And the decree finds that this allegation was true, and evidently makes it the basis for according the

limitation. But the liability which this towing company was pursuing was not for any fault in the management of the Newago, but for services rendered under a contract with her owner in an endeavor to rescue her from peril and the question whether she was stranded and lost without the privity or knowledge of her owner was wholly immaterial. But the case has been argued as if the case were properly presented, and we have accordingly so dealt with it.

The decree of the court below which limits the liability of the appellee in respect of the claim of the appellant must to that extent be reversed, with costs. The amount due thereon will be ascertained, and such further proceedings had as the rules and practice of the court require.

RUSSELL v. OREGON SHORT LINE R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1907.)

No. 1,385.

1. TRIAL—DIRECTION OF VERDICT—QUESTIONS OF NEGLIGENCE.

While questions of negligence are ordinarily for the jury in federal courts, a case may be withdrawn from the jury and a verdict directed for plaintiff or defendant, as may be proper, where there is no conflict in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376–395; vol. 37, Negligence, §§ 277–286.]

2 MASTER AND SERVANT—TEMPORARY SUSPENSION OF RELATION—DEPARTURE BY SERVANT FROM SERVICE OF MASTER.

Plaintiff's intestate, who was a bridge foreman on defendant's railroad, living at the time in an outfit car on a siding, went with his family on a velocipede car one afternoon to a spur track some 2½ miles distant, near which his father-in-law resided. The car was returned, and in the evening about 7 o'clock some of the men by his direction came after him with a hand car. He was then at his father-in-law's house, where he had been visiting since 5 o'clock, by which time his business for the defendant at the spur, if any, had been finished. About 8:30 he started back with the men, having no light on the car, and while on the way was killed in a collision with a meeting special train. *Held*, that at the time he was engaged on his own private affairs, and no relation of master and servant existed between him and defendant which brought him within the terms of a state statute making railroad companies liable for injuries to their employés caused by negligence of their fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 144–156.

Injuries to servant while not on duty, see notes to Ellsworth v. Metheney, 44 C. C. A. 489.]

3. RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

A bridge foreman on a railroad, familiar with the operation of trains thereon, and knowing that special trains were liable to run at any time, who, while not in the performance of any duty for the company, but in the pursuit of his own affairs, went upon the track at night on a hand car showing no light and was killed in a collision with a special train at a distance from any crossing, was guilty of contributory negligence, and there can be no recovery from the company for his death, even conceding that the train was negligently operated, where such negligence was not willful

nor wanton, and the presence of the hand car approaching on the track was not known to the engineer until the collision occurred.

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

Will R. King, for plaintiff in error.

F. S. Dietrich, for defendant in error.

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

HUNT, District Judge. The plaintiff, Frances B. Russell, as administratrix of the estate of P. J. Russell, deceased, brought this action against the Oregon Short Line Railroad Company, defendant, to recover a judgment for damages for the death of her husband, which occurred on the evening of December 3, 1903. Defendant denied negligence, set up contributory negligence, and that deceased was engaged on his own private business when he was killed. The evidence showed substantially these facts: The deceased, P. J. Russell, was and had been for seven years a bridge foreman of the defendant railroad company. About the time of his death, the bridge gang of which he was foreman was engaged in work upon a bridge that was about two miles or more east of the town of Ontario, a place of 1,100 or 1,200 people. The bridge gang lived in what are called "outfit cars," which were moved from place to place as convenience required. These cars were kept on a side track at the stockyards, half a mile east of the town of Ontario, The deceased and his family lived in one of the outfit cars. Russell had been working in that vicinity about a month. Two miles west of Ontario, at a place spoken of as "Washoe Siding," there was a spur. On the afternoon of December 3, 1903, the deceased did not go to work where the bridge gang was employed; but at noon of that day, at the outfit cars, he told one of the men that he was going to Washoe, and requested him (Stroup by name) to come over after him after the work of the day was finished. The custom of the bridge gang was to stop work at 6 o'clock, and then to eat supper. Prior to the date of the accident Russell had tendered his resignation to the defendant company, but was not to leave the service of the road for a few days. Russell had bought a ranch near the Washoe Spur, and his intention was to give up railroading, and to live upon his farm. Mrs. Russell's father and family also lived at Washoe next to Mr. Russell's place, about a quarter of a mile from the spur. About 3 o'clock on the afternoon of December 3d, the deceased took his wife and children on a railroad velocipede from the outfit cars to the Washoe Spur. Upon their arrival at the spur, the velocipede was left near the track, but was afterwards taken back by a railroad employé who had been at Russell's place that day. After leaving the spur, the Russells went over to the place owned by the deceased, and stayed there about half an hour. Mr. and Mrs. Russell were getting ready to move in a few days to the ranch. They spent the afternoon, principally, at Mrs. Russell's father's house. Mrs. Russell testified that while they were on the way to Washoe, or just before they started, her husband told her that he was going down there "to see about getting men to work, and to see about

the spur that was there, and to see if there was room to set cars in." She said, too, that her husband was outside of her father's house part of the afternoon, and that he had told her he was going to see about employing a man named Burgess. The Burgess people lived on the same side of the track that her father did, near the track, between her father's house and the town of Ontario, about a quarter of a mile nearer to town than her father's place. It would have taken her husband about 10 minutes to walk from her father's place over to the Burgess house. Russell took supper with his father-in-law and family about 5 o'clock, and remained with the family from supper time until he left. Mrs. Russell says that she intended to return with Mr. Russell, but her children went to sleep, and she did not go back, and that they remained so long after supper "simply visiting" and "in social intercourse" with her people. At about 7 o'clock three men from the bridge gang voluntarily went down to Washoe upon an ordinary hand car for the purpose of getting Mr. Russell. They reached Mrs. Russell's father's house about 7:30. They did not start back until about an hour or an hour and one-half after they reached Mrs. Russell's father's place, so that it was about half past 8 when Russell and the three men started eastward toward Ontario, where the outfit cars were. At a point approximately 3,800 feet west from the Ontario depot, an engine, drawing the general manager's special train of three passenger cars, came upon the hand car and the men. The speed of the hand car at the time was between five and eight miles an hour; it was making considerable noise. Russell was helping to pump the car. The speed of the special train is estimated by different witnesses for plaintiff at between 40 and 70 miles an hour. Some of the men on the hand car say they were looking ahead, but did not observe the special train until it was from 200 to 400 yards away, but could see the lights of the town of Ontario before they saw the train. There was no light of any kind on the hand car. There was then no headlight shining on the engine. Russell first called, "Stop! there is a train." The men stopped the hand car as quickly as possible, and endeavored to remove it from the track before the engine reached them. They lifted only one end of the hand car off the rail when the engine struck the other end, and threw Russell, who was trying to lift the hand car off, so injuring him that he died immediately. No one else was struck or hurt. The railroad track about this point was nearly straight for a distance of about two miles. The train had passed through the town of Ontario without a headlight, and without stopping, but it had whistled about a mile east of the town, and one of the men on the hand car says he heard a whistle just before the accident. Upon this point the witnesses do not wholly agree. The headlight on the engine was burning at Arcadia, the station east of Ontario six or seven miles, and the evidence tended to show that it was burning dimly at the first stopping place west of Ontario, three miles distant. It appeared that at that time the railroad company was gradually equipping its engines with electric headlights, and that the men found more or less difficulty in keeping the headlights burning constantly. Upon the night in question the fireman went out on the engine to fix the headlight, which had gone out, about the time the train approached the bridge east of Ontario. If it had been burning properly when the train

approached Ontario, it could have been seen two miles away. There is a serious conflict in the testimony as to whether the engine had its "blizzard lights," which are oil lights on the front end of the engine, burning that night when the train went through Ontario. Plaintiff's witnesses say they did not see them; defendant's witnesses say they were burning and in good order, and could have been seen. The rules of the company forbade the use of hand cars, except in the line of duty. Hand cars at night were also required to display red lights to the rear. It appeared from plaintiff's evidence that it was the duty of men engaged in the bridge gang, and they were instructed, to be on guard all the time for extra trains, and that this was particularly true of men engaged in work upon bridges, as it was necessary for them to obstruct the track at various places in driving piles and otherwise repairing or constructing bridges. Russell's superior testified for defendant that it was not in the line of the bridge foreman's duty to observe spurs with a view to setting cars in, and that Russell had no business on behalf of the company at any place, except where the bridge gang was at work, but that he had authority to employ and discharge men. At the conclusion of the evidence introduced by both sides, the court granted the defendant's motion to direct a verdict, based upon the grounds, among others, that the deceased was guilty of contributory negligence, and that when he was killed he was a trespasser upon the railroad tracks. Judgment was entered for the defendant, and appeal was duly perfected.

The principal assignment of error by the plaintiff is that the Circuit Court erred in not submitting the question of negligence to the jury. Counsel devotes a considerable part of his brief and argument to the contention that the case presented a question of fact for the jury to determine, from all the circumstances, whether or not the defendant company had provided suitable appliances for its train upon the night of the accident, and whether proper caution was used in running its special train through Ontario without a headlight, whether or not "marker" lights were on the engine, and whether defendant was or was not negligent in not having oil lamps at Ontario, so that, in case the electric lights went out, an oil lamp could be substituted. It is unnecessary to discuss the rule dwelt upon by counsel that ordinarily questions of negligence are for consideration by the jury, guided by proper instructions by the court as to the principles of law by which the jury should be controlled. That rule is so firmly established that it may be regarded as elementary. But it is also thoroughly well settled that a case may be withdrawn from the jury altogether and a verdict directed for plaintiff or defendant, as may be proper, where there is no dispute in the evidence, or where it is so conclusive in its character that the court, in the exercise of its sound judicial discretion, would be obliged to set aside a verdict rendered in opposition to such evidence. Delaware, etc., Railroad v. Converse, 139 U. S. 472, 11 Sup. Ct. 569, 35 L. Ed. 213. In Schofield v. Chicago & St. Paul Railway Company, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, Justice Blatchford, pronouncing the unanimous opinion of the Supreme Court, said:

"It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it,

is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. Improvement Co. v. Munson, 14 Wall. 442, 20 L. Ed. 867; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780; Herbert v. Butler, 97 U. S. 319, 24 L. Ed. 958; Bowditch v. Boston, 101 U. S. 16, 25 L. Ed. 980; Griggs v. Houston, 104 U. S. 553, 26 L. Ed. 840; Randall v. Baltimore & Ohio Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Anderson County Com'rs v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Baylis v. Travellers' Insurance Co., 113 U. S. 316, 5 Sup. Ct. 494, 28 L. Ed. 989."

Inasmuch, therefore, as the federal courts had authority, when this action was tried, to direct verdicts under certain conditions in negligence suits, we must inquire whether, in the present case, error was committed by the lower court in holding that, as a matter of law under the evidence, Russell was guilty of contributory negligence which barred recovery, whatever negligence there may have been on the part of the railroad company. There was substantial evidence of negligence on the part of defendant's engineer in running the train at a very high rate of speed through Ontario without a headlight. The engineer must have known his light was dim or out altogether, and he ought to have slowed down or stopped at Ontario and taken new lights, or repaired the one he had. It is highly probable that, if there had been a headlight shining before the train reached Ontario, some of the men on the hand car would have seen it, and the hand car could have been removed in time to have saved Russell's life. But the failure of the engineer to fix his headlight, or to slow down, or to get other lights at Ontario, did not impose liability upon the defendant for killing the deceased, unless plaintiff has shown that when deceased was struck he was acting in the line of his duty as a servant of the company, and that by reason of such relationship and action he was rightfully upon the track, and that, therefore, the defendant owed a duty to him of having a headlight burning, and of running its train at a slower rate of speed, and of having blizzard lights burning upon the engine. The most favorable view of the case from plaintiff's standpoint is that Russell took the velocipede car in the afternoon for two purposes—one, to see about setting cars in on the spur at Washoe; the other, to see about employing Burgess for the company. These were the only reasons given for the trip to Washoe. He reached the spur about half past three in the afternoon. Now, clearly, only a most casual observation was necessary to enable the deceased to see whether there were any cars already upon the spur, and whether the track was in condition to receive cars, if he wished to have any put there for convenience in connection with his bridge repair work. No assistance was needed to make this inspection; so no delays were required. Upon this branch of the case, therefore, we have no doubt at all that the only inference that can be drawn from the evidence is that Russell made such examination of the spur as he believed was necessary before half past 3, when he went with his family to his father-in-law's house. Passing, then, to the proposed employment of men, we find that Russell may have seen the man Burgess and talked with him about work. There is no evidence at all that he did go to Burgess' house, or did see him, except Mrs. Russell's statement of the inten-

tions of her husband, as he told them to her before they reached Washoe. Burgess was not called and did not testify; nor was his absence from the trial explained in any way. But, conceding that Russell did go to see Burgess, and did see him about employment, it yet appears that Russell must have seen him in the afternoon before 5 o'clock, because Mrs. Russell positively testified that her husband ate supper with her at her father's at 5 o'clock, and that he remained with the family from that time until he left for the outfit cars—about eight o'clock or after in the night. So, from 5 to 8, or thereabouts, he was doing nothing for the railroad company, and was engaged purely in pursuit of his own affairs. Had Russell gone back to the outfit cars in the afternoon with the velocipede, as he could have, the accident would not have happened; but he preferred to stay for his own pleasure, and wait for the men who were coming down with the hand car after supper. It is undisputed that the men in the hand car reached the house of Mrs. Russell's family about 7 or shortly thereafter. Supper was over, and, as Russell's duties for the company had ended before 5 o'clock, there was nothing to prevent his immediate return with the men, and had he gone at once with them the accident could not have happened. Again he delayed his departure, and remained at Washoe for an hour or more visiting with his wife's family. When he finally started, he went without a light on the hand car. Under this evidence, the conclusion is certain that his act in remaining until 8:30 o'clock was his own, and that, in returning when and in the manner he did on the hand car, he was acting for himself. His conduct was no part, whatever, of any business relation of master and servant. It must be held, therefore, as a matter of law, that his attitude became that of a servant who voluntarily stepped wholly aside from the business of the master to do his own pleasure exclusively. Under such conditions, the master is not liable for the servant's death.

In St. Louis Southwestern Ry. Co. v. Harvey, 144 Fed. 806, 75 C. C. A. 536, the Court of Appeals of the Eighth Circuit said:

"* * * For if a servant step aside from the business of his master for never so short a time to do any act that is not a part of that business, the relation of master and servant is for the time suspended, and the acts of the servant during that interval are not his master's but his own. Benson v. Chicago, St. P., M. & O. Ry. Co., 78 Minn. 303, 307, 308, 80 N. W. 1050; Baker v. Kinsey, 38 Cal. 631, 633, 99 Am. Dec. 438; Georgia Railroad Co. v. Wood, 94 Ga. 126, 21 S. E. 288, 47 Am. St. Rep. 146.

"Nor does the fact that servants guilty of a tortious act make use of the master's cars, engines, or other facilities, which they could not have obtained in the absence of the relation of master and servant, to commit it, while pursuing their own ends exclusively, charge the master with liability for their act, in the absence of his knowledge or consent to such use. Chicago, St. P., M. O. Ry. Co. v. Bryant, 65 Fed. 969, 973–975, 13 C. C. A. 249, 253–255."

The court cites numerous decisions to sustain the rule which controlled. Cousins v. Railway Co., 66 Mo. 572; Morier v. Railway Co., 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793; Campbell v. City of Providence, 9 R. I. 262; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Chicago Consol. Bottling Co. v. McGinnis, 86 Ill. App. 38; Snyder v. Railway Co., 60 Mo. 413. To this list may be added Shadoans, Adm'r, v. C. N. O. & T. P. R. Co., 82 S. W. 567, 26 Ky.

Law Rep. 828, where it was held that where a brakeman on a freight train went into the cab of the locomotive of another train to get a drink of water, and, while there for that purpose, the two trains collided and he was killed, there could be no recovery, though the collision was due to the negligence of the railroad's servants, deceased not being in the discharge of any duty to the master.

Again, as deceased was not doing duty for the company, but was pursuing his own affairs only at the time of his death, he was not in that relationship of fellow service with the engineer or operatives of the special train which enables his administratrix to recover, relying upon the fellow servant statute of the state of Oregon, approved February 10, 1903, entitled "An act imposing upon railroad corporations liability for injury to their employees in certain cases." In Railroad Co. v. Wade, 35 South. 863, 46 Fla. 197, a wife sued for damages for the death of her husband. The deceased was killed near the eastern boundary of a village in a collision between a hand car and a locomotive. In that case the facts showed that the engine was being run backwards in the night, and it was contended that it did not have proper lights and was running at an unusual rate of speed. The deceased was employed as a member of a bridge gang, but had been discharged for the day, and had borrowed the hand car he was upon from the foreman of the crew of which he was a member. But the court held there could be no recovery, basing its decision upon the ground that the deceased at the time of the accident was not on duty, and was not a fellow servant with the trainmen, and that no relationship of master and servant existed.

In conformity with the views expressed, our opinion is that the relationship of master and servant, and that of fellow servants, and the legal principles applicable thereto, are without the case, and that consequently the action resolves itself into the ordinary one where a plaintiff seeks to recover damages for the death of a person, resulting from the fault or negligence of another. Judged from this standpoint, under firmly established principles, the plaintiff must fail, for the reason that the undisputed evidence permits of no deduction other than that deceased was guilty of fault which directly contributed to the accident which resulted in his death. A railroad company must necessarily have an exclusive right to use its tracks (subject to certain legal rights of the public at crossings), and cannot ordinarily be held responsible for a failure of its engineers to anticipate that at night, between stations and away from crossings, there are persons using hand cars upon the rails without signals of any kind. Conceding that the company in this case was negligent in some respects, as heretofore stated, nevertheless its train was lawfully upon its tracks when deceased was killed; while the deceased was negligent in using the tracks at all by going voluntarily upon them in the night, for his own business, with a hand car, and without a light. His situation was one of great peril, which carried with it all risk of safety. He ought to have used the utmost vigilance to protect himself against possible approaching trains. He was familiar with railroads, and, as a bridge foreman, knew that a special train might come very unexpectedly. Northern Pacific Railway Co. v. Jones, 144 Fed. 47, 75 C. C. A. 205.

Appellant makes the point that even if deceased was guilty of negligence, still that such negligence should not prevent recovery if it was shown that the defendant company might, by the exercise of reasonable care and prudence, have avoided the consequences of the negligence of the deceased. Inland Seaboard Coasting Company v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, and Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, are cited to sustain this argument The facts of the present case, however, render these citations inapplicable, for it was thoroughly well established on the trial that the defendant's servants in charge of the special train not only could not have anticipated that the deceased was upon the track at the point where he was killed, and in a dangerous position, but that they could not by any possible exertion have avoided the injury to the deceased after his danger was discovered. There is no question of wanton or willful negligence involved. Indeed, the engineer knew nothing at all of any danger until the collision occurred. In Northern Pacific Railway Co. v. Jones, supra, speaking through Judge Gilbert, it was pointed out that the doctrine laid down in Inland & Seaboard Coasting Company v. Tolson was applicable where the agents of the defendant knew of the presence of the injured person, and where there appeared to be reason to believe that such person was not able to avoid injury or danger; but it was distinctly held that neither of the cases just cited "intended to lay down the broad rule that no contributory negligence of the party injured will defeat his right to recover if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of that negligence." Nor are cases involving the duty of a railroad company at a public road crossing pertinent, as the collision where deceased was killed occurred a considerable distance west of any road or crossing.

Our conclusion upon the whole case is that the court was right in directing a verdict, and that judgment must be affirmed.

PACIFIC COAST CO. et al. v. YUKON INDEPENDENT TRANSP. CO.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1907.)

No. 1,377.

1. SHIPPING—SUIT FOR DAMAGE TO CARGO—LIMITATION IN BILLS OF LADING.
   Provisions of bills of lading requiring claims for loss or damage to cargo to be presented to the carrier within a stated time, and barring any suit for such loss or damage unless commenced within a further stated time, will be enforced by the courts only so far as they are reasonable under the circumstances of the particular case, and such requirements may also be waived by the carrier by his conduct.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 493, 496.

   Limitation of owners' liability, see note to The Longfellow, 45 C. C. A. 387.]

2. SAME—WAIVER OF LIMITATION.
   Libelant shipped cargo on respondent's vessel from Seattle to St. Michaels, Alaska, under a clear verbal agreement that it should be delivered on the first trip of the vessel in the spring, or as soon as the ice

was out of the harbor. When the vessel arrived the harbor was still closed by ice, and the vessel, after tendering delivery at Nome, returned to Seattle with the cargo on board, and delivered it on the next voyage. The bills of lading provided that all claims for damages should be presented to the carrier within 10 days from notice thereof, and that no action should be brought after 60 days. When the vessel decided to return from Nome with the property on board, libelant's agent served notice that a claim would be made for such damages as might result, and, when the goods were finally delivered at St. Michaels, served as specific a claim for damages as could then be made, and a more specific claim was later presented in Seattle, which respondent took under consideration, and negotiations for settlement were continued for a year before suit was brought. *Held*, that libelant had made reasonable compliance with the terms of the bills of lading as to notice, and that the delay in bringing suit was waived by the carrier by entertaining the claim and continuing negotiations for its settlement.

3. SAME—CONSTRUCTION OF BILLS OF LADING—EVIDENCE.

In construing and giving effect to the provisions of a bill of lading, the conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it are to be taken into consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 416, 417.]

4. SAME—"DEVIATION" BY VESSEL.

A provision of bills of lading giving the vessel the right to "deviate" does not authorize her, after arriving at the port of delivery, to return to the port of shipment with the goods on board, and thence make a second voyage to the port of delivery, which is not a deviation, but an abandonment of the voyage so far as relates to such shipment.

5. SAME—BREACH OF CONTRACT OF AFFREIGHTMENT.

Libelant contracted with respondent for the carriage of goods from Seattle to St. Michaels, Alaska. It was fully understood that libelant intended to market the goods along the Yukon river as soon as the ice went out, and that it had a vessel awaiting at St. Michaels for the purpose. It was agreed that the goods should be taken on the first trip of respondent's vessel north, and should be delivered as soon as the ice was out of the harbor at St. Michaels, which was known to be usually about the 1st of July. Libelant refused to ship without such agreement. The bills of lading, which were issued after the cargo was on board, provided that in case the vessel should be prevented by stress of weather or otherwise from entering the port of delivery, the carrier might convey the property to the nearest or other port, and thence return it to the port of delivery by the same or other vessel, subject to the contract for the original voyage and at the risk of the owner. The vessel reached St. Michaels June 20th, and, finding the harbor filled with ice, returned to Nome, and there tendered delivery at ship's tackle, which being refused she returned to Seattle, and delivered the goods at St. Michaels on her next trip on July 19th. The ice went out of the harbor about July 1st. *Held*, that the vessel was bound by the contract of affreightment to wait until the ice went out or to transship the goods at Nome to be delivered at St. Michaels as soon as the harbor was free, at her own expense, and that she was liable for the damages caused by her breach of contract.

6. SAME—LIMITATIONS OF LIABILITY IN BILLS OF LADING—EFFECT OF ABANDONMENT OF VOYAGE.

In such case provisions of the bills of lading that the carrier should not be required to deliver at any particular time or to meet any particular market, and limiting its liability for damage to cargo, were applicable only to the original voyage, and it lost the benefit of them when it deliberately abandoned such voyage.

7. SAME—CONTRACT OF AFFREIGHTMENT—BILLS OF LADING.

A parol contract for the shipment of goods, pursuant to which they were laden on board, may be shown to affect the construction of bills of lading signed and delivered after the goods were loaded and when the vessel was about to sail, and, in order that provisions of such bills shall override the prior agreement, the burden rests on the carrier to show that they were called to the attention of the shipper and assented to by him.

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

The appellee caused the steamship Senator to be libeled because of the breach of a maritime contract for the carriage of goods upon the steamship Senator from Seattle, consigned to the steamer Monarch at St. Michaels, at the mouth of the Yukon river. The goods consisted of a large quantity of merchandise, including perishable articles. The contract was made after negotiations between the representatives of the appellee and the appellants, with the understanding that the goods were intended for early sale in the Yukon river markets, and that the delivery was to be made as soon as the Senator should arrive at St. Michaels, or as soon as navigation was open in that harbor. The shipments were made about the end of May, 1901, and the voyage was the first of the season. It was known by the contracting parties that uncertainty existed as to whether the harbor of St. Michaels would be free of ice on the steamship's arrival, and that usually the harbor was not accessible before about the 1st of July. The Senator, on her way to St. Michaels, arrived at Nome on June 16th. After discharging two-thirds of her cargo at that port, she proceeded with the remainder, which was the merchandise consigned to the Monarch, and arrived off Golovin Bay on the morning of June 20th. Golovin Bay was found to be filled with ice, and, after cruising up and down off the face of the ice and making attempts to force a passage through it to St. Michaels, the Senator on the morning of the 21st returned to Nome, and there her master offered to a representative of the appellee to make delivery at ship's tackle. This offer was declined. The Senator then left Nome for Seattle, and reached that port on July 3d. On July 7th she departed from Seattle on a second voyage, having the appellee's cargo still on board. She went to Nome and thence to St. Michaels, where she discharged the cargo to the steamer Monarch on July 19th. The ice had left the St. Michaels Harbor about July 1st, and, if the Senator had remained off that port on her first voyage until July 2d, she could then have entered the harbor and discharged the cargo. The suit was brought to recover damages for loss on the goods and delay to the steamer Monarch. The District Court held that the Senator, by returning to Seattle without making delivery on the first voyage, made a breach of the contract of affreightment, and held the appellants liable to damages in the sum of $12,119.75, of which $4,119.75 was for loss on the goods, and $8,000 was for the delay of the steamer Monarch. The bills of lading contain the following provisions:

"Shipped by ———— per Pacific Coast Steamship Co. (hereinafter called carrier), to be forwarded per Steamer Senator or per some other of the carrier's steamers, or per some other steamer or steamers in the employ of said carrier, the articles or property enumerated hereon in apparent good order, except when otherwise noted, the value, weight, quantity, quality and condition of contents being unknown to said carrier, to be forwarded with as reasonable dispatch as the general business of the carrier will permit, and delivered at vessel's tackle at the port, place or landing of St. Michaels in like apparent good order (but with the option to the master to carry the property on deck, to deviate and to lighter, surf, transship, land and reship the said property or any thereof and to stop and land and receive passengers and freight at intermediate ports or places)."

"The property shall be received by the consignees thereof at the vessel's tackle immediately on arrival of the vessel at the port or place of delivery, without regard to weather; if the consignee is not on hand to receipt the property as discharged, then the carrier may deliver it to the wharfinger, or other party or person believed by said carrier to be responsible, and who will

take charge of said property and pay freight on same, or the same may be kept on board or landed and stored in hulks, or put in lighters by the carrier, at the expense and risk of the owner, shipper or consignee, and at his or their risk of any nature whatever."

"And further, that in case the vessel should be prevented by stress of weather or other cause from entering the port or place of delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of this contract in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property."

"The carrier shall not be required to deliver the property at the port of delivery at any specific or particular time, or to meet any particular market."

"If in the judgment of the master of carrier's steamer it shall be impracticable or unsafe to land this freight at Nome on account of ice or weather, carrier may return same at owner's risk. On freight so returned same charges to be paid as if landed at Nome, but with no additional freight charge for returning to Seattle."

The evidence showed that the negotiations for the shipment of the cargo commenced as early as May 12, 1901. H. V. V. Bean, manager of the appellee, called on C. W. Miller, assistant general agent of the Pacific Coast Steamship Company at Seattle, and asked for freight rates for the first voyage of the Senator to St. Michaels, and informed him that, if the goods were taken, delivery must be made on the first voyage, as it was desired to reach the early market on the Yukon river. Mr. Miller replied that the ice might not be out of the St. Michaels Harbor when the steamer arrived, to which Mr. Bean replied that he wanted it understood that delivery must be made at St. Michaels on that voyage, and that otherwise the goods would not be shipped. After that conversation there were others, in which Mr. Miller was informed that the goods were largely perishable, and that the steamer Monarch was to come down the Yukon river to receive them at St. Michaels. He finally sent word to an agent of the appellee that he would take the goods and make delivery on the first trip of the Senator. It was arranged that Geo. R. Fisher, a representative of the appellee, should accompany the vessel to direct the delivery. After the vessel had arrived off the port of St. Michaels, and had remained there about thirty hours, the master told Fisher that he did not know how long he might have to wait, that he could not afford to remain there, and that he would have to take the goods back, but he offered to remain there two days if the appellee would pay the sum of $500 a day for the time of such delay. This Fisher declined, and he demanded delivery at St. Michaels. The evidence was that there was no danger or difficulty in remaining there if a good lookout were kept. The master testified that to remain outside the ice, but in the vicinity would not have subjected the ship to any particular danger, but it would have subjected her to a great deal of detention. The testimony was that on returning to Nome, on June 21st, the master, after consulting the appellant's agent there, offered to make delivery of the cargo at ship's tackle at that port, the appellee to pay lighterage charges and cost of transportation of the cargo thence to St. Michaels. This was refused.

Samuel H. Piles, James B. Howe, and Charles H. Farrell, for appellants.

Richard A. Ballinger, James T. Ronald, Alfred Battle, Albert J. Tennant, and Ira A. Campbell, for appellee.

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

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

It is assigned that the District Court erred in not dismissing the libel for the failure of the appellee to present its claim within the 10-day

period prescribed in the bills of lading, and for its failure to begin the suit within 60 days thereafter, as required by the bills of lading. The bills of lading provided that:

"All claims for damages to or loss of any property to be presented to the carrier within ten days from the date of notice thereof (the arrival of the vessel at port or place of discharge or the knowledge of stranding or loss of vessel to be deemed notice), and that after sixty days from such date no action, suit or proceeding in any court of justice shall be brought for any damage to or loss of said property; and that failure to present such claim within said ten days, or to bring suit within said sixty days, shall be deemed a conclusive bar and release of all right to recover against the vessel or its master, said carrier or any of the stockholders thereof, for any loss or damage."

The binding force of such a stipulation is recognized by the courts, provided that thereby a reasonable time is given to comply with its conditions. The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; Ward v. Mo. Pac. Ry. Co., 158 Mo. 226, 58 S. W. 28; Soper v. Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853. In the case of The Queen of the Pacific, the court said:

"It is unnecessary to say that if, under the circumstances of a particular case, the stipulation were unreasonable or worked a manifest injustice to the libelants, we should not give it effect."

In the Westminster (D. C.) 102 Fed. 366, it was said that the purpose of the claim of loss is to notify the carrier that the goods have been injured, and that it is charged with liability therefor. The evidence is that when the master of the Senator and the agent of the appellants at Nome decided to abandon the first voyage, and return to Seattle without delivering the goods at St. Michaels, the appellees served notice upon them that claim would be made for any loss that might result from such delay. At that time it was impossible for the appellee to state even approximately the loss which it would sustain. At the time when the goods were, on the second voyage, delivered to the Monarch, Mr. Bean protested against their condition, both to the master and to the appellants' agent, and served upon them as specific a claim for damages as could then be made. The extent of the damage to the goods was not known, and could not be known, until afterwards, and when the Monarch had made two round trips on the river and disposed of the goods. Thereafter Mr. Bean came out from Alaska, and a further claim, specifying the damages, was presented to the appellants' agent in Seattle. The agent made answer that the claim would have to be sent to the appellants' office in San Francisco and there be taken up. This was in October, 1901. Thereafter until October 8, 1902, negotiations were carried on between the parties looking to a settlement of the loss, during which the appellants gave no answer to the demand of the appellee, save to object to the amount thereof as unreasonable. On October 8, 1902, the suit was commenced. It is well settled that the requirement as to the presentation of such a claim, and the institution of suit to enforce the same within the time specified in the contract, may be waived by the carrier by entertaining the same and negotiating concerning its adjustment. Soper v. Pontiac, etc., R. Co., 113 Mich. 443, 71 N. W. 853; Hudson & Co. v. N. P. Ry. Co., 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; Wabash Ry. Co. v. Brown,

152 Ill. 484, 39 N. E. 273; Watch Case Co. v. Express Co., 120 N. C. 351, 27 S. E. 74; Wood v. Southern Ry. Co., 118 N. C. 1056, 24 S. E. 704. Upon the evidence in the case, we find no error in the refusal of the District Court to dismiss the cause for the appellee's failure to comply with that provision of the contract of affreightment.

It is assigned as error that the District Court disregarded certain provisions of the bills of lading, for the reason that they were printed in type so small as to be unreadable by persons having only ordinary powers of vision, and this in the face of the fact that the appellee made no showing or contention that the bills of lading were not read or understood or assented to when received. Upon a careful inspection of the rulings and opinion of the court, we find no basis for this assignment of error. It is true that in the opinion the court alluded to the fact that certain provisions of the bills of lading were printed in type so minute as to be illegible by persons of ordinary vision, but we do not discover that on that ground any portion of the bills of lading was rejected. The court said:

"For this reason the courts are compelled, when called upon to enforce them, to construe such contracts fairly, and to reject stipulations which are unreasonable, and to deny carriers all unfair advantages claimed by reason of exemptions from liability for negligence or plain violation of the carrier's obligation. In order to give a fair construction to a contract, all its parts must be considered, and conditions and circumstances which the evidence proves were known to the parties and contemplated by them in making it."

This doctrine is well sustained by the authorities, and is applicable to bills of lading, no matter in what kind of type they are printed. In Marx v. National Steamship Co. (D. C.) 22 Fed. 680, Judge Brown thus expressed the recognized rule of construction:

"In construing bills of lading, as in construing other commercial instruments, it is the right and duty of the court to look, not only to the language employed, but to the subject-matter and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself so far as possible in the place of the contracting parties."

Did the court err in construing the contract? The appellants contend that it was error to hold that the Senator, after having attempted and failed to make an entrance through the ice into the harbor of St. Michaels, did not have the right to proceed to Nome, and thence back to Seattle, and from that port to return to St. Michaels, and that to do so constituted a deviation not permitted by the bills of lading. The bills of lading authorized the steamship to deviate, but it is very clear, we think, that after arriving at the port of delivery to return to the port of shipment, and thence make a second voyage to the port of delivery, is not a deviation as that term is used and understood in maritime law. Deviation is variously defined. Generally speaking, it is a voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage. 14 Cyc. 282; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568; Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903. By returning to Seattle from Nome, the Senator abandoned her voyage, so far as it concerned the appellee, and, when she subsequently carried the goods to the port of delivery, it was by a sec-

ond voyage, and not by the voyage contemplated in the contract. The bills of lading, while they gave the right to deviate, contain special provision as to the permissible course of the appellants in the event that stress of weather or other cause should prevent the entrance of their vessel into the port of delivery. It provided that, in such a case, the cargo might, at the option of the master or agent, be conveyed upon said vessel to the nearest or other port, and thence returned to the port of delivery by the same or other vessel, subject to all the provisions of the contract in regard to the original voyage, and at the risk of the owner, shipper, or consignee. By this provision, the appellants were given the right, under the circumstances disclosed in the evidence, to carry the goods from off St. Michaels Harbor to Nome, and thence to carry them back to St. Michaels or to ship them to that port upon another vessel. They pursued neither course. They offered to deliver the goods to the appellee at Nome, but at ship's tackle, and they declined to assume the expense of lighterage or carriage to St. Michaels. The offer was not a compliance with the obligation of the contract, by the terms of which the appellants were bound to deliver the goods of St. Michaels at their own expense, notwithstanding the provision that the carriage from Nome to St. Michaels was to be at the owner's risk. In Luduc v. Ward, 20 Q. B. Div. 475, Lord Esher, M. R., said:

"In the present case liberty is given to call at any ports in any order. It was argued that that clause gives liberty to call at any port in the world. Here, again, it is a question of the construction of a mercantile expression used in a mercantile document, and I think that as such the term can have but one meaning, namely, that the ports, liberty to call at which is intended to be given, must be ports which are substantially ports which will be passed on the named voyage."

A well-considered case in point is Swift & Co. v. Furness, Withy & Co. (D. C.) 87 Fed. 345. In that case the libelant shipped fresh beef from Boston to London, under bills of lading which gave the vessel liberty to make deviation and to call at any intermediate port or ports for any purpose. The bills of lading also provided that the beef was to be shipped wholly at the risk of the shipper, and that the owners of the vessel assumed no responsibility whatever therefor during the voyage, and were not to be held liable for loss or damage thereto. The voyage ordinarily took from 14 to 16 days. On arriving at Dover the ship was ordered to go to Havre and discharge part of her cargo. From Havre she went to Flushing, Holland, thence back to London, where she arrived several days later, with the beef in a damaged condition. The court, in denying the vessel exemption from liability on the ground that her deviation was permissible under the bills of lading, said:

"Under both bill of lading and marine insurance policy, reasonable, necessary, and contemplated deviations are permitted. Unreasonable, unnecessary, and arbitrary deviations are held breaches of contract. The clause providing that 'meat is to be shipped wholly at the risk of the shipper, and that the owners assume no responsibility therefor during the voyage,' etc., does not afford the carrier protection for damage arising after the vessel was diverted from her voyage, and sent upon what must be regarded as an additional and independent voyage to Havre and Flushing. This clause refers to the voyage contemplated by the parties, and to deviations reasonably incident thereto, not to an additional voyage arbitrarily made by the order of the owner."

The case at bar presents stronger ground, for the application of that doctrine than did the case in which it was announced.

The clause of the bills of lading providing that if, in the judgment of the master of the steamship, it should be impracticable or unsafe to land freight at Nome on account of ice or weather, the freight might be returned to Seattle, does not avail the appellants in the present case, whether that provision be regarded as a part of a printed form applicable only to consignments of freight from Seattle to Nome and therefore not pertinent to the present contract, or whether it be regarded as a provision of the contract intended for the protection of the steamship in the event of her return to Nome after an unsuccessful attempt to reach anchorage ground at St. Michaels. In either view, it is the expression of the whole of the intention of the parties as to the right of the vessel to return to Seattle without delivering the goods. It is inapplicable here for the reason that, in fact, it was not impracticable or unsafe to land freight at Nome on account of either ice or weather. In the light of the circumstances attending the execution of the contract, and the provisions of the bills of lading, we think it is clear that the appellants were under obligation to deliver the goods upon their own or another vessel at St. Michaels as soon as that harbor was free from ice. The appellants could have been absolved from that obligation only upon the occurrence of an unforeseen event. It was not unforeseen that the vessel might be delayed on account of the ice. It was well known to both the contracting parties that the ice rarely left St. Michaels Harbor before the 1st of July. The contract was made with special reference to that contingency. The necessity of the delay or of transshipping the goods at Nome was fairly within the intention of the agreement, and the risk thereof must be presumed to have been compensated for by the freight money which the appellants received.

It is contended that the District Court erred in holding the appellants liable for damage for the decay of perishable goods when the bills of lading provided that they should not be responsible for the decay of perishable articles or damage to any article "arising from the effect of heat or cold, sweating, or fermentation." The answer to this contention is that the limitations of liability expressed in the bills of lading were applicable only to the voyage contemplated in the contract. They do not relieve the carrier from liability for damages resulting from the delay occasioned by the abandonment of the voyage and the return of the vessel to Seattle. 6 Cyc. 383; Balien & Son v. Jolly, Victoria & Co., Ltd., 6 T. L. R. 345; Luduc v. Ward, 20 Q. B. D. 475. In the latter case the court said:

> "It follows that when the defendant's ship went off the ordinary track of a voyage from Fiume to Dunkirk to a port not on the course of that voyage, such as Glasgow, there was a deviation, and she was then on a new voyage, different from the one contracted for, to which the excepted perils clause did not apply, and therefore the ship owner is responsible for the loss of the goods."

It is contended, further, that there was error in holding the appellants liable for delay in delivering the goods, and in allowing demurrage to the Monarch contrary to the provision in the bills of lading that the

carrier shall not be required to deliver property at the port of delivery at any specified or particular time or to meet any particular market. The foregoing considerations and the authorities just quoted are applicable also to this provision of the bills of lading, and to the further clause thereof, providing that claim for loss or damage to any of the property shall be restricted to "the cash value of the same at the port of shipment at the date of shipment unless otherwise agreed." The benefit of all of these provisions was forfeited by the appellants by their act in causing the Senator to return to Seattle without making delivery of the goods on the voyage upon which they were to have been delivered. For breach of that contract the appellee was entitled to damages for the loss of the market, with a view to which the contract was made. Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; The Arctic Bird (D. C.) 109 Fed. 167; Port Blakeley Mill Co. v. Sharkey, 102 Fed. 259, 42 C. C. A. 329.

The appellants earnestly contend that the court erred in admitting evidence of a prior parol agreement between the parties which tended to modify the terms of the bills of lading. The evidence so admitted tended to prove the negotiations antecedent to the shipment and the common understanding that the appellants intended to take advantage of the market prices prevailing at points on the Yukon river at the opening of navigation. It tended to show that the probable presence of ice in the St. Michaels Harbor was contemplated, and that the contract was made with the special understanding that delivery was to be made as soon as the harbor was free from ice. It showed, also, that the bills of lading were signed late at night, and at about the last minute before the boat went out. All of this evidence was admitted for the purpose, not of modifying the provisions of the bills of lading, but of showing the intent and purpose of the contracting parties, and aiding the court to construe the bills of lading with reference to that intent. The bills of lading were printed forms applicable to different consignments of goods to different ports. In Hutchinson on Carriers (3d Ed.) § 622, it is said:

"But the main object and intent of the contract is the voyage agreed upon, and, while the printed general words must not in construing a contract be discarded, it is well recognized that, when considering what the main object and intent of the contract is, it is proper to bear in mind that a portion of each is on a printed form applicable to many voyages, and is not especially agreed upon in relation to the particular voyage."

See, also, Marx v. National S. S. Co. (D. C.) 22 Fed. 680; Mobile & Montgomery R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed 527.

But if, indeed, the parol testimony so admitted in evidence did have the effect to modify some of the provisions of the bills of lading, it was. under the circumstances disclosed in this case, admissible for that purpose, for the bills of lading were issued after the goods had been delivered on board the Senator, and after they had passed from the control of the shipper, and the vessel was about to go on her way. The burden was then upon the carrier to show that its agents directed attention to the terms of the bills of lading and that the shipper assented

to them. The Arctic Bird (D. C.) 109 Fed. 167; Bostwick v. B. & O. R. Co., 45 N. Y. 712; Strohm v. Detroit & M. Ry. Co., 21 Wis. 562, 94 Am. Dec. 564; Mo. Pac. Ry. Co. v. Beeson, 30 Kan. 298, 2 Pac. 496; Michigan Central R. R. Co. v. Boyd, 91 Ill. 268.

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

ROSENCRANZ v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1907.)

No. 1,404.

1. CRIMINAL LAW — JURISDICTION OF OFFENSE — OFFENSES AGAINST UNITED STATES AND MUNICIPALITY.

Under the rule that when a court has jurisdiction of a crime a statute which merely confers the same judisdiction on another court, or authorizes a municipality to define and punish the same act, does not deprive the first court of its jurisdiction unless there is an express provision or clear implication to that effect, Act April 28, 1904, c. 1778, 33 Stat. 529, conferring power on municipalities in Alaska to prohibit certain things and punish the same as misdemeanors, and which repeals all prior acts and parts of acts inconsistent therewith, although acted upon by a town, does not affect the jurisdiction of the District Court over prosecutions for the same acts which are made offenses by Carter's Alaska Code March 3, 1899, c. 429, 30 Stat. 1253, there being no inconsistency between the dual jurisdictions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 176.]

2. SAME—INDICTMENT—ABOLITION OF DISTINCTION BETWEEN ACCESSORY AND PRINCIPAL.

Under Pen. Code Alaska, §§ 186, 188, which abolish the old distinctions between principal and accessory before the fact, one who aids and abets another in the commission of a crime may be charged in the indictment and convicted as a principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 103.

Prosecution and punishment of accessories, see note to 44 C. C. A. 326.]

3. DISORDERLY HOUSE—ELEMENTS OF OFFENSE—LETTING PREMISES FOR BAWDY-HOUSE.

An owner of property, or an agent of such owner, who knowingly rents the same to another to be used as a bawdyhouse, the keeping of which is a misdemeanor, aids and abets the commission of the offense, and under Pen. Code Alaska, § 188, which provides that in misdemeanors there are no accessories, is punishable as a principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, § 6.]

4. JURY—COMPETENCY OF JURORS—BIAS AND PREJUDICE.

The examination of jurors on their voir dire in a criminal case *held* to have disclosed such a state of mind on their part as to render the overruling of challenges by defendant for actual bias an abuse of discretion, where each disclosed that he had a fixed opinion that the defendant was guilty, and, while one thought he could lay his opinion aside "if the evidence showed he was not guilty," another stated that his was a strong opinion which he would not be able to rid himself of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 461–479.]

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

Mose Rosencranz, plaintiff in error, was indicted under the code of Alaska for the crime of keeping a bawdyhouse. The indictment, in its direct charging part, is as follows: "The said Rosencranz within two years last past, to wit, on the 30th day of September, nineteen hundred and six, in the district aforesaid, did wrongfully and unlawfully keep and set up a house of ill fame, brothel, and bawdyhouse, for the purpose of prostitution, fornication, and lewdness, the same being that certain apartment, being the fourth apartment east of the westerly line thereof on the southerly end of lot 46, block 19, according to the town-site plat thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States." Rosencranz interposed a plea in abatement, alleging that the municipal court in and for the city of Nome, Alaska, had exclusive jurisdiction of the offense charged in the indictment, and that the District Court of the United States for the District of Alaska, Second Division, had no jurisdiction. He also filed a demurrer to the indictment, based upon the ground that the grand jury had no legal authority to inquire into the crime charged, and that the indictment did not conform to the requirements of chapter 7 of title 2 of the act of Congress entitled "An act to define and punish crimes in the District of Alaska and to provide a Code of Criminal Procedure for said district" (Act March 3, 1899, 30 Stat. 1253, c. 429); and that the facts stated in the indictment do not constitute a crime. The court overruled the plea and the demurrer. Trial was had. At the close of all of the evidence, plaintiff in error moved the court to direct a verdict of not guilty. This motion was based upon the principal ground that the indictment did not allege a crime under the laws of Alaska, and that the evidence failed to show that plaintiff in error had acted as agent, owner, proprietor, or lessor, or that he had knowledge of the use to which the property had been put. This motion was overruled. Plaintiff in error was convicted, and sentenced to imprisonment for one year. He prosecutes this writ of error to review the proceedings and rulings of the lower court, and to set aside the judgment of conviction.

James W. Bell, C. D. Murane, Hobbes & Bell, W. H. Bard, James E. Fenton, and Albert Elliot, for plaintiff in error.

Henry M. Hoyt, U. S. Atty., for defendant in error.

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

HUNT, District Judge. The first contention of the plaintiff in error is that the District Court of Alaska had no jurisdiction because by the act of Congress approved April 28, 1904 (33 Stat. 529–534 c. 1778), which was "An act to amend and codify the laws relating to municipal corporations in the District of Alaska," Congress conferred upon municipal corporations in Alaska the power to prohibit gambling, houses of ill fame, and other misdemeanors, and to prescribe the punishment therefor, and that thereby it repealed section 127 of the act of Congress approved March 3, 1899 (Carter's Code), providing for the prosecution and punishment of such offenses in the District Courts of the territory. The particular clause of the act of April 28, 1904, which is relied upon by plaintiff in error, reads as follows:

"Sec. 8: That all acts and parts of acts inconsistent with this act are, to the extent of such inconsistency hereby repealed: and the provisions of this act shall apply to and govern all municipal corporations heretofore created in the District of Alaska." 33 Stat. 534.

It is established by the plea filed by plaintiff in error that the city council of Nome did on August 1, 1904, pass an ordinance making it a misdemeanor to set up or keep a house of ill fame or bawdyhouse for

the purpose of prostitution. The argument is that Congress intended to vest in the municipal authorities exclusive jurisdiction of the misdemeanors mentioned, and that the purpose was to prevent a conflict between the federal and local authorities within the limits of incorporated towns. To support this reasoning plaintiff in error cites decisions by the Supreme Courts of California and Missouri. But upon examination of the principal case relied upon, Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541, we find that it is really inapplicable. That was an application for a writ of prohibition by Green, who was indicted in the superior court of the city and county of San Francisco for conspiracy. The writ was sought upon the ground that inasmuch as conspiracy was punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both, jurisdiction was exclusively in the police court of the city and county of San Francisco. The Constitution of the State of California provided that the superior courts should have jurisdiction in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. By further constitutional power the Legislature was authorized to fix the jurisdiction of inferior courts created by it in pursuance of the Constitution; and an act was passed which prescribed the jurisdiction of the police court of the city and county of San Francisco, wherein it was provided that the police court should have jurisdiction of misdemeanors of a certain class, which included conspiracy. The court held that the jurisdiction had become exclusive in the police court because the Constitution had plainly conferred jurisdiction in the superior courts only until otherwise provided for, and that, inasmuch as other provision has been made, the authority of the superior court ended, as it was meant it should end under the provisions of the Constitution. It will be understood, therefore, that the decision turned upon the terms of the Constitution of the state, which indicated an intention that there should be jurisdiction in the one court. In the course of the opinion, however, the court expressly recognized the rule as a well-established one that where jurisdiction is given either by Constitution or statute to two different courts, not indicating whether such jurisdiction shall be exclusive or concurrent, the same may be regarded as concurrent in both courts, although the case then before the court was not brought within the operation of the rule, for reasons already indicated. So far, therefore, as the opinion is pertinent at all to questions of jurisdiction involved in the present case, it is but one of the many decisions which recognize the principle that, when a court has jurisdiction of a crime, a statute which merely confers the same jurisdiction on another court does not deprive the former court of its jurisdiction, unless there is an express provision or clear implication to that effect. The consequence is that concurrent jurisdiction is conferred. 12 Cyc. p. 199; State v. Nichols, 60 Atl. 763, 27 R. I. 69; Moren v. Commonwealth, 76 S. W. 1090, 116 Ky. 859. This principle is thus stated by Cooley in his Constitutional Limitations, p. 279:

"Nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the state law on the same subject; but the state law and the by-law may both stand together if not inconsistent. Indeed, an act may be a penal offense under the laws of the state, and further penalties under proper legis-

lative authority be imposed for its commission by municipal laws. And the enforcement of the one would not preclude the enforcement of the other."

Among the well-considered decisions in accord with Cooley's text are: Ogden v. City of Madison, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506, where it was held that where the keeping of a house of ill fame was made a misdemeanor by state law, so that one accused of doing so was entitled to a jury trial, it did not prevent a municipality from imposing a penalty for a like offense which could be enforced without a jury trial; McInerney v. City of Denver et al., 29 Pac. 516, 17 Colo. 302, where petitioner was convicted of keeping open a tippling house in violation of a city ordinance, and it was held that, although by general statute of the state the act was made a misdemeanor, yet the Legislature could delegate power to municipal corporations to adopt and enforce ordinances on matters of special local importance, even though general statutes exist relating to the same subject, and both could be given effect; Territory v. Guyott, 9 Mont. 46, 22 Pac. 134, where an act of the territory of Montana which made it a felony to sell liquor to an Indian was held to be constitutional, though Congress had passed a statute making the act a crime; and Town of Van Buren v. Wells, 14 S. W. 38, 53 Ark. 368, 22 Am. St. Rep. 214, where a conviction under a state law for carrying concealed weapons was held not to be a bar to a prosecution for the same act under a city ordinance. It was also decided in U. S. v. Wells, 2 Cranch, C. C. 45, Fed. Cas. No. 16,662, that a by-law of Georgetown prescribing a penalty for keeping a public gaming table did not supersede nor repeal a general law of Maryland prescribing a penalty for keeping a faro table in a house occupied by a tavern keeper; and in U. S. v. Holly, 3 Cranch, C. C. 656, Fed. Cas. No. 15,381, Judge Cranch ruled that it was not to be supposed that a power to pass by-laws to prohibit gambling, conferred upon the city of Washington, was to be regarded as an exclusive power bestowed. As we look at the question, Congress, in conferring power upon the municipalities of Alaska to prohibit houses of ill fame, gambling, disorderly conduct, and other offenses, and in conferring the further power upon the municipalities to define such offenses and to prescribe the punishment therefor, intended to bestow a larger measure of local self-government upon municipalities in respect to the regulation of certain matters usually brought under the police power as subjects of local municipal regulations; but in delegating such power we do not think that it was meant that Congress should surrender its own right of control over the subjects enumerated in the act of April 28, 1904, supra. There is no inconsistency between the dual jurisdictions; and, as the repealing provision of section 8, supra, only went to the extent of inconsistencies between the later and earlier legislation, both acts must be sustained, and effect must be given to both. We therefore hold that the District Court was correct in denying the several pleas and motions which were made to test the jurisdiction of the court.

The next contention of plaintiff in error is that the court should have directed a verdict of acquittal because of a fatal variance between the indictment and the proof, in that the charge is that plaintiff in error did unlawfully keep and set up a house of ill fame for pur-

poses of prostitution, whereas the evidence merely tended to establish that plaintiff in error owned the premises and received rental therefor from a woman who used the place for purposes of prostitution. Under section 186 of the Penal Code of Alaska, all persons concerned in the commission of a crime, whether it be felony or misdemeanor, or whether they directly commit the act constituting a crime or aid in the commission, though not present, are principals, and are to be tried and punished as such, and, by section 188, in misdemeanors there are no accessories. Plaintiff in error argues, however, that the particular acts which establish that a defendant aided and abetted the crime, and thus became in law a principal, must be pleaded in the indictment. To support this position he relies upon People v. Campbell, 40 Cal. 129, and State v. Gifford, 19 Wash. 464, 53 Pac. 709. These two cases hold that while it is proper to indict, try, and punish an accessory as a principal, yet that the particular acts which establish that he aided and abetted the crime, and thus became in law a principal, must be stated in the indictment. But in People v. Outeveras, 48 Cal. 19, the case of People v. Campbell, supra, was distinguished and in effect overruled, the court distinctly holding that principals in the second degree and accessories before the fact are all deemed chief actors under statutes generally similar to those in Alaska; that is, they are principals in the first degree in the commission of the crime, and are to be indicted, tried, and punished as such principals. The decision was put upon the ground that the statutes have abolished distinctions between accessories before the fact and principals, and that there is no variance between proofs and allegations if the charge is against one as principal, yet the evidence discloses that he is what has been called an accessory, for the law has declared that the aiding and abetting shall make the offender guilty as a principal, and that he may be charged accordingly. And in the later case of People v. Rozelle, 78 Cal. 84, 20 Pac. 36, the court reaffirmed the doctrine of People v. Outeveras, supra, again overruling People v. Campbell, supra. The case of State v. Gifford, supra, supporting plaintiff in error, was also expressly held to be against the current of recent authorities by the Supreme Court of Montana (State v. Geddes, 22 Mont. 68, 55 Pac. 919), where the earlier decision of the Supreme Court of Washington (State v. Duncan, 35 Pac. 117, 7 Wash. 336, 38 Am. St. Rep. 888), was cited with approval. See, also, People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 701; Bishop's New Cr. Law, § 674; State v. Kent, 62 N. W. 631, 4 N. D. 577, 27 L. R. A. 686; State v. Rowe, 104 Iowa, 324, 73 N. W. 833; State v. Comstock, 46 Iowa, 265; People v. Chapman, 62 Mich. 280, 28 N. W. 896, 4 Am. St Rep. 857; Boggus v. State, 34 Ga. 275; Stevens v. People, 67 Ill. 587; State v. Jones, 83 N. C. 605, 35 Am. Rep. 586; 1 Enc. Pl. & Pr. 69, 70; 1 Sup. Enc. Pl. & Pr. 14. In State v. Steeves, 43 Pac. 947, 29 Or. 85, the Supreme Court of Oregon passed upon the question now under consideration. A defendant was there jointly indicted with one Kelly for the crime of murder in the first degree. Defendants had separate trials. The defendant Steeves was not present at the killing, but the evidence showed that he counseled and procured his codefendant to kill the

deceased. It was insisted by defendant that, inasmuch as he was charged with the overt act and not as an accessory, his constitutional right to be informed of the nature and cause of the accusation against him was invaded, and that he could not tell by an inspection of the charge that an attempt would be made to prove he was an accessory before the fact. But the contention was held to be unsound, the court pointing out that the statute of the state which abrogated distinctions between accessories before the fact and principals, and authorized all persons concerned in the commission of a felony, whether they directly committed the act constituting the crime or aided and abetted in its commission, though not present, to be indicted, tried, and punished as principals, was valid, and that, when the law abolished distinctions between classes of offenders, an indictment charging one with the doing of the overt act substantially informed him of the nature and cause of the accusation against him. In Lowenstein v. People, 54 Barb. (N. Y.) 299, it was decided that a man who rents a house to be kept as a disorderly house, and which is so kept with his knowledge, especially where he derives a profit from that mode of using the property, may well be called the keeper of the house and be punished as such. And in People v. Erwin, 4 Denio (N. Y.) 129, it was held that the owner of a house who rents it to be used and kept as a house of prostitution is to be deemed a keeper of a bawdyhouse, and is liable to indictment and conviction as the keeper of such a house. The Court said:

"In misdemeanors there are no accessories. All who procure, counsel, aid, or abet the commission of the crime are principals."

The federal courts adopt the same rule, recognizing that the old distinctions which only pertained to felonies are generally abrogated, and that a charge against one formerly known as an accessory before the fact is good against him as principal. United States v. Snyder (C. C.) 14 Fed. 554; Toledo Ry. Co. v. Penn. Co., 54 Fed. 736, 19 L. R. A. 387; United States v. Stevens (D. C.) 44 Fed. 140.

Our conclusion is that where a statute has done away with former distinctions between principal and accessory before the fact, as it has in Alaska, a charge against one formerly known as an accessory is good against him as principal, and that he must answer to the proofs whether they disclose that he was present and did the overt act, or, not being present, aided and abetted the doing of it in a way to make himself liable as a principal.

It is next insisted that the court erred in overruling the challenges for cause to a number of jurors. Nearly every juror who sat was retained over the objection of plaintiff in error. Several of the jurors said they had prejudices against the keeping of bawdyhouses, that they knew the locality in the city of Nome described in the indictment and were prejudiced against it, but that they did not know the defendant, and would not convict him unless the prosecution established guilt beyond a reasonable doubt. It is evident that some of the jurors sat upon juries in the trials of other cases where defendants were charged with like offenses, and had formed opinions of more or less strength by reason of having heard the evidence in such other cases; yet their examinations failed to disclose such a knowl-

edge of the facts connected with this case, or such a frame of mind generally as to warrant us in holding that the trial court abused its discretion in overruling the challenges for cause. But among the jurors challenged were three whose examinations were as follows:

Phil. Ernst testified:

"I heard the statement of the case. I was one of the jurors in the Ludovic case; I have an opinion at this time as to the guilt or innocence of the defendant—I might say a fixed opinion, such as would require considerable evidence to remove. I believe I could be a fair and impartial juror. I don't know positively whether I could or not. I don't know the man, and have no prejudice against him. I have a prejudice against that business, but I have no knowledge of whether he is guilty or not; I might require less evidence to find a man, charged with setting up and keeping a bawdyhouse, guilty, but I think I would require the government to prove all the allegations of the indictment. I would require the government to prove him guilty by the preponderance of the evidence before I would render a verdict against him. I have an opinion as to the character of the house alleged from its description and locality; proof that the house was in the restricted district would be sufficient to my mind to establish its character. I don't know that a vacant house could have any character. There might be a laundry there. I don't know; but there would have to be evidence to show that to my mind. If the government simply introduced proof that the house is in the restricted district and no more proof were offered, I think I would conclude that it was a bawdyhouse from its locality.

"Mr. Bell: We challenge the juror for actual bias."

On cross-examination the juror said:

"I think that the government should prove beyond a reasonable doubt that the house which is alleged in the indictment was used as a house of ill fame or for the purposes of prostitution; but I would not infer that merely from the locality; but if there were no evidence offered as to the character of the house, and it was proved to be in that district, why, then, I would have an opinion as to its character from the district. I don't know this house; I would require the government to prove all the allegations of the indictment beyond a reasonable doubt before I would find the defendant guilty."

Chris Frantzen testified:

"I heard the statement of the case. I don't know the defendant. I have never heard the case discussed in any way. I have an opinion at this time as to the guilt and innocence of the defendant; it is a fixed opinion. I think I could lay it aside if the evidence showed he was not guilty. I was one of the jurors in the Ludovic case. I would try to lay aside my opinion and try the case according to the evidence. I am sure I could do it; but I have an opinion at the present time. I feel at the present time it would require evidence to remove that opinion; as it is, I would have to have some testimony before my mind would be evenly balanced as to the guilt or innocence of the defendant. I would not enter upon the trial of this case as a fair and impartial juror; that opinion which I now have would have some weight in considering the testimony and weighing the testimony that would be introduced, and my mind would be biased upon the testimony in finding a verdict at the present time. I do not feel that I could lay that opinion aside entirely and disregard it as though I never had any opinion whatever.

"Mr. Bell: We submit a challenge for actual as well as implied bias.

"Mr. Hoyt: We resist.

"Q. (by Mr. Landers) Upon what is that opinion based? A. Well, the house is inside the stockade. Q. You have an opinion just as to the character of the house then? A. Yes.

"(Continuing) I don't know anything about this house. I have a prejudice against the houses back in the stockade. I don't know whether this house is run as a house of prostitution or not. I don't know whether it is run by the de-

fendant. I have heard that he has several houses there, inside the stockade. I don't know whether he has or not. I don't know whether this particular house alleged in the indictment is one of them or not. I have an opinion in regard to this particular charge. I would enter into the trial of this case without any opinion whatever in regard to this particular charge of keeping a bawdyhouse within a certain house within that district."

James E. Cahill testified:

"I heard the statement of the case. I have heard the facts about this case. I know who the defendant is by sight. I have an opinion at the present time as to the guilt or innocence of the defendant. It is a decided opinion, which would require evidence to remove. It would require considerable evidence to remove the opinion that I now have, and I do not think I could lay it aside and have no weight in considering the testimony.

"Mr. Murane: We submit a challenge for actual bias.

"Mr. Hoyt: Challenge resisted.

"Q. (by Mr. Hoyt) Is your opinion based upon some knowledge which you have? A. No, just a general impression. Q. An impression, or a prejudice? A. No, an impression. Q. You have no knowledge as to the guilt or innocence under this charge? A. None whatever. * * *

"(Continuing) That is a strong opinion which I possess and which I will not be able to rid myself of.

"Mr. Hoyt. We do not resist the challenge.

"Q. (by the Court) Would you mix up with the evidence in the case, if you were sworn to try the case, would you mix up any knowledge that you might have with the evidence and base your verdict partly on that? A. Oh, no; I would not allow my prejudice to guide me to a verdict. Q. You do not know the defendant? Have you any prejudice against the United States? A. None whatever. Q. Do you think you could enter the jury box and render a fair, just, and impartial verdict? You would not convict anybody, would you, unless the evidence satisfied your mind beyond a reasonable doubt? A. I think, on the contrary, I would be more lenient after forming an opinion."

The statutes of Alaska bearing upon the qualifications of jurors are that a challenge for cause exists:

"Sec. 125. * * * Second. For the existence of a state of mind on the part of a juror in reference to the action or to either party which satisfies the trier, in the exercise of a sound discretion, that he can not try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias. * * *

"Sec. 127. Challenge for Actual Bias. That a challenge for actual bias may be taken for the cause mentioned in the second subdivision of section one hundred and twenty-five. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror can not disregard such opinion and try the issue impartially."

It is not to be disputed that, unless manifest error has occurred in ruling upon the qualifications of jurors, the action of a trial court should not be disturbed. The position of the trial judge necessarily enables him to try the fitness of a juror to much better advantage than an appellate court can. Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237. It often happens that the very manner in which the answers are given by a juror greatly aids the trial court in judging fairly of the state of the juror's mind. It sometimes occurs that a juror, particularly if he is a man who is unfamiliar with court procedure, or one not well versed in the English language, or one who is uneducated, does not at once fully understand the significance of

the questions put to him by counsel as to any opinions or impressions he may have bearing upon the case. Sometimes it is only by repetition and perhaps after some explanation that the juror appreciates the purpose of the proceeding and slowly discloses the actual state of his mind. Such a juror may be perfectly honest, not trying to keep back anything; he may be anxious to be wholly truthful; yet upon the bare printed record there appear to be inconsistencies or evasions in his answers. We believe generally that in such instances the discretion of the trial court, presumably wisely exercised, should control, and appellate courts ought to refuse to interfere. But, on the other hand, in the interpretation of statutes concerning challenges to jurors for cause, it is of vital importance that the constitutional right to an impartial jury secured to a defendant by the sixth amendment be most carefully guarded, no matter how unimportant the case may be wherein it is seriously urged that this right has been denied. In Williams v. United States, 93 Fed. 396, 25 C. C. A. 369, decided by this court, there was no difference of opinion upon these general principles, but the judges disagreed upon whether or not the action of the trial court presented a case of manifest error, the majority holding it did. In Dolan v. United States, 116 Fed. 578,[1] this court again considered a ruling by a lower court upon challenges to jurors for cause, and again the judges disagreed, not upon the principle involved, but upon the extent of its application to the particular facts and evidence presented by the record. In neither of the cases, just cited, however, did it appear that the jurors challenged answered as did the two last whose examinations are given above. The examination of Juror Frantzen certainly showed that he went into the trial of the case with a fixed opinion that the defendant was guilty. He frankly stated that he had such an opinion, though he thought he could lay it aside if the evidence showed the defendant was not guilty. The juror would do his best to disregard the opinion, but he felt he could not lay it aside entirely. He had heard that this defendant had several houses inside the stockade where houses of prostitution were, but did not know whether he had or not. It is true that in concluding his testimony he said he would enter upon the trial without any opinion whatever in regard to this particular charge. But in the light of the specific prior statements made by the juror, his own judgment that he would not be a fair juror appears to us to have been the only proper conclusion that was deducible from what he said, and we think he ought to have been excused upon the challenge. Juror Cahill was even more unfit for service. He knew the facts and had an opinion, and felt that he could not lay his opinion aside. He said later that he had no knowledge of the guilt or innocence of defendant under the charge, but he had "an impression," a "strong opinion," which he would not be able to rid himself of. The district attorney did not resist the defendant's challenge to this juror, but the court carried the examination farther and elicited from the juror statements that he would not allow his prejudice to guide him to a verdict, that he had no prejudice against the United States (he was not asked if he had any against the defendant), and that he would be more lenient as a juror after

[1] 54 C. C. A. 34.

forming an opinion, and would not convict unless satisfied of guilt beyond a reasonable doubt.

We find it impossible to avoid the conclusion that a jury made in part of men whose minds are in such a condition is not impartial. It is possible, of course, that such a jury will be perfectly fair; but the standards by which courts must test impartiality are necessarily those derived from common experiences with practical human nature. So if men start out in a case with fixed opinions of guilt, and fear they cannot disregard them, their mental attitudes are well characterized by the language used by Juror Frantzen when he said he thought he could lay his opinion aside "if the evidence showed that the defendant was not guilty." The burden of proof as to guilt is too apt to be lost sight of before such a jury, and the defendant at the outset, and before a word of evidence is heard, finds himself forced into a trial with the jury strongly against him, and therefore without that full measure of protection which the presumption of innocence should afford him. The question is, therefore, of such a substantial nature that it has received our most earnest consideration in an endeavor to uphold the exercise of the discretionary power of the trial court without infringing upon the constitutional provision which surrounds the exercise of that power, and our conclusion is that there was an abuse of discretion in overruling defendant's challenges, and that because of this error the judgment must be reversed.

If, upon a new trial of the case, the prosecution again offers evidence to show that plaintiff in error was the owner of the property kept and used for purposes of prostitution, as a circumstance tending to rebut this evidence plaintiff in error should be allowed to introduce deeds tending to show legal title in another. Such testimony is proper, although it is not necessary for the government to establish that defendant was the owner of the house, nor is it necessary to show by positive testimony that he was the keeper. It may be found that he was the keeper by his acts and admissions, or by proof that he acted and held himself out as such keeper. If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper; and by the same principle the agent of an owner who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. 14 Cyc. 489; Kessler v. State, 46 S. E. 408, 119 Ga. 301. We advise, too, that upon a new trial the court should adopt the suggestions as to what constitutes a reasonable doubt made by this court in its opinion remanding the case of Owens v. United States, 130 Fed. 279, 64 C. C. A. 525.

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

HORNSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1907.)

No. 1,403.

CRIMINAL LAW—JURISDICTION OF OFFENSE—OFFENSES AGAINST UNITED STATES AND MUNICIPALITY.

An ordinance prohibiting gambling and prescribing punishment for the same, enacted by a town of Alaska under authority conferred by Act April 28, 1904, c. 1778, 33 Stat. 529, does not deprive the district courts of jurisdiction of a prosecution for gambling within the limits of the town, instituted under the Penal Code of the district, which makes the same a criminal offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 176.]

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

Albert H. Elliot and George D. Schofield, for plaintiff in error.
Henry M. Hoyt, U. S. Atty.

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

HUNT, District Judge. Charles Hornstein, plaintiff in error, was convicted of the crime of gambling after trial upon information filed in the United States Commissioner's Court for the District of Alaska. To the information Hornstein filed a demurrer and plea in abatement, raising the point that the United States Commissioner had no jurisdiction over an offense committed within the incorporated limits of the town of Nome, District of Alaska, where the alleged crime was committed. The plea in abatement and demurrer were overruled, trial was then had before a jury, and a verdict of guilty was rendered. The plaintiff in error moved for a new trial, which motion was denied, and thereupon he was fined. From the judgment of conviction he sued out a writ of error to this court.

The statute of Alaska under which the information was filed reads as follows:

"That each and every person who shall deal, play, or carry on, open or cause to be opened, or who shall conduct, either as owner, proprietor or employee whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenet, rondo, vingt-un, twenty-one, poker, draw poker, bragg, bluff, thaw, craps, or any banking or other device whether the game shall be played for money, checks, credit, or any other representative of value, shall be guilty of a misdemeanor."

Congress passed an act, approved April 28, 1904, 33 Stat. 529, c. 1778, entitled "An act to amend and codify the laws, relating to municipal corporations, in the District of Alaska." Under this act, the town of Nome, a municipal corporation, passed an ordinance on August 1, 1904, making it a misdemeanor to gamble. This ordinance was in effect at the time of the filing of the information against the plaintiff in error.

The principal contention of the plaintiff in error is that the act to amend and codify the laws relating to municipal corporations in the

District of Alaska, approved April 28, 1904, repealed the act of Congress of March 3, 1899, 30 Stat. 1253, c. 429, entitled "An act to define and punish crimes in the District of Alaska," in so far as the said act of March 3, 1899, related to the offense of gambling, where said offense is committed within the limits of incorporated towns, and where such incorporated towns have enacted ordinances defining the offense of gambling, and where such ordinances are in force, as in the case of the city of Nome. The legal question involved is the same as that presented and decided in the case of Mose Rosencranz v. United States, 155 Fed. 38, and the conclusion there reached, that Congress under the act of April 28, 1904, c. 1778, 33 Stat. 529, did not intend to yield its authority over the subjects of gambling and other offenses enumerated, must control here. The argument that by the act of 1904 Congress intended to increase greatly the powers of town councils is sound until it is invoked to sustain the conclusion that the power conferred upon the municipality is inconsistent with the reservation of power by the United States. It then fails, for as we have shown in the Rosencranz Case, there is no repugnancy between the two acts, and in the absence of expressed or clearly implied terms that the jurisdiction should be exclusively in the municipalities we cannot find a surrender of the jurisdiction of the United States. Not finding such surrender, we cannot infer it merely upon the ground of a possible double prosecution. Cross v. North Carolina, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287; Bishop on Statutory Crimes, § 24; Fox v. Ohio, 5 How. 410, 12 L. Ed. 213.

Plaintiff in error also contends that the court erred in refusing to instruct the jury in writing when requested by the defendant. Section 137 of the Penal Code of Alaska provides:

Subd. 5. "When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; which instructions shall be reduced to writing if either party request it."

Subd. 7. "The court, after the argument is concluded, shall immediately, and before proceeding with other business, charge the jury; which charge, or any charge, given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it before the argument of the trial is commenced; such charge or charges, or any other charge or instructions provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court, and shall remain on file with papers of the case."

The bill of exceptions does not show that the plaintiff in error requested the court to charge the jury in writing; but sets forth that the counsel for the plaintiff in error, just before the government rested its case, requested the court "in charging the jury to charge the jury according to defendant's written requests numbered 1 and 2." The purport of counsel's request and of his exception was therefore, not that the court should charge in the form of a written instruction, but that the substance of the written requests should be stated as the law to the jury, without regard to any particular form. Argument of the case was waived by defendant. The court then charged the jury orally. After the judge had delivered his charge, counsel for the defendant

for the first time stated that he took exceptions "to the oral instructions given by the court and the refusal of the court to charge the jury in writing." But, as said, the only request made before argument to the court having been that the jury should be charged "according to the defendant's written requests numbered 1 and 2," plaintiff cannot now urge that his rights were prejudiced by the omission of the court to deliver a written charge. Under no circumstances, however, could the plaintiff in error have been prejudiced by the failure of the court to charge the jury in writing, inasmuch as his two requests related entirely to the question of jurisdiction, which had been previously properly passed upon by the court in overruling his demurrer and plea in abatement.

We find no error in the record, and the judgment is affirmed.

BOTTS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 27, 1907.)

No. 1,406.

DISORDERLY HOUSE—PROSECUTION FOR KEEPING—PROOF OF CHARACTER OF HOUSE.

Although Alaska Pen. Code, § 128, expressly makes common fame competent evidence in support of an indictment for keeping a bawdyhouse for purposes of prostitution, such evidence alone is not sufficient proof to warrant a conviction, but there must be some evidence that the house was in fact kept and used for such purposes. Such evidence need not, however, be direct, but may be circumstantial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 26–29.]

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

The plaintiffs in error, Lloyd Botts and James Haughey, were indicted by the grand jury of the District of Alaska for the crime of keeping a bawdyhouse for purposes of prostitution therein. The plaintiffs in error interposed pleas in abatement, alleging facts upon which the contention was made that the municipal court in and for the city of Nome, Alaska, had exclusive jurisdiction of the offense charged in the indictment, and that the District Court of the District of Alaska, Second Division, had no jurisdiction of said offense. Plaintiffs in error also filed demurrers to the indictment, raising the same questions of jurisdiction. The court overruled the pleas in abatement and the demurrers. Trial was had, and a verdict of guilty rendered. The plaintiffs in error were sentenced to imprisonment for the period of one year. This writ of error is prosecuted to obtain a review of the proceedings and rulings of the lower court, and to set aside the judgment of conviction, and to have the indictment dismissed and a new trial ordered.

W. H. Bard, James W. Bell, C. D. Murane, Hobbes & Bell, and James E. Fenton, for plaintiffs in error.

Henry M. Hoyt, U. S. Atty.

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

HUNT, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The same question of jurisdiction is presented by this writ of error that has been decided in the case of Rosencranz v. United States, 155 Fed. 38, and for the reasons announced in the opinion filed therein we affirm the action of the lower court overruling the pleas in abatement and the demurrers, and pass to the consideration of other points.

The record shows that the prosecution was conducted upon the theory that if the government proved that the reputation of the house situated upon the lot described in the indictment was that it was a bawdyhouse, and that if defendants as owners knew of such reputation, and with such knowledge received rentals from the occupant, they themselves became keepers of a bawdyhouse for purposes of prostitution, and were liable to punishment as such keepers. Upon this theory the court instructed the jury:

"That in all prosecutions for the offense of keeping a bawdyhouse, common fame or reputation is competent evidence in support of the indictment as to the character of the house. Therefore, if the house has the reputation of being a bawdyhouse or house of ill fame, beyond a reasonable doubt, that is sufficient to support a finding that it is such, if there is no evidence offered to the contrary."

The court refused to give in substance, or at all, an instruction requested by defendant that—

"under the statute common fame is made competent evidence of the character of the house in question, but reputation or fame alone is not sufficient evidence to warrant a conviction for keeping a bawdy house; there must be some other evidence showing that the house is actually used as a bawdyhouse for purposes of prostitution."

The question for decision, therefore, is whether evidence of the general reputation of a house is sufficient proof of its being bawdy and used for prostitution, or whether besides the ill repute of the house, some other evidence is necessary in order to justify the inference that it is bawdy. It is laid down that under the common law, evidence of the general reputation of the house would be inadmissible upon the issue of whether the house is a bawdy one. 14 Cyc. 503; State v. Plant, 32 Atl. 237, 67 Vt. 454, 48 Am. St. Rep. 821. But by statute, section 128, Alaska Code, "common fame" is expressly made competent evidence in support of an indictment such as we find in the present case. So that there is no room for contention that such evidence was inadmissible altogether, the point being, was it alone sufficient proof to sustain a conclusion that the house was in fact a bawdy one for purposes of prostitution? We must answer the question in the negative.

Undoubtedly there are some cases which hold that, where the evidence shows that a house is by general repute a bawdyhouse, the jury may find from such evidence alone that as a fact it is a bawdyhouse and used for immoral purposes. But where the offense charged is keeping a house of ill fame for purposes of prostitution, we believe there should be some evidence of the purpose or use for which the house was kept, besides that of common fame. If reputation alone is enough, then one may be tried and convicted of keeping a house commonly said to be a bawdyhouse for purposes of prostitution regardless of the question whether or not the house involved in the in-

quiry is in fact bawdy and used for such immoral purposes. On principle such a rule would be dangerous, and we must decline to approve it. There should be some additional evidence of the immoral purposes for which the house is kept; and, while it may not seem always easy to obtain testimony of such purposes, as a practical affair it ought not to be difficult, provided the reputation is based upon facts. The very same circumstances that have given a place its ill repute would ordinarily be ample additional evidence of the uses made of the house and the purposes for which it is kept. If men are seen going at unusual hours into a house where only women live; if obscene language and profanity are heard in the house; if drinking and boisterous conduct occur therein; if women clad in an unseemly way are about the premises; and if the women who live in the house are themselves reputed to be prostitutes—these are all circumstances which, when considered with the general reputation of the place, justify the conclusion that such a house is kept for purposes of prostitution. Drake v. State, 17 N. W. 117, 14 Neb. 535; State v. Steen, 101 N. W. 96, 125 Iowa, 307; State v. Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. St. Rep. 666; State v. Boardman, 64 Me. 523; Toney v. State, 60 Ala. 97; 14 Cyc. 510; Greenleaf on Evidence, § 186. These views dispose of the case, and necessarily lead to a reversal because of substantial error in the charge of the court.

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

HALL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 27, 1907.)

No. 1,405.

DISORDERLY HOUSE—PROSECUTION FOR KEEPING—PROOF OF CHARACTER OF HOUSE.

Although Alaska Pen. Code, § 128, expressly makes common fame competent evidence in support of an indictment for keeping a bawdyhouse for purposes of prostitution, such evidence alone is not sufficient proof to warrant a conviction, but there must be some evidence that the house was in fact kept and used for such purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Disorderly House, §§ 26–29.]

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

Plaintiff in error, defendant below, was tried and convicted under an indictment charging him with keeping and setting up a bawdyhouse for purposes of prostitution within the limits of the town of Nome, Alaska, the indictment being framed under section 127, tit. 1, of the Act of Congress, approved March 3, 1899, 30 Stat. 1272, which provides that if any person shall keep or set up a house of ill fame, brothel, or bawdyhouse for the purpose of prostitution, fornication, or lewdness, such person upon conviction thereof shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than $100 nor more than $500. Defendant sued out a writ of error, and has assigned errors based upon rulings of the lower court and the instructions given to the jury.

Jas. W. Bell, C. D. Morane, Hobbes & Bell, A. H. Elliot, W. H. Bard, and James E. Fenton, for plaintiff in error.

Henry M. Hoyt, U. S. Atty.

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

HUNT, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Plaintiff in error first presents the same question of jurisdiction that we have considered and decided in the case of Rosencranz v. United States, 155 Fed. 38; Hornstein v. United States, 155 Fed. 48, and Botts v. United States, 155 Fed. 50. Upon the authority of those decisions we hold that the District Court for the District of Alaska had jurisdiction of the case, and that it properly overruled the plea and demurrer.

In this case, as in that of Botts and Haughey v. United States (just decided by this court) 155 Fed. 50, error is assigned upon the charge of the court that, "in all prosecutions for the offense of keeping a bawdyhouse, common fame or reputation is competent evidence in support of the indictment as to the character of the house. Therefore, if the house has the reputation of being a bawdyhouse or house of ill fame beyond a reasonable doubt, that is sufficient to support a finding that it was such, and if there is no evidence offered to the contrary. * * *" This was an erroneous statement of the law, as we have shown in the case of United States v. Botts and Haughey, supra, in that it authorized a conclusion upon one of the essential elements of the charge against the defendant upon a quantum of proof less than the law demands. It is not possible to regard the error as cured or without prejudice. The jury were not only directed that they could predicate a finding upon the measure of proof prescribed by the instruction, but the evidence in the record shows that proof of the reputation alone of the house alleged to have been kept by defendant was relied upon as sufficient, and that no evidence of use or purpose other than reputation was considered necessary.

Moreover, the plaintiff in error requested a charge that reputation or fame, while competent, was by itself "not sufficient evidence to warrant a conviction for keeping a bawdyhouse; there must be some other evidence showing that the house is actually used as a bawdyhouse"; but the court, consistent with its rulings throughout the trial, refused so to charge. Inasmuch as our opinion in United States v. Botts and Haughey, supra, covers the point under consideration, we do not deem it necessary to repeat the views we there laid down. We advise that upon a new trial the court reform its definition of a reasonable doubt so as to avoid the double definition which was given substantially in language which was criticised by this court in Owen v. United States, 130 Fed. 279, 64 C. C. A. 525.

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

NEW AMSTERDAM CASUALTY CO. v. SHIELDS.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1907.)

No. 1,658.

1. INSURANCE—ACTION ON ACCIDENT POLICY—QUESTIONS FOR JURY.
The question whether appendicitis, which caused the death of an insured, was caused by an accident or was the result of a diseased condition existing prior to the accident, *held* properly submitted to the jury, where the testimony of physicians testifying as experts was conflicting.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1745.]

2. SAME—ACCIDENT INSURANCE—CAUSE OF DEATH.
In an action to recover for the death of an insured upon an accident policy which provided that "loss of life by accident as used in this policy shall be deemed to mean death from bodily injuries * * * which independently of all other causes are effected solely and exclusively by external and accidental means and which shall result in the death of the assured," it was shown that the insured while riding in a buggy was thrown against the dashboard, striking his abdomen; that the same night he complained of pains, and five days later was operated on for appendicitis, and a week after the accident died from septic peritonitis which resulted from appendicitis. Ten or twelve years before he had twice had appendicitis, but apparently recovered. *Held*, that the jury were properly instructed that if the insured had fully recovered from the former attacks, so that the disease no longer existed in his body, and there was only a susceptibility to it if a proper exciting cause should arise, and the fall against the dashboard was such cause, the case would be one for recovery under the policy; but that if the disease still actually existed, and was liable to be and was in fact rendered active and virulent by the injury sustained, his death was the joint result of the injury and the latent disease, and there could be no recovery.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1186, 1779.
Accident insurance. Risks and cause of loss, see note to National Acc. Soc. v. Dolph, 38 C. C. A. 3.]

3. SAME—ALLOWANCE OF ATTORNEY'S FEES—TENNESSEE STATUTE.
The allowance of $1,000 attorney's fee to the plaintiff in an action to recover on an accident policy for $5,000 *held* within the discretion of the jury under Tenn. St. 1901, c. 141, p. 248, which authorizes such an allowance, not exceeding 25 per cent. of the liability on the policy, on a finding that the refusal to pay the loss was not in good faith.

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

Clarence T. Boyd, for plaintiff in error.
Walter Stokes, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit upon a policy of accident insurance issued by the New Amsterdam Casualty Company to Oliver H. Shields for the sum of $5,000, his wife, Julia M. Shields, being the beneficiary. The policy provided that in case of loss of life by accident the company would pay Julia M. Shields $5,000, and also for any surgical operation for appendicitis $100. While the policy was in force, on Thursday, September 7, 1905, Mr. Shields was driving in a buggy, when a front wheel ran off and he was thrown against

the dashboard, striking his abdomen. That night he complained to his wife of pain in his bowels, especially on the right side. The next day, Friday, he was at his office, and that afternoon spoke to his family physician, Dr. Wood, of the accident and of the soreness in his bowels. That night he was suddenly seized with severe cramping pains in the abdomen, nausea, vomiting, high fever, and rapid pulse. Dr. Wood could not be reached, so Dr. Ewing was called over the telephone and prescribed castor oil and morphia. On Saturday his condition was worse. Dr. Wood was sent for, and upon his arrival found the patient suffering severely from pains in the abdomen; had been vomiting, temperature high, pulse rapid and irritable, abdomen distended, and his right side very tender and rigid. On Sunday morning, Dr. Douglas, a surgeon of high reputation, was called in consultation by Dr. Wood. They diagnosed the case as acute appendicitis, and that afternoon removed the patient to Dr. Douglas' infirmary. The following Tuesday, September 12th, Dr. Douglas, with the assistance of Drs. Wood and Tigert, performed an operation. This disclosed that the trouble was acute appendicitis, septic peritonitis, and locked bowel. Mr. Shields died on Thursday, September 14th.

Obviously, the question of fact in the case was whether the fall against the dashboard of the buggy caused the attack of appendicitis which brought about the death of the insured. It appears that Mr. Shields had had two attacks of appendicitis 10 or 12 years before his final one. The physicians and surgeons who attended him during his last illness all testified that he died from acute appendicitis, complicated with septic peritonitis and locked bowel, and these diseases were the direct results of the injuries he received when he fell or was thrown against the dashboard of his buggy. On the other hand, three physicians and surgeons of prominence, living in Nashville, testified as experts that the fall of Mr. Shields could not have caused the third attack of appendicitis which resulted in his death, but that the immediate cause of his death was septic peritonitis as the result of chronic recurrent appendicitis. During the trial, the plaintiff below amended her declaration so as to claim the statutory attorney fee of not exceeding 25 per cent. of the liability on the policy. The jury rendered a verdict for $6,286.86, being the face of the policy, $5,000, and the interest thereon, $186,86, a surgical bill of $100, and the attorney fee $1,000. Two questions are raised, or sought to be raised, respecting the recovery of the face of the policy. It is insisted, in the first place, that the court should have directed a verdict for the defendant on the ground that the evidence did not justify the jury in finding that the attack of apendicitis which brought about the peritonitis and locked bowel, which ended in his death, was caused solely by his fall against the dashboard of the buggy; and, in the next place, that, even if the case was properly submitted to the jury, the instructions of the court were erroneous.

We are not disposed to go into a discussion of the evidence in the case. The surgeous were naturally divided in their views. Those who attended Mr. Shields were clear in the opinion that the attack of appendicitis which terminated fatally was caused by his fall against the dashboard of the buggy, and those who were called as experts

only, and gave their opinion upon a hypothetical case, were equally clear in the view that the attack of appendicitis was not caused by the fall, but that the septic peritonitis and locked bowel, which brought about his death, was occasioned by a crippled or diseased appendix, as the result of chronic recurrent appendicitis. Under the circumstances, in the conflict of testimony upon a vital point, the court submitted the matter to the jury, giving full instructions upon the law of the case. These instructions we shall now consider.

In them, the court, after directing attention to the pertinent provision of the policy, drew the distinction between a disease and a mere susceptibility to disease. The policy provides:

"Loss of life by accident as used in this policy shall be deemed to mean death from bodily injuries not intentionally inflicted by the assured, which independently of all other causes are effected solely and exclusively by external, violent and accidental means and which shall result in the death of the assured within ninety days of the event causing the injury."

In this case it is conceded that the disease of appendicitis, with its consequences and complications, caused the death of the insured, but the real question of fact lies farther back, and is, whether the fall against the dashboard, acting independently of any other cause, produced this disease. If the insured recovered from his former attacks of this disease, so that it no longer existed in his body, and there was only a susceptibility to have it in case a proper exciting cause should arise, and in this case the fall against the dashboard proved to be such exciting cause, the case would be one for recovery under the policy; but if because of the former attacks there was not merely a susceptibility to a further attack, but the actual disease itself existed, liable to be rendered active and virulent by an injury such as that suffered by the insured, in that event the active disease which resulted in death would not be regarded as the result of the fall alone, but as the joint result of the fall and the latent disease, and hence there could be no recovery under the policy.

The portion of the charge to which exception is especially taken is the following:

"Now, there is another phase of it: Now, if this man had an actually diseased appendix, if it was not merely a liability or predisposition on account of previous attacks, but an actual state of disease, then existing at the time, and this accident simply aggravated or hastened that disease or process, why then the defendant would not be liable under the authorities and under the interpretation of this policy. And if the death resulted in that way and from that cause, as the efficient thing, your verdict should be for the defendant. You want to distinguish, now, between a diseased state and a mere susceptibility.

"If the man previously, at any time in the last 10 or 12 years, had appendicitis, it is in accordance with the weight of the medical testimony before you that a man that has suffered in that way is more susceptible to another attack than a man that has never had an attack. Of course, it is presumably true, and is so, according to this medical testimony, that all of us carry with us some liability to an attack, owing to the fact that we carry this germ called the 'colon bacillus,' which is enough, so far as its name is concerned; but that is not a susceptibility, that is an ordinary condition. But if a man has had an attack or two it may make him more susceptible than a person who has never had an attack, just as a man who has had the influenza or the grip and has already got it in his throat, the result of that, although it may be cured for practical purposes, he may take another case

more easily than a man who has never had it. And other conditions are called 'susceptible conditions.' Now, that would not be a disease, provided the previous attacks had passed away and the man had become well, although he might, in consequence of that and of the condition of his system, have been more liable to have an attack provoked than a man who had never been in that condition. That would be a greater liability or a greater susceptibility."

In this charge the court seeks to draw the distinction between a disease which is caused by the accident and one which is not caused by the accident, but exists in the insured and co-operates with the accident to produce the ultimate injury. This case is not covered by such an accident policy. 1 Cyc. p. 262. To come within its terms, if a disease plays a part, it must be in consequence of the accident. In Mutual Accident Assn. v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, the insured, by jumping from a platform to the ground, produced a stricture of the duodenum, which resulted in inflammation of that organ, from which he shortly died. The death was held to be the result of an accident and within the terms of the policy. In the case of Manufacturers' Accident Indem. Co. v. Dorgan, 7 C. C. A. 586, 58 Fed. 945, 22 L. R. A. 620, decided by this court, the insured, who was fishing by a stream, fell into the water during a temporary indisposition and was drowned. It was held that death was accidental, and a recovery under the policy was sustained. Similar are the cases of Winspear v. Insurance Co., 6 Q. B. Div. 42, and Lawrence v. Accidental Ins. Co., 7 Q. B. D. 216. In the first, the insured, while fording a stream, was seized with an epileptic fit, fell into the stream and was drowned; and in the second, the insured, while standing on a railway platform, was seized with a fit, fell from the platform across the track, and was run over and killed by a passing train.

If, however, instead of placing the insured in a position where he suffers from another accident, as in the cases we have described, the first accident brings about a disease, the company is liable for death caused by such disease. Thus, in the case of Delaney v. Modern Accident Club, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603, the insured, in friendly scuffle, had his finger cut by a steel eraser. Erysipelas and blood poisoning followed, with death. The court held that the disease was not concurrent with the injury, but was a natural result of it, and that the resulting death was solely due to the injury and not to any independent cause. In McCarthy v. Travelers' Ins. Co., 8 Bissell, 363, the insured, while exercising with Indian clubs, ruptured a blood vessel in his lungs, so that inflammation set in and death ensued. The jury, under instructions, found that the injury to the lungs produced a disease which resulted in death. In the case of Freeman v. Mercantile Accident Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 735, the insured died of peritonitis localized in the region of the liver and induced by a fall. He had previously had peritonitis in the same part, and the disease had produced effects which rendered him liable to its recurrence. The presiding justice said to the jury:

"The question as to whether peritonitis, if that caused his death, is to be deemed a disease within the meaning of this policy, and the proximate cause of death within the meaning of this policy, so as to prevent a recovery, depends upon the question whether or not before the time of the fall, and at

the time of the fall, he had then the disease—was then suffering with the disease. If he was, then in the sense of the policy, although aggravated and made fatal by the fall, he cannot recover. But if, owing to existing lesions caused by that disease, but not having the disease at the time, the same kind of malady—that is, peritonitis—was started up, the company are to be answerable, although, if there had been a normal state of things the fall would not have occasioned such a result." 156 Mass. 354, 30 N. E. 1013, 17 L. R. A. 735, citing cases.

Many other cases might be cited. The conclusion we reach is that the court below properly submitted to the jury the question whether the disease of appendicitis, which brought about the death of the insured, was itself caused solely by the fall against the dashboard.

Since we have already held that the jury acted within its province in finding that the death was accidental, within the meaning of the policy, we necessarily sustain the court below in directing a verdict for the surgical fee of $100 provided in the policy for the operation for appendicitis. And we do not feel disposed to disturb the verdict for $1,000 attorney fees. The statute of Tennessee of 1901, c. 141, p. 248, gives the court power to impose as a penalty a sum not exceeding 25 per cent. of the liability on an insurance loss, where it is satisfied that the refusal to pay the loss was not in good faith, and that additional expense upon the policy holder has been inflicted as a result. The constitutionality of this act has been sustained by the highest court of Tennessee, upon the authority of numerous decisions of the Supreme Court of the United States. Insurance Co. v. Whittaker, 112 Tenn. 151, 171, 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916. We are not disposed to quarrel with the action of the court and jury in the exercise of the discretion imposed by this statute.

Judgment affirmed.

WAITE v. PRESS PUB. ASS'N.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1907.)

No. 1,639.

LOTTERIES—GUESSING CONTEST—VALIDITY.

A guessing contest prior to the presidential election of November, 1904, by which defendant agreed to give $10,000 to the person who would make the nearest correct estimate of the total popular vote to be cast for the office of President of the United States, on November 8, 1904, and $5,000 for the second nearest correct estimate, persons filing guesses being required to pay small sums as a subscription to a periodical named in the advertisement, constituted a lottery in violation of the federal laws and also of Comp. Laws Mich. § 11,344, providing that every person who shall set up or promote within the state any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels, or merchandise, or any valuable thing, by way of lottery or gift enterprise, shall be punished, etc.

[Ed. Note.—What constitutes lottery, see note to MacDonald v. United States, 12 C. C. A. 346.]

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

Bernard B. Selling, for plaintiff in error.
George B. Perry, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This case involves the validity of what is popularly known as a "guessing contest." It was inaugurated by the publication, prior to the election to be held on November 8, 1904, for President of the United States, of certain advertisements by the Press Publishing Association, the defendant below, in which certain rewards or prizes were offered to those persons who, prior to such election, should submit to the Press Publishing Association the nearest correct estimates of the total popular vote to be cast for the office of President of the United States, on the day of the election, and at the same time should pay a certain sum as the subscription to the periodical named in the advertisement. The suit was brought to recover the sum of $10,000 offered for the nearest correct estimate, and the sum of $5,000 offered for the second nearest correct estimate of such vote, the two persons who, under the terms of the advertisements, submitted these estimates, having assigned their rights to the plaintiff. The correct total popular vote cast for the office of President of the United States on the 8th day of November, 1904, was 13,525,595. On or about November 1, 1904, one John Ruf, Jr., a citizen of the state of Illinois, submitted to the Press Publishing Association, as his estimate, 13,525,606, and along with it paid the sum of $5, being his subscription to a periodical mentioned in the advertisement. On or about June 6, 1904, one E. T. Battrick, a citizen of the state of Ohio, submitted to the Press Publishing Association, as her estimate, 13,525,608, and along with it paid the sum of $2 as her subscription to a periodical mentioned in the advertisement. The estimate submitted by John Ruf, Jr., proved to be the nearest correct estimate of such total popular vote, and that submitted by E. T. Battrick the second nearest correct estimate, and, according to the terms of the advertisements, the first was entitled to the reward of $10,000, and the second to the reward of $5,000. Suit was brought by the plaintiff as assignee of the successful estimators, and was decided by the court below upon the statement of counsel for the plaintiff in which were embodied the foregoing facts. The court held that the scheme outlined, which provided for the distribution of large sums of money dependent upon the nearest correct estimates of the total popular vote for President, was in the nature of a lottery, or gift enterprise against the policy of the laws of the United States, and in violation of the laws of Michigan.

Several years ago it was a doubtful question whether a so-called guessing contest was valid or not. Three Attorneys General of the United States (Miller, Griggs, and Knox), had, in formal opinions, sustained the validity of similar contests, and, following them, Judge Thomas, in the case of United States v. Rosenblum (C. C.) 121 Fed. 180, had refused to hold such a contest illegal, and had sustained a demurrer to an information against the president of a corporation then engaged in carrying on one. These rulings were in accordance with the trend of authorities in this country and England, the cases being

cited in the opinion of Judge Thomas (C. C.) 121 Fed. 182. The exception to be noted was the case of Hudelson v. State, 94 Ind. 426, 48 Am. Rep. 171, in which the Supreme Court of Indiana held that a contest dependent upon the guessing of the nearest to the number of beans contained in a glass globe was a lottery or gift enterprise. The cases which sustained the validity of the various guessing contests all held that, since the correct number either did or would exist, more or less skill and judgment could be exercised in guessing it, and therefore the estimate of the nearest number to the correct one could not properly be considered a matter of mere chance. On the other hand, in the Hudelson Case, the court, for the first time, drew attention to the fact that, while the number of beans in the glass globe would be fixed and definite, the ascertainment of that number could be nothing other than a mere matter of guessing, for it was impossible under the circumstances to ascertain the information upon which a correct estimate could alone be made. Subsequent to the decision in the Hudelson Case came that of the Supreme Court of the United States in Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, and People v. Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601. In the Coyne Case, the court sustained a fraud order issued by the Post-Office Department, directing the rejection of the mail of "The Public Clearing House" on the ground that it was a fraudulent scheme and constituted a lottery. It is unnecessary to describe the details of the scheme; the facts will be found in the opinion. The court, speaking by Mr. Justice Brown, disposes of the matter by saying:

"The scheme lacks the elements of a legitimate business enterprise, and we think there was no error in holding it to be a lottery within the meaning of the statute."

This case was followed by Pref. Mercantile Co. v. Hibbard (C. C.) 142 Fed. 877, decided by Judge Lowell.

In the Lavin Case, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601, the scheme provided for the distribution of money among those purchasers of certain brands of cigars who should estimate most closely the number of cigars of all brands upon which the government would collect taxes during the month named. Discussing what constitutes chance, Judge Cullen, speaking for the court, says (page 168 of 164 N. Y., page 754 of 71 N. E. [66 L. R. A. 601]):

" 'It is strictly and philosophically true in nature and reason that there is no such thing as chance or accident; it being evident that these words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely men's ignorance of the real and immediate cause. But though nothing occurs in the world as a result of chance, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation.' "

The court refers at some length to the Coyne Case, 194 U. S. 497, 24 Sup. Ct. 789, 48 L. Ed. 1092, and reaches the conclusion that the scheme before it falls far within the requisites of a lottery as defined in that case, under a statute very similar to the New York one. The two cases referred to, the Coyne Case and the Lavin Case, are cited by Attorney General Moody in his opinion of November 28, 1904 (25 Opinions of Attorneys General, 286), as authority for the reversal of the

opinions of his predecessors holding that "guessing contests" were not within the prohibition of the federal statutes. The schemes presented to Attorney General Moody for his decision were dependent, the one upon estimates of the total number of paid admissions to the World's Fair at St. Louis, and the other upon estimates of the total vote cast for President in 1904. The conclusions he reached were as follows:

"Conceding that the estimates in such a contest (the World's Fair contest) will be to some extent affected by intelligent calculation, the conclusion is, nevertheless, irresistible that it is largely a matter of chance which competitor will submit the nearest correct estimate. The estimates cannot be predicated upon natural and fixed laws, since the total number of admissions may be affected by many conditions over which the participants in this scheme have no control and cannot possibly foresee." Page 290.

And, again:

"Neither of these contests is a 'legitimate business enterprise.' In each thousands invest small sums in the hope and expectation that luck will enable them to win large returns. A comparatively small percentage of the participants will realize their expectations, and thousands will get nothing. They are, in effect, lotteries, under the guise of 'guessing contests.'" Page 291.

The last case to which we care to call attention upon the general question is that of Stevens v. Times Star, 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586. In this case, the Supreme Court of Ohio passed upon a number of guessing contests carried on by newspapers in Ohio. They involved the total vote for a state officer at a coming state election. Respecting the nature of these contests, the court said (page 150 of 72 Ohio St., page 1061 of 73 N. E. [106 Am. St. Rep. 586]):

"It is true that one acquainted with the results of the elections of the state in previous years and educated in politics would have some advantages over one ignorant in those respects, yet it must be apparent even to a casual observer that the result would depend upon so many uncertain and unascertainable causes that the estimate of the most learned would be after all nothing more than a random and undecisive judgment. In the sense above indicated there is an element of skill, possibly certainty, involved, but it is clear that the controlling predominating element is mere chance. It was a chance as to what the total vote would be; it was equally a chance as to what the guesses of the other guessers would be."

It only remains to consider whether this contest which clearly violated the federal laws and those of the states that we have mentioned also violated the laws of Michigan. The court below held it did. The Michigan statute (section 11,344, Comp. Laws 1897) provides that:

"Every person who shall set up or promote, within this state, any lottery or gift enterprise for money, or shall dispose of any property, real or personal, goods, chattels or merchandise, or valuable thing, by the way of lottery or gift enterprise, etc., shall be punished," etc.

In the case of People v. Elliott, 74 Mich. 264, 267, 41 N. W. 916, 3 L. R. A. 403, 16 Am. St. Rep. 640, a lottery was defined as "a scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished." The scheme used in this

case was what is called "policy." The court held it was "the obtaining of money or property by such means that our statute was intended to prevent and punish," and constituted a lottery.

In the case of People v. McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505, it was held that a so-called "Tailor Suit Club," the members of which contributed $1 each per week and had weekly drawings, through which a member might have received a suit of clothes costing about $20 for $1, was a lottery under the Michigan law. Respecting this scheme, the court said (page 693 of 139 Mich., page 176 of 103 N. W. [69 L. R. A. 505]):

"It was calculated to, and did, appeal to the gambling propensity of men, was within the mischief at which the legislation is aimed, was within the terms of the statute, and, in our opinion, a disposition of property by way of lottery."

We think, for the reasons given by the courts in the cases from which we have already quoted, the guessing contest before us came within the terms of the Michigan law and the mischief at which it was aimed. At the time the estimates on which this suit is based were submitted, the vote was yet to be cast; indeed, on June 6, 1904, when the Battrick estimate was sent in one of the leading candidates for president had not yet been nominated. The number of persons who would be qualified to vote at the election, and the number who would cast votes which would be counted, were not only undetermined but impossible of ascertainment at the time the estimates were submitted. A thousand causes might, in one way or another, intervene to affect the total vote cast, so that at the best an estimate, if at all near the total vote cast, would be but a lucky guess. In so great a vote the necessary margin of chance would be so large that no element of skill or experience could operate to predict the result. While one skilled in national politics and conversant with existing conditions might make a closer estimate than one wholly ignorant, yet, after all, the successful persons in such a contest would be but makers of lucky guesses in which skill and judgment could play no effective part.

The judgment of the lower court is affirmed.

NATIONAL STEEL CO. v. HORE

(Circuit Court of Appeals, Sixth Circuit. June 15, 1907.)

No. 1,632.

1. MASTER AND SERVANT—INJURY OF SERVANT—ASSUMPTION OF RISK.

To defeat recovery for an injury to a servant by the defense of assumption of risk, the master must show not only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself by reason of such negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 575.]

2. SAME.

A copper water block in the wall of a blast furnace being operated by defendant blew out, and plaintiff, who was a plumber's helper in defend-

ant's employ, was injured by the molten metal which escaped. The block, which was embedded in the wall, had become leaky, and preparations had been made to remove it, which could only be done when the blast was off. After much of the cement packing which held it in the wall had been removed, it was decided to allow it to remain for some hours, until the next blast should be off, in order to make repairs to the water system, which had also become defective at the same time. When the removal was about to be made, and while the furnace was still being operated, plaintiff was ordered upon a platform near the block to shut off the water, when the block was pulled, and was there when it blew out. *Held* that, although plaintiff knew of the defective water system, that the furnace was in full blast, and that a part of the packing had been removed from around the block, it could not be said as matter of law that he assumed the risk arising from such conditions, where it did not appear that he knew the dangers therefrom, or that his experience had been such that he should have known that there was danger that the block would blow out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068, 1077.

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

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

James C. Tallman, for plaintiff in error.

Fred S. Gates, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. By the sudden blowing out of a copper water block in the wall of one of the blast furnaces operated by the National Steel Company, John Hore, a plumber's helper, in the employment of the company, sustained severe injuries, for which he has recovered a judgment.

The facts essential to be stated are these: One of these blocks became leaky, and, preparatory to pulling it out to replace it with another, the plaintiff, John Hore, was directed by the manager of the furnace to ascend to a small platform, conveniently placed for removing this block, for the purpose of being ready to disconnect the iron water pipe which supplied it with water. Almost immediately upon his reaching his proper place, and before the blast had been shut off, this block blew out, and the molten contents of the furnace were ejected with great force in every direction.

These water blocks were hollow blocks of copper placed in many places in the wall of the furnace, through which, for the purpose of cooling the walls, a constant circulation of cold water was maintained. There was evidence tending to show that a water block could be pulled only when the blast was off, and that it was usually done when the blast was off for making a cast. Preparation for removing this block at the 9 o'clock morning cast had been made by removing much of the cement packing which held it in the wall and by giving direction to the plumber and his helper, Hore, to be ready then to disconnect the water pipe connections. There was evidence tending to show that not long prior to 9 o'clock it was reported to the manager that the filter in the water tank was clogged, and the brush, which was the mechanism

used for cleaning it, had gotten out of repair and would not operate. Thereupon the manager directed that preparation should be made for repairing the water system at the 12 o'clock cast, and the pulling of this water block postponed until then, that both jobs might be done when the blast should be shut off at 12 o'clock. The petition avers that it was negligent to keep the hot air blast on with a defective water circulation through a water block thus weakened by the cutting away of the cement casing which held it in place.

The case has been made to turn in the argument here chiefly upon the question as to whether Hore did not assume all the risks incident to assisting in the removal and replacing of this water block. This defense was made by demurrer to the petition, by request for a peremptory instruction, by request for special charges bearing upon the doctrine of assumption of risk, and by exceptions to parts of the charge as delivered. The demurrer was rightly overruled.

The petition does not deny that plaintiff knew that the water system had broken down, that the packing had been in part removed from around this block, nor that the furnace was being operated under full blast, when in obedience to the order of the master he took his place near this water block to disconnect its water connections. But it does aver that he was "ignorant of the danger" resulting from this state of facts. Now, knowledge of the conditions which surround the doing of a thing by a workman does not always imply knowledge of the dangers which confront him. The fact known, the defect which he sees, or should see if ordinarily observant, may present dangers so obvious that the law will conclusively presume that he did know the danger; no other inference being reasonable. Indeed, the inference in some circumstances is so strong that the denial of appreciation will be of no avail, for the law will say: "You should have known if you had been reasonably attentive to your own safety." Cooley on Torts, 1042 (3d Ed.), and cases cited. Cases in which this court has indulged the presumption of a voluntary assumption of risk are not rare in our opinions. See Detroit Crude-Oil Co. v. Grable, 94 Fed. 73, 36 C. C. A. 94; Railroad Co. v. Hennessy, 96 Fed. 713; Narramore v. Cleveland, etc., Ry. Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; Kenney v. Meddaugh, 118 Fed. 209, 55 C. C. A. 115; and Riley v. Louisville & Nashville R. R. Co., 133 Fed. 904, 66 C. C. A. 598. See, also, Reed v. Moore & McFerrin, 153 Fed. 358, and Coal Creek Co. v. Davis, 90 Tenn. 715, 716, 18 S. W. 387.

In the Grable Case, cited above, the contention was that, while the plaintiff might know of the defect by which he was hurt and be chargeable with knowledge of danger therefrom, "he did not anticipate being hurt in the way he was," and therefore a risk not assumed by the plaintiff. But in that case it appeared that the defect was known to the plaintiff and had been complained of. The court also found that the plaintiff was a mature and experienced man, and the danger to be apprehended presumably better known to him than the master. This court therefore said:

"When the defect is known, and the danger apparent, it is immaterial that the servant does not anticipate the precise extent or character of the injury which may result. None of the authorities upon the subject put the rule of

assumption of risks upon the narrow distinction that the servant may know of the danger, but not fully realize the extent or character of the injury which may be sustained."

On the other hand, this court has more than once held that the question whether one had knowingly assumed the risk of a particular defect was dependent upon the particular circumstances of the case, and, when more than one inference might be drawn, reasonably, it was a question for the jury. Valley Ry. Co. v. Keegan, 87 Fed. 849, 31 C. C. A. 255; Felton v. Girardy, 104 Fed. 127, 43 C. C. A. 439; Mason, etc., Ry. Co. v. Yockey, 103 Fed. 265, 43 C. C. A. 228; and Choctaw, etc., Ry. Co. v. McDade, 112 Fed. 888, 50 C. C. A. 591.

In the Keegan Case we said:

"Before a court is authorized to presume, as matter of law, that an employé accepts the dangers incident to defective machinery or roadbed, it must appear that he accepted employment with actual knowledge of such defect and its dangers, or that he continued in the service after he acquired knowledge, or by due care and reasonable attention might have known of the danger. To justify a presumption of knowledge, the defect must be obvious and its danger equally plain to one at all attentive. The facts here do not make a case where the court could justifiably say that Keegan's ignorance of the dangerous character of this space in the roadbed was unjustifiable in law, and his acceptance of the risk presumed."

The fact that plaintiff was a mature man and had had some experience about this furnace might well charge him with the assumption of the ordinary risks of his employment, including those which might ordinarily inhere in the replacement of a leaky water block. But the facts stated in the petition present a concurrence of circumstances which might or might not indicate danger that the block might blow out. It was the duty of the plaintiff in error to guard against such accidents as could be foreseen as liable to occur by the exercise of reasonable care, and the defendant in error had a right to assume that the master had not unreasonably and negligently subjected him to danger that this block would blow out. To assume as matter of law that a common laborer, such as Hore was, should have known that there was this danger from the facts known to him, is going too far. To determine the effect of the conditions known to him in producing hazard, not ordinarily incident to his service in aiding in the disconnection of the water pipes supplying the block to be removed, would require a skill and judgment which ought not to be attributed, as matter of law, to one who is described in the petition as a plumber's helper and whose experience about such work does not appear.

To defeat an action by the defense of assumption of risk, the employer must show not only that the servant knew of the negligence of which he complains, but that he knew and understood, or ought to have known and appreciated, the increased danger to which he voluntarily exposed himself. There is a distinction between knowledge of defects or knowledge of alleged negligent acts, and knowledge of the risks resulting from such defects or acts. In Cooley on Torts (3d Ed.) 1048, the rule is stated in these words:

"It is essential to the assumption of risk, not only that the servant shall know the defect out of which the danger arises, but that he should appreciate

the danger, or that the danger should be manifest to a man of ordinary intelligence and experience in the line of work in which the servant is engaged."

This is in accord with the great weight of authority. Welle v. Celluloid Co., 175 N. Y. 401, 405, 67 N. E. 609; Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232; Thomas v. Quaterman, L. R. 18 Q. B. Div. 1886–87, 685, 696 et seq.; Clark v. Holmes, 7 H. & N. 937, 949; Moylon v. McDonald, 188 Mass. 499, 74 N. E. 929; McDonald v. Champion Iron Co., 140 Mich. 401, 103 N. W. 829; and Hartrich v. Hawes, 202 Ill. 334, 67 N. E. 13.

Neither was there error in refusing to instruct the jury that under the facts the plaintiff had assumed the risk of the danger that this water block would blow out. The case was a somewhat close one upon the facts; but there was evidence that the plaintiff had had but a short experience about such a blast furnace as this was, though he had had a long experience about a puddling furnace and rolling mills as a common laborer. We are not prepared to say that the court erred in letting the case go to the jury upon this matter.

The assignments based upon the refusal of the court to give certain requests which were made by the defendant were grounded upon the theory that plaintiff's knowledge of the conditions necessarily involved knowledge of the danger that under such conditions this block might blow out. We need not go over this matter again. The ruling upon the demurrer covers this matter as well as the exceptions to the charge as given, which was the converse of these requests. The case in respect to the points not involved in the doctrine of assumption of risks is substantially identical with National Steel Co. v. Lowe, 127 Fed. 311, 62 C. C. A. 229. This accident and the injury to Lowe occurred at the same time, and the trial judge applied the principles determined in that case to this. The assignments of error which raise questions there decided are overruled upon the authority of that case.

Judgment affirmed.

NOTE.—The following memorandum was filed in the clerk's office of the District Court in this cause on overruling the motion for a new trial:

The evening before the accident, Thomas, the general superintendent, directed Chisholm, the plumber, to be ready to take the block out the next morning, and during the night a part of the packing about the block was removed, and the next morning Chisholm disconnected the pipes and put gum hose in their place, and afterwards told Thomas that the brush on the strainer in the water tank "had become disconnected," and Thomas then postponed the removal of the block from 9 o'clock to 12 o'clock a. m., saying that he would "fix both things at 12 o'clock," the brush and the block. In the meantime the platform 4 or 5 feet high had been erected to enable the men to reach the block, and the necessary appliances for its removal were provided. Thomas, the general superintendent, was present supervising the work. The situation was described by the plaintiff on the witness stand, as follows: "At the 12 o'clock cast we were standing around there by the orders to get ready; each man at his post ready to go to work. * * *" And Thomas said: "Now then, John, you and Bogus go up there and get ready to break that connection." In obedience to that order the plaintiff got on the platform, and in a minute or two the explosion took place. Thomas supervised the work from the beginning to the end. The accident was not caused by the negligence of the fellow servants of the plaintiff. It was not caused by the fact or the manner of the removal of a part of the mortar packing, nor by any unskillfulness in the repair of the water apparatus, but was caused by the negligence of the master in delaying

the repair of the water apparatus and the removal of the water block until 12 o'clock the next day, in the meantime continuing the operation of the furnace in full blast, thereby subjecting the block, in its weakened condition, to the constant pressure from within the furnace which finally drove it out after the heat of the furnace had burned its end off, and had softened the mortar packing which had not been removed the night before. The water supply having failed, and no other means having been provided for keeping the block cool, the heat of the furnace burned its end off and necessarily tended to soften the mortar packing and weaken its resistance to the pressure from the furnace. Only the master could suspend the operation of the furnace, only the master could direct the removal of the block and fix the time for its removal, and only the master could postpone the removal of the block so that the removal and the repair of the brush could be done at the same time, and clearly the negligence which caused the injury to the plaintiff was the negligence of the master, and not of his fellow servants.

The suggestion of counsel for the defendant that the explosion was caused by the introduction of cold water into the block is not supported by any evidence. Manifestly the end of the block had been burned off some time before the accident, and, in the condition in which it was left, the steam could not have been so confined as to cause an explosion. Besides, the testimony of Gabriel Redmond, upon which defendant relies, shows that his attention was called by a fellow servant, two or three minutes before the accident, to the fact that the water was not running through the discharge pipe leading to the block, but Redmond did not attempt to remedy the fault which prevented its flow, because, as he testified: "If I had, I wouldn't be here now." It was then too late to cool the block and his refusal to attempt to restore the flow of water, under the circumstances, was not an act of negligence.

But it is further claimed that two of the fellow servants of the plaintiff, in using a wrench shortly before the accident, put a strain on the block which contributed to or caused the accident. Whatever was done immediately preceding the accident was done in the presence of and under the supervision and direction of the general superintendent, Thomas, and the evidence does not show that these fellow servants acted upon their own initiative; but, if it be assumed that they did, and that what they did was an act of negligence which in any manner contributed to the accident, then the injury to the plaintiff was caused by the joint or concurrent negligence of these servants and the master, and the master is liable. Railway v. Cummings, 106 U. S. 700, 27 L. Ed. 266; Deserant v. Railway Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127.

If the water supply had been restored in the morning, or the block taken out at 9 o'clock of that morning, the accident would not have occurred. The master, by delaying the repair of the water apparatus and the removal of the block at the appointed time (9 o'clock in the morning), created conditions of danger unknown to these servants, which they, in making the customary preparations for its removal at 12 o'clock, might add to unwittingly. The situation therefore required the supervision of the master which was given it by the general superintendent, who represented the master.

The motion for a new trial will therefore be overruled.

LOUISVILLE & N. R. CO. v. FISHER.

SCOTT v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1907.)

Nos. 1,628, 1,618.

1. REMOVAL OF CAUSES—NONRESIDENCE OF BOTH PARTIES—CONSENT.
   A Circuit Court acquires jurisdiction of a suit by removal, although neither of the parties is a resident of the district, and the suit could not originally have been brought in that court, where the plaintiff fails to object in any way to such removal, and submits to trial on the merits.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 203.]

2. CARRIERS—CARRIAGE OF PASSENGERS—PERFORMANCE OF CONTRACT.
   A railroad company cannot be held answerable to a passenger in damages because of matters which are ordinary incidents of travel, such as exposure to drafts from windows opened by, or at request of, other passengers.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1087.]

3. SAME—ACCOMMODATIONS DURING TRANSIT.
   Plaintiffs purchased first-class tickets over defendant's railroad for passage between two points, and also tickets for a berth in a sleeping car between such points; such car being operated by another company and hauled under contract by defendant. At 3 o'clock in the morning, when some 45 miles from plaintiffs' point of destination, owing to a wreck beyond such point, the sleeping car was diverted and sent around over another road to its point of destination, and plaintiffs were required to transfer into a day coach for the remainder of their journey, which was made in about two hours. The car so provided was comparatively new and in good condition, and the only material complaint in regard to it was that it was filled with passengers, and the windows were kept open; the month being August, although the night was somewhat chilly. *Held*, that such facts did not establish a breach of the contract of carriage which rendered defendant liable in damages.

4. SAME—SLEEPING CAR COMPANY—CONTRACTS FOR ACCOMMODATIONS.
   A sleeping car company which sells accommodations in its cars between points on a railroad to passengers of the railroad company, the cars being hauled by the railroad company in its trains under a contract between the two companies, is not liable to a passenger for breach of contract because the car in which such passenger is riding is diverted by the railroad company on account of a wreck and does not reach the passenger's point of destination, in consequence of which he is compelled to change into another car.

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

John B. Keeble and E. T. Seay, for railroad company.
K. D. McKellar, for Fisher.
J. L. McRee, for Pullman Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Mrs. Anna M. Baldwin, an aged lady, and her daughter, Mrs. George Y. Scott, bought at Memphis, Tenn., from the Louisville & Nashville Railroad Company, tickets entitling them to first-class transportation from Memphis, Tenn., to Bowling Green, Ky., by a train leaving at 1 p. m. August 9, 1902, and due to

arrive at Bowling Green about 5 o'clock a. m. They also bought from the agent of the Pullman Palace Car Company at Memphis one sleeping car ticket entitling them to the use of one sleeping berth as far as Bowling Green. The route of this sleeper was between Memphis and Cincinnati. About 3 o'clock a. m. of the following morning they were awakened by the Pullman conductor at or near Guthrie, Ky., and told that in consequence of a wreck north of Bowling Green the sleeper would be detoured at Guthrie and carried by way of Nortonville and over the Illinois Central Railway; thence into Louisville; and thence to Cincinnati over the Louisville & Nashville. They were also advised that they could by an ordinary coach go on to Bowling Green, which would enable them to reach their destination in about two hours. Plaintiffs were thereupon given seats in a day coach, and arrived at Bowling Green about on time. Upon the facts of the case, alleging a breach of contract, separate actions were brought by each against the railroad company and the Pullman Car Company. Pending the suit of Mrs. Baldwin, she died, and her action was revived by her administrator, and her declaration amended so as to charge that her death was due to her wrongful removal from the sleeper to the day coach. Both suits were submitted to the same jury, who found for Mrs. Baldwin's administrator for $2,500 against the railroad company and for the railroad company against Mrs. Scott. In both cases, there was an instruction to find for the Pullman Company. The railroad company has sued out a writ of error in the one case, and Mrs. Scott in the other, and the cases have been heard together upon the same transcript.

A question of jurisdiction of the court below was suggested by the court growing out of the fact that the plaintiffs were citizens of the state of Mississippi, the Louisville & Nashville Railroad Company, a corporation of the state of Kentucky, and the Pullman Palace Car Company, a corporation of the state of Illinois. The suits were brought in the circuit court of Shelby county, Tenn., and removed into the Circuit Court of the United States for the Western District of Tennessee upon the application of the two defendant corporations solely upon diversity of citizenship. Thus the suits were not brought within either the district of the plaintiff or that of the defendants, and, not being a suit which might have been originally brought in the court to which it was removed, was not properly removable to that court from the state court. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150.[1] But the defendant corporations might and did waive any objection which they might have made to being sued in a district of which neither they nor the plaintiff were inhabitants, by themselves removing the suits, and the plaintiff submitted to the jurisdiction thus invoked by failing to object in any way to such removal and by submitting to a trial upon the merits. This consent by both parties to the jurisdiction takes the case outside the authority of Ex parte Wisner, and brings it under Central Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, which is recognized in the former case as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. Corwin Mfg. Co. v. Henrici Washer Co. (C. C.) 151 Fed. 938.

The question of the liability of the railroad company is the same in

[1] 51 L. Ed. 264.

each case, as the evidence was the same, and the ground of action identical. We consider the case of Mrs. Baldwin first.

In Tennessee, the statute provides that:

"Whenever the facts in the case entitle the plaintiff to sue for breach of contract, or at his election for a wrong or injury, he may join the statement of his cause of action in both forms or either." Shannon's Code Tenn., § 4439.

This is substantially what the defendant in error did, and while she states a contract, and sues for its breach, the gist of her action is the tort, the wrong and injury which arose out of the breach. The contract may in such cases be laid merely as the foundation of the duty which the defendant disregarded. Pouilin v. Canadian Pacific Ry. Co. (C. C.) 47 Fed. 858. Two distinct contracts are stated in the declaration, one with the railroad company, and the other with the Pullman Company. In one count there is the semblance of a statement of a joint contract, but the facts stated make it plain that the contract with each was distinct. The contract with the railroad company, as averred, is that it sold to the plaintiff "a full-rate ticket by which said railroad contracted to convey her in a first-class car all the way from Memphis to Bowling Green." The contract with the Pullman Company, as stated, is that she also bought a sleeping car ticket from its "agent at Memphis, paying full fare therefor, upon which ticket she was to receive sleeping car accommodations from Memphis to Bowling Green."

The court below instructed a verdict for the Pullman Company, and no writ of error has been sued out by Mrs. Baldwin's administrator against that company. We need not, therefore, consider its liability until we come to Mrs. Scott's writ of error to which it is a party. The only breach of the contract with the railroad company averred is in respect to the alleged failure of that company to carry her all the way to Bowling Green in a first-class car. That she was carried there is admitted, but it is averred she was removed from the sleeper in the nighttime and required to continue her journey in what is described as "an open car, in which were crowded men, women, and children, and in which all of the windows and doors were open." It is also said that:

"It seemed to have been an old car found somewhere along the company's line and for this supposed emergency, and was wholly different from the car in which the defendants had contracted to carry plaintiff to her destination."

It is then averred that the plaintiff was about 75 years of age, though she had enjoyed theretofore good health. That in consequence of exposure in this open car she contracted cold, and had been ill ever since. By the amended declaration it is charged that her death some 18 months afterwards was proximately caused by this "willful and wanton and unlawful conduct of the two defendants, in requiring her to change from a comfortable car in the manner stated to one where she was exposed as aforesaid and wholly unfit for the safety of herself." The evidence establishes that the train carrying the sleeper in which Mrs. Baldwin and Scott had secured sleeping accommodations was a train which ran between Memphis and Bowling Green. At the latter point the sleeper was taken by a train from New Orleans

and Nashville to Louisville and Cincinnati. In consequence of a wreck just beyond Bowling Green, it became necessary, in the opinion of the authorities, to detour this train at Guthrie, via Nortonville; thence, over the tracks of the Illinois Central Railroad, to Louisville. The sleeper contained quite a number of passengers for Louisville and points beyond. To accommodate the larger number, plaintiff and her daughter, whose destination was Bowling Green, were told of the situation and asked to take seats in the day coach, which would be sent through at once to that point. The distance was only some 45 or 50 miles, requiring a journey of something less than two hours. There was evidence that they were given an election to go around by Louisville in the sleeper, and thence back to Bowling Green by another train, or continue their journey with such accommodations as were obtainable under the conditions. It is not clear, however, that this was understood. We therefore lay this evidence aside, stopping only to observe that a journey to Louisville and then back to Bowling Green would have entailed something like 400 more miles of travel than to have gone direct to Bowling Green, and that it is not at all probable that these ladies would have for a moment agreed to such a circuitous route. It was undoubtedly inconvenient to be aroused from sleep at 3 o'clock in the morning and to change from a sleeper to a day coach, and it must be assumed that the change resulted in some comparative discomfort for the rest of the journey. But traveling is attended with more or less discomfort, and a temporary condition resulting from a wreck ahead compelled the carrier to either detour the only sleeper with the train, or procurable at the time, to accommodate the greater number, or to carry it on to Bowling Green for the accommodation of the two passengers destined to that point at the risk of greatly delaying and inconveniencing the greater number.

The question at last is whether the railroad company breached its contract by detouring this sleeper and thus necessitating a change into the day coach provided. We think not. The sleeper was the property of the Pullman Company, and was carried under a contract between that company and the railroad company. The Pullman Company sold sleeping accommodations to such persons as should be provided with railroad tickets. The railroad company neither sold nor received compensation for such accommodations, and its relation to the whole matter was under its contract with the Pullman Company, and no contract between Mrs. Baldwin and the railroad company is averred or implied, other than the contract to carry her in a first-class car to her destination. It was not therefore a breach of any agreement with Mrs. Baldwin to detour this sleeper under the conditions, provided she was given a seat in a safe and reasonably comfortable car, such a car as ordinarily furnished by well-managed railroad companies, to Bowling Green. There was hardly any dispute about the character of the car in which the plaintiffs finished their journey. The plaintiff, Mrs. Scott, described it in her evidence "as an open smoker," and that a "chill east wind was blowing through it." By "open" she meant that the windows were up. But she admits that she did not complain of this fact, and made no effort to have the windows put down, saying: "As a matter of course I could not control every

window in the car." The car was partitioned; one end being used as a smoker. But no smoking occurred while the plaintiffs used it. It was a comparatively new car, with comfortable upholstered seats. The substantial complaint is therefore limited to the fact that the windows in the car were up, or many of them, and the doors open; the car being a vestibuled car. The night had been very close and hot. Toward morning it grew chill; but it was an August night, and it would be somewhat unusual to find a car full of passengers who should, under such circumstances, unite in wishing all of the windows closed. The relation of a carrier to passengers is not that of an insurer. They must exercise a high degree of care in respect to all which concerns their safe transportation, but are only liable for negligence. When it comes to the mere incidents of their personal comfort or discomfort in the matter of open or closed windows, much must be left with the individual passenger. It would be a most unreasonable thing to hold a carrier answerable for the exposure of passengers to such drafts as are ordinarily an incident of travel. Passengers must be expected to exercise some judgment and discretion about the matter of open or closed windows and have some regard to the comfort of each other. Mrs. Scott understood this implied condition of travel, for she explains her failure to complain by saying: "I did not feel like I had the privilege of making every one in the car close their windows." This being one of the incidents, it is plain that the railroad company did not break its agreement to convey her in a first-class car by carrying her in one which had more or less of raised windows, especially as the plaintiffs gave the company no notice of special discomfort and no opportunity of locating them where they would be protected as far as possible, having due regard to the rights and comfort of others who might wish fresh air. See Edmunson v. Pullman Palace Car Co., 92 Fed. 824, 34 C. C. A. 382. Neither was there anything in the special circumstances which was likely to require any special attention. True, she was past 70, but she was veiled, and her age therefore not specially noticeable. She was accompanied by her daughter, Mrs. Scott, and the daughter testified that her mother was unusually active for her age and in good health.

The view we have taken of the case was presented to the court by one of the special requests presented by the railroad company, which was denied. That request was upon the plain and indisputable facts of the case applicable and should have been given. The thirteenth assignment of error is sustained for this reason. The request was in these words:

"Each of the plaintiffs alleges that she bought of the defendant, the Louisville & Nashville Railroad Company, 'a full-rate ticket, by which said railroad company contracted to convey her in a first-class car from Memphis, Tenn., to Bowling Green, Ky.' It is not alleged that the Louisville & Nashville Railroad Company agreed or obligated itself to furnish either plaintiff with any particular kind or make of car, or a sleeping car, or that it in any way became obligated to do so. If, therefore, you find that the said Louisville & Nashville Railroad Company furnished plaintiffs substantially a first-class car, then it has complied with its undertaking, and you will find for the defendant, the Louisville & Nashville Railroad Company."

The learned trial judge did, in substance, so instruct the jury; but he unfortunately coupled it with the condition that they should so find if the plaintiffs were given an option to go on with the sleeper to Louisville and then back to Bowling Green, or by the car which went direct to Bowling Green. It was immaterial, we think, whether such an option was or was not tendered, for passengers could hardly be concluded by declining a circuitous route of some 20 or 24 hours as against one of less that 2 hours in a coach such as they had a right to expect and require. In the view we take of the case it is not necessary to pass upon any of the other assignments.

We find no error of which Mrs. Scott can complain. The Pullman Company's implied contract was to afford Mrs. Scott sleeping accommodation in their sleeper to her destination, provided the railroad company would carry it. Duval v. Pullman Company, 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715. The Pullman Company did not detour it. That was the act of the railroad company, which, finding it could not be carried through by Bowling Green without great delay, undertook to carry it to its destination by a longer and different route, thereby serving the larger number. The utmost liability of the Pullman Company would be the difference between the schedule rate for sleeping car accommodations from Memphis to Guthrie and from Memphis to Bowling Green. The price of a ticket to each place was the same.

Judgment affirmed as to Mrs. Scott and reversed as to Mrs. Baldwin.

PAYNE v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1907.)

No. 1,627.

1. CARRIERS—PASSENGERS—TERMINATION OF RELATION.

A passenger on a railroad train alighted in the night at the town where he resided. The station, the town, and his home were all on the west side of the track, and the doors of the cars, which were vestibuled, were opened on that side. After his train had departed, he was killed by another train on a track to the eastward. *Held*, that he had ceased to be a passenger prior to his death, and the company at that time owed no duty to him as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 991–993.

Continuance of passenger relation, see note to Chesapeake & O. Ry. Co. v. King, 40 C. C. A. 437.]

2. DEATH—ACTION FOR WRONGFUL DEATH—QUESTIONS FOR JURY.

To justify the submission to the jury of a case brought to recover for the death of a person, alleged to have been caused by the negligence of defendant, there must be substantive proof not only of such negligence, but that it brought about the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 141.]

3. SAME—DEATH OF PERSON ON RAILROAD TRACK—EVIDENCE OF NEGLIGENCE.

In an action for wrongful death, it was shown that deceased was a passenger on a vestibule train on defendant's railroad, and alighted therefrom at night at the town where he resided. The station, town, and the home of deceased were all on the west side of the track, and the

doors of the train were opened on that side. On a side track to the eastward of the main track, a freight train was standing waiting for the passenger train to pass. After the latter had gone, the freight started, but a coupling broke, and the cars were separated some 30 feet before the front portion stopped, standing across a private crossing. The conductor and a flagman went back to the caboose with a lantern for a knuckle, walking along the west side of the cars. After the front part of the train had been backed up and coupled, the conductor passed forward to the engine on the same side of the cars, when he discovered the body of the deceased lying near the private crossing, on its back, with the feet to the west, and the head on the west rail, where it had been crushed by the wheels evidently when the cars were backed. There were no other injuries, and the clothing was not disarranged. The side track at the place of the injury was being moved, and the earth had been removed from between the ties, and it was unlighted. *Held*, that such facts would not warrant a finding that the death was due to such condition of the track, where all the evidence tended to show that the case was one of suicide, and, in any event, that deceased was a trespasser and guilty of such contributory negligence as to preclude a recovery.

4. RAILROADS—OPERATION—STATUTORY REGULATIONS—TENNESSEE STATUTE.
Shannon's Code Tenn. § 1574, subsec. 4, which requires every railroad company to keep some person on the locomotive always on the lookout ahead and to sound the whistle, apply the brakes, and employ every means to stop the train when any person, animal, or other obstruction appears upon the road, does not apply to a train which became uncoupled on a side track in depot grounds and was backing up to recouple.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 747.]

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

K. D. McKellar, for plaintiff in error.
Charles N. Burch, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This action was brought by the plaintiff to recover for the wrongful death of her husband, George Payne, who was run over and killed on the night of February 2, 1904, by a portion of a freight train of the Illinois Central Railroad Company, in the depot grounds at Dyersburg, Tenn. Payne lived in Dyersburg. Between 10 and 11 o'clock that night he arrived there from Paducah, Ky., on a vestibuled passenger train. A short time afterwards he was found dead on the side or passing track, then in use by a freight train bound north, which had been waiting for the south-bound passenger train, and was expecting to leave as soon as it arrived. Payne was killed by one of the portions of this freight train while being coupled together. The question raised below, and the only one in the case, is whether the proofs presented a case for recovery. The defendant submitted that no negligence on its part causing the accident was shown. This the court held and directed a verdict for the railroad company. Was the court correct in so holding?

The passenger train which Payne took reached Dyersburg between 10 and 11 o'clock that night. He was seen on the train, but no one observed him leave it. The train was vestibuled, and was going south. After the usual custom, the vestibules were opened on the west side. The station was located on the west side of the main track, and

so was the town and the home of the deceased. Payne was well acquainted with the town, had lived there for 18 years, was accustomed to railroad travel, and there was no occasion, so far as any one knew, for him to leave the train, except in the usual way, on the west side. When Payne arrived at the depot in Dyersburg that night, there was in the depot grounds, in addition to the main track, a side or passing track which lay to the east of the main track. Later the main track and the passing track were made into a double track. At the time of the accident there was a cut-off or switch connecting these two tracks, which was in process of removal; the gravel and dirt being taken out from between the ties.

The depot at Dyersburg was located between two crossings; the one on the south being a public crossing, and the one on the north a private crossing, used by persons having freight business with the railroad company. At the time the south-bound passenger train arrived at Dyersburg, a north-bound freight train was standing on the side or passing track, waiting for the passenger train to get out of the way. This freight train pulled into Dyersburg from the south at about 8 o'clock. It consisted of 28 or 30 freight cars. After its arrival, it was cut in two, leaving the rear cars south of the public crossing and the front cars (about 20 of them) north of it. This was done to permit the use of the public crossing. The private crossing to the north remained blocked by the cars which composed the front end of the freight train. Before the passenger train arrived, however, the front end of the freight had been backed and coupled to the rear cars, so the freight train was ready to pull out when the passenger train should leave. The freight train did not, however, start north until the passenger train left. When it started north, it had gone only about 30 feet, when, by the breaking of a knuckle, it became uncoupled and parted about five or six car lengths south of the private crossing. The train being equipped with air-brakes, which operated automatically, the rear cars were separated from the front not more than 30 feet. When the conductor discovered that the train had parted, he went back to the caboose for a knuckle. To get there he went along the west side of the passing track. He had his lantern and went by the point where Payne's body was subsequently found. So did the flagman, but neither saw a body. After securing a new knuckle in the caboose, the signal was given to the engineer to back. The cars composing the front end of the train were run slowly over the intervening space and the coupling effected. The conductor then proceeded north on foot to get to the engine and discovered Payne's body on the track, about two feet south of the private crossing. He had, in all probability, been run over when the front end of the train was backing in order to couple to the cars in the rear. The body was lying on the back, the head on the west rail of the east or passing track, and the body perpendicular to that track, stretching out toward the main track; the right hand was alongside the head, and was nearly severed, while the left hand was straight down alongside the body. The clothes were clean, there was no indication that the body had been rolled or dragged. The wheel had apparently passed over the mouth, and the lower part of the face was mashed to a pulp. There were no other injuries.

The negligence charged against the railroad company was: First, in negligently killing Payne when he was still a passenger, and when the company was under obligation to exercise a very high degree of care towards him; second, in negligently leaving a portion of the passing track, where the cut-off switch was located, unguarded and unlighted, when in a torn-up condition; and, third, in not taking the statutory precautions required by the law of Tennessee, when Payne was encountered as an obstacle on the track.

With respect to the first claim, it may be observed that the depot and the town were both on the west side of the track. The vestibules of the coaches were opened for passengers to alight on that side. The presumption is that Payne alighted on that side, and there is no evidence to the contrary. After thus alighting from the train, with a straight and unimpeded way into the town, and to his home, Payne ceased to be a passenger. No reason is given in the testimony, no explanation is offered, which would justify him either in alighting on the east side of the vestibuled train, or in crossing the west track and attempting to cross the passing track. When he was run over and killed on the passing track, his own train had pulled out and gone south, and his relation to it as passenger had long ceased.

The claim that the company was negligent in leaving the torn-up, cut-off track unlighted and unguarded is based, of course, upon the supposition that Payne stumbled and fell because of that condition, and was caught and run over by the freight train. This is pure conjecture. There is no proof whatever tending to support it; and there must be substantive proof not only that the defendant was negligent, but that the negligence brought about the injury, in order to justify the submission of the case to the jury. Looney v. Metropolitan R. R. Co., 200 U. S. 480, 26 Sup. Ct. 303, 50 L. Ed. 564; Carnegie Steel Co. v. Byers (C. C. A.) 149 Fed. 667; Moit v. Ill. Central R. R. Co., 153 Fed. 354.

The theory that Payne stumbled in the dark because of the torn-up track, and fell under the freight train, is not only without any support in the evidence, but refuted by it. The position of the body, the nature of the injuries, and the condition of his clothes, all indicate conclusively that he was not run down or dragged; but that he deliberately lay down with his head on the track. Payne had been a saloonist for many years and had lost his job by Dyersburg "going dry" the preceding summer. He had been suffering from the grip and was out of employment. He had been on an unsuccessful hunt for a job, and while away from home had talked and acted in a peculiar manner. He was identified by his cuffs, which were in his overcoat pocket. He had taken the precaution to write his name in pencil on them. The court cannot permit a jury to guess that in some way or other the death of a person was brought about by negligence, when the evidence all points to suicide. Payne never stumbled over the torn-up, cut-off track. He never started to cross it. He had no reason to and no design. The crossing there was private. It was blocked. His purpose ended with the nearest rail and the crushing wheels soon to pass over it.

The final point made by the plaintiff was that the railroad company omitted the statutory precautions it should have taken. But no stat-

utory precautions were demanded under the circumstances. Subsection 4 of section 1574, Shannon's Code, provides as follows:

"Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road the alarm whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident."

Our understanding is that the statute does not apply, and the precautions are not required, where the train is being made up in the depot grounds, as this one was. The movement which injured Payne was the slow backing movement preliminary to the final coupling up of the separated portions of the train. Cox v. L. & N. R. R. Co., 1 Shannon, Tenn. Cases, 475; Rogers v. R. R. Co., 136 Fed. 573, 69 C. C. A. 321; R. R. Co. v. Pugh, 95 Tenn. 419, 32 S. W. 311.

But if Payne did not deliberately lie down upon the track, he was guilty of such negligence in attempting to cross the passing track when blocked and in use by a freight train then being made up, as to plainly preclude a recovery. Under the circumstances, he was an intruder and trespasser. Besides, Payne was in a part of the station grounds where a passenger had no right to be, and the railroad company owed him no duty of precaution, unless his presence in that place was known to its employés, and this is not claimed.

Judgment affirmed.

LIMA LOCOMOTIVE & MACHINE CO. v. NATIONAL STEEL CASTINGS CO.

(Circuit Court of Appeals, Sixth Circuit. July 17, 1907.)

No. 1,652.

1. CONTRACTS—MUTUALITY.

Where plaintiff accepted defendant's proposition to furnish all plaintiff's requirements in steel castings for the remainder of the year, at prices mentioned, defendant was obligated to take from plaintiff all castings which their business should require, and the contract was therefore not void for want of mutuality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 32.]

2. CUSTOMS AND USAGES—WRITTEN CONTRACT—EXPLANATION—CONTRADICTION

While evidence of custom and usage is admissible to explain the meaning of words and phrases used in a written contract and to annex thereto certain incidents which circumstances indicate the parties intended, when the words used do not necessarily exclude the operation of such custom or usage, evidence thereof is inadmissible to contradict the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 34.]

3. CONTRACTS—PERFORMANCE—EXCUSE.

Nothing will excuse the performance of a contract, except an act of God or the public enemy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1409-1417.]

4. CUSTOMS AND USAGES — NONPERFORMANCE OF CONTRACT — ACCIDENT — UNAVOIDABLE DELAY.

Where plaintiff had knowledge that its furnace was working badly, and that normal results could not be relied on, at the time it contracted to

supply defendant's requirements of steel castings for the remainder of the year, the subsequent necessity to shut down its plant for repairs was not an "accident" or an unavoidable cause of delay, within a custom or usage among manufacturers of steel castings that all contracts are subject to the contingency of accidents and unavoidable delays.

5. CONTRACTS—DISCHARGE BY BREACH.

Plaintiff having contracted in April, 1902, to furnish defendant's requirements of steel castings for the remainder of the year, furnished the same until August 1st, when, because of the necessity of repairs, it was compelled to close its plant until November 19th, during which time defendant was compelled to withdraw its patterns from plaintiff and place them with other founders, having made arrangements on the best obtainable terms to obtain what plaintiff was unable to furnish. *Held*, that defendant was not bound to cancel such new contracts and return its patterns to plaintiff on notice given in October that plaintiff's plant would be in operation, ready to turn out work under the contract on or before November 19th.

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

Action upon account for goods sold and delivered, and cross-action for damages for breach of contract. Jury waived. The trial judge made a finding of facts and a general finding for the plaintiff for the full amount of the account and against the defendant upon its cross-petition.

On April 10, 1902, the National Steel Castings Company made in writing the following proposition to the Lima Locomotive & Machine Company: "Gentlemen: We make the following proposition for furnishing all your requirements in steel castings for the remainder of the present year at the prices mentioned below, f. o. b. cars at Montpelier, the terms to be thirty days net. You agree to furnish us on or before the 15th of each month the tonnage that you wish to order during the following month. We agree to fill your orders as specified to the amount of this tonnage, and to make such deliveries as you require." Then followed a schedule of steel castings and prices per pound. This was accepted in writing by indorsing thereon, at the foot of the proposition, "Accepted April 10, 1902," and duly signed by the Lima Company. This contract the defendant set out in its cross-petition and averred: First, that the castings for which the plaintiff had sued were ordered and supplied under this contract; second, that the plaintiff had failed and refused, though requested, to supply it with other castings necessary to meet the requirements of its business, and that defendant in consequence had been obliged to contract for same with other founders and had paid for the castings so procured $5,498.24 over and above the contract price with plaintiff.

The defenses to the cross-petition were: First, that the contract was void for want of mutuality; second, that the furnace of the plaintiff broke down through an "unavoidable accident," and the plant closed for repairs from about August 1 to November 19, 1902, and that for this reason the plaintiff was excused from carrying out its agreement, if valid, during that time, and that there was an universal custom among manufacturers of steel castings, well known to defendant, that all contracts were subject to the contingency of strikes, accidents, and unavoidable delays, and that this contract was entered into with reference to this custom; third, that notice was given the defendant that the furnace of the plaintiff would resume operation about November 19th, but defendant did not furnish plaintiff with patterns by which it might have supplied defendant's November and December requirements.

Henry W. Seney, for plaintiff in error.

Lloyd Williams, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

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

1. We find ourselves unable to agree with the learned circuit judge in respect to the nonmutuality of the contract by which the plaintiff agreed to supply all of the "requirements" of the defendant's business for the remainder of the year 1902. The defendant was engaged in an established manufacturing business which required a large amount of steel castings. This was well known to the plaintiff, and the proposition made and accepted was made with reference to the "requirements" of that well-established business. The plaintiffs were not proposing to make castings beyond the current requirements of that business, and would not have been obligated to supply castings not required in the usual course of that business. By the acceptance of the plaintiff's proposal, the defendant was obligated to take from the plaintiff all castings which their business should require. The contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties. The second and third paragraphs must be read in the light of the first. Thus read, there is no ground for doubting that the words the "tonnage you wish to order," and "such deliveries as you may require," have reference to the established "requirements" of the business for the following "month," and the deliveries of the tonnage thus estimated. The contract falls under and is governed by the case of Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C C. A. 220, 61 L. R. A. 402, where the contract was to sell to a manufacturer of fertilizer "its entire consumption of phosphate rock" for a term of five years. In that case we held that the contract was mutual, and the buyer under obligation to take its entire requirement of phosphate rock from the seller. Concerning the definiteness of such a contract, we said:

"A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise."

To the same effect and directly in point are the cases of Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, and Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218.

2. Among the findings of fact was the following:

"(19) Throughout the United States it is a custom among manufacturers of steel castings, such as were to be manufactured for defendant by plaintiff, to make all agreements contingent upon strikes, accidents, and other unavoidable delays, and all contracts for the manufacture of such castings were made with reference to and conditioned upon such custom, which said custom was well known to defendant when said agreement was entered into, and was made with reference to said custom."

The court also found that the contract itself was contained upon the printed letter head of the plaintiff, which, among other things, had printed thereon these words: "All agreements contingent upon strikes, accidents and other unavoidable delays, beyond our control."

Nothing is better settled than that it is not admissible to contradict a contract by evidence of custom or usage, but admissible to explain the meaning of words and phrases used and to annex to such contracts certain incidents which circumstances indicate the parties intended to annex when the words they have used do not necessarily exclude the operation of such custom or usage. Lillard v. Kentucky Distilleries & Warehouse Co., 134 Fed. 168, 174, 67 C. C. A. 74.

That nothing will excuse the performance of a contract except an act of God or the public enemy is equally clear. Whether the plain agreement to supply the defendant with all the castings which its business should require is not contradicted by a custom or usage which would excuse the performance upon the contingency of a strike or accident is a very grave question, and one which we pretermit because we do not find that the plaintiff was prevented from performing its contract by the occurrence of any accident or other contingency included by the alleged custom or usage in the steel casting business. It is true that the plaintiff's furnace was shut down from August 1st to November 15th for the purpose of making necessary repairs. But the facts found show that the want of repair which necessitated going out of blast for repairs August 1st was a condition which existed at the time this contract was executed, and had existed for some months before. The output had been severally affected for months by a defective operation, the cause of which was not understood. Various efforts were made to remedy the matter, but without results. In this existing crippled condition plaintiff entered into the contract here involved and continued to operate until some time in June, matters growing worse, when notice was given of a shutdown August 1st to overhaul and repair. It was after the work of overhauling had begun that the cause of the bad draught which had troubled the operation was discovered and remedied. The "accident" or "unavoidable delay" excused by custom or usage must be confined to accidents and delays due to causes originating after the contract. Plaintiff knew when it made this contract that its furnace was working badly, and that normal results could not be relied upon. They did not then know the cause of the trouble, but that the trouble was more vital than they then suspected and would take longer to remedy is a misfortune that cannot be cast upon the defendant as an "accident" excused by custom or usage.

3. The "requirements" for defendant's business for November and December were in excess of requirements of preceding months. The defendant in error says that on October 24th it gave plaintiff in error notice that on or before November 19th its furnace would be in running order, and that if furnished patterns they could put them in sand and be ready to turn out work on or before that day. The facts found show that the castings required were made upon patterns supplied by defendant, and that when plaintiff shut down these patterns were necessarily returned and placed with other founders, and so were in the hands of other contractors. When this notice was given, defendant notified plaintiff that it had been forced to make arrangements with other founders for its requirements for the remainder of the year, and that its patterns were in the possession of such other con-

tractors, to whom orders had been given. The court below found as a fact that from April 1st to the close of the year the prices of such castings advanced materially, and that it was difficult to get orders filled, and that the contracts made by defendants were for the best prices obtainable. The plaintiff, having inexcusably breached its agreement, is not in a situation to complain of the measures resorted to in good faith by the defendant to supply itself with the castings which the plaintiff was under obligation to furnish. It may be that some of defendant's outstanding contracts for November and December "requirements" might have been canceled and the patterns returned to plaintiff; but it was not bound to do so under the circumstances. The market was an advancing one, and defendant made arrangements on best obtainable terms to obtain what plaintiff was unable to furnish, and this is all the plaintiff had a right to ask. Upon the facts found the judgment should have been for defendant for $5,498.24, less $3,700.78, with interest on this balance from January 1, 1903, and the costs of this suit.

Judgment reversed, with directions to enter judgment in accordance with this opinion.

CLOUGH v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. July 17, 1907.)

No. 1,633.

1. CARRIERS—CIRCUS TRAIN—TRANSPORTATION—CONTRACT—PUBLIC POLICY.
A circus company, owning its own cars, contracted with a railroad company for the hire of motive power and the use of tracks and trainmen, to be considered as the circus company's servants, for the transportation of the train from one place to another; the contract exempting the railroad company from liability for injuries to any person or persons using the train from whatsoever cause. *Held* that, the railroad company being under no legal duty to move the circus company in the manner specified, the contract was not contrary to public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 648.]

2. SAME—INJURIES TO EMPLOYÉ—CARRIER AND PASSENGER—RELATION.
Where a carrier leased motive power, the use of its tracks, and train operatives to a circus company, under a contract exempting the carrier from liability for all injuries, the relation of passenger and carrier did not exist between the railroad company and an employé of the circus company, traveling solely by virtue of his employment, who was not a party to such transportation contract, so as to entitle such employé to recover against the railroad company for injuries sustained in a collision between two sections of the circus train.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 977.

Who are passengers, see note to Chamberlain v. Pierson, 31 C. C. A. 164.]

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

Action for injury to an employé of a traveling circus company while riding in a train of cars belonging to his employer, drawn, under a special contract, over defendant's road. The circus company owned as a part of its equipment the cars necessary for the transportation of its animals, property, and employés from place to place, and through its own servants loaded and unloaded these cars to suit its own convenience. For the hauling of these cars upon a

schedule arranged to suit its business, it contracted with the defendant company for motive power and servants to operate same and trainmen to operate the train. These cars were 36 in number, and were divided into two sections of same train. Plaintiff, while sleeping in one of the sleeping coaches provided by his employer for the use of his employés exclusively, was hurt by a rear-end collision betwen the two sections of the circus train. Whether this collision was a blameless accident, or was due to some defect in the brakes on the cars owned by the circus company, or some defect in one of the engines owned by the defendant company, or was due to some negligence of one or other of the servants engaged in the operation of the train itself, does not appear, and no effort was made by either side to explain. The plaintiff said below, and here repeats, that he was a passenger, and that proof of an accident and injury makes a prima facie case for him. The defendant denies that relation and relies upon the special terms of the arangement under which it was hauling this special circus train. That special contract, among other things, provided that the railroad company should hire the motive power and men to operate same and the right to use the tracks, to an extent necessary to haul said cars, and that it should furnish train conductors, brakemen, engineers, and firemen. but that the same should, while engaged in the operation of the circus company's train, be held to be the "servants" of the circus company, "and to be operating said motive power, cars, and trains under the order, direction, and control" of the circus company. To enable the defendant to operate its own trains without interference by the circus train and for the safety of all concerned, it was further provided that there operations should be subject also to the rules and regulations and orders of the defendant's train dispatcher. In consideration of the special character of this contract, and the reduced rates given, it was stipulated that the railroad company should not be liable to the circus company, or to "any person or persons whomsoever using said train or carried under this contract for any loss, injury or damage that may happen * * * no matter how the same may be caused, all risk whatsoever being taken and assumed by the" circus company, called the contractors. By another clause the circus company agrees to assumed all risk of loss or damage, no matter how caused, "which may be sustained by any person, animal, or property of any kind while being carried" and to "indemnify, protect and save harmless" the said railroad company from any loss, damage, or expense which it may bear or suffer arising out of any claim by any person on account of injury, or loss of property. Upon the conclusion of all the evidence, the court below instructed a verdict for the defendant in error.

John H. Brogan and Charles Hatch, for plaintiff in error.
Harrison Geer, 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.

If the contract under which the Wallace Circus was being transported over the railway of the defendant was a valid contract, the relation of the railway company to the circus company was not that of a common carrier at all. That the railway company was under no common-law obligation to move the circus company over its line in the manner it was being transported at the time of the injury to the plaintiff in error must be conceded. If the railway company was under no statutory or common-law obligation to render the special service it was called upon to render there were no reasons of public policy which forbade the rendition of such service upon such terms as the parties might stipulate. The right to make special stipulation under such conditions has been recognized and applied in a number of cases

substantially like the case at bar when circus trains were hauled under special agreements relieving the company from carrier's liability. Coup v. Wabash, etc., Ry. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Forepaugh v. Delaware, etc., Ry. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; Robertson v. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Chicago, etc., Ry. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161; Wilson v. Atlantic, etc., R. R. Co. (C. C.) 129 Fed. 774. The same freedom of contract in respect to the transportation of express matter and express messengers has been recognized repeatedly. B. & O. Ry. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and cases therein cited.

But it is urged with much force that Clough, the injured plaintiff in error, was not a party to the contract between the circus proprietors and the railway company, and therefore not affected by it. It has been said also that he neither agreed to relieve the railway company from liability for negligence while being carried upon the circus train nor bargained away by any agreement with the circus company his right to hold the railway company or the circus company liable for any negligence by which he might be injured while being transported as an employé of the latter. Upon these grounds it has been urged that the Voight Case has no application, because there the messenger had expressly assumed in his contract with the express company the risk of all injury he might sustain while in its service and to assume and ratify any agreement the express company had made or might make releasing any transportation company from liability to any of its employés. It is unnecessary to consider whether an express messenger's right of action to recover for carrier's negligence would depend upon any personal agreement made by him. In the Voight Case the messenger's release to the express company was a fact in the case, and as that inured to the benefit of the railway company it was unnecessary to go farther. See, also, Long v. Lehigh Valley Co., 130 Fed. 870, 65 C. C. A. 354, where it was held that the messenger would be presumed to know and assent to any contract between the express company and the railway company under which he was to be transported.

In Brewer v. N. Y., etc., R. Co., 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, it was held that the messenger was not affected by the contract between the express company and the railway company by which he was made to assume the hazard of his carriage; he having no knowledge of the contract.

The express messenger cases are all distinguishable from the case at bar in the character of the service which the railway company undertook to render. In the express company case the car in which the express matter was carried and the messenger traveled was furnished by the railway company, and the car itself was part of a train under the exclusive control of the carrier. Under the contract here involved, the trains were made of cars furnished and loaded by the circus company. These trains were pulled by engines which were the general property of the railway company, but the special property of the circus company under a contract of hiring. The trains were to be hauled over the tracks of the defendant in error, but only upon a

special contract for the use of the tracks to the extent necessary. The engine and the train were under the control of servants of the railway company, but under a contract by which they became for the purpose of moving this train the special servants acting under orders and directions and in behalf of the circus company.

Neither was such a contract one which disabled the railway company from discharging its general duties as a common carrier. The arrangement fell far short of that sort of transfer of corporate property which is involved in the leasing of one railway to another or to a stranger. In the absence of statutory power, a leasing which disables the lessor from the continued exercise of its corporate duties is ultra vires. Arrowsmith v. Nashville, etc., R. Co. (C. C.) 57 Fed. 165, and cases there cited. The stipulation between the railway company and the circus company involved only the temporary use of the company's tracks for the single purpose of passing its train over the rails from one point to another and the use of a limited amount of its motive power to haul these trains. This did not disable the company from the usual exercise of its corporate power. We see no illegality in a railway company permitting a use of its tracks by another which does not substantially disable it from the usual and ordinary performance of its corporate duties to the public. 2 Elliott on Railroads, § 451; Union Pac. R. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. Neither does the fact that the enginemen and trainmen were operating this train at the time of this collision affect the question of liability to this plaintiff. They were the general servants of the defendant in error, but on this occasion they were the special servants of those who hired them. For the time the railway company had parted with its control and direction of these servants and was not responsible for their acts to either the circus company or those in its service whose only right upon this train was by virtue of their relation to the circus company. Byrne v. Railway Co., 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; Hardy v. Shedden Co., 78 Fed. 610, 24 C. C. A. 261, 37 L. R. A. 33. This train under this contract was at the time being run or operated by the special servants of the circus company, and their acts were the acts of that contractor, and not the acts of the railway company.

The plaintiff paid no fare, and his only right upon the train was by virtue of the contract and arrangement which his employers had with the railway company. By the terms of that agreement his employers assumed all risks of transportation and undertook themselves as hirers of motive power to move their own train under trackage rights acquired under same agreement.

As the relation of passenger and carrier did not exist between plaintiff and the railway company, an action for negligence based only upon that relationship cannot be maintained.

Judgment affirmed.

LEBENSBURGER v. SCOFIELD et al.

(Circuit Court of Appeals, Sixth Circuit. July 18, 1907.)

No. 1,040.

1. LANDLORD AND TENANT—WANT OF REPAIRS—LANDLORD'S LIABILITY.
Where a lease of the upper floor of a building obligated the lessee to keep and return the premises in good repair, and the water-closet which subsequently overflowed and injured the goods of a tenant on the floor below was in ordinary repair at the time the upper floor was let, the lessor was not liable for the injuries so caused.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 657.]

2. SAME.
Plaintiff leased the two lower floors and basement of a building, belonging to S., for life, remainder to M. At the time of this lease, S. and M. had executed a mortgage on the entire property to secure S.'s debt to G.; S. having executed a conveyance of his life estate to M. to secure her guaranty to such debt, the conveyance providing that she should collect the rents, and apply the same, first, to the cost of collection; next, to repairs, taxes, and insurance; and, then, to the payment of such debt. *Held*, that the conveyance was a mortgage and ineffective to make M. liable as owner of the premises for injuries to S.'s goods caused by the overflow of a closet on the upper floor of the building rented to another tenant.

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

H. L. Peeke and C. T. Johnson, for plaintiff in error.
H. E. King and G. D. Welles, for defendants in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. Action by tenant of two lower floors of a three-story building for damages resulting from a defective water-closet on the floor above, occupied by another tenant. There was judgment for the defendant.

The building, of which the leased premises were a part, was owned by Frank G. Scofield and Mary S. Moore; Scofield being owner of an estate for his life, and Mrs. Moore of the remainder. In this state of the title, Lebensburger became tenant, under a lease made April 1, 1899, for a term of five years, of the two lower floors and basement. This lease was between Frank G. Scofield and Mary S. Moore, describing herself as trustee, as parties of the first part, and Lebensburger, as the party of the second part. The rental was made payable to "Mary S. Moore, trustee, or J. L. Moore, agent for Mary S. Moore, until said F. G. Scofield's notes, secured by mortgage upon said premises, shall be fully paid and thereafter on notice to second party by Mary S. Moore, Trustee, or J. L. Moore, agent, said rental shall be payable to Frank G. Scofield."

The mortgage referred to was one made by Scofield and Mrs. Moore, upon both his and her estate, to secure Scofield's debt to one Henry Graefe, shown by 11 notes for $500 each; one falling due each December and June thereafter with a precipitation of maturity in case of default of payment of any of the said notes when due, or the taxes upon the property. It contained no power of sale, but was to become

void upon performance of the covenants for the payments of the notes. Contemporaneously with this mortgage and lease to Lebensburger, Frank G. Scofield executed to Mrs. Moore a conveyance of his interest in the same premises, which recites the mortgage to secure Graefe in the payment of the grantor's notes, and that this instrument is to save her harmless therefrom. It is further provided that she is to collect and apply the rents from the conveyed premises, first, to costs and expenses of collection; second, to repairs and taxes and insurance; and, then, in payment of the grantor's debt to Graefe. In September, 1899, Frank G. Scofield executed a lease of the third or top floor in said building to an unincorporated social club, called the "Peerless Club," for a term of five years. Mrs. Moore was not a party to this lease, and the rental was payable only to the lessor, Scofield, or his order. While these two leases to different tenants of the lower and upper floor were in force and the respective premises in the exclusive occupation and control of the respective lessees, a water-closet upon the third floor became inoperative, either through neglect to keep same in repair or through negligent use, and flooded the lower premises occupied by Lebensburger, damaging his stock of merchandise to the extent of about $10,000.

The jurisdiction of the court below to entertain the action against Mrs. Moore was sustained upon a former writ of error; the case being reported under style of Lebensburger v. Scofield et al., 139 Fed. 380, 71 C. C. A. 476. Though entitled there and now as an action against Scofield and another, Scofield never appeared and has never been served, either personally or constructively. The action is therefore against Mrs. Moore alone; the tenant of the upper or third floor, the Peerless Club, not being sued.

There was no evidence upon which a jury could reasonably find for the plaintiff. It was therefore not error to instruct for the defendant, Mrs. Moore.

1. Mrs. Moore made two defenses: First, that she was not the owner or lessor of either the lower or upper floors of the property; and, second, if she was, she was under no obligation to repair. In such circumstances, the owner is not liable to the tenant for repairs, nor to strangers who sustain injury through the occupier's neglect to maintain repairs. Felton v. City of Cincinnati, 95 Fed. 336, 37 C. C. A. 88; 24 Cyc. 1081; Petz v. Voight Brewery Co., 116 Mich. 418, 74 N. W. 651, 72 Am. St. Rep. 531. Although the occupier may be liable to a stranger who sustains an injury due to want of repairs, yet the owner, if bound to repair, may be sued in the first instance. This is to avoid circuity of action, as the occupier would have his remedy over against the owner upon his covenant. Payne v. Rogers, 2 H. Black. 350. But if the premises were in a dangerous condition when let for the purpose for which they were to be used, and this was known to the owner, he would be directly liable to a stranger if his injury was due to such condition. Stenberg v. Wilcox, 96 Tenn. 163, 33 S. W. 917, 34 L. R. A. 615; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Wood on Landlord & Tenant, § 175; The King v. Pedly, 1 Ad. & E. 1, 822; and Ingwersen v. Rankin et al., 47 N. J. Law, 18, 54 Am. Rep. 109. But there is neither averment nor substan-

tial evidence that the plumbing on the upper floor was in a condition dangerous to the occupant of the lower floor when let out. This upper floor was unoccupied and therefore under the control of the owner at the time of the lease to Lebensburger in April, 1898, and so remained until September, 1899, when leased to the Peerless Club. That the owner would have been answerable to the occupier of the lower floor for any damage proximately due to defective plumbing upon the upper floor while in control of the owner must be conceded. Glickauf et al. v. Maurer, 75 Ill. 289, 20 Am. Rep. 238; Priest v. Nichols, 116 Mass. 401; Ingwersen v. Rankin et al., 47 N. J. Law, 18, 54 Am. Rep. 109. But this lease of the upper floor was not executed until September, 1899, and the flooding of the lower floor occurred July, 1902, and there was no material evidence showing that this water-closet was not in ordinary repair when the premises were let to the Peerless Club. That lease obligated the occupier to keep and return the premises in good repair. We do not overlook the fact that there was some evidence of comparatively unimportant troubles during the vacancy of the upper floor. But upon Lebensburger's complaint these were repaired. It was not until the spring after the third floor was let that any other repairs were found necessary. These were made by the then occupiers and were of an unimportant character. From time to time thereafter slight repairs were made by the club, but no condition developed beyond those incident to ordinary household plumbing. We can find in this transcript no such material evidence tending to show that this disaster was due to a dangerous condition of this plumbing, known to the owner, at the time of the letting of this third floor in September, 1899, as to make a case upon which a verdict could be founded upon the doctrine of the liability of an owner for the dangerous condition of premises when let out. Mrs. Moore, assuming her to be the owner, had no control of the premises let to the club from the date of their lease. The water-closet and toilet rooms were accessible only from the rooms occupied by the club and absolutely under their control. Being in reasonably good repair at the time of the lease, she would not be liable to the tenants of the lower floor for damages resulting from negligence of the tenant of the upper floor in failing to maintain the closet in repair or from negligent use. Having parted with the entire control, she is absolved from liability for defects originating under an occupier bound to do repairs. 24 Cyc. 1128, 1129; 2 Wood on Landlord & Tenant, §§ 175, 381; Haizlip v. Rosenberg, 63 Ark. 430, 39 S. W. 60; Freidenberg v. Jones, 63 Ga. 612; Ditchett v. Spuyten Duyvil, etc., Ry. Co., 67 N. Y. 425.

2. Neither could we sanction a judgment based upon the contention that Mrs. Moore was owner. Her estate was the remainder upon termination of the life estate in Scofield. The latter was alone entitled to the rents and profits during his life. The contention that she became owner by virtue of his conveyance to her of April 1, 1899, is not maintainable. That conveyance must be read with Scofield's mortgage of same date to Graefe and the contemporaneous lease to Lebensburger of part of the mortgaged premises. These instruments show that the one purpose was to protect her as his surety by a mortgage upon his individual estate and to empower her to receive and

apply the rents to come from Lebensburger in payment of the debt for which she was bound, after payment of such taxes, insurance, and repairs as he should authorize, etc. No default having occurred under any of the notes of Scofield's mortgage, Mrs. Moore had, under the law of Ohio, as mortgagee, no right to take possession of the premises and no right to the rents coming from Lebensburger, except such right as was given her by the instrument of mortgage. Kerr v. Lydecker, 51 Ohio St. 240, 248, 250, 37 N. E. 267, 23 L. R. A. 842; Allen v. Everly, 24 Ohio St. 97; Martin v. Alter, 42 Ohio St. 94. In Kerr v. Lydecker, Judge Burkett said of the legal title under a mortgage:

"The mortgage being, in equity, regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor as against all the world, except the mortgagee, and also as against him until condition broken; but after condition broken the legal title as between mortgagor and mortgagee is vested in the mortgagee."

The joinder with Scofield in the lease to Lebensburger was as trustee, and not as owner. Whatever effect this might have had by way of estoppel in making her liable under any covenants, express or implied, as trustee or individually, we need not consider. If we assume that she is estopped by that lease from denying that she was an owner or lessor, the estoppel would be limited to that part of the premises let to Lebensburger. She did not join Scofield in the lease of the third floor and is under no estoppel in relation to that. The result of this assumption would be that the relation of landlord and tenant might, by estoppel, exist between Mrs. Moore and Lebensburger as to the two lower floors; but, if she was not the owner or lessor or occupier of the third floor, she would not be liable for the condition of the plumbing on that floor, either when that floor was let out or subsequently.

Judgment affirmed.

GWYN v. CINCINNATI, N. O. & T. P. R. CO.

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

No. 1,638.

CARRIERS—PUTTING PASSENGER OFF AT DANGEROUS PLACE—PROXIMATE CAUSE OF DEATH.

Plaintiff's intestate was riding on defendant's railroad on a through ticket, which entitled him to transportation to a junction with the next connecting road. The train on which he took passage did not stop at the junction, but stopped at a station four miles north, to which the train of the connecting road also ran over defendant's track to make connection with it. Deceased was advised of such fact, and told to get off at such station, which he did, but for some unexplained reason got back on the same train and started southward. He was soon discovered by the conductor, who put him off a half mile south of the station and told him that if he would hasten back he could still catch his connecting train, which would soon follow. The place at which he was put off was between two tunnels, and he walked back through the north one, and while talking with a man whom he met his train left the station, which was in sight and only a short distance away. He then turned southward again, walked through the first tunnel, and entered the second, which was 1,600 feet

long, curving, very dark and narrow, and while in such tunnel was struck by a train and so injured that he soon died. There was no material evidence to show how he came to be struck. *Held* that, conceding that deceased was put off at a dangerous place between the two tunnels, he had passed such danger and reached a place of safety, and the proximate cause of his death was, not such negligence of the conductor, but his own voluntary act in turning back, for which defendant could not be held liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1245.]

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

A. G. Foster, the plaintiff's intestate, was run over and killed by a railway train operated by the servants of the defendant in error. The accident took place in a long, narrow, and dark tunnel, being tunnel No. 26, between Oakdale and Harriman Junction, Tenn. The deceased bought a ticket at Charleston, W. Va., from the Chesapeake & Ohio Railway Company, for Knoxville, Tenn.; one coupon calling for a passage over the Chesapeake & Ohio Railway Company to Lexington, Ky., another for a passage over the lines of the defendant railway company from Lexington to Harriman Junction, Tenn., and a third for a passage over the Southern Railway from Harriman to Knoxville. Harriman was the junction point of the railroads; but by arrangement the latter ran its trains over the rails of the first-named company to Oakdale, four miles north of Harriman, for the purpose of there exchanging passengers. One of defendant's daily passenger trains did not stop at Harriman at all, while the other did. The deceased, by mistake, took that train at Lexington which did not stop at Harriman. He was advised of this, and told to get off at Oakdale, where he could take a Southern train which would take him to Knoxville upon the coupon which called for that city. On reaching Oakdale deceased got off according to instructions given him; but instead of waiting for and taking the Southern train, which he had been told would follow defendant's train out of Oakdale, he for some unexplained reason got back upon defendant's train. He was discovered very shortly after leaving Oakdale, and told that he was on the wrong train, and that he could, by hurrying, get back to the platform and catch the Knoxville train before it should pull out. The train was at once stopped, and deceased put off at a point just about one-half mile south of the Oakdale platform, and at a point on defendant's line between two tunnels, one known as "Tunnel No. 25" and the other as "No. 26." Tunnel No. 25 is a straight tunnel, about 200 feet in length, and open and light enough to see through. Its southern portal was some 200 feet north of the point where deceased left the train, and its northern portal is 1,200 to 1,500 feet from the Oakdale station. Tunnel No. 26 began about 1,000 feet south of the point of ejection, and was some 1,600 feet long, curving, and very dark and narrow. Deceased started to walk back to Oakdale. He reached and safely passed through tunnel No. 25, and reached a point some 200 or 300 feet north of its northern portal, and was in plain sight of the Oakdale station, where the train he wanted was standing. There he met a Mr. Case, who lived at Oakdale, and stopped and had some conversation with him. While talking to Case the train he wanted to catch was observed to be moving, and Case told him he had missed his train. He then made some inquiries about trains out of Oakdale and Harriman, and hotels at each point. He was also told that it was about four miles to Harriman, and that Harriman was in just the opposite direction to Oakdale. Deceased then turned back and started down the track toward Harriman. While going through tunnel No. 26 he was struck and sustained injuries from which he soon died. There was no evidence, of material character, to show how he came to be struck. The tunnel is so dark and low and curving that smoke accumulates ahead of an engine going south in such a way as to prevent a headlight penetrating the darkness more than a few feet. There was evidence of compliance with the provisions of the Tennessee statute, in respect to the precautions to be observed in running trains, by the only two trains which could possibly have collided with him. Foster alighted from defendant's

train about 4:15 o'clock p. m. and was found in tunnel No. 26 between 4:30 o'clock and 5 the same afternoon; the day being December 7th. At the close of all of the evidence, the jury was instructed to find for the defendant.

Jerome Templeton, for plaintiff in error.

T. A. Wright and Edward Colston, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

After making the foregoing statement of the facts, the opinion of the court was delivered by LURTON, Circuit Judge.

It cannot be said that there was not evidence from which the jury might have found that the deceased was put off at a dangerous place, from which he could not reach a place of safety without some risk. Neither was the evidence all one way as to whether he got off voluntarily or not at that place. In view of this state of the evidence, the trial judge announced that upon the matter of negligence there was a question for the jury, and based his instructions to find for the defendant in error wholly upon the ground that any negligence in putting him off when and where it did was not, as matter of law, the proximate cause of his death. In this conclusion we concur. The deceased wished to connect with a train which would carry him to Knoxville. There is no disputing the fact that he knew he had to make his connection at Oakdale, and that the train he had taken would not stop at Harriman Junction. He got off at Oakdale to do this thing. For some unexplained reason he got back upon the train he alighted from. Possibly this was due to some confusion of mind, for he was awakened from sleep to get off there. However, the fact is that after being fully advised he got off at Oakdale and then got back on again. The conductor discovered him very soon after leaving Oakdale, and told him plainly he had time, if he would hurry, to get back to the platform and catch the train, which would in ten minutes follow his own train.

Now, assuming that he did not of choice alight at this place because it gave him a good chance to get back and catch the right train, but that he left only because the conductor put him off as a passenger upon a wrong train, it is not deniable that he was put off with the direction and in the reasonable expectation that he would go back to Oakdale, and that, if he did not delay, he would catch his train and retrieve his mistake. Contrary to his own expressed purpose and to the explicit direction of the railway conductor as to the direction he should take to extricate himself from the place, he dallied along until the train he was intent on catching had pulled out. If he had then gone to Oakdale, he would have there found that there was no passenger train, from either Oakdale or Harriman Junction, by which he might go to Knoxville, until morning. But if he preferred to stay at Harriman Junction, though it was a place without accommodations, in order to take a chance of getting into Knoxville on a freight train, he would have found at Oakdale that an accommodation train would leave for Harriman within a few minutes. But, losing his chance to catch the train he should have taken, he turned his back upon Oakdale, its hotel and station being in full sight, and set off to walk down the track to Harriman Junction, four miles away. This he doubtless did

upon some notion that he might have there a chance for a train to Knoxville which he would not have at Oakdale. Possibly he did this upon advice or information from Case. But Case was a stranger to the defendant in error, though he had once been in their employment. When he made this change in his plans, deceased had then extricated himself from any particular dangers incident to the place of his ejection from the train, and might have made his way safely to Oakdale in ample time to have taken the local train for Harriman, if, for any reason, he should prefer to go there.

The only legal liability of the defendant company in this action is for damages resulting from being put off of its train at a dangerous place. But when he changed his purpose of going to Oakdale he had extricated himself from that dangerous place and was that moment as safe as if he had there been put off. Being in plain sight of the Oakdale station and the principal Oakdale hotel, and very near to paths alongside of the tracks which would have led him safely to the railway station, he turned his back upon Oakdale, returned to the alleged dangerous place from which he had made his way, and then, in the face of the ominous appearance and warning notices at the portal of tunnel No. 26, undertook to go through that gloomy passage under the mountain. This voluntary return to the dangerous place from which he had safely escaped, and his voluntary effort to go through tunnel No. 26, whether superinduced by information from Case or not, is of no legal importance, as Case was a stranger, was an act of folly which could not have been reasonably anticipated, and was itself an intervening and proximate cause of his death which ensued. A wrongdoer is responsible for the results which should be anticipated as the natural consequences of the wrong, but not for those which ensue from some line of conduct by the injured person, or unforeseen consequences which might not be reasonably anticipated. The relation of the defendant's original negligence to the collision which occurred in tunnel No. 26 was too remote to be regarded as the proximate cause of his death. Milwaukee R. R. Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070; Butts v. Cleveland, C., C. & St. L. R. R. Co., 110 Fed. 329, 330, 49 C. C. A. 69; Jarnagin v. Travelers' Protective Ass'n, 133 Fed. 892, 895, 66 C. C. A. 622, 68 L. R. A. 499; Jackson v. Railroad Co., 13 Lea (Tenn.) 491, 49 Am. Rep. 663; Railroad v. Fleming, 14 Lea (Tenn.) 128; Hamilton v. Railroad Co., 183 Pa. 638, 38 Atl. 1085; Gaukler v. Detroit Ry. Co., 130 Mich. 666, 90 N. W. 660.

The case of Washington, etc., Street Ry. Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661, 41 L. Ed. 1101, has been cited and pressed upon us as if it established some new rule in respect to what constitutes a proximate cause of negligence. This is a misapprehension of the case. In that case counsel sought to separate the cause of the accident into two distinct causes, one of which they claimed was remote and the other proximate. The court, upon the peculiar facts of the case, said:

"The two so-called negligent acts were in fact united in producing the result, and they made one cause of concurring negligence on the part of both companies. They were in point of time substantially simultaneous acts and parts of one whole transaction, and it would be improper to attempt a separation in the manner asked for by the counsel for the horse car company."

Counsel have suggested that there might be a liability for the action of the signal man at the tower, between the two tunnels, in permitting north-bound trains to enter tunnel No. 26 while the deceased was in that tunnel. The pleadings raise no such question, nor does the evidence show the signal man to have had any knowledge of deceased's presence in the tunnel when he signaled trains bound north that the track was clear.

Judgment affirmed.

NATIONAL ASS'N OF RY. POSTAL CLERKS v. SCOTT.

(Circuit Court of Appeals, Second Circuit. May 30, 1907.)

No. 270.

1. INSURANCE—ACTION ON ACCIDENT POLICY—BURDEN AND MEASURE OF PROOF.
To warrant a recovery on an accident policy insuring against death only when it results alone from an accidental injury, the plaintiff must establish two fundamental propositions: First, that there was an accidental injury; and, second, that it alone caused the death.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1721.]

2. SAME—PROOF OF ACCIDENTAL INJURY—SUFFICIENCY OF EVIDENCE.
In an action to recover for the death of an insured under an accident policy or certificate which provided that the insurer should be liable for death only in case it resulted alone from bodily injuries received through external, violent, and accidental means, the plaintiff was not entitled to recover where the sole evidence relating to the receipt of any accidental injury by the deceased was testimony showing that some three months prior to his death there was a discolored spot on one of his shins, several inches in extent, which might have been caused by a bruise or an abrasion.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1721.]

3. TRIAL—DIRECTION OF VERDICT—INSUFFICIENCY OF EVIDENCE.
Under the rule of the federal courts, a court should direct a verdict where the evidence produced by the party on whom rests the burden of proof is insufficient to sustain a verdict in his favor.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376–380.]

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

On writ of error to the Circuit Court for the Western District of New York to review a judgment entered upon the verdict of a jury in favor of the plaintiff for $3,420.40, upon a certificate of insurance for $3,000, issued by the defendant to Winfield L. Scott for the benefit of the plaintiff, who was his wife.

Edward P. White, for plaintiff in error.

Carey D. Davie, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The certificate issued to Scott provides that if, during its continuance, he shall receive bodily injuries "through

external, violent and accidental means" and "if death shall result from such injuries alone within one hundred and twenty days the association will pay not to exceed $3,000 * * * to Mary A. Scott, his wife."

The complaint alleges that on or about November 1, 1902, at the village of Cuba "and while the said Winfield L. Scott was actually engaged in the performance of his duties as a railway postal clerk he received severe injuries by accidental, external and violent means, which injuries received as aforesaid caused the death of said Winfield L. Scott on the 25th day of January, 1903; that such injury, received as aforesaid, was entirely accidental, and that the same was the cause of the death of said Winfield L. Scott, and that such death occurred within the period of one hundred and twenty days after the occurrence of such injury."

This allegation is denied by the answer, the defendant alleging that death resulted from natural causes.

At the close of the testimony the court was asked to direct a verdict for the defendant on the ground that the plaintiff had failed to prove a case of death from accidental causes. The court was at first disposed to grant the motion, saying:

"My impression is that there is no evidence here of accidental death. I think I must ask you to convince me that this death was caused by one of these reasons specified in the policy and the constitution of the order."

Subsequently, however, he became convinced that there was "some evidence tending to show that prior to November 1, 1902, the decedent was a strong healthy man not afflicted with any of these diseases with which he was subsequently afflicted," and concluded to submit the case to the jury.

The principal question litigated was this: Did the assured receive on November 1, 1902, an accidental injury, and, if so, did death result from this injury alone?

In approaching the consideration of this question it is well to bear in mind that the law places upon the plaintiff the burden of establishing two fundamental propositions: First, that there was an accidental injury; and, second, that it alone caused the death of Scott.

The evidence is overwhelmingly to the effect that prior to November, 1902, Scott was far from well; he had been reduced in salary and placed on the short run between Salamanca and Hornellsville, instead of the long one between Salamanca and Jersey City. During the seven years prior to his death he was frequently off duty on account of sickness and wrote to the chief clerk explaining the cause of his absence and the nature of his illness, as shown by certificates of physicians inclosed. Thus, from January 1 to March 1, 1900, Dr. Lattin certified that he was suffering from "albuminuria," which incapacitated him from attending to duty; from April 30 to May 31, 1902, Dr. Wilcox certified that he was unable to attend to his duties because of an operation for "double hernia"; from June 27 to July 5, 1902, he was treated by Dr. Miller for "congestion of the liver and palpitation of the heart," and from November 4th to November 6th he was suffering from "heart trouble," as certified to by Dr. Bourne. Dr. Bozovsky, of Dunkirk, attended him from December 17, 1902, to December 30, 1902,

and certified that his ailment was "torpid liver and nephritis," and the same physician certifies that the chief cause of death was "nephritis," the contributing cause being "valvular heart trouble."

Within six months prior to November 1st, therefore, Scott, who was 60 years of age, had been treated for double hernia, congestion of the liver and palpitation of the heart. In view of all this it is not surprising that July 5, 1902, he wrote his chief: "Dr. Miller says I was pretty near a goner on June 27th." After November 1st there are certificates from three physicians as to Scott's maladies, but no one of them mentions an accident or the discovery of a bruise upon one of his shin bones. On November 6, 1902, Scott wrote Chief Wade: "I was taken seriously ill Tuesday night (November 4). My heart rather failed me." On November 11th and 13th and on December 1st he also wrote Wade, but in none of these was there any allusion to an accident or a bruise.

Under the certificate of insurance Scott was entitled to receive "a sum not exceeding $15.00 per week against loss of time." Although he was off duty for 12 weeks after November 1, 1902, he made no application for an allowance and did not mention any accident, notwithstanding the fact that he wrote to the defendant's collector paying an assessment about November 20th.

An autopsy was made February 4, 1903, and the physician who made it testified as follows:

"I examined the thorax and found both lungs in a state of congestion and engorgement, indicating pneumonia in life. The left pleura was adherent, showing that an old pleurisy had existed. The heart was hypertrophied; the left ventricle being greatly thickened. The middle valve of the aorta had a calcareous deposit at its base which seriously interfered with the closing of the valve, making a permanent heart leak. The aorta just above the valve had a patch of calcareous degeneration in it about half an inch long, and there were several other smaller patches of calcareous degeneration near it in the vessels beyond. The liver was simply engorged with bile, there being an impacted stone in the cystic duct pressing on the common duct and a suppurating gall bladder. Both kidneys showed degenerative processes, the capsules peeling readily, and an abscess was found in the upper part of the left kidney; constricted and encysted appendix. Other abdominal organs normal. From what I saw of the lungs and their condition, pneumonia had been present at the time of death. Pneumonia of both lungs of the degree observed, together with the weak and leaking heart, was practically of a fatal nature. In cases of serious pneumonia, a weak heart, or a heart such as that of the deceased, is a serious additional factor."

To find that Scott was a strong healthy man on the first day of November, 1902, involves the conclusion that he was a malingerer and a falsifier and that the physicians who certified to his disabilities were either charlatans or incompetents. On the contrary, the record shows that Scott was a hard working, conscientious, honest man and that the physicians were men of learning and high standing in their profession.

But, let it be assumed that there was sufficient dispute upon the testimony to warrant the submission of the question as to his previous health to the jury, how then stands the case? The entire fabric of the defendant's liability is built upon the theory that Scott received an injury on November 1, 1902, at Cuba, which caused his death. This

is the keystone of the plaintiff's case; if it be removed the entire structure falls to the ground. We have searched the record in vain for evidence of such an injury or, indeed, of any injury, on that day. The plaintiff testified that when her husband left home on the last day of October he was in good health, with no wound on his leg and that when he returned at 4 o'clock on November 1st he appeared sick, feeble and weary. There was a bruise on his left shin five or six inches long and two or three inches wide; it looked red. Dr. McIntosh saw this bruise in November but did not examine it until December. He thus describes it:

"It was very much discolored. It looked as though the skin had been rubbed or jammed and quite badly discolored. The discoloration was up and down the leg. It might have been five or six inches in length and four or five wide, about that. It did not look as though there had been any tearing through the skin, to get down through the whole of the skin."

When, where or how this bruise was received does not appear. There is no proof that it was received at Cuba on November 1st. In fact the testimony of the trainmen is to the effect that Scott performed his duties as usual that day. He said nothing about an accident and they heard of none. The postal clerk at Hornellsville, in whose office Scott was required to register, saw him November 1st. He also saw him on his next trip, November 3d. He said he was going to Cattaraugus to vote. On the night of election day he went to Salamanca intending to take his usual trip in the morning. That night he was found at his boarding house, in Salamanca, by Dr. Bourne in a serious condition from which he was aroused by hypodermics of strychnine and digitalis. On the 6th of November he went to his home where he remained until December 18th, when he was taken to the home of his son, at Dunkirk, where he remained until his death.

In the hypothetical questions addressed to the medical experts the plaintiff's counsel assumes that Scott received an external injury on November 1st severe enough to produce shock which caused all the other ailments which resulted in his death. Indeed, the trial proceeded from beginning to end upon this theory, which would be plausible enough were not the major premise—injury through external, violent and accidental means—wholly lacking.

It is true that he had a bruise on his left shin, but everything else regarding it is left to conjecture. Instead of proving an injury received at Cuba on November 1st severe enough to produce shock, the presence of shock caused by the injury and nephritis and heart disease resulting from shock, the plaintiff's logic is in the inverse order. The argument proceeds on the following hypotheses—that death on January 25, 1903, was caused by diseases which may have been produced by shock, that shock may be caused by a severe external injury, that a bruise on the skin indicates an external injury, therefore Scott must have received such an injury on November 1st at Cuba. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by an external injury.

We are of the opinion, therefore, that the court should have directed a verdict for the defendant on the ground that the plaintiff had not

sustained the onus of proving that Scott's death was caused alone by external violent and accidental means.

As there was no direct proof of this fundamental fact and as plaintiff's contention regarding it rested only upon presumption and guesswork, it was the duty of the court to direct a verdict for the defendant.

In Com'rs v. Clark, 94 U. S. 278, at page 284, 24 L. Ed. 59, the court says:

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule; to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." North Penn. R. Co. v. Com. Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Anderson Co. Com'rs v. Beal, 113 U. S. 227, 241, 5 Sup. Ct. 433, 28 L. Ed. 966; Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780; Treat Mfg. Co. v. Standard Steel & I. Co., 157 U. S. 675, 15 Sup. Ct. 718, 39 L. Ed. 853; Cudahy Packing Co. v. Marcan, 106 Fed. 645, 45 C. C. A. 515, 54 L. R. A. 258; Penn. R. Co. v. Martin, 111 Fed. 586, 49 C. C. A. 474, 55 L. R. A. 361.

Even if it be assumed that there was an injury as alleged in the complaint it is doubtful if there was sufficient evidence to go to the jury upon the question whether or not the injury alone caused the death. The law on this subject is well stated in Masonic Ass'n v. Shyock, 73 Fed. 774, 20 C. C. A. 3, as follows:

"The burden of proof was upon the defendant in error to establish the facts that William B. Shyock sustained an accident, and that that accident was the sole cause of his death, independently of all other causes. If Shyock suffered such an accident, and his death was caused by that alone, the association agreed by this certificate to pay the promised indemnity. But if he was affected with a disease or bodily infirmity which caused his death, the association was not liable under this certificate, whether he also suffered an accident or not. If he sustained an accident, but at the time it occurred he was suffering from pre-existing disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected with disease or infirmity, but died because the accident aggravated the effects of the disease, or the disease aggravated the effects of the accident, then the defendant is not liable, because the express contract was that the association should not be liable for the amount of the insurance, for in such a case death would not be the result of accident alone, but would be caused partly by the disease and partly by the accident."

The death being produced by Bright's disease assisted by valvular heart trouble it is difficult to perceive, in view of the prior difficulty with the heart, how it can be said that the injury alone caused the death. However, we prefer to rest the decision upon the entire absence of any competent proof of the happening of the alleged accident.

The judgment is reversed and a new trial ordered.

MARTIN v. WILSON.

(Circuit Court of Appeals, Second Circuit. June 10, 1907.)

No. 222.

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

A bill in equity alleged that complainant owned certain stock and bonds of a railroad company; that defendant represented that he had contracted to sell a large amount of the stock and bonds of said company to another company and agreed to pay complainant the same prices he was to receive for his stock and bonds and for those of other holders which he might secure; that a written contract to that effect was entered into between them and carried out, but that such representations were false and fraudulent, in that defendant was to receive, and did receive, larger prices than those stated, the exact amount of which were unknown to complainant. *Held*, that such bill did not state a cause of action cognizable by a federal court of equity, complainant having on the facts alleged a complete and adequate remedy at law by an action to recover damages for the fraud, and the amount actually received by defendant being as readily ascertainable in such an action as in an equity suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 156.]

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

S. C. Carleton and Wm. J. Harding, for appellant.

Carter, Ledyard & Milburn, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The salient allegations of the bill are as follows: That in July, 1892, the complainant stated to the defendant, who is the sole surviving partner of the firm of R. T. Wilson & Co., that he intended to bring an action, in which the said firm would be defendants, to contest the legality of the issue of certain bonds of the Louisville, New Orleans & Texas Railroad Company. That the defendant thereupon stated and represented to the complainant that he was the president of the said railroad company and that his firm was the owner and holder of a large portion of the capital stock and of certain bonds of the said road and that his firm had agreed with the Illinois Central Railroad Company for the transfer to it of the control of the said Louisville Company. That the firm of R. T. Wilson & Co. further stated that they were desirous of obtaining more bonds and stock of the Louisville Company than they then controlled to enable them to take advantage of their agreement with the Illinois Company and, for the purpose of inducing the complainant to part with his own bonds and stock and to procure the delivery of other like bonds and stock to the said firm, the defendant represented that only by dealing with his firm could complainant obtain more than $210 for each bond and $10 for each share of stock owned by him; which statement and representation was false and fraudulent. That thereupon the said firm offered the complainant, if he would refrain from bringing said suit, that they would pay

him for his bonds and stock the same price that they were to receive from the Illinois Company for their own bonds and stock. That they also offered to pay him the difference between the price at which he procured the bonds and stock of third parties to be delivered to them and the price which they were to receive for their own bonds and stock from the Illinois Company—the names of various owners and the amount of their holdings being particularly mentioned. That relying upon these false and fraudulent statements and representations the defendant entered into an agreement with the firm, a memorandum of which was reduced to writing and signed by complainant and said firm.

This agreement states in detail the bonds and stock which are to be sold and delivered and the prices to be paid therefor and, with the exception of a few unimportant formalities, concludes as follows:

"The $24,000 is all that is to be paid Martin under this agreement, except such profit as Mr. Martin may make on the bonds and stock below 25 cts. for the bonds and 10 cts. for the stock.

"The bonds and stock are to be paid for, to parties bringing them in, from time to time at such prices under 25 cts. and 10 cts. as Martin may designate; and if paid for at less than 25 cts. and 10 cts. the difference is to be paid to him as they are delivered by the parties. It is agreed that not more than 25 cts. shall be paid for the bonds and 10 cts. for the stock, to any parties during the pendency of this agreement, except with the permission of Martin."

The bill alleges further: That, for a valuable consideration, the defendant and his firm warranted that the Illinois Company had agreed to pay the firm for the bonds and stock owned by them $250 for each bond and $10 for each share of stock; that relying upon the said representations and warranty the complainant delivered under the contract 1,095 bonds and 4,300 shares of stock and was paid therefor at the contract rate. That the said firm received from the Illinois Company more than they paid complainant for said bonds and stock and profited greatly by reason of their false and fraudulent statements, to an extent unknown to complainant. That complainant first discovered the fraud and the larger amounts received from the Illinois Company in January, 1903.

The complainant offers to return to the firm of R. T. Wilson & Co. whatever bonds and stock may be necessary to put the firm in the position they occupied prior to June 26, 1892. The bill invokes equitable relief because the extent to which the said firm have secretly profited by said transaction is unknown to complainant.

Alternative relief is demanded as follows: First, that a master be appointed to take an account; or, if mistaken in this relief, then, second, that the written contract be reformed so as to agree with the oral contract; or, if mistaken as to the right of the complainant to an accounting or to a reformation of the written contract, then, third, that the contract be rescinded and the defendant be directed to return all of the bonds and shares of stock transferred thereunder. Lastly, the complainant prays, if he be mistaken in all the foregoing prayers, that he may have such other or further relief as to the court may seem just and equitable. The defendant demurs on the ground that the bill shows on its face that the subject-matter of the suit is not within the juris-

diction of a court of equity because the complainant has a plain and adequate remedy at law and is not entitled to the relief prayed for. Confining the allegations of the bill to the facts pleaded and reducing these facts to their last analysis we are convinced that the only cause of action stated is for the recovery of damages based on fraud. That the complainant has a complete and adequate remedy at law we have no doubt and we see no reason for the interposition of a court of equity. There can be no dispute as to what the actual agreement between the parties was because it was reduced to writing, and the reciprocal obligations of the parties are stated in concise and unambiguous language.

In substance R. T. Wilson & Co. agreed to pay the complainant 25 cents on a dollar for the bonds and 10 cents on a dollar for the stock, for all bonds and stock which he brought in, or caused to be brought in, to the firm. The amount due under this contract was fully paid. The accusation against the defendant is that the complainant was induced to enter into the contract by the false and fraudulent statements of the defendant that his firm was to be paid 25 cents and 10 cents, respectively, on the bonds and stock by the Illinois Company and that he would pay complainant the exact sum he received from the Illinois Company. Is it not manifest, if the complainant succeeds in proving the false representations and the averment that more than the contract price was paid by the Illinois Company to the firm of R. T. Wilson & Co., that when he has been paid the difference between what he did receive and what he should have received he will no longer have a cause of complaint against the defendant? It is argued that the amount received from the Illinois Company is unknown and that it is necessary to invoke the powers of a court of equity to compel a discovery in this regard. Assuming for the moment that the difficulty of obtaining testimony affords a reason for turning a complaint in an action at law into a bill in equity, we are unable to see, in the present situation, why there should be any greater difficulty in the one case than in the other. The defendant knows how much he received from the Illinois Company and that company knows how much it paid for the bonds and stock. The books of the company and of the firm undoubtedly contain entries of the transactions. The process of the court will compel the attendance of witnesses and the production of books as effectually in a common-law action as in a suit in equity.

The fact that the bill deals in large figures and states a seemingly complicated transaction tends to obscure the real issue between the parties. Let us test it by a simple illustration, for the principle is the same whether one bond or a thousand bonds are involved. A. agrees to pay $250 to B. for a bond the face value of which is $1,000. A. fraudulently represents that he has an agreement with C. by which C. is to pay $250 for such bonds; that no one else can afford to pay more than $210 and that if B. will sell he will be given the full benefit of the agreement with C. and receive whatever sum C. pays to A. Relying on this representation B. accepts the offer and the sale is consummated. Subsequently he learns that C. paid A. $300 for the bond. Is it not too plain for debate that, on these facts, B.'s remedy is an action at law

to recover damages, the measure of which should not exceed the sum of $50? A court of equity has no jurisdiction of such a controversy.

The decree is affirmed.

TOWNSEND, Circuit Judge, heard the argument, participated in the consultations and voted to affirm.

In re FIRST NAT. BANK OF LOUISVILLE, KY.

FIRST NAT. BANK OF LOUISVILLE, KY., v. HOLT.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1907.)

Nos. 1,654, 1,655.

1. BANKRUPTCY—MODE OF REVIEW—ORDERS MADE IN BANKRUPTCY PROCEEDINGS.

An order made by a court of bankruptcy affirming an order of a referee setting aside an allowance of a secured claim, and requiring the creditor to pay to the trustee the amount of an unlawful preference, is one made in the bankruptcy proceedings proper, and is reviewable on petition for review, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 915.

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. SAME—VOIDABLE PREFERENCES—INTENT TO GIVE PREFERENCE.

To render a preferential payment received by a creditor from his debtor within four months prior to the latter's bankruptcy voidable under 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], the bankrupt must not only have been insolvent when the payment was made, but must have intended it as a preference, and, if in fact made in the ordinary course of business, without thought of injuring other creditors and in the belief in his ability to pay them all, the creditor receiving it cannot be charged with reasonable cause to believe that a preference was intended.

3. SAME.

The making of a present loan is a sufficient consideration for a transfer of collateral to secure not only such loan, but also a prior indebtedness, and, where such a transfer was made in good faith when the debtor was solvent, the right of the creditor to the securities attached at that time and collections subsequently made by it thereon and applied on the prior debt after the debtor became insolvent and within four months prior to its bankruptcy do not constitute voidable preferences.

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

Lawrence S. Leopold, for First Nat. Bank.

Herman H. Nettelroth, for trustee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This case comes here by two methods for review—one by petition for review of an order made in the bankruptcy proceedings in Re R. M. Martin Company, and the other by an appeal from the same order in the respect that it is a decree in an

independent controversy arising in the course of a bankruptcy proceeding. The order complained of is one made by the referee and approved by the district judge setting aside an allowance of a secured claim of the First National Bank of Louisville, and requiring it to pay to the trustee $1,000 which, it was held, the bank had received from the bankrupt through an unlawful preference. The order was therefore one made in the bankruptcy proceedings proper, and not in an independent controversy arising in such proceedings, and is reviewable here upon the petition for review under section 24b of the Act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]). Accordingly the appeal is dismissed.

The secured claim of the bank was for the sum of $16,200, which, of course, did not include the $1,000 in question. The facts as found by the referee and reported to the district judge for review are substantially as follows: In July, 1904, the bankrupt had become indebted to the bank to the amount of $10,000. It was not secured; and, being in want of more funds to continue its business, the bankrupt entered into an agreement with the bank to which one Johnson, the secretary of the bankrupt, was a third party, and which agreement, after reciting the desire of the bankrupt to procure a loan for use in its business upon the security of its book accounts with its customers and the undertaking of the bank to make such loan, witnessed that:

"Said second party shall execute and deliver to the order of said bank its note of even date herewith, for the amount of such loan and advance, and interest thereon, payable after date thereof, and as security for the payment of said note, said second party hereby sells, assigns and transfers to said bank and its assigns, the following accounts now outstanding upon said second party's books, and all moneys due and to become due thereon."

Here follows a list of accounts, giving names and addresses of debtors and the amounts and dates when due, and a receipt and agreement by Johnson as follows:

"Received of the First National Bank, Louisville, Ky., for collection, sundry, accounts receivable assigned to it by the R. M. Martin Company, Louisville, Ky., as per foregoing list.

"All collections of said accounts to be turned over to said bank as they are received by me.

"Charles L. A. Johnson."

Then the agreement proceeds to stipulate that:

"Said third party agrees, upon request of said bank, to collect the amount of said accounts, or any of them, as the agent of said bank, without any charge against said bank for such collections, and all payments on such accounts shall be entered in said book, and said third party shall immediately pay over and deliver to said bank or its assignees, the amounts of such collections, to be applied to the extinguishment of said note, and all checks, drafts and moneys so collected by said third party shall be and remain the property of said bank until a sufficient amount has been collected, and paid over to pay the total amount of said note and interest, and any other indebtedness of said second party to said bank and after said note and all other indebtedness of said second party to said bank shall have been fully paid and extinguished, the remainder of said accounts, if any, shall revert to, and become the property of said second party.

"In case of the insolvency or bankruptcy of said second party before the payment of said note and interest, or, in the event of any breach of any of the provisions of this contract by either said second party or said third party,

the agency, of said third party for the collection of such accounts shall at once cease and determine, without notice, and said bank shall then proceed to collect the remainder of such accounts so far as possible, and apply the proceeds thereof to the payment of said note and interest, to the payment of any other indebtedness of said second party to said bank, and after deducting the expense of collecting said accounts, shall hold the surplus, if any, subject to the order of said second party or its assigns.

"In witness whereof, the parties hereto have executed this agreement the day and year first above written.

"R. M. Martin Co.,
"By R. M. Martin, President,
"C. L. A. Johnson, Treasurer."

And from time to time thereafter, whenever the bankrupt required more funds, similar loans were made by the bank and upon like security and a like agreement with regard to the accounts of the bankrupt and the application of their proceeds. The particular advances by the bank were paid out of these proceeds and $4,000 of the old debt of $10,000 were also paid. Johnson kept an account in his own name with the bank of his deposits made from collections, but without any distinction of the particular accounts from which the deposits came. From time to time these deposits were turned over to the bank by check, the method being, as we understand, first by Johnson's check to the bankrupt and then by the check of the bankrupt to the bank.

During the four months preceding the filing of the petition in bankruptcy loans were made by the bank in this way to the amount of $16,200. One of these loans was of $2,000 made December 16, 1905. On the 13th of that month Johnson checked out of his account $1,000 to the bankrupt, and the bankrupt gave its check to the bank for that amount. The referee states the circumstances as follows:

"It was assumed by the bank that the remainder of the pledged accounts which were still uncollected would suffice to discharge the entire contemporaneously secured indebtedness, and it was then agreed that said Johnson, agent, should pay out of his deposit account the sum of $1,000 to the R. M. Martin Company, and that the R. M. Martin Company should thereupon pay $1,000 to said bank upon said old indebtedness aforesaid. The evidence shows that a check was drawn by Johnson, agent, for $1,000 payable to said bankrupt company. Said check was deposited by said company in its account with said bank, and thereupon said company drew its check against its account in said bank for $1,000 and thereby paid said sum to said bank, which gave credit upon said old debt therefor."

The referee further states that the evidence shows "that on and after December 1, 1905, the R. M. Martin Company was insolvent," and "that the officers of said bank had reasonable cause to believe that said company was then insolvent." From the facts that the evidence did not show whether the $1,000 paid by Johnson on December 13, 1905, was collected from accounts pledged after December 1, 1905, or whether it was realized from accounts pledged before that date, and that Johnson had so commingled his collections that separation of the proceeds was rendered impossible, the referee concluded that the presumption should be that the payment was made from the proceeds of the newly assigned accounts, upon the principle applied to the willful commingling of goods. We find nothing in the case as stated by the referee which would justify the application of such a rule. There is no reason for supposing that the commingling of the col-

lections was in disregard of the agreement of the parties or was made with any wrongful intention. It was not reasonable to charge the parties with knowledge that bankruptcy was impending or that some other condition was likely to arise in which it would be necessary to have so careful a record. But we shall not pursue this subject further, because of the graver error into which the referee fell. Nor do we need to settle the rights of the parties upon the footing of mutual credits between banks and their customers. The facts found did not justify the conclusion that there was any preference which was voidable by the trustee, even if it should be found that the payment of the $1,000 operated in the circumstances to effect a preference, as the referee thought it did.

The question whether this was a voidable preference which must be surrendered before the bank can be permitted to prove its claim depends upon the construction and effect of section 57g of the act. Before the amendment of that subdivision and of section 60a and section 60b, there was ground for holding that section 57g made voidable all preferences which were declared such by section 60a. Before the amendment section 57g was not restricted, and so was open to the inference of a wide reference to section 60a for a complement, and that the two provisions by their association would render any payment or transfer a voidable preference which if made in the circumstances mentioned in section 60a, would enable the particular creditor to obtain an advantage over other creditors of the same class. This was so held in Pirie v. Chicago T. & T. Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, in a cause which arose prior to the amendment. But upon a recognition of the embarrassments which business men might suffer upon that rule of law in the collection of their debts, Congress in 1903, passed the amendment. And the amendment of section 57g makes only those preferences voidable which are made so by section 60b, or by 67e, which latter refers only to conveyances made with intent to defraud creditors or rendered invalid by some statute of the state; and that reference need not be further noticed. Section 60b, thus referred to, makes transfers voidable by the trustee when the creditor has reasonable cause to believe that the debtor intends thereby to create a preference. The nearest approach toward this requirement here is that for two weeks the debtor had been insolvent, and the officers of the bank had reasonable cause to believe the company was insolvent. A man is insolvent, as that term is defined by the fifteenth subdivision of section 1 of the act, 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. But, to make the reception of payment a preference, the creditor must have had reasonable cause to believe that the debtor was intending to give him a preference over other creditors, and we incline to think, with the Circuit Court of Appeals for the First Circuit (Hardy v. Gray, 144 Fed. 922, 925, 75 C. C. A. 562), that the reasonable implication of the language is that the debtor himself must have intended the preference. The very word signifies the doing of a thing with a purpose to give

an advantage; and the construction which treats the motive of the debtor as indifferent seems artificial and awkward. But it is enough to say that a belief that a debtor is insolvent is a very different thing from a belief that he intends a preference; for it would often, and probably generally, happen that a person, though in fact insolvent, would while continuing his business in the usual way make payments without a thought of disparagement of other creditors and with confidence in his ability to pay them all. And upon like considerations the creditor may share in the confidence of his debtor, and may well suppose that the debtor while paying him his debt in the common course of business is acting without any purpose of giving special favor. Such considerations have often been adverted to by the courts as the basis of decision, and were the principal motive for the amendment of 1903. Grant v. National Bank, 97 U. S. 80, 24 L. Ed. 971; Stucky v. Masonic Savings Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; In re Eggert, 102 Fed. 735, 43 C. C. A. 1; Off v. Hakes, 142 Fed. 364, 73 C. C. A. 464; Hardy v. Gray, 144 Fed. 922, 75 C. C. A. 562; J. W. Butler Paper Co. v. Geombel, 143 Fed. 295, 74 C. C. A. 433; Loveland on Bank. (3d Ed.) § 194c.

Moreover, this appropriation of the $1,000 was made pursuant to a stipulation entered into at the time when the last previous loan and assignment of accounts was made. That stipulation was that the assigned accounts should stand as security for the payment of the earlier debt, as well as for the loan then made. The making of that loan was a valid consideration for the assignment of the accounts as security for a pre-existing debt. Peters v. Merchants' & Farmers' Bank, etc., 149 Fed. 373, 79 C. C. A. 193; Jones on Pledges, § 361 (2d Ed.); 1 Brandt on Suretyship and Guaranty (3d Ed.) § 26, and note 16; Johnston v. Nichols, 1 Com. B. 250; Boyd v. Moyle, 2 Com. B. 644; Burgess v. Eve, L. R. 13 Eq. 450; Morrell v. Cowan, L. R. 7 Ch. Div. 151; Leask v. Scott, L. R. 2 Ch. Div. 376; Sitgreaves v. Farmers' & Mechanics' Bank, 49 Pa. St. 359; Buchanan v. International Bank, 78 Ill. 500.

The assignment was an executed agreement, and was not an agreement to be subsequently performed. No facts are found by the referee which impeach the good faith of the assignment. There is no finding that at the time it was made the Martin Company was in contemplation of bankruptcy or was then insolvent. That being so, the right of the bank attached when the agreement was made and would not be displaced by the subsequent bankruptcy of the assignor.

The order complained of in the petition for review must be reversed, with costs, and the original order allowing the complainant's claim as a secured claim will be restored.

In re HARPER.

(Circuit Court of Appeals. Second Circuit. April 30, 1907.)

No. 131.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—WILLS—CONSTRUCTION—PRECATORY TRUST.

A testator by a will made certain devises and bequests to each of his three sons, and left his residuary estate to his wife, "absolutely and without reservation," but expressing his desire that she should make a will, after advising with the sons, to carry out his wishes as far as practicable, confiding in her sense of justice and discretion. He subsequently revoked such will and made another leaving his entire estate to his wife, confiding in her ability and integrity to make "as early as practicable contemplated bequests which she is aware of" to the sons. After his death his wife made her will, by which she divided the greater part of her estate between the sons, share and share alike. Prior to her death a large part of the property was divided between the sons with her consent, each receiving more than was left them by the first will of their father. *Held* that, if the will of the father created a precatory trust, in the absence of any evidence as to what bequests were contemplated except the prior will, such trust had been fulfilled by the mother prior to her death, and that on her death after the bankruptcy of one of the sons the property received by him under her will came from her estate and was not a part of the assets of his estate in bankruptcy.

Petition to Review Order of the District Court of the United States for the Southern District of New York.

E. Adams and E. Bisbee, for petitioner.

E. A. Turrell, for respondent.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. In view of the very considerable pecuniary interests involved in the disposition of this case, we have thought it proper to state for future reference the reasons which were assigned orally at the conclusion of the argument for affirming the order under review. The order refused the application of the trustee to compel the bankrupt to assign and turn over to him the property which came to the bankrupt's hands from the estate of his deceased mother after the adjudication in bankruptcy. If the bankrupt's title to this property vested in him by the will of his deceased father, it inured prior to the adjudication, and would be part of the assets belonging to his creditors to be distributed in the bankruptcy proceeding.

The facts are these: April 1, 1889, John Harper, the father of the bankrupt, made his will, by which, after leaving certain bequests to nieces and nephews, he gave to his son John certain real estate and certain shares of stock, and to his son Charles certain real estate and certain shares of stock, and to his son Orlando, the bankrupt, he gave $40,000, "the sum I loaned him for aid in business and took memorandums for same payable on demand," and he also gave to him a certain watch. The remainder of his estate, real and personal, he bequeathed and devised to his wife, Lydia, "absolutely and without reservation." In a subsequent clause was this statement:

"It is also my desire that she will as soon as practical make a judicious will, advising with my sons, and being guided by the equitable laws of Pennsylvania, and to carry out my wishes as far as practicable. There are many things to do which I leave to her sense of justice and discretion."

June 3, 1889, he made a codicil to this will, revoking the devise and legacy to John, and substituting therefor a devise and bequest in trust for him of the rents and profits during his life, "the same not to be liable * * * for any debts or liabilities" of John or "subject to any execution or attachment against him," and whereby at the death of John the trustees were to account for the property to his wife and children. November 6, 1889, he canceled the will and codicil in writing, and on November 8th made a new will revoking all wills theretofore made, and giving to his wife all his real and personal estate, "confiding in her ability entirely and faultless integrity that should it be the will of God to withdraw me suddenly from earthly life that she make as early as practicable contemplated bequests which she is aware of to my sons John A. Harper, Orlando M. Harper and Charles S. Harper." In April, 1891, the testator died, leaving an estate of the value of about $1,000,000. Shortly thereafter his wife, Lydia, made her will, in which, after making a provision for her grandson, she bequeathed all the rest and residue of her estate, real and personal, to her sons, John, Orlando, and Charles, share and share alike. In February, 1902, the three sons made an agreement in respect to the distribution of the mother's estate upon her death. During her life, and with her approval, they distributed among themselves a considerable portion of her property. Mrs. Harper died in January, 1904, and subsequently her will was duly proved and admitted to probate in the probate court having jurisdiction thereof.

If a precatory trust was created by the will of the father, it was one which devolved upon the mother the duty of making by will certain contemplated bequests. There is no satisfactory evidence what bequests were contemplated, except those which were mentioned in the previous will and codicil of the father. That will indicates that he had expressed his wishes to her, and wished her to carry them out as far as practicable, being guided by the advice of her sons and the equitable laws of the state, and that he meant to leave that which remained to be done to her sense of justice and discretion. The codicil indicates that he did not wish the bequests to his sons to be such that they would lose the benefit of them in case they became financially irresponsible. So far, then, as regards all the evidence in the case, except the will of the mother herself and the subsequent arrangements made between the sons, it establishes merely that when the last will was made the father contemplated that the sons should have certain definite bequests, and such other provisions out of his estate as their mother at her discretion should see fit to make by her will. The request in the earlier will that she should be guided by the advice of her sons and the laws of Pennsylvania was omitted in the last will. She was at liberty, therefore, giving the precatory clause of the will due force, to make such disposition of all the estate coming to her by his will as she thought best and just, except as to the definite bequests in the earlier will and codicil. The fact that after the father's death

she made by her own will more liberal provisions for the sons is not very important. She knew that she had the widest discretion, and if she advised with the sons, as the father had requested her to do in the earlier will, it was not strange that she should have concluded to devise the bulk of the estate equally between them. The agreement between the sons themselves is still less important; they all wanted such a division of the estate as the one they agreed upon. The whole evidence, therefore, leads us to the conclusion that there was no precatory trust by which it became the mother's legal duty to make any disposition of the estate in favor of the sons, other than to recognize and to effectuate the bequests mentioned in the first will and codicil.

The petition in bankruptcy was filed in August, 1902. The bankrupt had previously, and during the years 1891 to 1898, inclusive, received from his father's estate in the hands of his mother money and property far in excess of any interest he had in it under the precatory trust. There was consequently no existing interest to which the title of the trustee could attach.

KENYON v. FOWLER.

(Circuit Court of Appeals, Second Circuit. June 10, 1907.)

No. 286.

BANKS AND BANKING—NATIONAL BANKS—LIABILITY OF STOCKHOLDERS OF RECORD.

One who was notified that shares of stock in a national bank had been transferred into his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 916.

Who liable as shareholders in national banks, see notes to Beal v. Essex Savings Bank, 15 C. C. A. 130; Earle v. Carson, 46 C. C. A. 503.]

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

D. R. Cobb, for plaintiff in error.

Fowler, Crouch & Vann, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge. The action was brought by the receiver of the American Exchange National Bank of Syracuse to recover an assessment on 40 shares of stock standing in the name of the defendant on the books of the bank. The defense is that the stock was issued, and his name as owner entered upon the books, without his knowledge or consent.

It is apparent that the record does not present the entire transaction, but the salient features, so far as they appear, are as follows:

The stock register of the bank contains entries showing that on December 11, 1903, two old certificates for 20 shares each in the

name of Herman Bartels were surrendered and two new certificates for the same number of shares were issued in the name of Otis W. Kenyon, the defendant. This business was done by Carl H. Reynolds, a broker, who took the Bartels certificates to the bank, received the new certificates and receipted for them on the stubs of the scrip book. With the new certificates he went to the office of the defendant where the following interview took place:

"I told Mr. Kenyon that this was the stock of Jim Ratchford, and that Jim wanted the stock put in his [Kenyon's] name, and I told him 'here are the certificates made out in your name,' and asked him to put his name on the back of them, and assign them in blank, which he did. I took the certificates over to the office of Mr. Ratchford and delivered them to him. Never heard of them since."

The defendant testified that he first knew that his name appeared on the books of the bank some time after the failure of the bank, which occurred in February, 1904; that he never purchased any of its stock or authorized any other person to purchase for him. Regarding the interview with Reynolds he gives the following account:

"He came to my office and I was very busy, and he called me out and said, 'You are a stockholder of a bank.' He said, 'I have got the certificates here,' but I don't know whether there was one or two, 'in your name, and I wish you would assign them in blank.' I didn't even look at them; turned them on my desk bottom side up; put my name on them and he went out. I never saw them after that."

The answer contains an averment as follows:

"In the latter part of the year 1903, or early in the year 1904, one Carl H. Reynolds came to defendant's office and informed him that he had just purchased some stock in the American National Exchange Bank of Syracuse, and had taken it in his [defendant's name], and asked defendant, since he had no interest in the same, to formally assign it, which defendant then and there did."

We are of the opinion that the following facts are established:

First. The defendant's name appeared on the books of the bank as a stockholder, two certificates for 20 shares each having been issued in his name.

Second. The defendant knew that the certificates were taken in his name and he knew, or should have known, that his name appeared as a stockholder on the books of the bank.

Third. In December, 1903, the defendant duly assigned the certificates in blank and has not seen them since.

Fourth. The defendant made no effort to have his name removed from the books of the bank as a stockholder or to have the name of the legal owner of the certificates substituted.

Fifth. On August 9, 1904, the Comptroller of the Currency made an assessment of $67 per share on the stockholders of the bank pursuant to the provisions of the National Bank Act.

Upon the undisputed testimony it was the duty of the court to direct a verdict, it being manifest that there was no question of fact for the jury to determine.

It cannot be denied that the rule invoked by the plaintiff, and followed by the Circuit Court, is a severe and drastic one imposing upon the

stockholder the duty, after he has sold and assigned his stock, of seeing to it that his name is removed from the books of the bank. In the case at bar the defendant would have had no difficulty in doing this, but in many cases, where the certificates are assigned in blank and the stockholder does not know who the purchaser is, it might become an exceedingly arduous and complicated undertaking. Nevertheless, we are constrained to hold, under the authorities which must govern our action, that the court below was right in directing a verdict for the plaintiff. Harsh as the rule may seem, it is clear that it is necessary for the speedy and efficient winding up by the Comptroller of the affairs of insolvent banks. He cannot enter upon an investigation and hear proofs pro and con to determine who are the stockholders, and the reasons are manifest and cogent for holding that, in making his assessment, he is justified in relying upon statements found in books of the bank. They are at least prima facie evidence. There was nothing to indicate to the Comptroller that the defendant had parted with his stock and the defendant, with full knowledge of the facts, not only failed to repudiate the action of Reynolds in having the shares taken in his name, but took no steps to have them registered in the name of the true owner. He cannot now, as against creditors, be permitted to dispute his liability.

In Keyser v. Hitz, 133 U. S. 138, 149, 10 Sup. Ct. 290, 294, 33 L. Ed. 531, the court, says:

"We must not be understood as saying that the mere transfer of the stocks on the books of the bank, to the name of the defendant, imposed upon her the individual liability attached by law to the position of shareholder in a national banking association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done—nothing more appearing—she would not be held to have assumed or incurred liability for the debts, contracts and engagements of the bank. But if, after the transfers, she joined in the application to convert the savings bank into a national bank, or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of national banks."

In Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. Ed. 936, 50 shares of stock were transferred to the defendant without his knowledge and consent. The court, at page 67 of 142 U. S. and page 139 of 12 Sup. Ct., said:

"He is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner and the burden of proof is upon him to show that he is in fact not the owner."

The court held that being acting cashier and director of the bank he was presumed to know what the list of shareholders, required by law to be kept, contained; and, at page 70 of 142 U. S. and page 140 of 12 Sup. Ct., the court says:

"No general rule can be laid down as to what will constitute, in any particular case, an acceptance of the transfer of stock or the equivalent thereof, in a case where the transferee is in fact ignorant of the fact of transfer; but each case must be decided on its own facts. * * * The defendant, as vice-president and acting cashier of the bank, had the power himself to transfer the 40 shares back to McNany and the 10 shares back to De Walt. He did

not do so, but, knowing that the 50 shares had been transferred to his credit and stood in his name upon the books, he suffered the matter to remain in that shape for twenty days, until the doors of the bank were closed."

The judgment against him was affirmed.

See, also, Richmond v. Irons, 121 U. S. 27, 58, 7 Sup. Ct. 788, 30 L. Ed. 864; Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571; Rankin v. Insurance Co., 189 U. S. 242, 23 Sup. Ct. 553, 47 L. Ed. 792; Greene v. Sigua Iron Co., 88 Fed. 207, 215, 31 C. C. A. 458; Davis v. Stevens, 17 Blatchf. 259, Fed. Cas. No. 3,653; Lewis v. Switz (C. C.) 74 Fed. 381. We do not regard the case of Glenn v. Garth, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344, as in conflict with the views above expressed. Indeed, Judge Finch, in disposing of the motion for a reargument, recognizes the rule for which the receiver here contends. "It is insisted," he says, "that we have violated the rule that one who authorizes and permits a transfer to himself of shares of stock upon the books of a corporation must be held to be a stockholder, whether in truth the real owner or not, when the rights of corporate creditors are involved, and is equitably estopped from denying the apparent relation. I admit the rule and have nowhere doubted or denied it." The defendant was released upon the peculiar facts there developed because the transfer to him on the books was a mistake which he immediately repudiated and sought to undo. Here, on the contrary, the defendant acquiesced in the broker's acts and at no time expressed his disapproval.

The judgment is affirmed with costs.

TOWNSEND, Circuit Judge, heard the argument, participated in the consultations, and voted to affirm.

MAXWELL v. FEDERAL GOLD & COPPER CO.

(Circuit Court of Appeals, Eighth Circuit. July 5, 1907.)

No. 2,449.

1. COURTS—JURISDICTION OF FEDERAL COURTS—CONTROVERSY BETWEEN CITIZEN OF STATE AND CITIZEN OF TERRITORY.

Diversity of citizenship between citizens of different states is indispensable to sustain the jurisdiction of a federal court on that ground.

A controversy between a citizen or citizens of a state or states and a citizen or citizens of a territory or territories will not confer jurisdiction upon a national court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 853.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249 and Mason v. Dullagham, 27 C. C. A. 298.]

2. SAME—TERRITORIAL LAWS NOT LAWS OF UNITED STATES.

The laws enacted by a territorial Legislature, subject to disapproval by Congress, are not laws of the United States, and a suit arising under them, as where a corporation organized under them is a party to the suit, does not arise under the laws of the United States, and a federal court has no jurisdiction on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 820.]

8. SAME—JURISDICTION—LACK OF, FATAL TO GENERAL JUDGMENT FOR DEFENDANT.

Where the court has no jurisdiction, a general judgment for the defendant is erroneous, because it renders the merits of the case res adjudicata. It must be reversed and a judgment of dismissal for want of jurisdiction, or without prejudice, entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 158.]

(Syllabus by the Court.)

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

H. V. Mercer (George P. Wilson, on the brief), for plaintiff in error.

M. B. Webber (Edward Lees, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This writ of error challenges a judgment for the defendant upon a jury trial in an action brought by Maxwell, a citizen of Minnesota, in the Circuit Court for the District of Minnesota, to recover of the Federal Gold & Copper Company, a corporation organized under the laws of the territory of Arizona, $35,000 damages for the conversion of some of its stock which the plaintiff claimed to own. Upon the opening of the argument in this court attention of counsel for the plaintiff in error was called to the familiar rule that the only diversity of citizenship which confers jurisdiction upon a federal court is diversity between citizens of different states, or between an alien and a citizen of a state, and that diversity of citizenship between citizens of a state and citizens of a territory has no such effect. City of New Orleans v. Winter, 1 Wheat. 91, 94, 4 L. Ed. 44; Barney v. Baltimore City, 6 Wall. 280, 287, 18 L. Ed. 825; Watson v. Bonfils, 116 Fed. 157, 53 C. C. A. 535; Snead v. Sellers, 66 Fed. 729, 15 C. C. A. 631.

But counsel invoke the provisions of section 1891 of the Revised Statutes that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized as elsewhere within the United States," and argue that, as citizens of the states have the right to the trial of their controversies with citizens of other states in the national courts, the citizens of the territories have the like right, under this statute, to the trial of their controversies with the citizens of the states. But the Constitution and laws of the United States do not grant to citizens of the states the right to the trial of their controversies with citizens of the territories in the federal courts (Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], and, as the Constitution and laws have the same effect in the territories as in the states, they fail to confer upon the citizens of the territories this right. In the second place, the right to try the controversy in this case is invoked by a citizen of a state, and not by a citizen of a territory.

Another contention of counsel is that the defendant is a corporation organized under a statute of the territory of Arizona, that

the laws of the territories are laws of the United States because they are subject to nullification by Congress (Rev. St. §§ 1850, 1851), and hence that this case involves the construction of, and arises under, a law of the United States, under the decisions in Union Pac. Ry. Co. v. Myers, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; U. S. Freehold, Land & Em. Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470. But the laws of the territories are not laws of the United States. Ex parte Moran, 75 C. C. A. 396, 405, 144 Fed. 594, 603; Linford v. Ellison, 155 U. S. 503, 508, 15 Sup. Ct. 179, 39 L. Ed. 239; Maricopa & Phenix Railroad v. Arizona, 156 U. S. 347, 351, 15 Sup. Ct. 391, 39 L. Ed. 447. This suit, therefore, did not arise under the Constitution or laws of the United States, it does not involve a controversy between citizens of different states, and the court below had no jurisdiction of it.

The judgment of the Circuit Court, however, is a general judgment for the defendant. It is erroneous, and must be reversed because it renders the issues in the action res adjudicata. The proper judgment is one of dismissal of the action for want of jurisdiction, or without prejudice. Speer v. Board of County Commissioners, 32 C. C. A. 101, 105, 88 Fed. 749, 753; Indian Land & Trust Co. v. Shoenfelt, 68 C. C. A. 196, 199, 135 Fed. 484, 487, and cases there cited.

The judgment below is reversed, and the case is remanded to the court below with directions to dismiss the action for want of jurisdiction.

THE RICHMOND. THE BOSWELL. THE IOWA. THE JAMES W. ELWELL. THE POWELL.

(Circuit Court of Appeals, Second Circuit. June 11, 1907.)

Nos. 12, 13, 14.

1. COLLISION—MEETING TOWS AND OVERTAKING SCHOONER—FAULT OF TUG.

A double collision at sea, one between a schooner and a barge in tow, and a resulting collision between two other tows, *held* due solely to the fault of one of the tugs, which, on meeting another tug with two tows, which were being overtaken by a schooner, passed to the port of such tug and tows, although her own tows were sagging in that direction on account of the wind and failed to make sufficient allowance for such sagging, the result being that the schooner was pocketed and compelled in extremis to change her course.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 78. Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

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

For opinion below, see 143 Fed. 996.

Butler, Notman & Mynderse and T. M. Brown, for The Boswell.

Robinson, Biddle & Ward (W. S. Montgomery, of counsel), for The Elwell.

Moen & Kilbreth, for The Richmond.

Wing, Putnam & Burlingham and James Forrester, for The Powell.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. We do not think anything will be gained by rehearsing the contentions of the several parties or by discussing the testimony of the witnesses. In its ultimate analysis the cause presents questions of fact only. Although as to some of the propositions advanced there is a close concurrence between the statements of many of the witnesses, a more careful study of the movements of these eight vessels leads to the conclusion that such concurrence is not entitled to the weight which is sought to be attached to it.

At the base of the whole case there lie two questions: (1) Were or were not the movements of the tugs and tows such as to make the lane of water between them practically a cul-de-sac, dangerous for the schooner to navigate? (2) Did or did not the schooner, after coming in sight of the tows, make a change of course so as to enter into this lane, or did she hold her course, at a safe distance, from the tow she was overtaking, until the converging side of the lane caused by the sagging of the Boswell's barges made it necessary for her to change in order to avoid the latter? (3) And a third question, supplementary to the others, is whether or not the Elwell failed to discover the presence of the Powell until she was so close upon her that her own navigation was thereby seriously interfered with.

Taking the last question first, we are satisfied that the contention made in argument that the mate of the schooner did not discover the Powell till he was within 50 feet of her is a misinterpretation of the answers of the witness. We find nothing in his testimony to qualify his positive statement that he saw her as he was just passing astern of the Dempsey, which would be at the distance of nearly 1,000 feet away. We concur with the district judge that at that time the Elwell "was already pocketed by the tows," and that she was in a position of peril which she herself had not contributed to produce.

As to the second question. We place no reliance upon the statement of the witnesses, even from the schooner, that there was a considerable breadth of water near the place of collision. The circumstance that the Iowa, whose hawser to the Indiana (1020 feet long) did not part, was struck by the Powell about her fore-rigging, shows conclusively that the distance between the Elwell and Powell must have been less than that. We do not credit the estimate of the master of the Iowa that he sheered out of his course 800 feet. His collision with the Powell took place, as the master of the Indiana says, over the latter's quarter. We are satisfied that the estimate of the master of the Powell that the distance between himself and the Indiana when he passed her was 300 or 400 feet is more nearly accurate, and that he passed the Richmond still closer. Indeed, we are inclined strongly to the belief that the Richmond did stop or slow to aid the Powell in making clearance—a point sharply in dispute between the mate of the schooner and the master of the Richmond. But it is not necessary to decide this last point. The lane of water between the tows narrowed from nearly half a mile to a width so small as to make it a perilous task to take the schooner through. Once in the lane, she was practically "pocketed by the tows" as the district judge finds. And we concur in the conclusion that the Boswell was in fault for not sooner taking

action to haul her sagging tows to the westward when she first saw the schooner.

As to the first question. Despite the array of witnesses from the tows, we are satisfied that the schooner did not make the extraordinary and unaccountable change of course attributed to her across the bow of the Boswell, but that she maintained her course until the converging side of the cul-de-sac forced her to change it in order to avoid the sagging barges.

Whatever errors of navigation were committed when the bottom of the pocket was reached and the four colliding vessels were in close proximity were in extremis as the district judge finds, and, the extremity not having been produced by either of the four, they should not be held. On the whole case we concur with the district judge.

The decree is affirmed, with interest and a single bill of costs against the Boswell.

TOWNSEND, Circuit Judge, heard argument, participated in consultation, and voted to affirm, but did not see the opinion.

GREAT SOUTHERN GAS & OIL CO. v. LOGAN NATURAL GAS & FUEL CO.

(Circuit Court of Appeals, Sixth Circuit. May 25, 1907.)

No. 1,612.

CONFUSION OF GOODS—DAMAGES—ACCOUNTING FOR TRESPASS—MINGLING OF GOODS.

Defendant wrongfully entered upon land on which complainant held a valid oil and gas lease, and drilled a well from which it continued to take and market gas pending suit by complainant to establish its rights. Defendant conducted the gas into a pipe line in which gas from 60 wells was mingled, taking no measures to determine the quantity or value of the gas so wrongfully taken. *Held*, that on an accounting therefor, conceding that defendant's claim of right was made in good faith, it was bound to fully compensate complainant for its loss, and that in ascertaining such compensation every reasonable doubt should be resolved against it; that under the evidence and the peculiar circumstances of the case complainant was entitled to recover one-sixtieth part of the amount realized by defendant from the entire product of the 60 wells.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Confusion of Goods, § 15.]

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

F. A. Durban and Wm. B. Sanders, for appellant.

G. E. Shaw and C. H. Grosvenor, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This case was here upon the questions arising over conflicting leases of the oil and gas rights in the same land. The facts are fully stated in our former opinion. 126 Fed. 623, 61 C. C. A. 359. Shortly after the litigation began defendants struck gas, and they continued to take and market the gas until the well was exhausted.

The court below referred the case to a special master for an accounting as to the value of the gas. It appeared that the gas from the well was conducted to a pipe line, together with the gas from some 60 wells owned by the defendant, and that no serious effort was made to measure the contribution of this well to the pipe line. Upon the theory of confusion of goods by a trespasser, the master charged the defendant with the gross receipts for the entire product of its 60 wells aggregating over $1,000,000. Upon exceptions this report was set aside, and the value of the gas fixed by the Circuit Judge at $10,000, that being the estimated market value of a gas well of the approximate productiveness of this well in the Sugar Grove field. The plaintiff assigned error to this decree. That it was a trespasser ab initio must be now conceded. That it continued to use this gas during the litigation which denied its title, and that it did this taking no care to determine the amount of the gas or its value thus wrongfully taken, must be also conceded. Conceding that it was a good faith claimant and that the litigation was not flimsy, but bona fide, it nevertheless remains that it must fully compensate the plaintiff. Powers v. U. S., 119 Fed. 562, 56 C. C. A. 128; Jegon v. Vivian, L. R. 6 Ch. App. 742, 761; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; Ross v. Scott, 15 Lea (Tenn.) 479. Having taken no step by which it can account for the property of plaintiff, it must submit to every inconvenience in ascertaining that compensation and all reasonable doubts which arise in that accounting. Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653. The reasonable market value of a gas well does not, under the peculiar circumstances, compensate plaintiff. That would be to give it only the value of the gas in the ground. That might be adequate but for the fact that plaintiff had its own pipe line, and could therefore market gas from this well with little addition to the cost of conducting its business.

This well is also shown to have been a larger producer than the average well in this field. It also appears that all of the wells contributing to defendants' pipe line did not contribute during the entire life of this well, and, further, that the appellant was obliged to buy gas of appellee to meet its own requirements. In view of all of the facts, we conclude that an aliquot part of the gross product of 60 wells will not be an unjust compensation. Cooley on Torts, 53; Sutherland on Damages, § 101; Moore v. Bowmen, 47 N. H. 494, 500. The gross product was marketed for $1,003,813. One-sixtieth part of this is $16,730.21. The decree will be therefore modified so as to fix the damages at that sum, with interest from the date of our former decree affirming the decree of the Circuit Court, and costs.

BONG v. ALFRED S. CAMPBELL ART CO.

(Circuit Court of Appeals, Second Circuit. May 30, 1907.)

No. 275.

COPYRIGHT—PAINTING—ASSIGNMENT OF RIGHT.

Where the author or owner of a painting is a citizen or subject of a foreign nation having no reciprocal copyright relations with the United States, and therefore not entitled to copyright such painting under Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406], as amended by Act March 3, 1891, c. 565, 26 Stat. 1110 [U. S. Comp. St. 1901, p. 3417], he cannot, while retaining the painting itself, convey such right to another.

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

M. J. Kohler, for plaintiff in error.

Baggott & Ryall, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. This is an action under the copyright statutes to recover penalties and forfeiture for infringement of alleged copyright of a painting. Verdict in favor of defendant was directed by the court upon the pleadings and opening. It thereby appeared that one Hernandez was the author of the painting, and that he was and always had been a citizen of Peru. The plaintiff is a citizen and subject of Germany. Section 13 of the act of March 3, 1891, 26 Stat. 1110, c. 565 [U. S. Comp. St. 1901, p. 3417], amending Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406], provides that the copyright act shall apply only to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time. No such proclamation has ever been made as to Peru. It is conceded that Germany is within the terms of the section. Prior to November, 1902, Hernandez executed documents purporting to convey to the plaintiff the right to enter the painting in his (plaintiff's) own name as proprietor for copyright protection in the United States, and also the exclusive right of reproduction in colors, and also the exclusive right of engraving, etching, and lithography in black and in colors, reserving, however, the right of photography and reproduction by all photographic monochrome processes. Thereafter plaintiff took the usual steps to secure copyright of the painting. For aught that appears the painting still belongs to Hernandez.

The peculiar form of assignment of rights of reproduction, conveying part and reserving part, presents an interesting question which need not be here discussed. The concessions as to citizenship are sufficient to dispose of the case. It has been held that when a person is

the author or proprietor of a painting, and has the right under our statute to secure a copyright on the same, he may separate the two, selling the right to take out a copyright to one person, while he himself retains the original painting, or sells it, without copyright privileges, to another person. We know of no authority which holds that when a person is the author or owner of a painting, but has no right under our statutes to secure a copyright here, he may nevertheless, while retaining the painting, convey to some one else what he does not own himself, viz., the right to take out copyright. In the absence of controlling authority we are unwilling so to hold, believing that such a construction would be judicial legislation defeating the very object which Congress, by the thirteenth section above cited, sought to obtain.

The judgment is affirmed.

UNITED STATES ex rel. SCHAUFFLER v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Second Circuit. May 30, 1907.)

No. 285.

APPEAL AND ERROR—TIME OF TAKING PROCEEDINGS—EFFECT OF MOTION TO VACATE JUDGMENT.

The six months allowed by statute for suing out a writ of error for the review of a judgment by the Circuit Court of Appeals cannot be extended by a motion in the trial court to vacate the judgment, filed after such time has expired, which brings nothing new into the record, but is in effect merely a motion to reargue the question whether the judgment was warranted by the record.

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

See 147 Fed. 228.

Creevey & Rogers, for plaintiff in error.

Frank H. Platt and Henry W. Clark, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought by the trustee in bankruptcy of George W. Mosely to recover upon a bond given by defendant for the faithful performance of his duties by a former trustee of the same estate, who was alleged to have defaulted. Issue being joined in the District Court, an order was made on March 17, 1903, sending the cause to a referee to take testimony and report. Subsequently, and while the hearing was still proceeding before the referee, such order was amended (June 21, 1904) so as to direct the referee to hear and determine the issues. Thereafter, the referee having rendered his decision in favor of defendant, said decision with the pleadings, orders, testimony, and exhibits came before the District Court, which on November 1, 1905, directed that judgment be entered in favor of defendant, dismissing the complaint on the merits with costs. Judgment was formally entered November 8, 1905. Plaintiff took an

appeal from such judgment to the Circuit Court of Appeals, which was dismissed; but he applied for no writ of error within the six months limited by statute for proceedings to review a judgment of the District Court in the Court of Appeals. About four weeks subsequent to the expiration of the six months he moved in the District Court for an order vacating the judgment, on the ground that it was null and void by reason of the fact that said court was without jurisdiction, authority, or power to direct the entry of the same, or to amend the order of reference without relator's consent, and for the further reason that said judgment was irregularly entered. The motion was denied, and this writ of error was sued out to review such denial.

Before disposing of the case, it may be noted that we do not express any opinion upon the question whether or not a trustee in bankruptcy is "an officer of the United States authorized by law to sue" in the District Court, under the fourth paragraph of section 563, Rev. St. [U. S. Comp. St. 1901, p. 456]. The point made by plaintiff is that there was no jurisdiction to order a reference to hear and determine without plaintiff's consent or to enter judgment upon a referee's report made in conformity with such order. To reverse or vacate a judgment upon such theory, it would, of course, have to be shown that the order of reference complained of was not consented to or acquiesced in. No facts are set forth in the moving papers which were not before the District Court when judgment was ordered and entered. Every proposition which is now advanced could have been fully presented upon a writ of error to review the judgment itself.

We are of the opinion that the case is within the principle laid down in Conboy v. First Nat. Bank of Jersey City, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128. In substance and effect the motion was an application to the District Court to reargue the question whether upon the record before it in November, 1905, judgment should or should not have been entered. Having allowed the time to review the decision embodied in that judgment to expire, plaintiff cannot, by any motion for reargument or similar relief, extend such time beyond the limit fixed by statute.

The order is affirmed.

ERIE R. CO. v. KANE.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1907.)

No. 1,628

MASTER AND SERVANT—DEATH OF SERVANT—FELLOW SERVANT ACT—CONSTITUTIONALITY.

The Ohio fellow servant act of April 2, 1890 (87 Ohio Laws, p. 150), providing that, in an action for injuries to a railroad employé, it shall be no defense that the injury was caused by the negligence or default of a fellow servant, is a valid law under the Constitution of Ohio, and is not repugnant to the fourteenth amendment of the federal Constitution.

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

For former opinion, see 142 Fed. 682.

John H. Clarke, for plaintiff in error.
George F. Arrel, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. The question as to whether there was evidence to go to the jury upon the question of the contributory negligence of the deceased is a close one, perhaps somewhat closer than that before us upon the former writ of error, 142 Fed. 682. But the case has now been here four times, sometimes upon a writ of error by one side, and sometimes upon one sued out by the other. There must be an end of litigation. There is no such substantial difference between the former transcript upon this point and that now before us as to justify a reversal because the trial court submitted the question to the jury. The Ohio fellow servant act of April 2, 1890 (87 Ohio Laws, p. 150), is not void for repugnancy to the fourteenth amendment to the Constitution of the United States, and, as we have before held, was a valid law under the Constitution of Ohio. None of the errors assigned are well taken.

Judgment affirmed.

ÆOLIAN CO. v. HARRY H. JUELG CO.

(Circuit Court of Appeals, Second Circuit. May 3, 1907.)

PATENTS—CONTRIBUTORY INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction to restrain contributory infringement of patents covering a piano player by the sale to purchasers of such players of music rolls to be used therewith, in violation of the license contracts under which the instruments were sold by complainant, *held* properly granted, although the rolls made and sold by defendant were also adapted to be used with other instruments, where the injunction was carefully limited by its terms so as to prohibit only sales of rolls "intended to be used" in players covered by the patents in suit and sold subject to such restrictions.

[Ed. Note.—Contributory infringement of patents, see note to Edison Electric Co. v. Peninsular Light, Power & Heat Co., 43 C. C. A. 485.]

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

This cause comes here on appeal from an order for preliminary injunction, upon bill and affidavits submitted by complainant and opposing affidavits submitted by defendant.

For opinion below see 145 Fed. 939.

Charles Neave, for appellant.
Livingston Gifford and Gifford & Bull, for appellee.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Complainant for several years has, under certain patents which it owns, been manufacturing and selling self-playing pianos—it calls them Pianolas—to be operated with perforated paper music rolls; it also sells such rolls. The complaint avers that since March 31, 1905, it has sold its instruments only upon the conditions expressed in a certain notice which it avers has been affixed to all the pianolas so sold. The notice reads as follows:

"This Pianola, Number ———, is manufactured under patents owned or controlled by The Æolian Company, and is sold by us and licensed to be used under such patents and under our guarantee, only with attachments, improvements, and music-rolls especially designed and manufactured by us for use therewith. It must not be used with spurious imitations of any of our attachments, or with rolls not of our manufacture, otherwise the guarantee and license terminate. We guarantee the instrument to be of our standard workmanship and material and we will repair or replace any part found defective in material or workmanship during the period of one year from the date of sale by us. The Æolian Company."

Defendant manufactures and sells perforated paper music rolls, adapted for insertion in complainant's instruments, and also adapted for insertion in several other varieties of self-playing pianos which are on the market and not covered by complainant's patent. The injunction restrains defendant from "directly or indirectly vending to others to be used music rolls adapted and intended to be used in mechanical musical instruments, or mechanical players for musical instruments, purchased from the complainant herein under patent license to be used only with music rolls made and sold by said complainant, or manufacturing or using the said rolls for such purpose."

It will be observed that the injunction is carefully restricted; it does not prohibit defendant from selling generally, nor from selling rolls to be used with other instruments than complainant's, nor from sales to such owners of complainant's instruments as bought the same without restrictions. The evidence warrants a finding that in at least one instance defendants sold its rolls to be used with one of complainant's Pianolas after it had been informed by the purchaser that his instrument contained the notice in question and that complainant was insisting that under its terms he was not permitted to purchase rolls elsewhere than from the Æolian Company. Indeed, the evidence fairly warrants the conclusion that, unless restrained by injunction, defendants intend to press the sale of their rolls among purchasers of the Pianolas who have bought with full knowledge of the restrictions and have accepted the same. Upon this state of facts the injunction was properly issued.

Order affirmed.

BRUNSWICK-BALKE-COLLENDER CO. v. H. WAGNER & ADLER CO.

(Circuit Court, S. D. New York. May 3, 1907.)

No. 8,793.

PATENTS—INFRINGEMENT—POOL TABLES.

The Cunningham patents, Nos. 553,185 and 556,532, the former relating to the construction of a pocket for pool tables having return conduits for balls, and the latter to the conduit, if conceded invention, *held* not infringed. No. 559,790 to the same inventor, also relating to pockets, is void for lack of invention.

In Equity. On final hearing.

Philipp, Sawyer, Rice & Kennedy (James Q. Rice, of counsel), for complainant.

Dickerson, Brown, Raegener & Binney (S. L. Moody, of counsel), for defendant.

PLATT, District Judge. This is a bill in equity, based upon three patents, mentioned later; the improvements therein claimed being capable of conjoint use upon a single pool table, and the usual remedies are demanded. The only claim of patent in suit 553,185 is:

"In a pool table having ball troughs, or alleyways, for conducting the holed, or pocketed, balls from the vicinities of the pockets to a receptacle beneath the table, a ball receptacle comprising an outer dish-shaped portion, to receive the ball, and an inward, gutter-shaped extension fitting within the outer end portion of the alleyway of the table; said ball receptacle being securely fastened to the woodwork of the table, without fitting, or securement, to the exterior surface of the table body."

The defense to this claim is that the patent is void for want of invention, and, if valid at all, must be so limited that defendant's device does not infringe. We find nine patents in the prior art showing various constructions of pool tables of the bottomless pocket, concealed conduit, type. Complainant's expert, after discussing them, admits that pool tables of that general character are old, and, further, that the combination of (1) "the table body"; (2) "the ball conduit thereof"; (3) "the usual pocket iron"; and (4) "a ball receiver, or ball receptacle, having dish-shaped or cup-shaped portion to receive the ball and deflect it toward the alleyways or conduits"—is old.

This being so, did it involve invention at the date of the application for the patent in suit to disclose an "inward, gutter-shaped extension fitting within the outer end portion of the alleyway of the table," and a way to dispose of the ball receptacle so that it might be "securely fastened to the woodwork of the table, without fitting, or securement, to the exterior surface of the table body"? As long ago as April, 1878, Boyle, in No. 203,108, had a vague notion of the advantage to be found by making the pockets on a pool table bottomless, so that the balls might be conveyed in conduits under the table to a general receptacle; but he did not explain how to connect the pocket with the concealed conduit, nor how to convey the balls properly in the conduit. Three years later, Jefferson, in No. 239,508, studied the same problem. He showed conductors leading from each pocket to a central conductor, which in turn leads to a general receptacle. He saw that the ordinary net pocket of Boyle must shake about when a ball was driven into it, and so undertook to correct that by offering "K," which is a slanted sole-leather attachment, with strips to be buttoned on to the netting at such a point that the ball would be guided by the leather into the conduit. Brunswick, No. 324,004, August 11, 1885, took an appreciable step forward. He was the first to realize that to produce a successful concealed conduit system for pool tables, it was essential to provide a means for reliably and accurately insuring the delivery of the balls from the table into the conduits. Using the ordinary table and pocket iron, he fastened to the pocket iron a pocket of soft or yielding material, preferably of leather or worsted netting. This was extended down and made fast to a metal cup, which was screwed onto the exterior of the table. This cup is so arranged that it is in alignment with and connected to the alleyway or conduit.

In this state of affairs Cunningham came upon the scene, asking for the patent in suit. He avoided marring the exterior surface of the

table by putting the metal cup of Brunswick below the pocket and inside the table. Jefferson had shown a sole-leather attachment, "K," used to guide the ball to the conduit, and located inside the table. It was not too "cup-shaped," it is true; but it curved like a cup in one direction, and it is admitted that it had a tendency, at least, to curve in the other direction. With Jefferson's suggestion before him, it was easy to find in Brunswick's device the cup-shaped part of his construction, and the gutter-shaped extension into the conduit is obvious therefrom. With his first patent in mind, Cunningham shortly proceeded to apply for his second patent, No. 559,790, dated May 5, 1896, of which claims 1 and 3 are in issue:

"1. In that species of pocket table provided with ball conduits, or concealed alleyways, the combination, with the table body, the ball conduit thereof, and the usual pocket iron, of a ball receiver and guide, which communicates, at its inner portion, with said ball conduit, and the outer upper portion, f, of which is curved upwardly toward and near to the pocket iron and is securely fastened at its upper edge to the depending portion of the leather covering of said iron, all substantially as and for the purposes set forth."

"3. In combination with the table body, the ball conduit thereof, and the usual pocket iron, a ball receiving and guiding device having a cup-shaped outer portion, f, extending up toward and fastened to the pocket iron, or its covering material, and composed of thick leather, molded or formed into the requisite shape, as and for the purpose set forth."

The first patent described a cup-shaped receiver with a series of perforations "for the attachment thereto of the leather of the pocket iron * * * in about the usual manner." It might have been either of metal or leather, and the third claim of this patent only differs from the first by calling for leather. The only substantial difference, therefore, between the two patents, is that in the one now under consideration the cup-shaped device is carried up nearer to the pocket iron. With the entire prior art before him, he cannot well be credited with invention for such a suggestion as that. The more one studies these two patents, the less he finds in them. A simple statement of what the patentee had done would have exposed their sterility. It is true that the greatest simplicity may embody the highest inventive thought; but one finds no such thing here. The second is void for lack of invention, and the first has, at best, so little merit that the defendant escapes infringement.

So much for the pockets and their connection with the conduits. Now as to the conduits themselves. The third patent in suit touches that matter. It is No. 556,532, dated March 17, 1896. The claims as finally allowed and now at issue are:

"1. The wooden ball trough for pool tables, provided with the rabbets, e, and with strips, C, C, of elastic material, such as is described, secured in the rabbets so that the ball will travel only on their upper and inner edges, as and for the purpose set forth.

"2. The wooden ball trough for pool tables, comprising the pieces, A, A, and b, b, provided with rabbets, e, in the pieces, A, A, and with the strips, C, C, of elastic material, such as is described, secured in the rabbets so that the ball will travel along their upper and inner edges, as and for the purpose set forth."

To construe them fairly we must glance at the prior art, and at the proceedings in the Patent Office. When an ivory ball rolls down a

wooden trough located within a pool table it naturally makes a noise, and this would not please the player at the game. Jefferson and Reingardt thought of that, and sought to avoid the trouble by lining the troughs with cloth or rubber. Augustine, No. 472,423, April 5, 1892, had a track with parallel ribs upon which the balls rolled, thus reducing friction; but the entire track was covered with leather or other suitable material to diminish noise. (See page 3, lines 42–45, specification.) Goss, No. 507,900, October 31, 1893, had a conduit which he called a "table chute." It was composed of several parallel wires or rods covered with soft rubber to prevent injuring the balls, and so arranged as to form a circular wire cage in which the balls were carried along. Noise would be thereby materially diminished, of course; but the patentee says nothing about that feature of his construction. Roberts, 425,551, April 15, 1890, suggested a means of getting the balls on a bowling alley back to the player by using what he called a "noiseless bowling crease." The crease upon which the ball is delivered by the player is covered with cork or linoleum, and this covering seems to extend over and be applied to the "slanting channel" in which the ball comes back to the player.

The use of skids upon which barrels are rolled in and out between truck and warehouse is well understood by everybody. This, and more, being the case, Mr. Cunningham went to the Patent Office. He attempted to claim a conduit with an open bottom (old in Ryan patent, 249,679, November 15, 1881), provided with two parallel ways, or skids, of rubber, or other noiseless material, upon which the balls should travel. He did not specify just how the balls should roll on the skids or how the skids should be attached to the conduits. He wanted the full benefit of the skid construction, so long as he kept the balls "wholly" thereon. He was rejected, and at once renewed his attack. This time, instead of asking for the entire skids, he limited their use so that "the ball must travel on the angular portions or edges thereof," but was again rejected. He appealed to the board, who affirmed the examiner, but suggested the present claims, which were allowed. These claims limit him specifically to rabbets in which to secure his skids. He does not monopolize the right to secure them in grooves near the edges. He must come out to the very edge and use the well-understood rabbet device to obtain securement. In this apparent advance in the art there is really no advance at all.

His argument in support of his right to avail himself of the angular portions or edges of the skids to support the balls was rather persuasive, and may have merited a better fate at the hands of the Patent Office; but the trouble seems to have been that the patentee was in great straits. While the contest proceeded his employer (the complainant herein) was making his conduits, and they wanted to stamp the patent mark thereon as a warning to trespassers; and so he appears to have abandoned all chance of impressing the office with the merit of his request. He deliberately threw away the substance and caught at a shadow.

We need not waste words about the commercial success of the combined patents, nor upon infringement. In August, 1896, Cunningham applied for patent No. 573,262, which issued December 15, 1896.

This is not in suit, but was applied to complainant's tables, and presumably accounts in large measure for the increased popularity of complainant's open pocket, concealed conduit, pool tables.

Defendant's construction is concededly in accordance with patent to Charles Fisher, No. 690,052, dated Dec. 31, 1901. The Patent Office, which was astute in finding novelty and invention in the patents in suit, retained its cunning, so as to find the same qualities in Fisher's conception. If anticipation could not be found by the careful searchers when Fisher asked a boon, it is not worth while to ask the court, with its notions of all the patents, to discover infringement.

From every conceivable standpoint one is forced to the conclusion that the bill must be dismissed, with costs. It is so ordered.

GERMAN-AMERICAN FILTER CO. OF NEW YORK v. LOEW FILTER & MFG. CO. et al.

(Circuit Court, N. D. Ohio, E. D. July 5, 1907.)

No. 6,029.

PATENTS—ANTICIPATION—FILTERING PROCESS FOR BEER.

The Stockheim patent, No. 378,379, for a process of filtering beer when drawn off from the store cask into the keg or other selling receptacle, the essential feature of the invention being to prevent foaming in the filter by means of forward and back pressure and to keep the filter at all time full of solid beer, *held* not anticipated, valid, and infringed.

In Equity. Suit for infringement of letters patent No. 378,379 for a filtering process for beer granted to Heinrich Stockheim February 21, 1888. On final hearing.

For former opinions, see 103 Fed. 303, and 107 Fed. 949, 47 C. C. A. 94.

Hoyt, Dustin & Kelley and Wetmore & Jenner, for complainant.

William R. Baird and Francis C. McMillin, for defendants.

TAYLER, District Judge. This case is before the court on final hearing of the action brought by the complainant seeking an injunction and accounting for infringement of letters patent of the United States No. 378,379, granted February 21, 1888, to Uhlmann and others as assignees of one Stockheim and by them conveyed to the complainant. The defense to the action is a denial of the validity of the patent and of its infringement by the defendants. The bill was filed over seven years ago, and a motion was made for a preliminary injunction, which was heard upon numerous affidavits and elaborate argument by Judge, now Justice, Day, who allowed the motion. The case on that hearing is reported in 103 Fed. 303. On appeal to the Circuit Court of Appeals the decision of the Circuit Court was affirmed, but the order was modified so as to permit the injunction to be dissolved upon giving a bond conditioned for summary judgment thereon by the court below, and in this suit, for such damages as might thereafter be adjudged to have resulted to the complainant. The case on that hearing is reported in 107 Fed. 949, 47 C. C. A. 94; the decision

being rendered on March 5, 1901. Thereafter a large amount of testimony was taken in various parts of the country, bearing chiefly on the claim of alleged prior use and publication of the process covered by the patent in suit. In view of the published decisions respecting this patent, to which reference will be hereafter made, no fuller description of the process covered by the patent will be given than is necessary to make clear this opinion. Reference may be had to the decisions as reported for a fuller account than it is necessary to give here of the process of filtering beer and of this and related patents.

It is sufficient for our present purpose to give the following description:

Prior to the time when Stockheim patented his process for filtering beer great difficulty had been experienced by brewers all over the world in so cleansing and purifying beer as to remove from it all deleterious substances which were held in solution or otherwise, to make it bright and clear, and to preserve in it the carbonic acid gas, without which the beer would be flat and unmerchantable. Much labor and ingenuity and a large amount of money had been spent in the effort to perfectly clarify and purify beer. The result was that while, measured by present results, no practical success seems to have been attained, many, if not all, of the steps which were combined in the Stockheim process and described in his patent were made use of. So it came about that in 1887 Stockheim, a citizen of Germany, filed his application for a patent for a process of filtering and refining beer, which resulted in the patent in suit, granted February 21, 1888. Confining ourselves to the processes of filtration only so far as they are involved in the present inquiry, we discover that it was necessary to conduct the beer from what we may call the storage cask through the filter into the cask or bottle which was to be sold so that the contained deleterious substances should be removed, the carbonic acid gas remain, and the beer be discharged into the selling vessel without foaming. Stockheim claims to have conceived the idea that this result could be successfully accomplished by keeping the filter full of solid beer by two operations: First, the maintenance in the filter of an adequate pressure above that of the atmosphere; and, second, the absence in the filter of all free surfaces of air, gas, or foam, by the removal of the same whenever necessary, and the maintenance of back pressure, pressure in the filter, and forward pressure, or pressure on the supply cask, so as to prevent the recurrence of such free surfaces. It is claimed by the complainant that until the Stockheim process there was no known method by which beer could be commercially filtered without the development in the filter of air or gas from free surfaces due to the different resistance offered by the filtering medium to air, to gas, and to the liquid beer. The substance of Stockheim's process, whether novel or anticipated, was to prevent the foaming of the beer in the filter—the critical place in the system—where the gas is most likely to separate from the beer, and deliver therefrom foamless beer into the keg or bottle. This he sought to accomplish by maintaining on the beer in the storage cask a pressure which would keep the gas in the beer and force the beer through the system, by collecting and discharging, as an initial step, any air or gas that might enter,

or gas that might be freed in the filter, and carrying it off from the line of discharge by separate devices, by maintaining a back pressure, as well as a forward pressure, upon the beer in the filter so as to keep the filter full of solid beer, thereby preventing the formation of gas or air spaces, and when, nevertheless, these spaces have formed to carry off the collected gas or air before it has had an opportunity to work mischief, and thus restore the condition of the filter expressed by the words "to keep the filter full of beer," as distinguished from beer and separated gas or foam. The definition of the phrase "to keep the filter full of beer" is important. As related to the most persuasive argument made against the validity of the patent, it is controlling. If we define the expression as meaning that condition of the contents of the filter which we describe as solid beer without any foam or air or disengaged or separated gas, we have a very different conception from that which we ordinarily have when we speak of a vessel being "full" of a liquid. As to some of the devices which are cited as anticipations of the Stockheim patent, it is claimed that in their operation the filter must have been full of beer, and, if so, there is nothing left to the patent in suit. Undoubtedly some of these prior devices so operated that the filter must have been, while in operation, full of beer; but they were not "full of beer" in the sense in which that expression is used in the Stockheim patent. If they had been, they would probably have been successful. They did not take care of the gas and air which entered the filter with the beer nor of the gas liberated in the filter; and, since they did not do this, the beer foamed at the keg or the filter got out of order.

The patent contains four claims for a process, and they are all directed to the accomplishment of "the filtration of beer in its passage from the store cask to the keg into which it is drawn, without material loss of the gas contained in the beer and without materially foaming in the keg, into which the filtered beer is delivered." Each of the claims describes the drawing of the beer from the storage cask under a pressure exceeding atmospheric pressure, and conducting the same to and through a filtering apparatus in which that pressure is maintained; but this alone would not keep the filter full of beer or suffice to prevent material loss of gas, or avoid foaming at the keg, so that we find the following additional means claimed in the first claim: "Collecting and carrying off any air entering the filter along with the beer, and gas separating from the beer during the filtering operation"; and, in the second claim, "collecting and carrying off from the beer, during its passage from the store cask to the keg, air that may be mingled with the beer, and gas that may separate from the beer"; and, by the third claim, "creating and maintaining a back pressure in the filter, so as to keep the filter full of beer." The fourth claim fairly embodies the other three.

This patent has been so often passed on by the courts that, apart from any question of comity, we might dispose of this case without further inquiry; and this solely because of the fact that the validity of the patent has been so frequently sustained, after full hearing, as to inform all persons interested in the subject, that its status in the courts was established; but it is claimed by the defendants that the chief defense

here is anticipation by prior use and publication, and that a large and conclusive amount of testimony to that effect, which was not before the courts in any of the other cases, is now before this court, and ought to result in a different conclusion.

It is undoubtedly true that the proof in this case, adverse to the validity of the patent, is somewhat stronger than it was in any of the other cases; and it may be true, without at all intimating the propriety of a different finding now, that, if all of the proof now here had been presented to Judge Gresham when he heard the first case in 1889, he might have come to a different conclusion. Whatever else is true, it is undoubted that such rights as the defendants have and such obligations as they have assumed in consequence of the manufacture of the infringing device were all acquired and assumed with knowledge of the fact that the courts had deliberately sustained the validity of the Stockheim patent after full and careful hearing. Yet a fair and full examination of all the additional testimony in this case leads me to the conclusion that, in so far as any prior use has been shown, it is merely cumulative to the proof in the former cases, and is not persuasive, even where it is not wholly weak, inconclusive, and unsatisfactory, as much of it is. It is necessary, in order to understand the case, to make some examination of the facts developed in the prior litigation.

The patent was granted February 21, 1888. On December 16, 1889, Judge Gresham, holding the Circuit Court at Chicago, rendered his decison in the case of Uhlmann et al. v. Bartholomae & Leicht Brewing Company et al., 41 Fed. 132. There is a full description of the patent in this opinion, with a history of the prior art as then developed by the testimony. The opinion in that case, as well as the record, shows that the most important circumstances bearing upon the question of anticipation, to wit, the Enzinger patent of 1878 and the Enzinger pamphlets of 1881 and 1885, were before Judge Gresham and were considered by him. The validity of the patent was upheld by the decision. On January 4, 1893, Circuit Judge Dallas, sitting in the Eastern District of Pennsylvania, rendered his decision in a suit for infringement of the same patent in the case of Uhlmann et al. v. Arnholt & Schaefer Brewing Company (C. C.) 53 Fed. 485. This case was vigorously contested and elaborately argued. All of the testimony in the preceding case was before the court together with other testimony tending to show anticipation. The patent was carefully analyzed and passed upon, and again was held valid. On November 21, 1899, Circuit Judge Gray, sitting in the Circuit Court for the Eastern District of Pennsylvania, rendered a decision in a suit brought for infringement of the same patent in the case of German-American Filter Company of New York v. Erdrich (C. C.) 98 Fed. 300. Again the case was fully tried, ably argued by counsel, and elaborately discussed by the judge in his opinion. New testimony appeared in this case respecting prior use and prior publication. They were all carefully considered, and, as it seems to me, full weight was given to all these additional circumstances, with the result that the patent was again held valid and infringement found. I have had before me the records in these last two cases, and have gone to some pains to go

over them with a view of learning how fully the facts were developed, and especially with a view of determining how important is the new evidence in this case. It is enough to say that every controlling fact in this case appears in both of the Philadelphia cases. The cumulative proof before us now will be hereafter referred to.

In 1900 this suit was commenced. The application for a preliminary injunction was heard on affidavits which set out the substance of all that had been shown in the former cases, together with some additional circumstances showing anticipation. It appears from the opinon rendered by Judge Day (103 Fed. 303) that he gave careful consideration to the patent itself, and especially to what may be called the King anticipation, as evidence of his device then made its first appearance. The preliminary injunction was allowed because the court found the patent valid notwithstanding the claim of anticipation. On appeal to the Circuit Court of Appeals of this circuit the merits of the case were not discussed; but two propositions were laid down: First, that an order granting a preliminary injunction against infringement will not be reversed on appeal unless it clearly appears that the court below has fallen into a misapprehension respecting the facts or the law in the case in a matter vital to the issue; and, second, as applicable to this case, that strict and convincing proof is required of a prior use set up for the purpose of defeating a patent, especially when the invention has been a long time in general use, and has several times been through the ordeal of contested litigation.

Referring now to this new testimony, we discover a large amount of evidence taken respecting the use made in this country prior to the patent in suit of the Enzinger filter at Syracuse, N. Y., Lebanon, Ill., Socorro, N. M., and at other places. Some testimony respecting the use of this filter at Lebanon, Ill., and at Socorro, N. M., was in a former case. It is sufficient to say of all this proof of prior use that it falls far short of the certainty which the law requires, and as expressed by the Circuit Court of Appeals in this very case to which reference has just been made. It seems to me that nothing could be truer or fairer than, as claimed by complainant, that prior to the introduction of the Stockheim process and apparatus the finishing or fining of lager beer by mechanical filtration was never successfully practiced or known in this country, although it was ardently desired and had been frequently attempted. I think it fair to say that we must interpret all of the testimony introduced by the defendants in this case, showing the use of the Enzinger filter at Syracuse, Lebanon, and elsewhere, as having been entirely ineffective to accomplish the purpose which it was thought they would accomplish. Indeed, its use was so meager and its want of success so apparent that the novelty and usefulness of Stockheim's process are only emphasized by this testimony intended to show a prior use. Certainly the use thus made of the Enzinger filter made no impression upon the brewers of this country, and nowhere was it used except in the most trifling and inconsequential way. I am wholly unimpressed by the King filter or by the testimony pertaining to it. King's conception, at best, was vague, dim, and not considered valuable. It may have contained the germ from which the inventive mind could evolve the Stockheim process; but it seems to me to fall

far below the Enzinger device in its usefulness and its suggestiveness. He applied for a patent, but never deemed it of sufficient value to prosecute his application to a conclusion.

Referring to the previous publications made in Germany and Austria, proof of which did not appear in the other cases, it is enough to say that to my mind they, like the King device, do not carry anything like the suggestiveness contained in the Enzinger filter itself as patented and exhibited prior to the Stockheim patent; but, in so far as the Enzinger filter may be said to be an anticipation of the Stockheim process, the question is entirely foreclosed by the careful and constant determination reached by the eminent judges who have already passed upon the question. All of them have had the changes rung on the Enzinger patent from every possible point of view. When we compare the additional testimony in this case with all that was presented to the other judges, we must conclude that it is of slight weight, and wholly without persuasion to accomplish the purpose which defendants' counsel claim for it.

Justly it ought to be said that, when a patent whose validity has been vigorously contested in four separate litigations has been sustained without dissent by four judges such as Gresham, Dallas, Gray, and Day, we might well conclude that its validity was thoroughly established; and, if any security in property rights is to be assured, why should we not so conclude?

As to the question of infringement by the defendants' device, I can see no reason to doubt the claim of the complainant.

A decree may be entered in accordance with this opinion.

JOHNS-PRATT CO. v. SACHS CO. et al.

(Circuit Court, D. Connecticut. July 18, 1907.)

No. 1,241.

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction against infringement of the Sachs patent, No. 660,341, for an electrical safety fuse, denied, where upon the showing made there was a serious question whether the article made and sold by defendants embodied the invention of the patent and it also appeared that similar articles were generally made by others and for sale in the open market, and that the injunction, if granted, would cause serious loss to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 489–495.

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. On motion for preliminary injunction.

Gross, Hyde & Shipman (Edmund Wetmore, of counsel), for complainant.

Bartlett, Brownell & Mitchell (John P. Bartlett, of counsel), for defendants.

MARTIN, District Judge (orally). This motion for an injunction pendente lite is based upon complainant's bill and affidavits.

It is claimed by the complainant that the defendant Sachs on or about

the 24th day of November, 1899, invented a new and useful improvement in electrical safety fuses; that on the 23d day of October, 1900, said Sachs procured letters patent No. 660,341; that on the 14th day of January, 1903, said Sachs, then being the sole owner of said patent, transferred the same to the complainant for a valuable consideration, and from thence hitherto the complainant has been the owner thereof; that the same was and is of great value and utility; that the orator has manufactured and sold large numbers of safety fuses, which in construction embody the invention set forth in said letters patent; that, were it not for the infringement by the defendant, the complainant would be "in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by said patent and would be in the receipts thereof"; that in August, 1905, said Sachs organized a corporation in which the three defendants named were its stockholders and officers; that the complainant, upon information, believes that each of said stockholders and officers well knew of the facts relating to said invention and patent, also of said sale and transfer of said patent to the complainant, and that the complainant was in the business of manufacturing and selling said safety fuses, using the principle of said invention; that said Sachs is estopped from denying that said letters patent are good and valid, and that the other defendants, by reason of their knowledge, privity, association, and co-operation, are also bound by said estoppel; and, further, that said defendants without right have been and are now manufacturing and selling safety fuses that embody the principles of said invention and patent that was so sold and transferred to the complainant. There are other facts stated in the complainant's case which are not necessary to refer to here. The defendant Sachs does not deny inventing a mode of construction of electrical safety fuses, nor of obtaining letters patent No. 660,341 therefor. He also admits that the same was sold and duly transferred to the complainant; that said patent was legally obtained; that it was a novelty in the construction of safety fuses, etc. The defendants Parker and Hart admit the formation of the Sachs Company; that they are stockholders and officers therein; that the defendant Sachs is president and manager of the company, but each claim that they never had any experience in the business of manufacturing; that they knew nothing about electrical safety fuses; that they have always been engaged in other business; that they have taken no part in the management of the business carried on by said company; that they have always understood and believed that the articles manufactured by said defendant company were not covered by patents owned by the complainant or any other party or parties, and never actually knew of this patent until the bringing of this suit.

In the view I take of the pending question, it is unnecessary to discuss or even consider the allegations of Parker and Hart. The complainant asserts: That the fuse covered by this patent is a "combination of old elements, each old in itself, but taken together alleged to produce an improved fuse—that is, a wide, thin fuse strip (old), a casing (old) and a filling (old). The novelty consists in uniting a wide, thin strip with the filling so it will completely envelop the fuse and

thus best utilize the properties of the ready fusibility and the quick dispersion of the heat of the strip when melted. The thin strip of the claims means any degree of thinness which will accomplish the useful result intended to be achieved, viz., a fuse which will carry its required load, melt readily, completely and quickly without hanging, so called." That the use of such a fuse in an electrical circuit is that it melts under predetermined conditions—i. e., when the electrical current passing through it becomes heavier or more powerful than is considered safe for the circuit—and thus, by so melting, automatically cuts the circuit before the electrical system or apparatus can be injured by the excessive current. That the fuse consists of a flat fusel strip of metallic ribbon inclosed in a case of nonconducting fiber with metal end caps usually of brass, to which the ends of the fusible metallic ribbon are joined by terminals, and the filling material of the fuse forms a nonconductor about the fusible metallic ribbon. That the hanging or arcing process is avoided by use of a fuse manufactured under this patent, and, further, that the fuses now made and sold and put on the market by the defendants embody the identical principle of the patent.

The defendant Sachs has filed an affidavit, and therein quite minutely and extensively states the condition of the art preceding his invention, and the history of electrical fuses. He agrees with the complainant that the casing of the safety fuse, metallic wires, and strips passing through it, surrounded by a nonconducting filling, were old in the art, but he denies the allegations of the complainant that the said invention and patent involved in this case was simply a combination of these old elements. On the contrary, he claims a new discovery, namely, the adjustment of a very thin, fine metallic ribbon with an extended area within the casing of the fuse, so thin and so extended in its area that the nonconducting material encased about it being likewise extended, thus giving such a maximum contact with the nonconducting filling material that the circuit is immediately opened when any portion of the metallic ribbon or strip becomes molten and the electrical continuity is immediately severed or cut off while in this molten condition; that in fuses previously manufactured the filling material so supported the molten metal that the melting of the fuse did not immediately cut the circuit but would arc or hang, and that such failure of immediate interruption of the circuit upon the melting of the ribbon or strip under the old process resulted in inaccuracy and unreliability as to its operation in the presence of "unequal current value." The complainant contends that the dimension of fusible ribbon—i. e., its length, area, and shape—is simply an adaptation to the load in amperes and volts which it is intended to carry; that its thickness or area must be adjusted to the normal element of the current, which will cause it to melt, and therefore it is merely a question of degree, and that the patenting of a degree of thickness is absurd. It occurs to me that this contention of the complainant amounts simply to a criticism of the patent.

As the evidence now stands, I am of the opinion that this principle above set forth as the defendant's claim is the real novelty, if any,

and the gist, of the invention. The defendant says that he has not made and sold and is not now making a fuse like that covered by this patent; that the fuse he is making is like those in general use by other manufacturers, which are understood by the trade generally not to be covered by any enforceable patent; that the metallic strips in fuses that he is making and selling are not "very thin and fine with extended area," but that the metallic substance is reduced in the center, and that such fuses do not infringe the patent in suit. Samples produced by the defendant as exhibits in the case sustain his claim to the effect that they do not contain a "thin, fine ribbon of extended area," which extended area is brought in contact with the filling of nonconducting material. The defendant further says that, soon after obtaining the patent in suit, it was discovered that fuses of the patent lacked mechanical stability and ease of manufacture, and that the advantages secured by it were not sufficiently superior to fuses made under the old means of manufacture to warrant the increased cost which was entailed, and therefore the complainant never adopted it in practical use, and that it never marked its fuses as having been manufactured under this patent.

There is a serious question in my mind as to whether the patent in suit covers the make-up of the fuses that the defendants have been manufacturing and selling. It is a well-settled rule of the law that where grave doubt arises as to what the final decree upon the merits must be, either as to fact or law, the summary power of the court to grant injunctions pendente lite should not be exercised, unless it may be to preserve the status quo of the parties under circumstances that will not work serious hardship to the party enjoined. It is also a settled rule of law that in acting upon applications of this sort the court "should regard the comparative injury which would be sustained by the defendant if the injunction were granted and by the complainant if it were refused." Besides, the granting and withholding of an injunction pendente lite rests in the sound and judicial discretion of the court.

Applying these principles of the law to the circumstances of this case, we find:

First. Upon examination of the facts developed by the affidavits, that there is a serious question as to infringement. The evidence raises a doubt as to either the complainant or defendants having been or being now in the manufacture or sale of fuses covered by this patent. The complainant shows by affidavits that the fuses manufactured by it were covered by the patent, and that the fuses manufactured by the defendant are also covered by the patent. This is squarely denied by the defendants' affidavits; hence a question of fact is raised which can only be settled upon the hearing on the merits.

Second. The evidence discloses the further fact that fuses which the complainant asks the defendant to be enjoined from making and selling are quite generally manufactured by other parties, are in the open market for sale, and thus the complainant will not suffer irreparable damages should the parties remain in status quo until the case can be disposed of on its merits.

Third. It appears from the affidavits of defendant, and not disputed, that, if this temporary injunction is granted, the defendants will suffer great injury and loss.

Wherefore the application for temporary injunction is denied.

HENDEY MACHINE CO. et al. v. PRENTICE BROS. CO.

(Circuit Court, D. Massachusetts. August 2, 1907.)

No. 124.

PATENTS—INFRINGEMENT—FEED MECHANISM FOR SCREW CUTTING LATHES.

The Norton patent, No. 470,591, for a feed mechanism for screw cutting lathes, limited to the precise combination of old elements shown and claimed, as it must be in view of the prior art, *held* not infringed by the machine of the Newton patent, No. 787,537, in which the cone gears are not located on the feed shaft as specifically described in each claim of the Norton patent.

In Equity.

Wood & Wood and Emery, Booth & Powell, for complainants.
Southgate & Southgate, for defendant.

BROWN, District Judge. This suit is for infringement of claims 2 to 7, inclusive, of letters patent No. 470,591, granted March 8, 1892, to Wendell P. Norton, for feed mechanism for screw cutting lathes. The defendant's device is constructed according to letters patent No. 787,537, granted April 18, 1905, to Albert E. Newton for change speed gearing for engine lathes. The object of the patentee, Norton, was to produce changes in the speed of the feed-shaft which gives movement to the carriage containing the screw-cutter.

The device and its mode of operation will appear from an examination of claim 2 of the patent in suit:

"2. In a device of the class described, the combination with a series of interchangeable gear-wheels, of a shaft driven from the said series of interchangeable gear-wheels, a pinion mounted to turn with and to slide on the said shaft, a driving gear-wheel in mesh with the said pinion, a second series of gear-wheels of various diameters arranged step-like on the feed-shaft and adapted to be engaged by the said driving gear-wheel, and a lever carrying the driving gear-wheel and arranged for shifting the said pinion on the said shaft and moving the driving gear-wheel in and out of mesh with the feed-shaft gear-wheels, substantially as shown and described."

The series of interchangeable gear-wheels may be transposed so as to give different speeds to a shaft. The second series of gear-wheels, arranged step-like or cone-like on the feed-shaft, gives different speeds to the feed-shaft, as power is applied to gear-wheels of different diameters. The total number of speed variations possible is the number of steps in the cone series multiplied by the number of changes of the interchangeable gears, since the shifter takes from the shaft the different speeds given it by the interchangeable gears (say three rates of speed) and at either of these rates can produce as many variations of speeds as there are steps on the cone (say 12), the total changes being 36. The shifter slides

along the shaft and comprises a handle and a pair of gear-wheels in mesh. One of the pair takes motion from the shaft and gives it to the other member of the pair, which other member engages one of the steps of the cone and thus gives motion to the feed-shaft and to the carriage containing the screw-cutter.

The fundamental organization, or generic combination comprising two series of speed varying gear-wheels, with a shifting connection, whereby the changes of the second series can be multiplied by the changes of the first series, was used in the prior art for the same purpose and in the same class of machines. The prior art upon which the defendant chiefly relies is found in the patents to Miles, No. 111,859, February 14, 1871; to Hyde, No. 247,764, October 4, 1881; to Humphreys, No. 83,774, November 3, 1868; to Bevier, No. 338,916, March 30, 1886; and to West, No. 296,491, April 8, 1884.

The patent in suit was before the Circuit Court for the Southern District of New York in Hendey Machine Co. et al. v. Prentiss Tool & Supply Co. (C. C.) 113 Fed. 592. The opinion of Judge Lacombe says (page 594):

"An examination of the prior state of the art, as disclosed in the proofs, shows that the patentee was not a pioneer. Indeed, it is not contended that he was. He has used old devices in a new combination (for there is no actual anticipation shown) to accomplish a particular result (rapidity of speed change), and a like result may be obtained by other combinations. The case is one, therefore, where the particular combination of parts and details which the patent secures to him is to be conformed to the self-imposed limitations which the patentee has inserted in the claims, and 'nothing can be an infringement which does not fall within the terms the patentee has chosen to express his invention.' McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Groth v. Supply Co., 9 C. C. A. 507, 61 Fed. 284. It will be noted that in every one of the claims above recited the series of gear wheels, of varying diameters, arranged step-like or in cone shape, is explicitly described as being located 'on the feed-shaft.' In the combination of defendant's lathe a similar step-like or cone-shape series of gears is found, but it is not located on the feed-shaft; but upon a countershaft arranged adjacent to, and parallel with, the feed-shaft. Defendant contends that this is an important improvement—a contention which complainant disputes, and which need not be decided. It would seem to be sufficient, under the authorities cited supra, that the step-like gears are not located where in eight separate claims the patentee distinctly asserted that they should be, to embody his invention."

This seems to me a correct interpretation of the patent, and a decision which is directly applicable to the present case.

The defendant's machine may rightfully employ the generic combination. It does not use "a series of interchangeable gear-wheels," if we give that expression the same meaning given to it in the specification of the patent in suit, but employs a double cone system generally similar in function, it is true, to complainants' interchangeable gears, but also similar to Humphreys' device for the same purpose, though the defendant has improved upon Humphreys, and uses a cone gear system as the multiplier by which three different speeds are obtained without the necessity for shifting interchangeable gears. It does not secure what complainant calls "the unlimited capacity of interchangeable gears" (which might, perhaps, follow from the substitution of other gears rather than from an interchange of the gears

shown), but limits the changes to the number possible with the fixed cone gears of the multiplier.

I am also of the opinion that the defendant's second series of cone gears is not arranged on the "feed-shaft" as the claims require. The "feed-shaft" of the patent in suit is a specific part—a threaded shaft which in screw-cutting gives motion to the carriage. Being so located, the complainants' cone gears are limited in function to providing changes for screw-cutting. The defendant has located its cone gears upon a separate shaft, or countershaft, upon which is a slip-pinion which can be shifted to engage either the threaded feed-shaft used for screw-cutting, or a second feed-rod which is used in turning. The advantages of this are said to be that a further system of feeds is obtained and the feed-shaft is employed only for cutting screw-threads. This matter is particularly referred to in the specification of the defendant's patent to Newton, page 2, lines 65 to 105.

The complainants seek to avoid the effect of Judge Lacombe's opinion by pointing out differences between the Lodge-Shipley device, there involved, and the defendant's device. It would not be profitable to discuss these differences. They do not affect the proposition that the patent in suit is of the class in which, as its specification states, "the invention consists in certain parts and details and combinations of the same."

I am of the opinion that neither as a matter of function nor as a matter of nomenclature can it be said that the defendant has located its cone-gears on the feed-shaft. The superior convenience of Norton's location of the shifting lever, and of a "one hand lever movement," and the preservation of the "unlimited capacity of interchangeable gears," are insisted upon. The last feature the defendant does not have, and the other features would probably be insufficient to constitute a patentable improvement on the devices of the prior art. These matters, however, are outside the claims. I am of the opinion that the defendant does not infringe.

The bill will be dismissed.

RICHARDS et al. v. MEISSNER et al.

(Circuit Court, E. D. Missouri, E. D. June 19, 1907.)

PATENTS—SUIT TO COMPEL ISSUANCE—ISSUES AND PROOFS.

The government is treated as a party to all actions in which the validity of a patent is involved, in order that it may protect the public against a monopoly granted to one who is not entitled thereto, and in a suit under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to compel the issuance of a patent to complainant for an invention for which one was granted to the defendant, evidence is admissible to show that defendant's patent is void for anticipation, although no such issue is made by the pleadings, and although such evidence may defeat the action.

In Equity. On motion to require a witness before a commission to answer questions.

E. Hayward Fairbanks, for the motion.

Samuel E. Hibben, opposed.

TRIEBER, District Judge. This is a proceeding in equity under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], pending in the United States Circuit Court for the Western District of Missouri.

The complainants having completed their proofs, the defendants proceeded to take the testimony of the defendant Meissner, the patentee, before an examiner, under equity rule 67. Upon cross-examination, the witness was interrogated in relation to British patent 2,182 of 1875 to one Lake, for the purpose of proving that the invention patented to the witness had been anticipated by that British patent, and that, for this reason, there was no patentable novelty in the defendant's alleged invention. The effect of such proof would, of course, not only defeat the patent granted to the defendant, but also defeat this action of the complainants. Counsel for the defendants objected to this testimony upon the ground that the only issue raised by the bill in this cause is whether the Commissioner of Patents erred in refusing the application for a patent of the complainant on his intervention and granting it to the defendant. It is further urged that, had the complainants alleged in their bill that the British patent 2,182 of 1875 had anticipated the invention for which the complainants by this action seek to obtain a patent, the bill would have been dismissed on demurrer, and for this reason it is claimed that these questions are inadmissible. The complainants now ask for an order requiring the witness to answer the questions in relation to the British patent.

Ordinarily, no evidence is admissible in a suit in equity unless relevant and material to the issues as made up by the pleadings. As has been aptly said: "Proofs without allegations are no better than allegations without proof." So far as the pleadings in this case show, there is no such issue as priority of the invention by a third party whose patent antedates the claims of both contestants, and necessarily none could be raised by the complainants in a proceeding under section 4915, Rev. St. But does this rule apply to proceedings of this nature? By virtue of the authority granted by the Constitution, Congress has provided for the granting to inventors of a patent whereby they are entitled to a monopoly of the products of an invention for a limited period as against the entire Nation. While this great privilege is intended as a reward for meritorious inventions, and to encourage them, still it is a monopoly, and, all monopolies being odious, the beneficiary will be held strictly to the terms of his grant.

In United States v. Bell Telephone Company, 128 U. S. 315–370, 9 Sup. Ct. 90, 98 (32 L. Ed. 450), the court say:

> "The United States, by issuing the patents which are here sought to be annulled, has taken from the public rights of immense value and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege and conferred it as an exclusive right upon the patentee. * * * This has been taken from the people, the public, and made the private property of the patentee by the action of one of the departments of the government acting under the the forms of law, but deceived and misled, as the bill alleges, by the patentee."

In divorce cases, it has been the practice in the ecclesiastical courts of England for the crown to be represented by its proctor in opposition

to both parties, for the protection of society, and to prevent collusive actions. And in this country it has always been the rule for courts, in divorce proceedings, for the same reasons, not to consider themselves bound by the pleadings, but, on its own motion, examine witnesses and permit evidence on matters not put in issue by the pleadings, but which in the opinion of the court may tend to defeat the action or show collusion or condonation. 9 Am. & Eng. Encyc. (2 Ed.) p. 729.

For like reasons Congress and the courts treat the government as a party to all actions in which the validity of a patent is involved, in order that it may protect the public against a monopoly granted to one who may not be entitled thereto. It is upon this ground that patents, when granted by the government after all the issues of facts have been determined by one of the departments of the government, are still subject to attack and defeat in a collateral proceeding (section 4920, Rev. St. [U. S. Comp. St. 1901, p. 3394]), although in all other matters it is the well-settled rule that the determination of facts intrusted by law to one of the departments of the government is conclusive, unless there has been a misconstruction of the legal effect of the statute under which the department is acting, or fraud or mistake. Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Passavant v. United States, 148 U. S. 214, 13 Sup. Ct. 572, 37 L. Ed. 426; Burfenning v. Ry. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; The Japanese Immigration Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 590, 48 L. Ed. 888; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Harris v. Rosenberger, 145 Fed. 449, 76 C. C. A. 225; Lewis Publishing Company v. Wyman (C. C.) 152 Fed. 787.

But whatever doubt may have existed on that point has been removed by what was decided in Hill v. Wooster, 132 U. S. 693–700, 10 Sup. Ct. 228, 33 L. Ed. 502. That was a suit under the same section as is this case, and the contention of counsel, as stated by the court, was:

"That no question is made in the answer but that one party or the other is entitled to a patent, and that therefore evidence which does not tend to show which party is entitled to the patent is irrelevant and should be suppressed."

But the court overruled this contention, and held:

"This court, however, has repeatedly held that, under the Constitution and the acts of Congress, a person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof, and that it is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful; but it must, under the Constitution and the statute, amount to an invention or discovery."

In Leslie v. Tracy (C. C.) 100 Fed. 475, the same question was before the court, and it was held, quoting from the headnote:

"In a suit brought under Rev. St. § 4915, to require the issuance of a patent to the complainant, where the controversy is between two claimants to priority of invention, there can be no adjudication in favor of either, unless the alleged invention is patentable." Davis v. Garrett (C. C.) 152 Fed. 723.

In the case at bar, it may be true that this proof may defeat the action of the complainants by showing that they were not entitled to a patent; but, at the same time, it may also show that the defendants are not entitled to a patent, and thus relieve the public from the monopoly created by the granting of the patent to the defendants.

For these reasons, I am of the opinion that the questions in relation to a prior patent covering the claims of the defendants to the patent herein involved should be answered, subject, however, to the right of counsel to note their objections thereto, in order that, upon a final hearing, the trial court may pass upon the admissibility of the evidence without prejudice to anything decided herein.

UNDERWOOD TYPEWRITER CO. v. GRAVES TYPEWRITER CO. et al.

(Circuit Court, S. D. New York. June 10, 1907.)

PATENTS—INFRINGEMENT—TABULATING ATTACHMENT FOR TYPEWRITERS.

The Gathright patent, No. 436,916, for a tabulating attachment for typewriters, as previously construed by the Circuit Court of Appeals, *held* infringed, on motion for a preliminary injunction.

In Equity. Suit for infringement of letters patent Nos. 436,916 and 452,268, both for improvements in typewriters, granted to Josiah B. Gathright; the first September 23, 1890, and the second May 12, 1890. On motion for preliminary injunction.

Briesen & Knauth, for complainant.

Fred. Chappell, for defendants.

LACOMBE, Circuit Judge. The question whether the devices complained of infringe the second Gathright patent will have to be decided at final hearing.

As to validity and construction of the first Gathright patent, a careful examination of the patents which have been introduced here, but which were not in the record filed in prior suit of Wagner Typewriter Company v. Wyckoff, Seamans & Benedict, 138 Fed. 108, 151 Fed. 585, leads to the conclusion that their introduction in such prior suit would not have induced that court to modify its opinion. These patents are understood to be Morgan, 191,149, of 1877; Ritty and Birch, 271,363, of 1883; Kaley, 317,375, of 1885; Thomson (English), 7,269, of 1888 (same as Jenne [U. S.], 548,553, of 1895). The court may be in error in this enumeration, since counsel have failed to furnish the list asked for at oral argument, and an independent search has been made through the earlier record. No consideration is given to any patents subsequent to December 28, 1887, the date of invention found for Gathright by the Court of Appeals.

As the fourth and fifth claims are construed by that court, infringement seems entirely clear. The circumstance that prior to that decision the Patent Office granted a patent to defendant's assignor without citing Gathright's patent against him is not important. Non constat that such grant would have been made, had the decision of the Circuit Court of Appeals been before the examiner.

Injunction will issue against the Graves Company and against the Fox Typewriter Company, Limited. None will issue against the Fox Typewriter Company, which apparently was neither sued nor served, and whose appearance for the purpose of praying leave to file some plea was restricted to that purpose only.

SHARP v. BELLINGER et al.

(Circuit Court, N. D. New York. July 23, 1907.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A motion for a preliminary injunction against infringement of a patent denied where the patent was new and unadjudicated and not a pioneer and infringement was denied and in doubt on the showing made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 489. Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

In Equity. Motion for preliminary injunction in suit for alleged infringement of patent to Judson C. Sharp, for fire escape, issued November 13, 1906, on application filed July 13, 1904.

Franklin H. Hough (Charles J. Williamson, of counsel), for complainant.

Robinson, Martin & Jones, for defendants.

RAY, District Judge. The patent in suit was issued in November, 1906, some two years after application filed. The delay in issuance was occasioned by an interference proceeding declared in the Patent Office between the application of complainant and that of one William A. Burnop, and which interference was decided in complainant's favor. Defendant Davy is the assignee of Burnop. The question there was, not the validity of the patent, but who was the first inventor. The validity and breadth and scope of complainant's patent has not been adjudicated in any court, and, of course, there has been no long acquiescence in its validity. This is not a new art, and complainant's is not, in any sense, a pioneer invention. Defendants' fire escape, alleged to infringe, is not a Chinese copy of complainant's. There are differences in construction and in mode of operation. Defendants insist they do not use one or more of the essential elements of complainant's apparatus or the substantial equivalent. There is an essential contradiction in the affidavits, and on the whole, without forming or expressing an opinion as to the merits of the controversy, I think the case is one where the decided cases preclude the granting of a preliminary injunction. Diligence will bring the case to a final hearing at an early day.

Motion denied.

CONTRA COSTA WATER CO. v. VAN RENSSELAER.

(Circuit Court, N. D. California. July 10, 1907.)

No. 13,379.

1. EMINENT DOMAIN—NATURE OF RIGHT—PROPERTY RIGHT—TRANSFER.
The right of a corporation to maintain a proceeding to condemn land for a public use is not a right of property, in the sense that it may be made the subject of private proprietorship, so as to be capable of conveyance by deed from one corporation to another.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 35.]

2. SAME—PROCEEDINGS—CHANGE OF PARTIES.
Where a corporation entitled to exercise the right of eminent domain, after instituting proceedings for that purpose, transferred all its franchises, rights, and property to another corporation organized for the same purpose and entitled to exercise the same rights, the transferee thereby became invested by operation of law with the right to continue such proceeding as the representative of the state, and was therefor entitled to be substituted as the petitioner in the pending proceeding under Code Civ. Proc. Cal. § 385, providing that, in case of a transfer of interest, the court may allow the action or proceeding to be continued by or against the successor, or may allow the transferee to be substituted as a party to the suit.

E. W. McGraw, for the motion.
Thos. S. Molloy, opposed.

VAN FLEET, District Judge. This is a motion to substitute the People's Water Company, a corporation, as plaintiff in the action in the place and stead of the present plaintiff, upon the ground that the former has succeeded to the interests of plaintiff in all matters in litigation in the action.

The plaintiff, at the commencement of the action, was a public service corporation organized and existing under the laws of this state, and engaged in furnishing water for domestic and other uses to the inhabitants of certain cities and towns in Alameda county, in this state; and the action was commenced by it to condemn an undivided interest in certain lands in Alameda county described in the complaint, owned by the defendant in common with the plaintiff, alleged to be essential to the needs of the latter in carrying on said public use.

The motion is based upon a showing that the People's Water Company, sought to be substituted as aforesaid, is a corporation formed and organized under the laws of this state for like purposes, among others, as those of the present plaintiff; that, since the commencement of the action, the first-named corporation has acquired by purchase from the plaintiff, and has succeeded to the ownership of, all its properties, including all the waters, water rights, water privileges, and appropriations, vested or contingent, with reservoirs, pipes, pipe lines, flumes, aqueducts, mains, service pipes, rights of way, easements, privileges, and franchises, heretofore owned and held by plaintiff, or in any way connected with the business of furnishing water as aforesaid, heretofore carried on by it, together with the interest of the plaintiff in the real property described in the complaint; and that said

People's Water Company, as such successor, is now engaged in the said public service heretofore performed by the plaintiff as aforesaid; and that plaintiff has retired from and entirely ceased to carry on said business.

The motion to substitute is opposed by the defendant upon the ground that the People's Water Company, by the transfer to it, as set forth in the affidavit, acquired no right which would entitle it to be substituted herein or proceed in the prosecution of the action; the point of the objection being, not that the alleged transfer was in any wise insufficient to invest that corporation with title to whatever property, property rights, or franchises the plaintiff may have had to convey, but that the right to bring or maintain an action such as this was not property owned or possessed by plaintiff, or a right of property at all in the sense that it was the subject of conveyance from the one corporation to the other, but was a mere incident to the existence of plaintiff as a public or quasi public corporation, which died when the plaintiff corporation ceased to exist and act as such. And hence it is very strenuously argued that, if the People's Water Company wishes to proceed in its own behalf to condemn the property sought to be taken, it can do so only by commencing an action de novo in its own name and right.

There is just enough truth in defendant's position to make it plausible upon a first statement, but the objection will not bear examination. It is undoubtedly quite true that the right to maintain an action of this character is not a right of property in the sense that it is the subject of private proprietorship, and so capable of conveyance by deed from one party to another. The power of eminent domain, or the right to take private property for a public use, which is the controlling principle underlying the action, does not partake of the nature of an estate or interest in property, but is essentially a governmental function existing in the sovereign, "as a necessary, constant, and inextinguishable attribute." Lewis, Em. Dom. (2d Ed.) 9; Mahoney v. Spring Valley Water Company, 52 Cal. 159; Cal. Cent. Ry. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599.

Defendant is therefore right in his contention that the power is one which is inalienable in the state and cannot pass to private ownership, but this concession does not meet his needs. While the state may not abdicate its sovereign functions, or surrender them to private hands, it may, and generally must, provide for their exercise through the instrumentality of agencies created by it and under its control; and such authorization is in no sense a transfer of its right of sovereignty, since the power is still, in contemplation of law, exercised by the state, though at the instance and through the intervention of the agent. California Central Ry. Co. v. Hooper, supra; Mahoney v. Spring Valley Winter Co., supra; 4 Thomp. Com. on Corp. § 5587 et seq. Provision for such agency has been made by the Legislature in section 1001 of the Civil Code, which provides:

"Any person may, without further legislative action acquire private property for any use specified in section 1238 of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title 7, part 3, of the Code of Civil Procedure; and any person seeking to ac-

quire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms, as used in such title. * * *"

The title of the Code of Civil Procedure referred to in the above section of the Civil Code provides the purposes for and the manner in which the power in question may be invoked, and includes the purpose for which this section is sought to be maintained. And, having the right to provide for the exercise of the power through its chosen agents, the state may provide for a change or transfer of the agency in any case, the instrumentality through which the power is invoked being merely incidental to the main purpose to be subserved, that of acquiring property for a public use. Thus, in California Central Ry. Co. v. Hooper, supra, it is said:

"While a corporation which brings such an action is the proper party to bring it, because the statute makes it the proper party, its interest in the action is but incidental and subordinate to the main purpose (which alone justifies the proceeding under the Constitution); the main purpose being to secure private property, upon just compensation, for a public benefit. In initiating the proceedings, the corporation acts as agent of the state; the Legislature having provided the mode for the employment of the power of eminent domain. Houghton v. Austin, 47 Cal. 655; Mahoney v. Spring Valley, 52 Cal. 162. The Legislature, which has power to name the agent, has power to provide for the transmission of the agency during the pendency of an action by a change of the plaintiff, at least where, as here, the substituted plaintiff has acquired all the rights, powers, and franchises of the original plaintiff, continues the prosecution of the same action upon the same cause of action, for the condemnation of the same property, for the same public use."

It is therefore immaterial that the conveyance from the plaintiff to the People's Water Company did not and could not, for the reasons stated, include the right of agency to maintain the action; since the grantee being a corporation authorized to represent the public use, and having acquired all other rights of the plaintiff in the premises, the right to represent the state devolved upon it by operation of law, as a necessary incident, and clothed it with the right to proceed with the prosecution of the action. This being so, it is entitled, upon the showing made, under section 385 of the Code of Civil Procedure, to be substituted as plaintiff in the action.

It is contended by the defendant that the principles announced in Cal. Central Ry. Co. v. Hooper were intended only to apply to an instance such as there presented, where the substituted plaintiff, a railroad company, was a corporation deriving its being from a consolidation under the statute with the original plaintiff in the action; and cannot have application to a case like this, where the party proposed to be substituted is an entirely distinct and separate creature. But there is no reason in any such limitation of the doctrine; nor is there anything in the language of the court calculated to give color to that view, other than the incidental reference to the fact that the corporation there substituted as plaintiff was created in the manner indicated.

Nor is there anything in Mahoney v. Spring Valley, supra, at variance with the views here expressed. That was an attempt by the corporation plaintiff to assign to individuals its right to maintain and carry on the condemnation proceeding; and it was held that not only was the attempted transfer ultra vires, but that under the statute as it then ex-

isted no one but a corporation was authorized to prosecute such an action, and for that reason the effort to confer the right on individuals was abortive.

For these reasons, I am satisfied that the motion should be granted, and an order will be entered to that end.

UNITED STATES v. PARK & TILFORD.

(Circuit Court, S. D. New York. May 24, 1907.)

No. 4,827.

CUSTOMS DUTIES—CLASSIFICATION—TOOTH SOAP—SPECIFIC DESIGNATION.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], for "all descriptions of toilet soap," constitutes a more specific enumeration of tooth soap, used as an application to the teeth, than does the provision in paragraph 70, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1631], for "preparations used as applications to the * * * teeth, * * * such as * * * dentifrices, * * * not specially provided for."

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

For decision below, see G. A. 6,518 (T. D. 27,845), reversing the assessment of duty by the collector of customs at the port of New York.

The Board's opinion reads as follows:

McCLELLAND, General Appraiser. The merchandise which is the subject of this protest is described on the invoice as "carbolic tooth soap." It was returned by the appraiser as a toilet article, and was assessed for duty by the collector at the rate of 50 per cent. ad valorem, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 70, 30 Stat. 155 [U. S. Comp. St. 1901, p. 1631]. It is claimed that duty should have been assessed at either 15 cents per pound, or at 20 per cent. ad valorem, under the provisions of paragraph 72 of said act (30 Stat. 155 [U. S. Comp. St. 1901, p. 1631]).

The appraiser states in his special report on the protest that the merchandise is intended for use only as an application to the teeth, and this testimony is in the main confirmed by the testimony submitted on behalf of the protestants. The paragraph under which said classification was made reads as follows: "70. Preparations used as applications to the hair, mouth, teeth or skin, such as cosmetics, dentifrices, pastes, pomades, powders, and other toilet articles, and articles of perfumery, whether in sachets or otherwise, not containing alcohol or in the manufacture of which alcohol is not used, and not specially provided for in this act, fifty per centum ad valorem." The provisions of this paragraph are not specific, but most general in character, covering different classes of articles used for the toilet.

The paragraph under which claim is made reads: "72. Castile soap, one and one-fourth cents per pound; fancy, perfumed, and all descriptions of toilet soap, including so-called medicinal or medicated soaps, fifteen cents per pound; all other soaps not specially provided for in this act, twenty per centum ad valorem." In this paragraph we have specific provision for all kinds of soaps, and the question involved is not so much one as to whether the article under consideration is for the toilet, for that is practically conceded, but as to whether it is in fact a soap. The evidence of the official examiner who passed the merchandise is that it has the characteristics of soap. The analysis furnished by the official chemist also shows that the article has the characteristics of soap.

Tariff Act October 1, 1890, 26 Stat. 588, contained the following paragraphs:

"323. Starch, including all preparations, from whatever substance produced, fit for use as starch, two cents per pound." Section 1, Schedule G, 26 Stat. 588.

"730. Tapioca, cassava or cassada." Section 2, Free List, 26 Stat. 610.

The court, construing these two paragraphs, held that tapioca flour, although it might be used as a starch, was not dutiable under paragraph 323, supra, but was more specifically provided for in paragraph 730, supra, as tapioca. Mr. Justice Peckham, writing for the court, said: "Attempting, as is our duty, to give effect to the statute in all its parts, we think the proper construction of these provisions is that under paragraph 323 a duty is laid upon starch, including all preparations, from whatever substance produced, fit for use as starch, and assuming that tapioca flour is within that general description fit for such use, yet by virtue of paragraph 730 tapioca is placed on the free list, and the substance being tapioca flour, being tapioca in one of these forms, is excepted from the general language of paragraph 323, and is entitled to free entry. It is so excepted because, although assuming it to be fit for use as starch, it is notwithstanding tapioca, and tapioca is in so many words put on the free list." Lung v. Wise, 176 U. S. 156, 20 Sup. Ct. 320, 44 L. Ed. 412.

We think it logically follows, therefore, that the provision for toilet soap contained in said paragraph 72 is more specific than the general provision for "preparations used as applications to the hair, mouth and teeth," in paragraph 70.

In Abstract 11,618 (T. D. 27,393) and Abstract 12,612 (T. D. 27.572), involving merchandise of a similar character to that here involved, the Board affirmed classifications made under paragraph 70; but since our attention has been directed to the Lung Case, supra, we are inclined to think that, so far as these abstract decisions bear upon the issue, they should be overruled, for we feel constrained to sustain the claim in the protest that the merchandise should be assessed with duty at the rate of 15 cents per pound, under the provision in paragraph 72 for all descriptions of toilet soap.

The protest is sustained to the extent indicated and the decision of the collector reversed accordingly.

J. Osgood Nichols, Asst. U. S. Atty.
B. A. Levett, for importers.

PLATT, District Judge. Decision affirmed.

KNAUTH, NACHOD & KUHNE v. UNITED STATES.

(Circuit Court, S. D. New York. May 16, 1907.)

No. 4,164.

1. CUSTOMS DUTIES—CLASSIFICATION—WALL POCKETS—LITHOGRAPHIC PRINTS.
Articles composed of cardboard on which lithographic prints have been pasted, and which is cut into forms adapted to be folded into pockets to hang on walls, some of them having pincushions or calendars attached, are not dutiable as "lithographic prints," under Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], but as manufactures of paper, under paragraph 407, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

2. SAME—COMMERCIAL DESIGNATION—LITHOGRAPHIC PRINTS.
The expression "lithographic prints," in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672], had no such definite, general, and uniform meaning in the wholesale trade and commerce of the United States at the time of the passage of that act as to control its construction.

3. SAME—EVIDENCE—ADMISSIBILITY OF PREVIOUS RECORDS.
The Board of General Appraisers admitted as evidence in a case testimony taken previously in another case. This was done over the objec-

tion of counsel, who had not appeared in the previous case nor had opportunity of cross-examining the witnesses therein; and the articles involved in the two cases were not shown to be the same. *Held*, that such evidence should not have been admitted.

4. SAME—APPEAL FROM BOARD OF GENERAL APPRAISERS—COMPETENCY OF EVIDENCE.

Though Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], providing appeals from the Board of General Appraisers to the Circuit Court, makes competent evidence admitted by the board, the court may attach very slight weight to such evidence.

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

The decision below affirmed the assessment of duty by the collector of customs at the port of New York on imported merchandise. The case involves construction of Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1934], the pertinent part of which reads as follows:

"The court shall order the Board of Appraisers to return to said Circuit Court the record and the evidence taken by them, and all the evidence taken by and before said appraisers shall be competent evidence before said Circuit Court."

Everit Brown, for importers.

J. Osgood Nichols, Asst. U. S. Atty.

PLATT, District Judge. The merchandise involved in this case is wall pockets. These are made in the following manner: The lithographer makes what is concededly a lithographic print; the same being an ornamental design in color, produced by printing from stone, zinc, or other equivalent material. These lithographic prints are sent to another manufacturer, who pastes them upon cardboard, embosses them, cuts them out, and puts them in the shape of little pockets designed to hang upon the wall and hold odds and ends. They are imported in this condition, all of them having separate pieces accompanying to form the pockets. They are not used in the imported condition, as they are imported in a flat shape, which is commonly known as a "knocked down" condition. Some of these articles are decorated with pincushions, and most of them have calendars attached, which calendars are produced by ordinary printing, and not lithographic printing. The goods were assessed for duty at 6 cents per pound, under paragraph 400 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule M, par. 400, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1672]), as "lithographic prints." The importers claim that they are not lithographic prints, and that therefore they fall into the more general clause for "manufactures of paper, or of which paper is the component material of chief value," found in paragraph 407 of said act.

Counsel for the United States makes a preliminary question as to whether paper be in fact the component material of chief value. I am satisfied on the testimony of all the witnesses that it is the component of chief value. Under the decisions the various components of an article must be taken in the condition in which they are found in the article; and there is practically no component in these wall pockets except paper, some of which is in a lithographed condition

and enhanced in value beyond the condition of ordinary paper, but is still paper.

On the main question involved I am clearly of the opinion that in the wholesale trade and commerce of the United States on and immediately before July 24, 1897, there was no such definite, general, and uniform understanding to the term "lithographic prints" as the decisions require to impose such commercial meaning on terms in the tariff act. The Board of General Appraisers relied on the testimony taken in what may be called the "Overton Case" some years previously. G. A. 4,959 (T. D. 23,169). At the hearing before the board this testimony was offered in behalf of the government; but its acceptance was objected to by counsel for the importers, on the grounds that they had no participation in the proceedings in the Overton Case, that no opportunity for cross-examination of the witnesses in that case was afforded to present counsel, and that the merchandise in the Overton Case is not shown to be the same as the samples in the present case. The samples in the Overton Case were before this court together with the samples of the merchandise now in dispute, and it is evident that there are differences; so that what the witnesses said about the samples in the Overton Case might very possibly not have been said about the samples in the present case. For all these reasons I am of the opinion that such testimony in the Overton Case should not have been admitted by the Board of Appraisers in the case at bar.

Having been admitted and having become by operation of section 15 of the customs administrative act (Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1934]) competent evidence in this court, I am nevertheless compelled to give it very slight weight in view of the preceding considerations. Giving it such weight as I think it is entitled to, and also taking into account the subsequent evidence in the case at bar before a referee, including the testimony of witnesses both for the importers and the government, I have reached the conclusion, as previously indicated, as to the commercial meaning of "lithographic prints." We are therefore relegated to the ordinary meaning of the words; and, as these articles are clearly manufactures of lithographic prints (a provision for which occurred in the act of 1890, but is omitted from the present law), rather than lithographic prints themselves (In re Kursheedt Manufacturing Company, 54 Fed. 159, 4 C. C. A. 262), I feel convinced that they are dutiable, not under paragraph 400, but under paragraph 407, of the act.

The decision of the Board of General Appraisers is reversed.

LEERBURGER v. UNITED STATES.

(Circuit Court, S. D. New York. June 11, 1907.)

No. 4,133.

1. CUSTOMS DUTIES—PROTEST—SUFFICIENCY.

An importer contended in his protest that merchandise was "woven fabrics in the piece, dyed," and dutiable "at 60 cents per pound," when he should have contended for 50 cents per pound, the rate on goods in the gum; the relevant portion of the tariff act being: "If in the gum, fifty

cents per pound, and if dyed in the piece, sixty cents per pound." *Held*, that the protest was a sufficient reference to the proper provision to satisfy the requirements of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

2. SAME—REFERENCE TO WRONG PARAGRAPH.

An importer in his protest contended that merchandise should have been classified under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 388, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1670], the terms of which were inapplicable to such goods; and the language of the protest showed that he had intended to refer to paragraph 387, which did apply., *Held*, that the protest should be considered as referring to the latter paragraph.

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

In the decision below the Board of General Appraisers affirmed the assessment of duty by the collector of customs on merchandise imported by George Leerburger, on the ground that, though the goods had been improperly assessed, the importer was not entitled to relief, because his protest did not satisfy the requirements of Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]. This section provides that importers' protest must set forth "distinctly and specifically" the "objections" to the assessment. The pertinent portion of the paragraph under which the merchandise should have been classified is as follows: "Woven fabrics in the piece, not specially provided for in this act, weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, and containing not more than twenty per centum in weight of silk, if in the gum, fifty cents per pound, and if dyed in the piece, sixty cents per pound, * * * but in no case shall any of the foregoing fabrics pay a less rate of duty than fifty per centum ad valorem." Extract from Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669].

The importer asserted in his protest that the goods were dutiable "at 60 cents per pound (or 50 per cent. ad valorem) under the first clause of paragraph 388, * * * being woven fabrics in the piece, dyed, weighing not less than 1⅓ ounces nor more than 8 ounces per square yard, and containing not more than 20 per cent. in weight of silk."

The Board observed as follows in the opinion filed in the case: "Howell, General Appraiser. The alternative claim that the goods are dutiable under paragraph 388 is undoubtedly a clerical error. The language used in setting forth the claim under this paragraph shows that the importer intended to cite paragraph 387, which contains the provision for woven silk fabrics, and we therefore construe this claim as having been made under that paragraph. Shaw v. U. S., 122 Fed. 443, 58 C. C. A. 425; U. S. v. Hunter (C. C.) 124 Fed. 1005; Weil v. U. S. (C. C.) 124 Fed. 1006. But, even construing this claim as having been made under paragraph 387, the protest is nevertheless insufficient, for the importer has failed to point out the provision of the statute which actually controls. The goods are not "piece dyed" goods dutiable at the rate of "60 cents per pound," but not less than 50 per cent. ad valorem, as claimed, but are woven silk fabrics "in the gum," dutiable at the rate of 50 cents per pound, but not less than 50 per cent. ad valorem. The protest is therefore overruled for failure to make the proper claim, without an affirmance of the decision of the collector. U. S. v. Bayersdorfer, 126 Fed. 732, 62 C. C. A. 16; Hanano v. United States (D. C.) Estee's Hawaiian Rep. 344 (T. D. 24,946); U. S. v. Fleitmann, 137 Fed. 476, 69 C. C. A. 624.

D. Macon Webster, for importer.
J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. The petitioner prays for a review of the decision of the Board of United States General Appraisers as to

the rate and amount of duty on certain merchandise imported by him by steamer St. Louis, November 12, 1900.

The merchandise consists of woven fabrics in the piece weighing not less than 1⅓ ounces nor more than 8 ounces per square yard, to wit, 1.37 ounces per square yard, and containing not more than 20 per cent. in weight of silk in the gum, dutiable at the rate of 50 cents per pound, but not less than 50 per cent. ad valorem, as specially provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 387, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]. Duty was assessed by the collector at the rate of 8 cents per square yard and 30 per cent. ad valorem, under the provisions of paragraph 311 of said act. The collector found that cotton was the component material of chief value. The Board of Appraisers found that the chief value was of silk, and I affirm that finding. The fabrics in this case are the same as those involved in a previous case between the same parties, except in this case the goods were imported in the gum, while in the previous suit they were piece dyed. In the previous case the court found that the chief value was silk, the same as it is in this case. No claim was made on hearing but that an error was made by the collector; but the government insists that the protest does not distinctly and specifically set forth the importer's reasons for his objection to the action of the collector, in that:

First. He refers to paragraph 388, instead of 387.

Second. He refers to the fabrics as being dyed in the piece, instead of being in the gum. The Board of Appraisers excused the error as to the paragraph as being clerical, but overruled the protest without affirmance of the decision of the collector because the word "dyed" is used in the protest. I concur with the ruling of the Board as to the error in the protest being clerical in reference to the paragraph, but to hold that the government should keep the excess of duties collected because the word "dyed" is used in the protest seems to me more technical than just. The importer, in using the word "dyed" in his protest, made an error against himself of 10 cents per pound, provided no reference is made to the provision for 50 per cent. ad valorem. This error evidently arose from the fact that the goods involved in the previous case were fabrics dyed in the piece. The question of fact in dispute between the importer and the collector in the previous case and in this case was as to whether cotton or silk was the component material of chief value. In the former case, that fact was found with the importer, the same as that fact is now found with the importer in this case. The protest distinctly and correctly sets forth the date, place, and manner of importation, the material of which the goods were manufactured, the chief value of such material, and as being woven fabrics in the piece, weighing not less than 1⅓ ounces nor more than 8 ounces per square yard, and containing not more than 20 per cent. in weight of silk. If no reference had been made in the protest to any paragraph of the tariff act, such a description must have directed the collector's attention to such provisions of the law as relate to woven fabrics in the piece, of the weight therein described, and containing not more than 20 per cent. in weight of silk, and, whether dyed in the piece or in the gum, the duty must be at least 50 per cent. ad valorem and up to 50 cents per pound if in the gum, and 60 cents

per pound if dyed in the piece, as provided in said paragraph 387. Whether it should be 50 or 60 cents a pound he could readily ascertain by looking at his sample. It was evident from the sample produced at the hearing that it was not dyed in the piece, but was in the gum. The error in the use of the word "dyed" was evidently not misleading, and was harmless. Former litigation must be construed to have established beyond further question that the fabrics made of this material do not come within the provisions of paragraph 311. The use of the word "dyed" in the protest thus—"being woven fabrics in the piece, dyed, weighing," etc.—I regard as superfluous, or at least a clerical error.

Wherefore the decision of the Board of Appraisers in overruling the protest is reversed.

A. A. VANTINE & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 17, 1907.)

No. 3,576.

1. CUSTOMS DUTIES—CLASSIFICATION—APPLIQUÉD GOODS—TEMPORARY CONDITION.

   Fabrics to which tinsel cord has been attached by an appliqué process, resulting in goods which are fairly ornamental, durable, permanent, and salable, but not in the highest sense, are articles "appliquéd," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], though only 60 per cent. of the material imported was used in the form in which imported; the cord being removed from the remainder because the goods were more salable in that condition.

2. SAME—TEMPORARY CONDITION OF MERCHANDISE—SUBTERFUGE.

   A collector of customs excluded goods which had been cheaply appliquéd from a tariff provision for "appliquéd" articles, on the ground that the appliqué feature was added to secure a lower rate of duty than would be applicable if they were imported plain. *Held*, that as the greater portion of the goods were sold in the condition in which imported, and the appliqué work was not done solely as a subterfuge to obtain the lower duty, they should have been classified as "appliquéd."

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

For decision below, see G. A. 5,688 (T. D. 25,330), affirming the assessment of duty by the collector of customs at the port of New York.

The goods in controversy were described by the Board as follows: "This merchandise consists of woven fabrics of silk in the piece, boiled off, and having a cotton cord loosely wound with gilt paper sewed upon the fabric with a colored thread. These cords are doubled and run lengthwise of the fabric at distances varying from about 6 to 18 inches apart, and are looped in loops of a variety of shapes and sizes at irregular intervals of from 9 to 12 inches, without design or the least semblance of regularity."

The Board found that these materials had been temporarily put in the appliquéd form for the purpose of making them subject to a duty lower than that to which they would be liable if classified as silk fabrics, and that they were not in "a permanent condition either of their manufacture or sale," and held that "the dutiable character of merchandise is determined by its form when made up into a completed article, and not as it may appear by reason of changes made thereafter, effecting a temporary condition during importation in order to avoid duties imposed by law."

D. Macon Webster, for importers.
J. Osgood Nichols, Asst. U. S. Atty.

PLATT, District Judge. The merchandise in question was assessed for duty as woven fabrics of silk, boiled off, at the rate of $3 per pound, under the provisions of paragraph 387 of the tariff act of July 24, 1897, c. 11, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669], and is claimed properly dutiable at the rate of 60 per cent. ad valorem, either directly or by similitude, by virtue of section 7, as "articles appliquéd, made of silk or of which silk is the component material of chief value, not specially provided for" under the provisions of paragraph 390 of said act. The protest sets forth other claims, none of which were insisted upon at the trial. The Board of General Appraisers overruled the protest and sustained the assessment of duty by the collector. The importer appeals to this court.

In 1902 the same Board, in G. A. 5,202 (T. D. 23,977), found the same merchandise to be appliquéd. Now, upon further consideration, it has reached the opposite conclusion. If the tinsel cord which appears on the silk were a flimsy, impracticable, useless appliance, and had been put upon the silk after manufacture solely as a subterfuge, to be stripped off after the merchandise had been safely lodged in the control of the importer, the decision of the Board would commend itself to my judgment. The evidence before the Board, coupled with that taken in court, does not bring my mind to such a conclusion.

The merchandise as imported may not be in the highest sense ornamental, durable, permanent, and salable. It is, however, fairly so; and in those respects only differs from Exhibit 20 in suit, concededly an appliquéd article, in degree, if it differs at all. The testimony shows that 60 per cent. of the importation was used as it came, and that the cord was removed from the balance because in that condition it found a readier sale in the market. As between plain silk, boiled off, and silk appliquéd, it deserves the latter classification.

The decision of the Board of General Appraisers is reversed.

MORSE DRY DOCK & REPAIR CO. v. MUNSON S. S. LINE.

(District Court, S. D. New York. June 6, 1907.)

ACCOUNT STATED—WHAT CONSTITUTES.

Where the repairer renders accounts for the work done and materials furnished and the owner of the vessels accepts the accounts and uses them to obtain its pay from the Government, to which they were chartered, upon assurances of correctness, and an examination of the accounts by the agents of the Government follows, the accounts will be deemed stated between the parties and a recovery for the full amount allowed without reduction for a commission claimed by the respondent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, §§ 30–40.]

(Syllabus by the Court.)

In Admiralty.

Armstrong, Brown & Boland, for libellant.
Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the Morse Dry Dock and Repair Company against the Munson Steamship Line to recover a balance of $10,978.40 claimed to be due for repairs made on the steamships Bergen, Jacob Bright, Cubana and Laupar, between the 30th day of September and the 11th day of October, 1906. The libel alleges that bills to the extent of $75,978.40 were incurred on the vessels, of which the sum of $25,000 was paid on the 3rd of November and $10,000 on the 12th of November, leaving the balance due and owing since the 17th of October. The libel further alleges that previous to the furnishing of the work and materials for the vessels, the respondent had chartered them to the United States for various periods and at various rates and as follows:

"That it was agreed between the United States and the respondent that the smaller charter rates on said vessel were to be the normal rates, and that the additional amounts paid for the first fifteen days on each charter were to provide a fund for fitting up said vessels according to specifications, to render them available as transports for United States Army use.

Fifth: That the respondent engaged the libellant to fit up said vessels as aforesaid, and directed the libellant to spare no expense in the procuring of extra and night labor, and materials, to make the said vessels ready in the limited time required by the United States.

Sixth: That libellant employed extra and night labor as directed, and purchased materials on short notice, and performed the work of fitting up said vessels, within the time required by the respondent and the United States, and the reasonable value of such material and services furnished to each vessel was as follows:

To the 'Cubana'	$21,522 56
To the 'Bergen'	15,362 29
To the 'Laupar'	13,961 18
To the 'Jacob Bright'	25,132 37

Seventh: That itemized bills for such work and materials against each vessel as aforesaid were delivered by the libellant as to the respondent between the 17th day of October, 1906, and the 20th day of October, 1906.

Eighth: That repeatedly between the 17th day of October, 1906, and the 26th day of December, 1906, the respondent admitted the said bills to be correct, and promised to pay on account of same, and to pay the bills in full as soon as the respondent received from the United States the amounts due to the respondent.

Ninth: That said bills so delivered to the respondent by the libellant, were by respondent presented to the United States, and were asserted, and certified by the respondent to be correct, and payment thereof demanded upon the ground that the extra charter monies aforesaid, agreed upon to be paid for fitting up said vessels, were insufficient to pay for same, because of the extra work not called for in the specifications, and extraordinary expenses incurred in complying with the demands of the United States in getting the said repairs completed within the time designated by the said United States, and that respondent was required to pay the said bills to the libellant; and that thereupon, pursuant to said demand, and on or about the 26th day of December, 1906 the United States paid to the respondent for the work and materials furnished by the libellant, the following amounts for each vessel:

'Cubana,' $9,042.25, besides the sum of $12,375, extra charter money previously paid.

'Bergen,' $4,428.25, besides the sum of $9,750, extra charter money previously paid.

'Laupar,' $5,817.38, besides the sum of $8,250, extra charter money previously paid.

'Jacob Bright,' $11,362.62, besides the sum of $13,500, extra charter money previously paid.

Tenth: That the respondent collected from the United States as aforesaid, the full amount of libellant's said bills, except for certain items aggregating about $1,452.90, which were for repairs or improvements to the ships not properly chargeable to the United States, but the respondent has refused to pay the libellant the aforesaid balance due to the libellant."

The answer denies that the total value of the repairs amounted to $75,978.40 or that the sum of $40,978.40 is due and makes some general denials, alleging that the libellant's charges were excessive and exorbitant and the respondent never stated that the bills would be paid and as follows:

"Tenth: Further answering the libel herein, and as a separate and distinct defense thereto, the respondent alleges that at the time the charter parties referred to, were entered into between the United States Government and the respondent, the Government's representative stated to the respondent that it would be necessary to make extensive repairs and alterations to said vessels to fit them for the Government's purposes. He requested respondent to undertake the supervision of said repairs, to see that said repairs were properly carried out, and that the work was pushed with all possible speed. It was also agreed between the Government's representative and the respondent that the respondent should be paid a reasonable compensation for its services in the matter of such supervision. Upon the completion of the work, the bills as above specified, were rendered by the libellant to the respondent, and were at once objected to by the respondent, who stated to the libellant that said bills were excessive and exorbitant. The libellant thereupon informed the respondent that if the Government would provide the respondent with funds sufficient to pay said bills the libellant would then take up the matter of the adjustment of said bills with the respondent, and make such reduction as would be reasonable and fair under all the circumstances. Said bills were then exhibited to the Government's representative who stated to the respondent that said bills were excessive and exorbitant. It was understood between the respondent and the Government's representative that the amount of said bills should be paid by the Government to the respondent, and that the respondent should then obtain from the libellant a reduction of said bills to a figure which should seem fair and reasonable, and that such reduced amount should be paid to libellant. Immediately thereafter the respondent requested the libellant to make a reasonable reduction from the amount of said bills, but the libellant has refused to make any reduction whatever, and has demanded the payment of said bills in full. The respondent has at all times been ready and is now ready and willing to pay the libellant an amount which shall be fair and reasonable compensation for the labor, material and services furnished by the libellant to the respondent, and is content to leave to this Honorable Court the determination of said amount.

Wherefore the respondent prays that this Honorable Court will be pleased to inquire into the matters herein set forth, and will fix and determine the fair and reasonable amount due from the respondent to the libellant by reason of the matters aforesaid."

The testimony on the part of the libellant shows that four bills covering the repairs to the steamers were duly rendered to the respondent and that the bookkeeper went to its office for the purpose of making some alteration in form, as requested by the respondent, and he then saw the Secretary of the corporation, Mr. Bromell, who said that the bill seemed to be all right but there was one in which he wished that the regular time and overtime of the workmen should be put in separate bills. The change was made and there was no further objection to the bills. Another witness was Mr. Morse, the general manager of the libellant, who said he called to see Mr. Bromell, who told him that he had not had time to go through the accounts thoroughly

but would pay $25,000 on account and take up the matter for final settlement when the Government had paid; that Mr. Bromell then asked what there was in the bills for them and they ought to have ten per cent. Mr. Morse replied that he was crazy, that they only made twelve per cent. and could not run their plant on two per cent. Mr. Bromell then said we can not give you more than $25,000 but would take up the matter with the libellant again and in the meantime Mr. Morse had better speak to his company about it which he promised to do; that Mr. Bromell did not make any statement that the bills were wrong; that on the 7th of November Mr. Morse called upon Mr. Bromell again and told him that he had put the matter up to his company and they had decided that if the Munson Company would pay the bills in full at once, they would be allowed five per cent., but Mr. Bromell refused to discuss that proposition saying:

"We are in your hands. We can't do that, we have not received the money from the Government but the commission will be optional with you when it is finally settled."

Mr. Morse then asked for another payment on account the reply to which was

"We can't give you any money today, but on Friday we will give you $20,000 more."

On that day a representative of the libellant was sent to the respondent but he was told that it could not pay the $20,000, and subsequently Mr. Morse had a conversation with Mr. Bromell in which he charged the latter with not keeping his agreement to which Mr. Bromell replied:

"I am not the whole show. Mr. Munson dont want to pay any more money until we get some from the Government, but probably next week we can give you some more."

And the next week the respondent did pay $10,000. About the 26th of December Mr. Bromell telephoned that he wished to make a settlement and Mr. Morse called upon him when the former said it wanted ten per cent off the bills, to which Mr. Morse replied:

"You know what I told you before, that we would give you five per cent if you advanced the money and we didnt carry it. Our company will give you about two per cent, which is $1,600, and that is all they will give. I have discussed the matter with them."

He refused and said if it did not give the respondent the commission, it would not pay the bills. He further testified that at none of their interviews was any objection made to the size of the bills; it was simply what it could get off for itself; that there was never any question as to the correctness of the bills. The witness then produced a copy of a letter from Mr. Bromell, with a proposed form of letter from the libellant to the respondent as follows:

"New York, December 8, 1906.

Morse Dry Dock & Repair Company
Mr. E. P. Morse, General Manager
Foot 56th St., Brooklyn, N Y

Dear Sir:

The Quartermaster's Department at Washington has returned to the Quartermaster in New York, accounts for extraordinary charges in the fitting up of the 'Cubana,' 'Bergen,' 'Laupar' and 'Jacob Bright' asking for an explana-

tion as to why these abnormal charges were incurred, and we wish to have a letter from you, addressed to ourselves, embodying the phraseology of the pro forma letter which we enclose. Kindly write this at your earliest convenience, and send it to us, and oblige. Monday if possible.

Yours very truly,

Munson Steamship Line
A. H. Bromell
Secretary."

"New York, December 8, 1906.

Munson Steamship Line
82 Beaver Street, New York

Dear Sirs:

In connection with the expenses of fitting up your steamers 'Cubana,' 'Bergen,' 'Laupar' and 'Jacob Bright' for the carriage of animals for the Quartermaster's Department, we desire to say that the conditions prevailing at the time this work was done were such that the fitting up of the ships could only be done with the greatest difficulty, owing to the fact that some 17 to 18 boats were being equipped at the same time, and the services of competent carpenters was almost impossible to obtain. We were compelled to utilize any character of carpenters which we could obtain, and work them day and night, naturally getting but very poor results and entailing a vastly increased outlay of money for a minimum amount of return. You no doubt are aware of the fact that we are compelled to pay carpenters three and one quarter days for each night worked and on this basis for each part thereof. The men, naturally, being worked continuously, could perform very inadequate service. We regret that these conditions should have prevailed, but we assure you that the very utmost was done under these very disadvantageous conditions.

Yours very truly,"

The words "You no doubt are aware of the fact that we are compelled to pay carpenters three and one quarter days for each night worked and on that basis for each part thereof" were added to the draft suggested to Mr. Bromell by Mr. Morse.

A letter dated December 28, 1906, from the libellant to the respondent was also produced.

"Dec. 28, 1906.

The Munson Steamship Line,
82 Beaver Street,
New York City.

Gentlemen:

Referring to Mr. Bromell's conversation, yesterday, with our Mr. Morse, we cannot afford to allow you more than two per cent discount on the bills S. S. 'Cubana', 'Laupar', 'Bergen' and 'Jacob Bright.' Considering the extraordinarily long delay in payment of these bills by you and the necessity we were thereby placed under of borrowing funds, and payment of interest thereon, properly we should not now be asked to allow any discount whatever, but, in order to preserve our excellent friendly relations also to get the full balance of money now due us from you promptly, we will allow you two per cent on the face of the bill, providing, however, we have check for balance in full not later than noon Dec. 31st, 1906. Should we not receive a check by that time, we shall be obliged to refuse any discount whatever on said bill. In order that there shall be no misunderstanding about the amount of our account, the four vessels' bills make a total of $75,978.40; decreasing it by 2 per cent, viz., $1,519.57, and by the $35,000 previously paid on account, leaves a net balance due us of $39,458.83.

We sincerely trust that this disposition of the matter will be entirely satisfactory to you, upon reflection as to our limited profits, as explained by Mr. Morse to you, as well as our loss of use of these funds for so long

Yours very truly, Morse Dry Dock & Repair Co.
D. J. Leary
Pres."

The witness further testified that no reply was received to this last letter and the discussion throughout was on the basis of a commission, the amount of which was left with his company.

The libellant next produced as a witness a Mr. Nye, who said that he was Marine Superintendent of the United States Transport Service and had general supervision of fixing up vessels. As the witness was proceeding to testify, objection was made on behalf of the respondent that he could not be a witness to the correctness of the bills which was the subject of the controversy. The witness was allowed to testify, however, and the question was reserved as to the admissibility of his testimony. Even as an admission, it would have been competent. The fact that the admission was made to a third party seems immaterial. It is said in 1 Amer. & Eng. Enc. of Law, 675: "Admissions may be made to the adverse party, or his agent, or to a third person." It was not necessary for the libellant to prove an express consent by the respondent to the correctness of the account, such consent could be implied from the surrounding circumstances. Spellman v. Muehlfeld, 166 N. Y. 245, 59 N. E. 317. The admission of the testimony seems to have been correct.

Mr. Nye testified that he had general supervision of the vessels on the part of the Government and all bills were handed to him to examine; that the bills were the subject of discussion between Colonel Miller, of the Quartermaster's Department, Mr. Frank Munson, of the respondent company and himself; that he had previously gone over them with Mr. Munson who said that the bills were excessive and gave the reasons therefor; that the bills were returned to Mr. Munson, after the witness had checked them off and found there were certain charges there which rightfully belonged to the owner and not to the Government; that he had several subsequent interviews with Mr. Munson in order that the bills should be rendered in such a way as to show why the extraordinary charges were made; that the amount of the bills was finally settled at something over $75,000 and paid by the Government; that Mr. Munson did not continue to say that the bills were excessive; that he came to the conclusion that the bills were correct when he rendered them and they had all been straightened out; that he would not be positive that Mr. Munson signed the bills finally as correct but he thought he did so, as all bills have to be signed by the ship owner. The witness subsequently corrected his testimony with reference to Mr. Munson stating that the bills were excessive and said it was Colonel Miller and not Mr. Munson who considered the bills excessive; that Mr. Munson said he understood the bills to be correct, and the charges high because of night work and the labor strike; that Mr. Munson stated the reasons for the excess were "owing to night work, strikes which were on at that time, labor strikes, and working men three or four days; that is, I mean by that working day and night, and the men being pretty well fagged out, which they were"; that Mr. Munson gave these reasons why the bills were larger than was originally contemplated and put in the charter party.

Colonel Miller, whose official title was Lieutenant Colonel and Deputy Quartermaster General in the United States Army, Depot Quartermaster in New York, testified that when Mr. Munson first

brought the bills to him, he. Colonel Miller, in the presence of Captain Nye, looked them over and expressed the opinion that they were excessive; that Captain Nye and Mr. Munson were present at the time. The witness further testified:

"Q. What did Mr. Munson say as to that? A. Mr. Munson went into an explanation of the amount of the bills and the character of the bills, and gave as the reasons the condition of affairs in the ship yards in the Port of New York, consequent on the great number of chartered transports that were being fitted up, the labor troubles, strikes and night work, and because they worked twenty and forty hours without stopping; all tending to show that the bills would naturally run very high.

Q. Did he say anything as to whether they were right or wrong? A. It was to the effect that they were correct under the circumstances.

Q. After that, what did you do with the bills? A. I examined them over carefully in connection with Captain Nye. There were some items that were irregularly placed, different from that stated in the bills—charged against one ship that should be to another, my recollection is; certain expenses that were included in the charter party had been charged as extras, certain extras had been charged as extraordinary, and vice versa.

* * * * * * * * * * * * * * *

Q. Did you ever have any conversation with any of the officers of the Munson Steamship Line in regard to the payment by you on behalf of the Government of a commission for supervising this work? If so, state that to the Court. A. The Munson Company, through Mr. Frank Munson, rendered a bill of something over $6,000, for ten per cent of the Morse bills, for the supervision of the work.

Q. Did they ask you to pay it? A. Yes sir.

Q. What did you do about that? A. I refused to pay it.

Q. They wanted ten per cent. from the Government for their supervision? A. About that.

Q. It is stated in the answer to this libel, that at the time of the chartering of these four ships, the Government, through you, asked the Munson Steamship Company to undertake the supervision of these repairs, to see that they were properly carried out. Is that correct? A. Yes.

By Mr. Cortis. Q. Was that after the charter? A. At the time of the charter.

By Mr. Brown. Q. It is alleged that there was an agreement made between you and the Munson Steamship Company, that they should be paid for that supervision? A. Included in the extra charter money for the first fifteen days; the estimate by the Munson Company of the amount necessary to put the ships in shape.

Q. It is also asserted that there was an understanding or agreement between the Munson Steamship Company and you as the representative of the Government, that the amount of these bills as rendered by the Morse Company should be paid by the Government, and that then the Munson Company should obtain from the Morse Company a reduction of these bills to a figure which should be fair and reasonable, and that the Morse Company should only receive the reduced amount. Was there any such agreement made with you? A. None whatever."

* * * * * * * * * * * * * * *

"Cross examined by counsel for respondent.

By Mr. Cortis. Q. Do I understand you to say that in the conversation you had with Mr. Munson it was understood between Mr. Munson and you that the compensation of the Munsons for their services in overlooking these repairs to the ships should be included in their figures, when they estimated the expense of these repairs? A. That is right. That is at the time the charter party was made.

Q. And that they should get their compensation by increasing the estimate—

Mr. Brown. We object, upon the ground that any contract between the Government and the Munson Steamship Company as to compensation to them for services we are not parties to.

The Court. I allow the question.

Ans. If I may take time enough to say what I mean: at the time the charter party was made, Mr. Munson at my request undertook to fit up certain ships, and in order to make the payment for the fitting up of the ships the ordinary charter party—the amount of it—was increased by so much over as to include the cost of the fitting up, in the first fifteen days of the charter party, and in fact the ten per cent, or whatever profit was coming to the Munson Company for fitting up the ships as estimated, was included.

Re-direct examination by counsel for libellant.

By Mr. Brown. Q. It turned out afterwards that the cost of fitting up was very much greater? A. Very much greater.

Q. And the difference was paid to them by these bills? A. Exactly.

Q. Was this compensation for the supervision of the work that they were to get— A. Under the charter party as estimated.

Q. Did they supervise this work? A. Not altogether, no sir.

Was the subject of this compensation brought up to you after the repairs were done, and they made the claim for supervision? A. At the time these bills were first presented.

Q. Then they made the claim for supervision? A. Yes.

Q. What did you tell them about it? A. That the estimate included the ten per cent—or whatever it was understood to be—of the amount, and that the supervision of the Morse ships was not coming to them in the extraordinary expenses.

Q. What did you mean? That they were not entitled to supervision of the Morse ships? A. Yes.

Q. Why? did you tell them? A. I think so, as I stated before.

Q. Why was it? A. On account of the estimate including that.

Recross by counsel for respondent.

By Mr. Cortis. Q. Is it your idea, was it your intention that they should pay themselves out of that money which they had charged? A. Out of that money?

Q. Out of the money which was paid over to meet the estimate they had originally made, that that estimate was supposed to be sufficiently greater than that of the Morse Company to pay them? A. Say that again, please.

Q. Was it your idea after this conversation, that they should make their estimate for the cost of the repairs sufficiently in excess of what the Morse Company would charge, to pay them for their services? A. No, that is not the way I put it. Munson and Company made the estimate to put the ships in shape, and as with all estimates it included the cost of the man that does the work.

Q. Of the Munsons? A. Yes.

Q. In other words, the cost of the Munsons would make for their services— A. Was included. That estimate was included in the increased charter money.

Q. And it was in that way they were to be paid for their services? A. Yes sir.

By Mr. Brown. Q. That was an understanding between you and the Munson Steamship Company? Mr. Morse was not there, was he? A. I did not know him at all."

Mr. Bromell was then called and testified that he had charge of fitting up the vessels; that he first knew that the charge therefor approximated $75,000 when he received the bills from the libellant; that Mr. Morse called upon him at his request and he told Mr. Morse that the bills were exorbitant and that Mr. Morse had better take them back and put them down to a proper basis before they were submitted to the Quartermaster's Department; that Mr. Morse took the matter under consideration and a day or two afterwards telephoned he could make no changes; that the witness then said all that could be done was to submit the bills as they were if no changes could be made; that he never said to Mr. Morse or to any one of his concern that he thought the bills reasonable; that all he said to Mr. Morse's book-

keeper was that the bills required some alteration in form, but nothing about the reasonableness of the bills. On cross examination he said that the alterations were made on Captain Nye's instructions; that he paid something on account but all the time maintained the bills were excessive down to the time the money was received from the Government; that he did not collect the money, the settlement with the government having been made with Mr. Frank Munson; that what he picked out to be wrong was the number of men employed on a certain vessel at a certain time and the price he charged for materials, which he figured were 50 or 60 per cent higher than they should be; that when Colonel Miller thought the bills were excessive, he wanted to set before the Government certain statements that they were right; that he drafted the letter of December 8th and thought the facts there stated to be true to a very large extent; that he did not know how to explain wherein they were not true; that there may be degrees of truth; that the conditions expressed in the letter to be written by Mr. Morse, under request of December 8th, were true all through; (By Mr. Cortis) that it was merely an explanation of the conditions under which the work was done and to give some satisfactory reason for the bills being as they were; (By Mr. Brown) that to a certain extent he believed that what he said was true, the conditions as expressed in the letter there; that the bills which were on the bill heads of the Morse Company were copied on their own bills to the Government, that the Government demanded vouchers for everything and the Morse bills were sent with their own.

Frank C. Munson was then called upon to testify for the respondent and he said that he handled the matter entirely with Colonel Miller; that a couple of days after the bills came in Mr. Bromell advised him what the total amount was; that he never had any conversation, as he remembered, with the Morse Company; that he never stated to any one that he thought the bills reasonable.

On cross examination he testified as follows:

"By Mr. Brown. Q. You didn't think they were reasonable did you? A. I didn't think they were reasonable, no sir.

Q. And you never tried to explain to anybody that they were reasonable, did you? A. I talked with Colonel Miller about the bills, and told him what the circumstances were surrounding the work and so forth, which I had received from Mr. Bromell and the superintendent.

Q. What you told Colonel Miller was the truth, wasn't it? A. Yes sir.

Q. And it was because it was suggested by Colonel Miller that the bills were excessive, that you made this explanation, wasn't it? A. Yes.

Q. Col. Miller said they were excessive? A. I agreed with Col. Miller that the bills were excessive, and I told him that we had protested to Mr. Morse that the bills were excessive, but that Mr. Morse said that he couldn't reduce them.

Q. What were you trying to convince Col. Miller of? A. I was trying to convince Col. Miller that the bills could not be materially reduced, because Mr. Morse had taken the stand that they must be paid on or about the basis on which they were rendered.

Q. Then you deny that you told Col. Miller the bills were right, do you? A. I told Col. Miller—

Q. Just answer that question. Col. Miller has testified that you told him tht the bills were correct. Is that true? A. I told Col. Miller the bills as rendered would have to be paid.

Q. Col. Miller said they were excessive? A. Yes sir.

Q. What were you trying to prove to Col. Miller? A. We made a certain contract with the Government which was on a lesser basis than total bills rendered by Morse were. I went to Col. Miller and said, 'Here are bills which are more than what we agreed to do the work for, and we will be out a certain amount of money if these bills are not paid.' And he said, 'I dont want to see you people lose money on the contract, because I asked you to use your expert supervision in fitting up these boats.'

Q. What were you trying to convince him about the bills, that they were right or wrong? A. I was trying to convince him they were right."

In rebuttal Mr. Morse testified as follows:

"By Mr. Brown. Q. At any time from the time this negotiation began down to date, have you ever heard of any agreement in regard to the payment of compensation to the Munson Steamship Line for supervising the work you did? A. Not until lately. At that time I had not, no.

Q. When did you hear of any such agreement? A. I think about a month ago. Capt. Nye mentioned it.

Q. That was after this thing was all over? A. After this thing was all over, yes.

Q. Up to that time you never heard about their being paid for supervision? A. No.

Q. Was any suggestion ever made to you as to that effect? A. No.

Q. Mr. Bromell testified to a conversation with you just after the bills were paid, in which he said he told you the bills were excessive and ought to be recast, taken back and refigured. Do you remember that testimony? A. Yes.

Q. Is that true? A. (No answer)

By Mr. Cortis. Q. Do you state that you remember the testimony? A. Yes.

Q. Did anything like that happen? Didn't he ask you to reduce the bills? A. No sir.

Q. Didn't Mr. Bromell ever ask you to reduce the bills? A. No sir. I think I stated that the only conversation regarding our bills was the ten per cent, eventually reduced to five per cent. When I refused the ten per cent, he wanted five per cent. That is the only discussion we had relative to the bills, that is, to the amounts.

Q. Mr. Bromell never said to you those bills were too high? A. No sir."

The testimony indicates the facts to be that the respondent made a contract with the Government for the chartering of certain steamers, which required some repairs and alterations, and the libellant was employed by the respondent to make them within a limited time allowed by the Government. The repairs were made to the satisfaction of the Government and the bills therefor rendered by the libellant to the respondent, and some changes in form made by the libellant at the request of the respondent, which adopted them as correct and presented them to the Government for payment. Some objection was made by the Government to the charges, particularly for carpenter labor, and the respondent then suggested to the libellant the writing of an explanatory letter, which it did and it was presented to the Government officers, who had charge of the matter, with some verbal explanations. The Government officers were eventually satisfied by an examination with the correctness of the bills and paid the respondent the full amount of the claims, after deducting a small amount, said to have been $1498.75, which they considered as being for the benefit of the charterer and not for that of the Government. The total amount of the work done by the libellant was $75,978.40 and the respondent paid thereon about $35,000, leaving due some $40,978.40, which the

respondent was apparently willing to pay if the libellant would reduce it by ten per cent on the full claim for the respondent's benefit. It does not appear that the respondent was entitled to any reduction from the amount of the claim, which was presented by it to the Government as correct in items and amounts. There was some understanding between the respondent and the Government that the respondent should obtain its compensation for superintending the work from the amount of the bills paid by the Government but the libellant had no part in such understanding and it was not in any way bound by it.

There is no doubt in my mind that the libellant is entitled to recover from the respondent and the only remaining question in the case is, whether the form of action of an account stated, puts the matter in such shape as to enable the court to allow a decree.

It has been said by Mr. Justice Story in his work on Equity Jurisprudence (v. 1, p. 544) as follows:

"526. What shall constitute in the sense of a Court of Equity a stated account, is in some measure dependent upon the particular circumstances of the case. An account in writing examined and signed by the parties will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted. But in order to make an account a stated account, it is not necessary that it should be signed by the parties. It is sufficient if it has been examined and accepted by both parties. And this acceptance need not be express, but it may be implied from circumstances. Between merchants at home, an account which has been presented and no objection made thereto after the lapse of several posts is treated under ordinary circumstances as being by acquiescence a stated account. Between merchants in different countries, a rule founded in similar considerations prevails. If an account has been transmitted from the one to the other, and no objection is made after several opportunities of writing have occurred, it is treated as an acquiescence in the correctness of the account transmitted, and therefore it is deemed a stated account. In truth in each case the rule admits or rather requires the same general exposition. It is, that an account rendered shall be deemed an account stated from the presumed approbation or acquiescence of the parties, unless an objection is made thereto within a reasonable time. That reasonable time is to be judged of in ordinary cases by the habits of business at home and abroad; and the usual course is required to be followed, unless there are special circumstances to vary it or to excuse a departure from it."

This is no doubt a correct statement of the law and applying it to the case under consideration, I conclude that the action was properly brought in the form adopted. I see no reason to refuse a recovery here of the amount demanded. The only real controversy in the case is that relating to some deduction claimed by the respondent from the amount which it has collected. The original contract here was between the Government and the respondent for the charter of some of the latter's vessels. The libellant was called in to make some repairs but this gave the respondent no legal or equitable claim to the profit or a portion of it.

There will be a decree for the libellant for $40,978.40, with interest.

FERRY v. LATROBE STEEL CO. et al.

(Circuit Court, E. D. Pennsylvania. July 29, 1907.)

No. 31, April Sess. 1906.

CORPORATIONS—VOLUNTARY LIQUIDATION — POWERS AFTER SUSPENSION OF BUSINESS.

Where a manufacturing corporation has sold its plant, good will, and property, and by the action of its directors and stockholders abandoned its corporate business and entered upon liquidation, proceeding so far as to make distribution of the greater part of its assets among its stockholders, it has no power, over the objection of a stockholder, to invest cash which has been collected, and is merely awaiting distribution, in the stock of another corporation, although it is the intention to distribute such stock in specie among its stockholders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2458–2460.]

In Equity. On final hearing.

Frank R. Lawrence, Lester B. Johnson, Frank Lawrence and John F. Keator, for complainant.

John G. Johnson, for respondent.

J. B. McPHERSON, District Judge. The complainant, who is a citizen and resident of the state of New York, has filed this bill against the defendants, who are corporations of Pennsylvania and of New Jersey, respectively, for equitable relief under the following facts, none of which is in serious dispute:

The Latrobe Steel Company (hereinafter called the "Steel Company") was organized on or about August 15, 1895, under the Pennsylvania statute, for the purpose of manufacturing iron and steel and other metals, and articles of commerce from metal or wood, or both. It had and has a capital stock amounting to $1,500,000, divided into 15,000 shares, of the par value of $100 each, and all of this stock was issued to, and is held and owned by, sundry stockholders. At the times hereinafter named the complainant and his wife were, and they still are, the owners and holders of 500 shares, of the aggregate par value of $50,000. In addition to these 500 shares, ever since the organization of the company, until November 17, 1905, the complainant was the owner of 1,100 other shares, of the par value of $110,000. In November, 1905, he transferred the legal title to these 1,100 shares to another person, but regained the title in October, 1906. Soon after its organization the Steel Company began the corporate business for which it was chartered; this business consisting in the manufacture and sale of car couplers, and of tires for the wheels of railroad cars, and carried on the manufacture until on or about January 9, 1906, when it conveyed its property and ceased to manufacture, as will be presently set out more at length. Its plant was situated in the state of Illinois.

The Latrobe Steel & Coupler Company (hereinafter called the "Coupler Company"), a corporation of New Jersey, was organized in 1898 to comply with what was believed to be the requirements of the laws of Illinois, and was chartered to carry on the Steel Company's business

of manufacturing and selling couplers. It had, and has, a capital stock issued and outstanding amounting to $300,000, divided into 300 shares, of the par value of $100 each. All of its stock, ever since its organization, has been owned and held by the Steel Company, having been issued in consideration of the transfer to the Coupler Company of the Steel Company's coupler business and plant.

On and before November 16, 1905, the Steel Company owned an extensive manufacturing plant, consisting of real estate, buildings, other structures of various kinds, tools, machinery, and sundry appliances, situated at Latrobe, in the state of Pennsylvania, where its business was then carried on. On that day it entered into a written agreement with the Railway Steel Spring Company, a New Jersey corporation (hereinafter called the "Spring Company"), which agreement is as follows:

"Agreement made this 16th day of November, 1905, between Latrobe Steel Co., a corporation of Pennsylvania, hereinafter called 'vendor,' party of the first part, and Railway Steel Spring Co., a corporation of New Jersey, hereinafter called 'purchaser,' party of the second part.

"Said parties, each in consideration of the agreements of the other herein stated, and vendor in consideration of the partial payment made to it by purchaser, and hereinafter stated, mutually agree as follows:

"Vendor agrees to sell, convey, transfer and deliver to purchaser, at the price and upon the terms and conditions hereinafter stated, all vendor's manufacturing business and properties, including all vendor's real estate, plants, furnaces, structures, machinery, tools and appliances (including manufacturing books, accounts and data of costs, but excluding books of account of the business other than those containing accounts thereof, since November 1st, 1905); all materials and supplies and all manufactured product and material in process of manufacture, and all patents, processes, inventions, rights under, and interests in and claims to, patents, processes and inventions (including all the Griffith and other inventions and patents relating in any way to car wheels), trade marks, trade rights and trade names of every sort and kind to it belonging, and the good will of said business, and the exclusive right to use the name 'Latrobe Steel Company' in carrying on said business, and all leaseholds, contract and other rights, privileges and franchises used or of use in or in connection with, or acquired for, said business, and all gas, power, light and other tributary properties, being substantially all the properties of every kind and wheresoever situate of vendor, excepting cash, shares of stock of the Latrobe Steel & Coupler Co. (which company is to be permitted to continue business under that name), bills and accounts receivable.

"The sale and transfer of the properties hereinbefore described is to be as of November 1, 1905, and from that date it is understood that the business and properties aforesaid have been and will be operated for account and at the expense of purchaser.

"Deeds, bills of sale and other instruments of transfer of said properties, shall be delivered at the office of Harvey Fisk & Sons in the city of New York on the 2d day of January, 1906, or earlier in case transfers and examinations of title and the requisite corporate action shall be ready earlier, and such transfers and the instruments thereof shall be supported by such corporate action, and action of individual stockholders, of vendor as shall be requisite to make such transfers wholly legal and effective, which action vendor shall cause to be taken at the earliest moment.

"At the time of such transfers vendor will cause to be executed and delivered to purchaser an agreement not to engage in the tire, car wheel, or ring manufacturing or selling business or any branch thereof in the United States or Canada (except in connection with purchaser), for the period of ten years, executed by M. C. Smyth, president of vendor, and vendor will use its best efforts to cause a like agreement to be so executed and delivered by each of the following: C. C. Warren, G. Aertsen, J. K. Griffith, J. M. Howard.

"Immediately after the transfer by vendor to purchaser as hereinbefore provided, vendor will proceed with the liquidation of its business and properties and distribution thereof among its stockholders, and will thereupon be dissolved as a corporation, and will notify purchaser forthwith of such dissolution.

"The purchase price hereinbefore referred to is four million three hundred thousand dollars ($4,300,000), and, in addition thereto the book value (but not exceeding the cost paid by purchaser) of materials, supplies, finished products and materials in process of manufacture, which vendor had on hand at the close of business on October 31, 1905, and purchaser shall have access to vendor's books and works prior to transfer hereunder in order to ascertain or verify the exact amount of such materials, supplies, product and material in process of manufacture. Purchaser shall also have access to the books of account, records and papers retained by vendor after transfer pursuant thereto, for all entries and other data useful for the conduct of the business by purchaser.

"Said price is payable as follows:

"$500,000 thereof on the execution and delivery of this agreement, and vendor hereby acknowledges receipt thereof from purchaser.

"$500,000 thereof on the delivery of deeds and instruments of transfer as hereinbefore provided.

"The balance of fixed purchase price in equal installments of $825,000 each, one, two, three and four months respectively, after the delivery of deeds and instruments of transfer.

"But purchaser shall have the right to anticipate any and all payments in whole or in part. Such deferred payments shall be secured by the deposit with Drexel & Company of bonds of the issue which purchaser proposes to make and secure, or cause to be made and secured, by first mortgage (which bonds and mortgage shall be in the form usual in such cases) upon the properties so to be transferred to it by vendor, amounting in aggregate principal amount to the same proportion of the whole issue, as the amount of the deferred payments bears to $4,300,000; such deposit to be accompanied by appropriate documents providing for the retention of such bonds as security for such deferred payments (proportional amounts to be released as installments are paid) and for the usual remedies in case of default; but this deposit of bonds, shall not in any way discharge or diminish the absolute liability of purchaser to pay every installment of purchase price at the time herein fixed therefor.

"The price of materials, supplies, product and materials in process shall be paid within thirty days after the determination of the amount thereof, which determination shall be made as rapidly as possible.

"All installments of purchase price (including that for materials supplies and products) shall carry interest at five per cent., from November 1st, 1905, to date of actual payment.

"The properties of vendor so to be transferred to purchaser shall be free and clear of all incumbrance and indebtedness whatsoever, as of November 1, 1905, excepting only the contracts hereinafter agreed to be assumed by purchaser; and the full sum of $238,000 has been, or will be, paid by vendor toward the cost of the additions to plant and new construction now going on. And all mills, machinery tools and appliances of every kind herein agreed to be transferred shall be free and clear of all liability to pay royalty or other liability or incumbrance of any kind to patent owners or licensees. Vendor will also pay all taxes on its properties so to be transferred for the current tax fiscal year.

"Purchaser agrees to buy from vendor the properties hereinbefore described, and to pay therefor the price hereinbefore stated, at the times hereinbefore fixed, and further agrees to assume and perform the outstanding contracts of vendor listed in the schedule hereto annexed marked A, 1, 2 and 3 and all vendor's obligations under them or any of them. As to any omitted contracts mentioned in page 3 of said Schedule A-3, purchaser will assume any such, provided they are reasonable in character and made in the ordinary course of business.

"This agreement shall be binding upon and enforceable by the successors and assigns of the parties hereto respectively.

"In witness whereof hereunto in duplicate the said parties have set their seals, and the signatures of their presidents, respectively the day and year first above written.

"[Seal.] Latrobe Steel Company,
"By Marriott C. Smyth, President.

"Attest. Chas. C. Warren, Secretary.

"[Seal.] Railway Steel Spring Company,
"By J. E. French, President."

On November 18, 1905, at a special meeting of the board of directors of the Steel Company, the following resolution was passed:

"Resolved, that we unanimously do approve the sale of our property to the Railway Steel Spring Company as embodied in form of contract or agreement which has been prepared, and that we do authorize the execution by the president under seal of the company of said sale and contract."

The contract or agreement thus referred to is the same agreement just set forth in full, and was spread at length upon the minutes of the meeting. On November 22, 1905, the Steel Company, by a circular letter signed by its president, notified its stockholders that the agreement of November 16, 1905, with the Spring Company had been executed. The letter is as follows:

"Philadelphia, November 22, 1905.

"Dear Sir: I beg to advise you that your board have sold the plant of the Latrobe Steel Co. for $4,300,000 cash. Agreement has been signed and $500,000 paid. When deeds, etc., are delivered, an additional sum of $500,000 will be paid, and $825,000 monthly thereafter until the purchase price has been paid in full.

"Our company retains all its assets, such as cash on hand, bills and accounts receivable, material (which latter will be sold for cash), and the stock of the Latrobe Steel & Coupler Co.

"By the time the Latrobe Steel Co. is liquidated, you will have received your proportion of the stock of the Latrobe Steel & Coupler Co., in addition to your proportion of the cash received for the plant of the Latrobe Steel Co. as above.

"The sale is a very advantageous one, and I trust to receive all the papers enclosed, properly signed and returned to me promptly.

"Just how much the stockholders of the Latrobe Steel Co. will receive per share for their stock is still uncertain, but the sale will net them a very handsome and substantial profit on their investment.

"Yours very truly, Marriott C. Smyth, President."

At the annual meeting of the stockholders of the Steel Company, held December 18, 1905, the president reported inter alia as follows:

"As you have already been notified by circular and letter, the works of the Latrobe Steel Company have been sold to the Railway Steel Spring Company for $4,300,000, your company retaining all of its assets, such as cash, bills and accounts receivable, and the stock of the Latrobe Steel & Coupler Company.

"When all moneys due us are collected, we anticipate the stockholders will receive not less than $400 per share for their stock.

"Your board deemed this sale a very wise one, and the acquiescence to the sale by a large majority of the stockholders has confirmed their action.

"In this, the last report of the board of the Latrobe Steel Company to its stockholders, it is proper to congratulate them on the remarkable success of the company from its inception. Starting as it did with but $600,000 capital, which was subsequently increased to $1,500,000, it has paid the stockholders in dividends $2,381,700, and will receive for the works, with the cash assets

retained, in round numbers, about $7,000,000, being a total return for the investment of over $9,000,000, exclusive of the stock of the Latrobe Steel & Coupler Company.

"After the distribution of cash received from the sale of the works and the liquidation of the company is completed, the stock of the Latrobe Steel & Coupler Company will be divided pro rata among the stockholders of the Latrobe Steel Company, and, although it is improbable that any such dividends will be made on the Coupler Company stock as has been on the Steel Company's stock, we look forward to the Coupler Company's doing a good business and making fair returns.

"Respectfully submitted on behalf of the board.

"Marriott C. Smyth, President."

This report was accepted by the stockholders' meeting, and directed to be entered at length upon the minutes.

On December 26, 1905, at a special meeting of the stockholders of the Steel Company, called for that purpose, the following action was taken, as appears from the minutes:

"The chairman stated that the first business before the meeting, in accordance with advertisement, was the confirmation of the sale of the property of the Latrobe Steel Company to the Railway Steel Spring Company on the terms approved by the board of directors as embodied in the following agreement: [Being the agreement of November 16, 1905, which is set forth in full in the minutes of the special meeting.]

"On motion, duly made and seconded, it was

"Resolved, that we do approve of the sale of the property of the company as made by the board."

Out of a total issue of 15,000 shares, 14,399 shares voted in favor of the resolution; but complainant did not vote the 500 shares of which he and his wife were then the owners upon the adoption thereof.

On or about January 9, 1906, the Steel Company executed and delivered to the Spring Company a deed and bill of sale conveying to the Spring Company the properties and rights agreed to be granted and conveyed by the agreement of November 16, 1905, and on or about January 9th delivered possession to the purchaser of the properties so conveyed. The full purchase price named in the agreement has been paid to the Steel Company by the Spring Company.

At a special meeting of the board of directors of the Steel Company, held January 13, 1906, the following resolutions were passed:

"Resolved, that the sum of $100 per share be distributed to the stockholders of this company, as they appear of record upon its books, upon production of the certificate therefor to Drexel & Co., in order that the amount of said payment may be indorsed thereon.

"Resolved, that all such payments be made by check marked as 'On account of liquidation of this company.'

"Resolved, that Drexel & Co. be requested, upon presentation of the certificates for that purpose, to stamp upon each certificate an indorsement showing the amount paid per share and date of such payment.

"Resolved, that the president and treasurer of this company be authorized, upon receipt of the remaining payment stipulated for in the agreement with the Railway Steel Spring Company, and of the other amounts due this company, to make from time to time further distributions to the stockholders of this company in liquidation of its assets in the same manner as provided in the foregoing resolutions.

"Resolved, that we approve of the sending to the stockholders the letter prepared by the president announcing the liquidation together with the form of letter to Drexel & Co. and of the receipt by them for the certificates, as follows:

"'Philadelphia, January 16th, 1906.

"'Dear Sir: The property of this company has in pursuance with the authority given at the stockholders' meeting held December 26th, 1905, been sold to the Railway Steel Spring Co. for $4,300,000 cash. Part of this amount has already been paid, and the balance is secured by bonds deposited with Drexel & Co. as trustee.

"'The board of directors has resolved that out of this sum there shall be distributed to the stockholders of record on the company's books, in liquidation of the company's affairs, as first payment, the sum of $100 per share on presentation of the certificates of stock to Drexel & Co., Philadelphia, Pa. In order that the amounts now and hereafter to be paid may be noted thereon as made, please forward immediately your certificate of stock, with power of attorney properly signed and witnessed, to Drexel & Co., Philadelphia.

"'Further distributions will be made from time to time as the balance of the purchase price is paid. These distributions will also have to be noted on the certificate. We therefore advise you that you authorize Drexel & Co. to retain your certificate for this purpose, and inclose a form of letter to be filled up and signed by you to that effect. On receipt of certificate of stock and letter, they will give you a proper receipt.

"'Yours truly, Latrobe Steel Co., Marriott C. Smyth, Prt.'

"'(Form of Letter.)

"'January ——— 1906.'

"'Messrs. Drexel & Co., Philadelphia—Gentlemen: In accordance with the instructions of the company in its circular letter of the 16th inst., I herewith inclose certificates Nos. ——— for ——— shares of the capital stock of the Latrobe Steel Company, the property of the undersigned, in order that payment of $100 per share, in liquidation, now authorized may be noted thereon. You may retain the same in order that subsequent payments, in liquidation, may be noted on them as made.

"'Please acknowledge and forward receipt for the inclosed certificate, as mentioned in the company's letter.

"'Yours very truly.'

"'(Form of Receipt.)

"'Received January ——— 1906, from ——— certificates Nos. ——— for ——— shares of the capital stock of the Latrobe Steel Company, standing in the name of ——— to be retained on deposit by the undersigned in order that payments in distribution made on account of the liquidation of the affairs of that company may be noted thereon, in accordance with the terms of the circular letter from the company to its stockholders under date of January 16th, 1906, and of the letter addressed to the undersigned by you, dated ———.

"'Drexel & Company.'"

Payments of cash aggregating $6,000,000, or $400 on each share of stock, have been made to the stockholders of the Steel Company in liquidation of its assets. These payments were made in four sums of $1,500,000 each, at the dates presently to be mentioned; and, as the stockholders received the payments, they were required to present their stock certificates for the following indorsements thereon:

"There has been paid in liquidation of the assets of the Latrobe Steel Company, upon the shares included in this certificate, the sums hereunder noted, to wit:

January 17, 1906.....$100 per share.
January 29, 1906.....$100 per share.
February 5, 1906.....$100 per share.
February 13, 1906.....$100 per share."

At the time the fourth payment in liquidation was made by the Steel Company, the stockholders were notified as follows:

"Philadelphia, February 7th, 1906.

"Dear Sir: The 4th payment of $100 per share in liquidation of the Latrobe Steel Company will be payable on Feby. 13th, 1906. Please forward to Messrs. Drexel & Company, Philadelphia, in the inclosed envelope, the receipt they issued to you for the stock deposited with them, so that the payment may be indorsed thereon.

"The receipt will be returned to you properly stamped, with check for $

"Yours very truly, Latrobe Steel Company,

"Marriott C. Smyth, President."

"The next dividend which will be paid to the stockholders in liquidation of the Latrobe Steel Company will be the final dividend. It will not be paid until all the moneys due the company have been collected. Due notice will be given when the time for such payment arrives."

Since January 9, 1906, the Steel Company has not carried on, but has wholly ceased to transact, any of the business for which it was chartered; neither has it exercised since that date any corporate function whatsoever, except for the purpose of liquidating and distributing its assets, and except for the further purpose complained of in the pending bill. By reason of the sale and delivery of its manufacturing plant and other property, of its good will and the exclusive right to use its name in carrying on its former business, and by reason also of the nearly complete liquidation and distribution of its assets, the Steel Company, in its present condition, is incapable of resuming or further carrying the business on for which it was incorporated.

This brings us to the matter in dispute. On May 21, 1906, the Steel Company by order of its board of directors sent the following letter to its stockholders, together with a notice calling them together in a special meeting on June 11, 1906:

"Philadelphia, May 21st, 1906.

"Dear Sir: The stockholders of the Latrobe Steel Company are probably aware that all of the stock of the Latrobe Steel & Coupler Company, amounting to $300,000, is owned by the Latrobe Steel Company, and that the Steel Company has heretofore furnished the Coupler Company with the necessary funds to conduct its business. In order to continue the coupler business the capital must be increased to $1,000,000.

"It is proposed to accomplish this by purchasing 7,000 shares of the Latrobe Steel & Coupler Company stock at par, using for the purpose $700,000 of the funds of the Latrobe Steel Company now in hand secured in the liquidation of that company.

"If this plan meets the approval of the shareholders, a distribution of this Coupler Company stock will be made among them which will amount to 66⅔ per cent. of their present holdings of the stock of the Latrobe Steel Company. In addition to this, they will receive a further sum of about $35 per share in cash in final liquidation of the Latrobe Steel Company.

"Your board recommends this plan for your approval, and believes that the Latrobe Steel & Coupler Company will thus be established on a substantial basis and that it should make good returns to its shareholders.

"Board of Directors,

"Marriott C. Smyth, President."

On June 11, 1906, the special meeting of the stockholders was held, and the following resolution was passed:

"Resolved, that the officers of the Latrobe Steel Company be and they are hereby authorized to purchase at par for cash seven thousand (7,000) shares of the stock of the Latrobe Steel & Coupler Company at the par value of $100 per share, and to take such steps as may be necessary to carry out the final liquidation of the company in accordance with the terms of the circular letter of May 21, 1906."

In pursuance of this action of the board and of the stockholders, there is no doubt, and I find as a fact, that (if the present bill had not been filed on June 21, 1906) the Steel Company was about to employ $700,000 of the money acquired by it in liquidation of its assets, in order to buy 7,000 shares of the capital stock of the Coupler Company, and that it intended to distribute afterwards these 7,000 shares among its stockholders in place of the cash used in such purchase. These shares of the Coupler Company were not to be converted into cash, but were to be distributed in specie among the stockholders of the Steel Company. In consequence of the filing of this bill, however, the Steel Company has not yet subscribed or paid any money in pursuance of the resolution passed on June 11th, and none is expected to be subscribed or paid until the end of this litigation.

The complainant did not agree to this resolution, but voted in opposition the 500 shares that were held or controlled by him on June 11th—300 shares being in his own name, and 200 shares being in the name of his wife. He and his wife also protested against the proposed action, as will appear by the following extract from the minutes of the meeting:

"Mr. C. H. Ferry and Mr. Frank R. Lawrence, attorney for Mrs. Emily Mansfield Ferry, offered the following joint protest against the proposed action of the Latrobe Steel Company in the purchases of the Latrobe Steel & Coupler Company's stock:

"'June 11, 1906.

"'To the Latrobe Steel Company and to the Directors, Officers and Stockholders Thereof:

"'The undersigned stockholders of said company demand that the liquidation and distribution of the assets thereof be completed without unnecessary delay, and that they be respectively paid their proportionate shares thereof.

"'The undersigned protest against the making of any subscription by or on behalf of said company to the stock of the Latrobe Steel & Coupler Company, and give notice that in case any of the funds or assets of said Latrobe Steel Company are used or applied in payment of any such subscription such use or payment will be an unlawful diversion of such funds or assets for which said Latrobe Steel Company, and all persons taking part therein will be liable to the undersigned who will take such measures with respect thereto as they may be advised.

"'Charles H. Ferry,
"'Emily Mansfield Ferry,
"'By Frank R. Lawrence, Her Proxy and Attorney.'"

The following additional facts have more or less relevancy in certain aspects of the case: The Coupler Company is now solvent, and has been solvent for some time before the beginning of this action. In or about the year 1902 the Coupler Company owed the Steel Company $750,000 for money previously loaned for the erection of a new and extensive plant, and for advances necessary to carry on its large and increasing business; but this indebtedness was reduced before November 14, 1905, from the earnings of the Coupler Company's business, to the sum of $275,000, and in this amount the Coupler Company is still indebted to the Steel Company. On August 31, 1906, the Coupler Company owned assets sufficient to pay all its liabilities in full, including its debt to the Steel Company; to pay its capital stock of $300,000 in full; and, after so doing, to leave a surplus exceeding $600,000. The valuations placed upon the assets of the Coupler Company in a

balance sheet dated August 31, 1906, from which the figures just stated have been taken, are conservative valuations, and it seems safe to say that the evidence shows the value of its $300,000 of stock to be not less than $900,000. It is also true that upon the financial statements of the Coupler Company, that were offered in evidence, no credit is taken for the value of its good will, and that its plant is carried upon the books at about $100,000. In my opinion this amount is too small. Indeed, the president of the Coupler Company who has filled that office, and has also been the active head and manager of both companies, ever since their organization, testified that he would not be willing to advise the Coupler Company to accept $1,000,000 for its bare plant; and I believe the finding to be justified that the value of the plant exceeds considerably the sum at which it is carried upon the company's books. As further evidence of the value of the plant and the capital stock, it may be noted that the net profits for the fiscal year 1905 were $359,093.87; for the fiscal year 1906, more than $300,000; and for the period from November, 1906, to February, 1907, inclusive, about $130,000. Since August 31, 1906, the Coupler Company has had on hand more cash than would pay its debt of $275,000 to the Steel Company. The profits just mentioned from the Coupler Company's business for the period ending with January, 1907, were earned by the use of its own capital and surplus, exclusive of the sum of $275,000 which it owes to the Steel Company; for it was able to repay this sum at any time during the period named, out of cash on hand and not in use. On February 25, 1907, there was due and owing to the Coupler Company from sales made, $361,699.60; on the same day the company had $284,000 worth of material on hand that had been paid for; and, after paying every matured or presented indebtedness, excepting only the $275,000 due to the Steel Company, the Coupler Company had a cash balance on hand of $313,098.03, more than enough to pay its indebtedness to the Steel Company. These conditions are fairly representative of its general financial condition. In addition to the $275,000 owing to the Steel Company, the Coupler Company, at no time during the month of October, 1906, had a less amount of cash on hand than $81,000; during November never less than $77,000; during December, never less than $72,000; during January, 1907, never less than $102,000; during February, 1907, never less than $38,098.03; and the average daily cash balances during said months, in addition to the sum of $275,000 due the Latrobe Steel Company, were in

October	$ 92,634.41
November	104,054.41
December	117,849.90
January	123,868.91
February	85,485.75

The proposed subscription of $700,000 from the funds of the Steel Company to the capital stock of the Coupler Company is not necessary to enable the latter company to pay its debt to the former, or to carry on and continue its original business with success. The principal object, to which the proposed new capital of $700,000 is to be devoted, is the erection of a new casting plant by the Coupler Company, and this is a distinct and separate kind of business from that in which

it is now engaged. This casting plant is expected to cost $500,000, exclusive of the cost of the necessary ground; and this sum will only provide for the cost of the plant itself, leaving additional working capital to be also provided in order to operate the plant. It is evident, therefore, that the Coupler Company intends to use much the greater part of the proposed new capital of $700,000 in establishing a general casting business, and that this is separate and distinct from its former business of manufacturing couplers. A general casting business embraces the making of castings for use in the manufacture of machines, in the erection of buildings, in the frames of cars, in making anvils for hammers, and generally in the construction of many varieties of manufactured metal.

As I have already stated, there is no serious dispute about these facts. The controversy is waged concerning the proper inferences that should be drawn, and concerning the right of the directors and of the majority stockholders of the Steel Company to exercise what they believe to be a sound business judgment in regard to the future of the Coupler Company's affairs. The defendants' position is clearly expressed in the following extract from pages 4 and 5 of their answer:

"The directors of the Latrobe Steel Company were and are unanimously of the opinion that it would be greatly prejudicial to the interest of the stockholders of the Latrobe Steel Company to distribute the shares of the Coupler Company amongst the stockholders without making proper provision for the continued conduct of said Coupler Company in the future without sacrifice.

"Not only it was and is impossible for the Coupler Company to pay its debt of $275,000 or any part thereof consistently with the continuance of its business in the future, but it was and is impossible, in the opinion of the directors, successfully to conduct and manage its business without capital sufficient to enable it to make additions and improvements such as are required to be made to enable it to compete with its competitors. A reserve capital is believed to be essential.

"It will be no longer possible for the Coupler Company, from time to time, to obtain the capital required from the Steel Company. To borrow such capital would injure its credit and would greatly imperil the future value of its shares.

"The directors of the Steel Company are unanimously of the opinion that the proper method to protect the value of the investment already made by the Steel Company in shares of stock and loans to the Coupler Company will be to liquidate the indebtedness owing by the Coupler Company by the issuance to the Steel Company of additional shares of stock to the extent of $275,000 and by the further issuance to it for cash of additional shares of stock to the extent of $425,000 sufficient to enable it to conduct its business properly.

"The directors of the Steel Company were and are unanimously of the opinion that the Coupler Company will be able, by the possession of a capital amounting to $1,000,000 thus issued to conduct a safe and prosperous business, whereby the investment of $575,000 heretofore made and now held by the Steel Company will be assured. In their opinion, any other course of dealing will greatly imperil the value of their investment. In their opinion, the proper method of realizing for the stockholders of the Steel Company the value of the investment already made will be to issue to the Steel Company shares of the Coupler Company to the additional amount of $700,000, of which the proceeds to the extent of $275,000 will be used to liquidate the indebtedness of the Coupler Company to the Steel Company, and of which the remaining proceeds, viz., $425,000, will be used as additional capital in the carrying on by the Coupler Company of its business."

The foregoing facts support the legal proposition upon which the complainant relies, namely, that since the Steel Company has, by agree-

ment and by vote of its stockholders, undertaken to liquidate and distribute its assets, has abandoned its corporate business, has sold almost all of its corporate property, has actually begun and nearly carried through the distribution of its cash among the stockholders, it cannot now, of a sudden, cease the process of liquidation and distribution, and invest a part of its cash, that is merely awaiting distribution, in the stock of another corporation, thus compelling its own dissenting stockholders to embark in a business enterprise against their will. This position I believe to be sound. The subscription of $700,000 proposed is obviously not liquidation at all. On the contrary, it is investment; and, while it may be the part of business prudence to enlarge the Coupler Company's plant and facilities, so that it may carry on two kinds of manufacturing instead of only one, the Steel Company is, I think, without power to devote any of its funds to this object, under the facts as they have already been set forth. Whatever right, derived from either the Pennsylvania statutes or from any other source, the Steel Company may have had, while it was a going concern, actively engaged in carrying on its corporate business, to subscribe to the stock of a manufacturing company chartered by the state of New Jersey, it seems to me to be clear that the right was lost after the Steel Company had gone so far upon the road to dissolution. Suppose the process of liquidation had been complete, and that all the assets had been converted into cash, ready to be distributed—could it be doubted that neither the directors nor the majority of the stockholders could embark any part of this cash in a new venture, so as to bind a minority stockholder who refused to take part in the enterprise? Under the facts before the court, the difference is one of degree mainly, for I think no difference in principle appears. It is doubtless true that the proposed subscription to the Coupler Company's stock is in good faith regarded by the directors and the majority stockholders of the Steel Company as a highly desirable step to take; and it may even be conceded, for the immediate purpose, that their business judgment is correct, and that in all probability the result of the proposed subscription would be to enhance the value of the Coupler Company's stock, both the shares now held and those proposed to be acquired by the Steel Company. But, even if these be assumed to be the facts, I am still of opinion that the complainant cannot be compelled to take the risk of subscription; that he has a right to his share in cash of the money that the Steel Company proposes to divert to the uses of another corporation; and that he is, therefore, entitled to such equitable relief as will protect so much of his property from being devoted to an object to which he is opposed. The brief of complainant's counsel refers to many decisions that support the propositions just stated, but I shall not delay this opinion by taking the time necessary to discuss them. The reasoning of Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524, Lauman v. Railroad Co., 30 Pa. 42, 72 Am. Dec. 685, and Clearwater v. Meredith, 1 Wall. 25, 17 L. Ed. 604, to name no others, is instructive, and justifies, I think, the conclusions to which I have come.

The bill raises no question concerning the right of the Steel Company to distribute among its own stockholders in specie the 3,000 shares

of the Coupler Company. Assuming this right to exist, or—what comes to the same thing—the consent of the Steel Company's stockholders to accept these shares instead of requiring what might be a ruinous sacrifice by a forced sale, the Coupler Company may then be in a situation to take such steps for its own business advancement as it may think wise. But this is a different question, and I express no opinion about it.

In reply to a part of the defendants' argument, I may add that I do not regard as important the fact that a formal dissolution of the Steel Company has not yet taken place. Obviously, if the corporation had been actually dissolved, there could be no such question as is raised by the bill; for the power to carry on the corporate business would have ceased and the company's affairs would be in the course of administration by a judicial tribunal, or in some other manner. The controlling facts here are that the company undertook to liquidate and dissolve, that the process of liquidation and distribution has gone so far as to be nearly complete, that the corporate business has been wholly abandoned, and therefore that the corporate organization —so it seems to me—exists in effect for the mere purpose of dividing the remaining assets among the stockholders, and not for the purpose of taking up again, and using, corporate powers that have been already relinquished. Of course, the unanimous consent of the stockholders would leave nobody to object; there being no creditors, and the interest of the state being laid aside without consideration. But, in the face of objection by a dissenting stockholder, I think the courts are bound to protect his rights, and to see that he gets his share of the money that is now on hand, ready to be distributed.

It remains to pass upon the respondents' motion to strike out certain testimony taken by the complainant in support of the supplemental bill. It is needless to go into this matter fully. I have given it careful consideration, and am clearly of opinion that the motion should prevail. It was unnecessary for the complainant to prove more than the bare facts that he had sold 1,100 shares of his holdings, and that he had been successful in a suit to reclaim them. The details of the litigation were irrelevant. The complainant should therefore pay the costs of the supplemental bill, and also of taking and printing the testimony referred to in the motion to strike out. The remaining costs should be paid by the Steel Company.

A decree may be drawn as prayed for by the bill.

OLMSTED v. CITY OF SUPERIOR et al.

(Circuit Court, W. D. Wisconsin. August 15, 1907.)

No. 90.

1. MUNICIPAL CORPORATIONS—COLLECTION OF DELINQUENT SPECIAL CITY ASSESSMENTS BY COUNTY—RELATION TO BONDHOLDER.

Under Wis. St. 1898, § 1114, which provides that delinquent city taxes on real estate turned over to the county for collection, whether general or special taxes, become the property of the county, which is debtor to the city for the total amount thereof, a county to which a city has turned

over as delinquent taxes due on a special assessment pledged for the payment of improvement bonds does not become a statutory trustee for the benefit of a holder of such bonds, and he has no standing to maintain a suit in equity against it for an accounting.

2. SAME—DIVERSION OF TAXES COLLECTED—REMEDY OF BONDHOLDER—JURISDICTION IN EQUITY—REMEDY AT LAW—ADEQUACY.

A bill by a holder of improvement bonds issued by a city, which alleges that by the statute of the state the city is made a trustee to levy and collect special assessments on the property benefited by the improvement and to apply the proceeds solely in payment of the principal and interest of such bonds, and that it has diverted such proceeds to other purposes in violation of the statute and its duty as trustee and threatens to do so with future proceeds, states a cause of action for relief in equity against the city and which a court of law could not afford.

[Ed. Note.—Rights and remedies of holders of invalid municipal securities, see note to Chelsea Savings Bank v. City of Ironwood, 66 C. C. A. 235.]

3. EQUITY—PLEADING—MULTIFARIOUSNESS.

Where the Supreme Court of a state has expressly held that under a state statute a certain issue of bonds by a city created a general liability for their payment on the part of the city and also made it a statutory trustee for the collection and application on the bonds of a special assessment, a bill in equity by a holder of such bonds to enforce the duty of the city as trustee is not multifarious, because it also seeks to enforce its general liability by obtaining a judgment against it, which may properly be treated as incidental or supplementary to the equitable remedy sought and not inconsistent with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 340, 341, 347.]

In Equity. On demurrers to amended and supplemental bill and motion for preliminary injunction.

This is a suit in equity against the city of Superior and the county of Douglas, based upon certain street improvement bonds of the city of Superior. The bill has been twice amended, and the demurrers involve the sufficiency of the amended and supplemental bill of complaint. Briefly stated, the bill of complaint sets forth the following facts:

By section 30, c. 124, p. 796, Laws 1891, the common council of the defending city was authorized to lay out, make, open, and keep in repair all highways and streets. This charter provides a scheme of special assessments upon abutting property to defray the expense of improvement of highways or streets. Section 132 authorizes the common council to issue improvement bonds, leaving a wide discretion to the common council as to the terms of said bonds. Section 133 provides that such bonds shall be semiannual interest coupon bonds, payable in annual installments, and shall draw interest at a rate not exceeding 6 per cent. Such bonds may be sold by the common council at not less than par, and the proceeds collected by the city treasurer shall be paid to the contractor when due to him, etc. Section 134 requires the city clerk to prepare a statement of the special assessment in which the bonds are issued, and record the same together with a copy of said bonds. Section 135 requires the city treasurer to pay the interest and principal of said bonds as the same become due, and charge the amount to the proper fund. Section 136 requires a special tax on said property benefited to be levied each year, sufficient to pay the installment and interest due on such bonds. Section 82 withdraws from the control of the common council the special fund for street improvement. Section 83 prohibits the city treasurer from encroaching upon said special fund, or diverting any part thereof to any other purpose.

By virtue of the provisions of this charter, the city undertook the improvement of Belknap street between Hammond avenue and West Seventh street in said city, and the necessary and proper steps required by the charter were taken to that effect. Special assessments were levied upon abutting prop-

erty, payable in equal annual installments during a period of five years. And thereupon the defending city caused to be executed and issued on the 1st day of September, 1891, bonds of said city for $54,739.80, comprising five equal series, designated as A, B, C, D, and E, each installment consisting of 11 bonds numbered from 1 to 11. Such bonds were sold in the market to provide the necessary funds to carry out such street improvement.

The following is a copy of one of such bonds, the others being the same except as to series and number:

"United States of America. Installment E.

"No. 1. $1,000.00.

"State of Wisconsin, City of Superior. Street Improvement Bond. County of Douglas.

"Know all men by these presents that the city of Superior in the county of Douglas, and state of Wisconsin, for value received, hereby acknowledges itself indebted to and promises to pay the bearer hereof the sum of one thousand dollars lawful money of the United States of America, to be paid on the 1 day of September A. D. 1896, with interest thereon at the rate of six per centum per annum, payable semi-annually on the first days of March and September in each year as evidenced by the semi-annual interest coupons hereto attached. as they severally become due; both the interest and principal of this bond being payable at the National Bank of the Republic in the city and county of New York.

"This bond is issued under and by authority of chapter 13 of the amended charter of said city of Superior, being chapter 124, laws of Wisconsin for the year 1891, approved March 31st, 1891, and of a resolution duly passed, approved and published by the common council of said city, dated the 25 day of August A. D. 1891.

"This bond is one of an issue of annual installment bonds the aggregate amount of which is fifty-four thousand seven hundred thirty-nine $^{80}/_{100}$ dollars of which this bond is number 1 of installment E, said issue being divided into five equal installments designated installments A, B, C, D, and E respectively. Each installment consists of 11 bonds numbered from 1 to 11 inclusive. Numbers 1 to 10 inclusive being of the denomination of one thousand dollars and numbers 11 of nine hundred forty-seven $^{96}/_{100}$ dollars.

"All bonds in installment A are payable on the 1 day of September A. D. 1892 and the remaining installments in the order in which they are above mentioned become payable annually thereafter on the 1 day of September in each year, so that the last installment, namely, installment E becomes due and payable on the 1 day of September A. D. 1896.

Said bonds are issued for the purpose of defraying the cost of constructing the improvement on Belknap street between the Hammond avenue and West Seventh street and on account of such assessment, made upon the property benefited by reason of such improvement, as the owners have not elected to pay. The payment of the principal and interest of this bond is made chargeable upon the property benefited by said improvement, as evidenced by a statement and schedule of such special improvement, on which the bonds are issued, as recorded in the office of the city clerk of said city of Superior. And it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this bond have duly happened and been performed in regular and due form as required by law. The faith and credit of said city of Superior is hereby irrevocably pledged for the prompt payment of this bond, both principal and interest.

"In testimony whereof the said city of Superior in the county of Douglas, and state of Wisconsin, has caused this bond to be signed by its mayor and city clerk, and countersigned by its comptroller, and the seal of said city to be hereto attached this 1st day of September A. D. 1891.

"W. J. Dargis, Martin Pattison,
"City Clerk. Mayor.
"[Seal.] Countersigned: Lewis Larson, City Comptroller."

Coupons representing installments of interest were attached, which are in the usual form.

That complainant purchased and now owns all the bonds of series "E," aggregating $10,947.96. That by mutual agreement between the complainant and the defending city the payment of the principal of said bonds was extended until 1898. That said city regularly paid the interest upon said bonds up to the 1st day of January, 1901. That all the bonds of this issue have been paid except series "E," which are the bonds in suit. That the city has collected a large part of the assessments pledged to the payment of these bonds from time to time, but has neglected and refused to pay the complainant's bonds or any part thereof, or any interest thereon, since the 1st day of January, 1901. That without the consent of the complainant the city has extended the payment of the special assessments on the property benefited by the improvement, and that two annual installments of such assessments amounting to $5,000 are still to become due. That said city has from time to time turned over to the county of Douglas these unpaid special assessments as delinquent taxes, in accordance with the laws of Wisconsin, which require the return of such delinquent special assessments at the same time and in the same manner as other taxes are returned. That said county of Douglas has from time to time collected considerable sums of money upon such special assessments so returned as delinquent, by sales of the property, by redemption thereof after sale, etc. That said county now has on hand in its treasury a considerable amount of money as the proceeds of such delinquent special assessments, which said county refuses to account for or pay over to the complainant in liquidation of said bonds. That the city of Superior has from time to time unlawfully and in fraud of the rights of this complainant encroached upon and appropriated the sinking fund which was created for the payment of the bonds in suit. That by resolution of the common council of said city such special assessment funds have been transferred to the general fund for various purposes. That by act of said common council said sinking fund so specially devoted to the payment of the complainant bonds has been rehypothecated for the payment of other improvement bonds, and that by various methods the city has dissipated and misapplied the fund which, by the terms of the bond in suit it undertook to keep and administer as a statutory trustee for the benefit of the complainant to pay the bonds in suit. That unless restrained said city will divert and misappropriate the balance of said fund still remaining in the city treasury, and the deferred payments of special assessments which are yet to become due. That when the city ceased the payment of interest on said bonds, the complainant elected, pursuant to the terms of said bond, to declare the same due and payable. That said bonds are in law a general obligation of said city, and that said city should be held in law to be a primary debtor as well as a statutory trustee. The bill sets up that before complainant purchased said bonds the Supreme Court of the state of Wisconsin had held said bonds to be a general obligation of the defendant city.

The complainant by his bill asks for an accounting to ascertain and determine the amount of money which the county of Douglas and the city of Superior have in their respective treasuries which ought to be applied to the payment of the bonds, and also the amount of such sinking fund that has been misappropriated; that the complainant recover the amount of all sums collected of or on account of said Belknap street assessment by said city, not heretofore applied to the payment of other bonds of the Belknap street issue. The bill contains a further prayer that said city of Superior be held liable for the whole amount of the complainant's bonds and interest, by reason of the general obligation of said city to pay said bonds and coupons as its general indebtedness, by reason of the city's misappropriation and conversion of said Belknap street assessments to its own use, and its failure to provide a fund in which said assessments should be set apart and reserved for the payment of said Belknap street bonds.

The bill prays recovery against the county of Douglas for the amount of the Belknap street assessment collected by said county, either directly or by the redemption of certificates of sale for such assessments. The bill contains a prayer for a temporary injunction restraining the city from paying out any further sum from the street bond sinking fund, except upon the complainant's bonds or coupons, from using or appropriating any moneys which may be

hereafter collected on account of said Belknap street assessment, and that such injunction may be perpetual.

The county of Douglas demurs separately to the supplemental amended bill, on the ground, amongst others, that the bill is without equity as to the said county of Douglas.

The city of Superior separately demurs to the whole supplemental amended bill on various grounds, which will be stated in the opinion.

Chester B. Masslich and H. E. Ticknor (Eugene Dupee, of counsel), for complainant.

William R. Foley, for the county of Douglas.

Louis K. Luse, for the city of Superior.

QUARLES, District Judge (after stating the facts as above). The defendant county of Douglas was made a party to the amended bill of complaint, and then interposed a separate demurrer thereto. The court sustained the demurrer; but the complainant, having obtained leave of the court to file a supplemental bill, retained the county of Douglas as a defendant, and added certain new and additional averments. The county again demurs to the supplemental bill. This demurrer must be sustained, upon the same ground upon which the former ruling was based, namely, that such supplemental bill presents no equitable cause of action against the county of Douglas.

The theory of the bill is that all proceeds from such delinquent special assessments as came to the treasury of the defending county belonged to the holders of such special improvement bonds; that the county as well as the city was its statutory trustee to collect these delinquent taxes, and should be held to account accordingly. I am satisfied that this theory is erroneous.

Complainant's contention is practically foreclosed by the Supreme Court of Wisconsin in the case of Sheboygan v. Sheboygan, 54 Wis. 415, 11 N. W. 598. It is elementary that the decision of the highest court of Wisconsin construing a Wisconsin statute will be followed by the federal court. By section 1114, St. Wis. 1898, it is expressly provided that such city taxes, when turned over to the county as delinquent, shall belong to the county and be collected for its use, and such section is applicable to cities. The city is entitled to credit for the total amount of delinquent taxes of every name and description as soon as the same are turned over. The court holds:

"The city by the return of its treasurer having transferred to the county the duty under the statute of enforcing payment of delinquent taxes on land, also passes to the county all interest in such taxes when collected, or interest in the land when sold for nonpayment of the tax, and should be credited with the amount of such taxes, paying over the balance only to the city."

Further on the court say:

"The return may include state, county, town or city, ward, school, or road tax, or any special assessment whatever, authorized by law. These are not separately returned, but all unpaid taxes of every description on a given parcel of land are massed, and the aggregate amount of all is alone stated in the delinquent return."

The principle of the statute is that the county, having given the city credit for the total amount of delinquent taxes, shall assume all such delinquent taxes of every nature which have been legally levied

in the several towns and municipalities of the county which, like the defendant city, fall under the general statute; and the county reimburses itself out of the proceeds of the sales for such delinquent taxes, or out of the lands sold, in case the county is the purchaser.

By virtue of section 129 of the charter of the city of Superior, a rule is established as to improvement certificates, which has no application to improvement bonds, and this distinction is controlling. The section reads as follows:

"The comptroller's statement of the special assessment to be placed in the next tax roll shall include an amount sufficient to pay said certificates, with interest at the legal rate from the date of such certificates to the time when the city treasurer is required to make return of delinquent taxes, and thereafter the same proceedings shall be had as in case of other taxes, except that all moneys collected by the city treasurer, and all moneys collected by the county treasurer or county clerk on account of such taxes, shall be delivered or paid to the owner of the same on demand, upon the surrender of such certificates."

This section of the charter has been construed and commented upon by the Supreme Court of Wisconsin in State ex rel. v. Hobe, 106 Wis. 412, 82 N. W. 336. The court recognizes this special charter provision as constituting the county treasurer a statutory trustee for the holder of the improvement certificates. There is no similar provision relating to improvement bonds. The bondholder must look to the sinking fund in the hands of the city treasurer, upon which the bond is made a lien.

There being no contractual relations between the complainant and the defending county, and there being no statutory provision making the county treasurer an agent or trustee for the bondholder, the bill presents no equitable case against the county of Douglas, and as to it the demurrer must be sustained for want of equity, and as to said defendant the bill is dismissed, with costs.

Second. This brings us to the consideration of the demurrer to the whole supplemental bill interposed by the city of Superior. The grounds of demurrer are: First, that complainant has a plain, adequate, and complete remedy at law, and that there is no equity in the bill; second, that the bill is multifarious, in that it joins allegations and prayers for relief against the city of Superior for general liability on the bonds in question, with allegations and prayers for relief, and for an accounting and recovery of moneys collected by said city, and also by the county of Douglas upon the special assessment; third, that said bill is multifarious in that it joins, or attempts to join, causes of action at law with causes of action in equity; fourth, that the bill is multifarious in that it joins, or attempts to join, causes of action, allegations, and prayers for relief against the city of Superior, for the full amount of the bonds, as a legal liability in which the county of Douglas has no concern, with allegations and prayers for relief by way of an equitable cause of action to reach moneys collected by way of assessment by both city and county; fifth, that said bill is multifarious in that it joins causes of action and prayer for relief against the city of Superior upon its general liability upon the bonds, assuming such bonds to create a general liability, with allegations and prayers

for relief that the city is not so liable, but is liable as trustee for collection, safe-keeping, and payment over of said special assessment; sixth, that said bill is multifarious in that it prays for alternative relief both in law and equity, which are on their face contradictory and inconsistent, and that there is a misjoinder of causes of action and misjoinder of parties defendant. Counsel on all sides have displayed such industry and learning in the argument of this cause, the court feels called upon to discuss the several contentions at somewhat greater length than it would ordinarily do.

The first ground of demurrer requires but slight attention. The supplemental bill of complaint, as we read it, is properly planted in equity, and a court of law could afford no adequate relief in the premises. From the bill it satisfactorily appears that the city assumed the duty to create, administer, and distribute a certain fund derived from special assessments on certain real estate, which fund was pledged for the payment of these bonds; that thereby the city became a statutory trustee, bound to preserve this fund and administer it solely and exclusively for this special purpose; that in violation of this duty the defending city has by various methods particularly set out in the bill, encroached upon, appropriated, and misapplied the fund, and has neglected and refused to pay the bonds in suit that were made a lien upon such fund; that two installments of such special assessments, amounting to $5,000, are to become due, and that unless restrained the city will divert and misappropriate the same; that the city has, in violation of its duty, assumed to rehypothecate this fund for the security of other city bonds not connected with the bonds in suit, and that a portion of said fund has been applied upon such other bonds; that $12,000 has been drawn out to pay a bonus for the location of a normal school; that an accounting is necessary to ascertain the true amount of money the city has actually received which properly belongs to such fund, and how much has been unlawfully diverted therefrom. It is apparent that complainant is entitled to relief, which it is the peculiar province of equity to afford, and that a court of law would be powerless in the premises. The following cases cited by complainant's counsel treat of these principles in analogous cases: Vickrey v. Sioux City (C. C.) 104 Fed. 164, 166; Same case on appeal (C. C.) 115 Fed. 437; Farson v. Sioux City (C. C.) 106 Fed. 278.

Is the bill multifarious? This case does not fall within the definition of multifariousness usually adopted. Certainly not under the test applied by the Circuit Court of Appeals for this circuit in Von Auw v. Chicago T. F. Co. (C. C.) 69 Fed. 448. There can be no pretense that this bill embodies two distinct causes in equity either one of which might sustain a separate bill, and this seems to be the test usually applied. The real objection seems to be that there is a misjoinder of two causes of action which are not compatible, because one is legal in its nature and the other is equitable. In other words, the complainant insists that by the terms of these bonds the city of Superior is a primary debtor as well as a statutory trustee; that its faith and credit have been pledged generally for the payment of the bonds, and he has included in his prayer a demand for a money judgment.

It has been held by the Supreme Court of Wisconsin in Fowler v. Superior, 85 Wis. 411, 418, 54 N. W. 800, that these bonds and accompanying coupons are issued on the faith and security of said assessment; but there is no condition that the bond shall be payable only out of that fund. In other words, that the city has obligated itself generally to pay the bonds, and has also pledged its faith to provide a sinking fund which shall be an additional resource and security for the faithful fulfillment of its promise. There is no conflict of authority between the Fowler Case, supra, and Uncas National Bank v. Superior, 115 Wis. 349, 91 N. W. 1004, because the bonds were issued under different statutory provisions. This is clearly pointed out in the opinion of Judge Seaman in White River Savings Bank v. Superior, 148 Fed. 4, 78 C. C. A. 169. See, also, King v. Superior, 117 Fed. 115, 54 C. C. A. 499. The language of the opinion in Jewell v. Superior, 135 Fed. 22, must be read in connection with the fact that by virtue of a stipulation in that case resort should alone be had to the sinking fund and to the liability of the city as statutory trustee, and any claim based on general liability of the city was expressly waived. If the underlying statute authorized the issuance of such a bond, the reasoning by the Wisconsin court in the Fowler Case has been indorsed by the federal courts. United States v. County of Clark, 96 U. S. 214, 24 L. Ed. 628; United States v. Ft. Scott, 99 U. S. 152, 25 L. Ed. 348; United States v. Saunders, 124 Fed. 124, 130, 59 C. C. A. 394; King v. Superior, 117 Fed. 115, 54 C. C. A. 499. But it is not for us to consider whether the Fowler Case was correctly decided. We must adopt its construction of a local statute, and therefore must proceed upon the theory that these bonds impose general liability upon the defending city.

Does the averment of general liability of the city in connection with the equitable cause of action create such a misjoinder as would render the bill multifarious? Both obligations inhere in the bonds, and the pleader has correctly stated their legal effect. Under the authorities the difficulty may be resolved, if the assertion of general obligation may properly be treated as incidental to the equitable remedy sought by the bill. As we read this complaint, its primary purpose is to work out the conservation of a special fund to which the bondholder is entitled to resort by way of security, and thus an accounting is rendered indispensable.

It is strenuously contended by defendant's counsel that under the averments of this bill the claim for legal damage is primary and not subordinate, and that the case falls within the doctrine of Cherokee Nation v. Kansas Ry., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, and Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569. These two cases are clearly distinguishable. In the former the bill presented in the alternative two distinct aspects that were irreconcilable. An injunction was prayed on the ground that the railway company had not sufficient authority to take the land, while at the same time asking damages on the theory that the taking was lawful. It was obvious that, if the equitable cause of action failed, the strictly legal action was not available in the equity tribunal. In the Hurt Case, supra, the complication arose under the Texas practice act.

The complainant's bill was to remove a cloud from the title to real estate, which was purely equitable, but under the state practice the defendant had interposed a claim of legal title to the land and demanded damages such as are awarded in an action of ejectment. The cause having been tried in the state court without objection, the question was whether the federal court on obtaining jurisdiction could tolerate the two conflicting claims in the same suit. Manifestly the legal counterclaim had no standing in the equity suit. Here there is no demand for alternative relief predicated upon inconsistent theories and diverse facts, but a well recognized equity suit, based upon certain bonds, which were a lien on a special fund, coupled with an assertion of an additional legal remedy growing out of the same transaction, springing from the same bonds, which the court is asked to employ if necessary to do complete justice between the parties. The right to resort ultimately to the general liability and general funds of the city is guaranteed by the law and by the terms of the bond, but it must be regarded as an incidental or subsidiary remedy, in that it does not come into play unless and until the primary equitable remedy shall have been exhausted either in whole or in part.

If the court, by means of the peculiar remedies of equity, shall succeed in recruiting and conserving the special assessment fund, so that the complainant's bonds may be liquidated, there will then be no outstanding cause of action either legal or equitable. But on the other hand, suppose that after such sinking fund has been applied and all equitable remedies have been exhausted, a balance still remains due and unpaid; may not the court, having settled the rights and equities of the parties, retain jurisdiction to do complete justice and to render final judgment against the city for the amount still due on the bond? The authorities are so numerous which recognize such authority as residing in a court of equity that we can cite but a few of those collected by complainant's counsel.

The familiar doctrine is thus stated in 1 Pomeroy's Eq. Juris. § 181:

"When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." Pacific R. R. v. Atlantic Ry. (C. C.) 20 Fed. 277, 280; Patton v. Glatz (C. C.) 56 Fed. 367; Krohn v. Williamson (C. C) 62 Fed. 869, 877; Burlington Bank v. Clinton (C. C.) 106 Fed. 269; Ward v. Todd, 103 U. S. 327, 26 L. Ed. 339; Phosphate Mining Co. v. Bradley, 105 U. S. 175, 26 L. Ed. 1034; Beecher v. Lewis, 84 Va. 630, 6 S. E. 337; Robinson v. Cross, 22 Conn. 171. See, also, Continental Ins. Co. v. Garrett, 125 Fed. 589, 593, 60 C. C. A. 395.

There is such conflict and confusion in the authorities as to what constitutes multifariousness that it is impossible to lay down any exact rule. As Mr. Foster in his work on Federal Practice (Fed. Pr. 206) says: "The cases upon the subject are extremely varied, and the court in deciding them seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule." It is a subject largely controlled by the discretion of the court. Certain it is, however, that if a good equitable cause of action has been stated in the bill, no error of judgment on the part of the pleader, either in giving undue prominence to a mere sub-

ordinate remedy, or in framing a prayer which confuses legal distinctions, will prove fatal on demurrer. No such erroneous legal conclusions will conclude the court or render the bill multifarious. De Neuville v. N. Y. Ry., 81 Fed. 10, 13, 26 C. C. A. 306; Brown v. Guarantee Trust Co., 128 U. S. 412, 9 Sup. Ct. 127, 32 L. Ed. 468; Lehigh Zinc & Iron Co. v. N. J. Z. & I. Co. (C. C.) 43 Fed. 548. Here there is but one cause of action, and that is for the recovery of the amount due on the bonds; but the bonds and the statute under which they were issued offer two remedies, or two methods of enforcement, one in personam, and one by way of security. Shall not both be available when a court of equity has properly assumed jurisdiction?

Upon the argument great reliance was placed upon Plankinton v. Hildebrand, 89 Wis. 214, 61 N. W. 839. A careful examination of the facts will show that the case is not in point, and that it was expressly distinguished by Mr. Justice Pinney in his opinion. There two separate and distinct causes of action were insisted upon—one the foreclosure of a pledge of chattels, and the other the contingent liability of certain of the defendants as indorsers of a promissory note evidencing the debt. If all the defendants had fallen under the same legal liability on the note, a different conclusion might have been reached, as appears from the earlier case of Wilson v. Johnson, 74 Wis. 337, 339, 43 N. W. 148, where in an equity action to foreclose a pledge of chattels, a judgment for deficiency was sustained on general principles without the aid of any statute. That the Supreme Court of Wisconsin is in accord with other courts on the general doctrine above announced appears by reference to Turner v. Pierce, 34 Wis. 658, and Pinkum v. Eau Claire, 81 Wis. 301, 51 N. W. 550.

Perhaps no better or more authoritative statement of the rule can be found than the case of Clews v. Jamieson, 182 U. S. 480, 21 Sup. Ct. 845, 45 L. Ed. 1183:

"It often happens that the final relief to be obtained by the cestui que trust consists of the recovery of money. This remedy the court of equity will always decree, when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein."

We recall the vigorous language of Lord Chancellor Nottingham in Parker v. Dee, 2 Ch. Cr. 200: "And when this court can determine the matter, it shall not be handmaid to the other courts nor beget a suit to be ended elsewhere."

The fifth ground of demurrer is that the bill is multifarious because it attempts to join a cause of action involving the general liability of the city with one based upon the trust relation arising out of the contract and the circumstances of the case. It is sufficient to say that there is not here disclosed such trusteeship as to make the objection pertinent. The trust relation here is constructive merely, and such as the court of equity has invented to work out justice in a large class of cases where the strict accountability of the trustee is imposed to extend the remedial power of the court. 1 Pomeroy Eq. Juris. §§ 155, 157, 158.

For these reasons the demurrer of the city of Superior is overruled, and said defendant may interpose an answer to the bill, if so advised, on or before the October rule day. Otherwise, complainant will be entitled to a decree.

From the propositions above laid down it follows that the complainant is entitled to a preliminary injunction against the city of Superior pendente lite, substantially as prayed in the bill. Complainant's counsel will however prepare such preliminary injunction and submit the same to counsel for the city before presenting the same for signature.

UNIVERSITY OF THE SOUTH v. JETTON et al.

(Circuit Court, M. D. Tennessee. August 14, 1907.)

No. 3,481.

1. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A federal court has jurisdiction of a suit by a landowner to restrain revenue officers of a state from prosecuting proceedings expressly based on a state statute to enforce the collection of taxes against such lands, on the ground that such statute as applied to complainant's lands impairs the obligation of a contract with the state exempting such lands from taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 820, 821.

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Brunning, 63 C. C. A. 437.]

2. CONSTITUTIONAL LAW—WHO MAY RAISE CONSTITUTIONAL QUESTIONS—TAXATION—EXEMPTION OF LAND—INTERESTS OF LESSEES.

An educational corporation, owning lands which by a contract with the state are exempted from taxation, may maintain a suit in equity to restrain the officers of the state from levying and collecting taxes on improvements made on such lands by lessees, which by the terms of the leases become part of the realty, to be paid for by the landlord on the termination of the leases; such taxes being in effect against the lands themselves, and in any event in direct diminution of their rental value.

3. SAME—IMPAIRMENT OF CONTRACT—ERRONEOUS CONSTRUCTION OF STATUTE.

Where officers of a state are prosecuting proceedings under a state statute relating to taxation, the effect of which will be to impair the obligation of a contract, the right of a party to such contract to invoke the jurisdiction of a federal court for the protection of his constitutional rights is not affected by the fact that such officers may be proceeding upon an erroneous construction of the statute, and that, properly construed, it is not unconstitutional.

4. COURTS—FEDERAL COURTS—JURISDICTION—ACTIONS AGAINST STATES.

An action by a university, whose lands are exempt from taxation, against officers charged with the duty of levying and collecting taxes, to restrain such officers from enforcing taxes on improvements erected by lessees on such exempt lands, is not a suit against the state, so as to exclude the jurisdiction of the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 844½.

Federal jurisdiction of suit against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

5. SAME—CONFLICTING JURISDICTION OF STATE AND FEDERAL COURTS—ENJOINING STATE COURT ACTION.

Nor can such suit be considered one to enjoin the action of a state court, on the ground that the tax officers are charged with judicial functions.

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

In Equity.

Spears & Lynch, Crownover & Crabtree, A. T. McNeal, and J. J. Vertrees, for plaintiff.

Lynch & Phillips, Charles T. Cates, Atty. Gen., and Thos. B. Lytle, for defendants.

CLARK, District Judge. In the study of this case it is found that the industry of eminent counsel on both sides has accumulated such a number of cases in the briefs as to make it impracticable to restate or to rediscuss these cases in this memorandum opinion without extending its limits beyond all reasonable length. In this situation I deem it sufficient to assure eminent counsel that I have examined the cases and have undertaken to give them the consideration which they deserve, in view of their bearing on the issues presented in this case for determination. Under such circumstances I shall content myself with a simple reference to some of the cases which seem to me to support and to require the ruling which is about to be made on the issues here to be disposed of.

It is probably best in the outset to remark that, so far as the lessee complainants are concerned, there is no statute of the state confessedly which has undertaken to exempt them from taxation, and their contention, consequently, does not and cannot involve a federal question such as to give this court jurisdiction; and this view makes it immaterial to consider whether the case as to each of these complainants would show a jurisdictional amount sufficient to sustain jurisdiction, for I think it is certain, upon the authorities, that the amount connected with the complaint of each one of these lessees is a separate matter, and that their several complaints could not be aggregated or put together to make up jurisdictional amount. However this may be, as just suggested, I do not now find it necessary to decide. There is, as to them, really no substantial federal question. And the second ground of the demurrer is special and separate against the complainants other than the University of the South, and is accordingly sustained, and all other grounds assigned in the demurrer, and the demurrer as a whole, so far as it applies to the University of the South, is overruled, for reasons which will sufficiently appear in the further statements of this memorandum opinion.

The first objection is that the bill presents no federal question, and that there is a want of federal jurisdiction, as distinguished from state jurisdiction. However, upon a careful study of this question, I am unable to accept the views so cogently presented by the able counsel on behalf of the state's revenue collecting and tax assessing officers. Reference may be made to the following cases: Bank of Kentucky v. Stone (C. C.) 88 Fed. 383; Union & Planters' Bank v. City of Memphis, 111 Fed. 561, 49 C. C. A. 455; Illinois Central Railroad Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; City Ry. Co. v. Citizens' Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114.

The case of Hamilton Gaslight Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, is relied on by the defendants' able counsel as supporting the proposition that there is a want of federal jurisdiction. It must be remembered, however, that there was in that case a contention that there was no statute of the state of Ohio which furnished authority or color for the city in the enactment of the ordinance in question, and it was said in reference to this that a municipal ordinance not passed under supposed legislative authority could not be regarded as a law of the state, within the meaning of the constitutional provision against impairing the obligation of contracts. The court, after recognizing the soundness of this contention as a general proposition of law, proceeded to say distinctly that federal jurisdiction was sustained because it appeared that the defendant grounded its right to enact the ordinance in question upon a certain section of the Municipal Code of Ohio, as found in the Revised Statutes of Ohio, and it was held that the circumstance that the ordinance was passed under the authority or color of that section raised a federal question, and gave to the federal courts jurisdiction. This case was distinguished in this respect in the case of American Waterworks & Guarantee Co. v. Home Water Co. (C. C.) 115 Fed. 171.

Now, in the case at bar the entire tax proceeding on its face, and in every step of the procedure from first to last, is based obviously and expressly upon the revenue act of 1903 (Acts 1903, p. 599, c. 257) passed by the General Assembly of the state of Tennessee, and I think under the authorities the existence of a federal question here cannot be successfully denied, and that the court possesses jurisdiction as between the University of the South and the defendants; and I conclude the position which is suggested, rather than argued, that this is a suit against the state, is not maintainable, and just in this connection I may refer to the contention that, while the tax proceeding is expressly and avowedly under the act of 1903 in its different provisions as authority for the tax, still the tax proceeding and judgment would be good, if such a proceeding can be maintained and such a tax laid or assessed under any other provision of law, and under any other classification of the property of the lessees as personalty, or otherwise. I am sure that defendants' very able and thoughtful counsel will agree that it would be extremely embarrassing for the court to go entirely outside of the case, as made in the tax proceeding clearly and expressly, and also in the pleadings, and inquire whether or not the tax proceeding was illegal and void, and whether or not, if found to be so, it could be sustained upon other grounds and other provisions of law different from those under which the proceeding was clearly conducted, and which proceeding is sought to be enjoined by the pleadings in this case, which pleadings present exactly the same issues and questions as those which arose on the tax proceeding on its face. I do not think this can be done. Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444. Such an inquiry as that of going outside of anything that appears on the face of the tax proceeding, or in the pleadings which present the case for the court's ruling, would manifestly be to make the case turn on issues partly of law and partly of fact entirely dehors the proceeding. It would be to consider issues that do not arise on the face of the act of the Assembly, nor, again,

in the tax proceeding expressly under color of the authority of that act, nor, again, in the pleadings which make the case for decision.

In this same connection reference may be made to the case of University v. Skidmore, 87 Tenn. 155, 9 S. W. 892, the decision in which eminent counsel insist should be read into the revenue act, and so considered as if it appeared in the very face of the act, and in consequence of which it is said the constitutional invalidity of the act would appear. This, however, would be again to go outside of the record, and if the law declared in the Skidmore Case were read into this act the situation would still be that the act would be contradictory on its face, in that it expressly and clearly declares what property shall be taxed and what shall be exempt, and then declares in positive terms that there shall be no other exemption. Furthermore, whether or not the Skidmore Case could be relied on would involve an inquiry into the nature of the lease contracts, and a construction of those contracts, and whether the lease contracts relate to parcels of property within the 1,000-acre exemption, or, again, possibly whether or not the interest of the lessees could, as matter of law, be separated from the general fee and general ownership, so as to become the subject of taxation in the hands of the lessee. These questions would give rise in any case, and in as many cases as may occur in the future, to lawsuits of serious difficulty, and unless the University of the South can protect itself by injunction, as it is now seeking to do, it seems evident enough that it will be subjected to a lawsuit in respect of each and every lease contract which it makes. If it should stand by until the tax proceeding is carried to completion, the tax record then on its face, and on the face of all that might be considered, would confer upon the purchaser at the tax sale a title, to defeat which it would be necessary for the University of the South to bring suit, or to be sued, and then set up its exemption from taxation, as broadly declared in the Skidmore Case. The tax proceeding would obviously prevent handling the property on the market so long as it existed, and would injure its market value and its rental value, and its validity would depend on matters entirely outside of the tax record as made up, and on which the tax title would rest. If we may assume that the University of the South has as many as 50 lessees, it would involve it in as many as 50 separate lawsuits to protect its property and to maintain practically its value to it for renting or for other uses. It would involve it in lawsuits with tax purchasers at the tax sales, and would, of course, unless it should protect its tenants and lessees, cause a rental loss on account of the fact that such lessees and tenants would refuse to be involved in litigation in connection with the title, the ownership of which might be regarded as doubtful. In view of these and some other points which might be suggested, I conclude, without difficulty or misgiving, that the University of the South has a constitutional right to maintain a bill to protect its exemption contract against impairment. Under the common law, and under the common law as expounded in this state by repeated decisions, the taxes assessed on real estate during the lease fall upon the landlord, in the absence of any express stipulation to the contrary, and it is an obligation resting on the landlord constantly to keep down and to pay such taxes and

to protect the lessee in his possession against disturbance or interference by tax proceedings.

In view of the averments of the amended bill, which must be taken as true on this application and in hearing the demurrer, the University of the South is resting under this common-law obligation toward its lessees to pay this tax, if it can be lawfully assessed; and under such circumstances a tax against the lessees is, for all substantial purposes and in fairness, a tax on the rents and a debt against the landlord on account of property which the state has by contract exempted from taxation. It can make no difference in substance as to the form in which the tax is laid. It finally falls upon the landlord, under his obligation, to pay, or necessarily under a diminution of the rental value of the property, and the fact that the result in a given case may come about indirectly, instead of directly, is not material. It is the substance and the necessary effect of what is done, and not the form of it, that must be regarded in administering substantial justice. It is obvious enough that a tax upon the rent for the use of land is a tax on the land itself. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; Mosely v. State, 115 Tenn. 52, 86 S. W. 714. And, indeed, it is obviously plain that a tax laid or assessed against a tenant or lessee is a tax upon the land and against the landlord, in the absence of express stipulations which change the result. If the state and county might assess a tax against these buildings and improvements as personalty under a classification and under tax proceedings appropriate to that view of the situation, it seems clear enough that this has not been done, or attempted to be done, by anything in the legislation of the state, and certainly not by anything in this tax proceeding which can be regarded as at all apt or appropriate to such a classification of property and such a procedure. It would be necessary in such legislation as that, and in such procedure under it as might be adopted, to so express and so restrict the legislation as to show a clear intention to classify and to tax the improvements of the lessees only, and to make it a charge upon such improvements only, and not on the fee general.

This is all that it is positively necessary to decide in relation to this point made in the discussion; but I do not think that the state, under the broad doctrine of the Skidmore Case, is at liberty to adopt this method of laying a tax on the improvements or supposed interests of the lessees. Under the terms of the lease contract, I conclude that the improvements cannot be separated or segregated from the land, and that the lessees possess no interest which can be separated from the general fee. The lessees, under a proper construction of the contract, are entitled, at the expiration of the lease, either to a renewal of the lease in accordance with the terms of the lease, or to an appraisement of the value of the improvements, at which the University of the South is required to pay for the improvements if the renewal is not made. As matter of law the lessee could not and cannot, over the objection of the University of the South, at any time remove these improvements, and if the University of the South should refuse to renew the lease, and should then in bad faith, or otherwise without good cause, refuse an appraisement, the remedy of the lessee would be to sue the University

of the South to recover damages for the value of the improvements, which should, under the contract, have been fixed by appraisement. This right would accrue only when the University of the South would defeat the right of appraisement and substantially deny that remedy to the lessee. Both parties would in such an event as that be relegated to their common-law rights, and a right to remove permanent buildings, which is not one that belongs to the lessee at the common law. I conclude that the case of Luttrell v. Knox County, 89 Tenn. 257, 14 S. W. 802, is essentially and substantially distinguishable from the case at bar, and that its bearing on the issues here determined is not sufficiently material to affect the result.

As I have already stated, I regard the doctrine of the Skidmore Case as broadly declaring the exemption of the University of the South from any form of burden or taxation, direct or indirect, in respect of the 1,000-acre exemption. I think that decision is obviously just and fair in principle. In regard to an educational institution of so much value to the state and to the South as the University, the state's exemption should be construed with entire fairness and justice, not to say liberally, and it is not like an exemption in favor of a private corporation organized for the promotion of strictly private interests and for money gain. This is true in principle, regardless of what any case may say upon the subject. I conclude upon the case as a whole, as already intimated, that the University of the South has the right to maintain this bill to protect its exemption contract from unconstitutional impairment by the state. I conclude, as already stated, that this is not a suit against the state, and that the injunction is not one to enjoin a court of the state, which is another point made in the defense.

I think the trustee, in the proceedings had before him, was engaged in the mere ministerial execution of the provisions of the statute of the state, and, of course, incidentally he determines whether the statute of the state is applicable; but this does not constitute his functions judicial, nor his position in the matter that of a court, in the sense of section 720 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 581]; and this court must, of course, determine for itself what is a state court within the meaning of that section of the Revised Statutes. Western Union Tel. Co. v. Myatt (C. C.) 98 Fed. 335. His position is substantially that of a ministerial officer, or, at most, that of an executive or administrative board charged with the execution of a statute. The fact that he might incidentally exercise quasi judicial power would not change the result.

The proposition that the court possesses jurisdiction on the equity side to prevent a multiplicity of suits, and to prevent a cloud being cast upon the title of the University of the South, is supported by Ogden City v. Armstrong, supra, and Wilson v. Lambert, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599.

I return for a moment to the contention on behalf of the defendants that the revenue act of 1903 should be read and construed in the light of the Skidmore Case, just as much as if the doctrine of the Skidmore Case were declared in the act, and that the act as thus construed would not and could not apply to the University. It should be further remarked, in regard to this contention so earnestly pressed on behalf of

the defendants, that the revenue officers are presumed to know the law and the doctrine of the Skidmore Case. Furthermore, the situation must be looked at, not in a strained or theoretical method, but under a practical and substantial view, and it is hardly to be doubted that these revenue officers, in a matter of such importance and delicacy, are acting under the advice of eminent counsel, and that they are construing this act as authorizing the tax which is being assessed against this property, notwithstanding the doctrine of the Skidmore Case. If the Skidmore Case were read into the act, as counsel contend it should be, and the state, through either its judicial or executive departments, should still construe and enforce the act as authorizing the tax proceeding here in question, this would be unconstitutional, and furnish foundation for the relief sought, notwithstanding the courts should conclude that the construction being put upon the statute and the method of its execution were not in accordance with a proper interpretation of the state statute.

In the case of Chicago, Burlington, etc., Rd. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, in reference to a similar view that the Constitution of Illinois on its face did not violate the fourteenth amendment, the Supreme Court of the United States, speaking by Mr. Justice Harlan, said:

"It is not contended, as it could not be, that the Constitution of Illinois deprives the railroad company of any right secured by the fourteenth amendment; for the state Constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another by any right protected by that amendment against deprivation by the state 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U. S. 339, 346–347, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075. These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896, in which it was held that the prohibitions of the fourteenth amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the fourteenth amendment."

This view may be further illustrated by reference to In re Thomas, 31 C. C. A. 80, 87 Fed. 453. In that case the governor of the Soldiers' Home of Dayton, Ohio, had been arrested and convicted before a magistrate in the state of Ohio and sentenced to pay a fine and to be imprisoned until such fine was paid. The prosecution was instituted and complaint and affidavit made by the dairy commissioner of Ohio under a statute regulating the use of oleomargarine. The governor of the Soldiers' Home, on writ of habeas corpus, was discharged by Judge Taft, and the order discharging the defendant from

custody was affirmed by the Circuit Court of Appeals in a court opinion found at page 87 of 31 C. C. A., and page 453 of 87 Fed. The Circuit Court of Appeals gave the opinion that upon a proper construction of the statute of Ohio it did not and could not apply to the use of oleomargarine at the Soldiers' Home. The Circuit Court of Appeals, in reference to this point, said:

"With respect to the question of law involved, we concur in the reasoning upon which Judge Taft's opinion proceeds (and which we are content to adopt as our own), and in the conclusion which he reached, save that we prefer to rest our approval of the order made by the court below upon the ground that, inasmuch as the Legislature of Ohio had no power to regulate the conduct of this administrative agency of the national government by such a statute as is here in question, it ought to be presumed that the Legislature did not intend it to have such an application, and that the statute should be construed accordingly."

The case was carried on appeal to the Supreme Court of the United States, and the judgment below affirmed. Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699. The Supreme Court of the United States, in disposing of the case and discussing the issues, called attention to the fact that the dairy commissioner and the justice of the peace of Ohio were actually construing the law and enforcing it, or attempting to enforce it, as being applicable to the Soldiers' Home, and that court wholly ignored the view that upon a proper construction of the statute it did not so apply. As the state was, through its judicial department and its executive officers, actually enforcing the statute as applicable, that court broadly declared the statute unconstitutional and pretermitted any reference whatever to the view that the statute did not apply to the Soldiers' Home, if properly and fairly construed.

And so here, if in the light of the Skidmore Case the revenue act of 1903 could not and should not be construed as applying to any interest or right of the University, or as affecting its exemption, still the fact practicallly is that the state, through its revenue officers, is actually enforcing and construing the statute in such a way as to make it applicable to the 1,000-acre exemption on the lands of the University, and in such a way that it will or may affect the title and interest of that University and cast upon it a cloud which will require litigation for its removal. This discussion, however, must not be prolonged further.

The injunction applied for will accordingly be allowed in favor of the University of the South alone against any further proceedings by the defendants against any and every lessee and tenant of the University of the South occupying parcels or parts of the 1,000 acres belonging to the University of the South. The order can be drawn and made to run in apt and appropriate language and form, and is allowed accordingly. The complainant lessees will, of course, pay the cost of the cause so far as that is incident to their having been made parties, as the result is, as to them, final. Of course, it results from these views that the court concludes that the revenue act of 1903, so far as the University of the South is concerned, is in violation of both the state and federal Constitutions.

Ex parte WOOD.

(Circuit Court, W. D. North Carolina. July 22, 1907.)

1. HABEAS CORPUS—JURISDICTION OF FEDERAL COURTS—DISCHARGE OF STATE PRISONER.

Where a federal court granted a preliminary injunction restraining the officers of a state from enforcing a state statute fixing rates to be charged by railroads for the carriage of passengers within the state pending suits by the railroad companies to determine the constitutionality of such statute, and by its order required such companies to issue coupons to purchasers of tickets calling for the difference between the rates charged and the statutory rate, to be repaid in case the statute was sustained, the selling of tickets in conformity to such order was "an act done * * * in pursuance of * * * an order * * * of a court" of the United States, within the meaning of Rev. St. § 753 [U. S. Comp. St. 1901, p. 592], and, where an agent is adjudged guilty of a crime and imprisoned for such act by the state authorities, the federal court is authorized by such section to discharge him on a writ of habeas corpus.

[Ed. Note.—Jurisdiction of federal courts, see note to In re Huse, 25 C. C. A. 4.]

2. CONSTITUTIONAL LAW—DENIAL OF EQUAL PROTECTION OF LAWS—STATUTE IMPOSING EXCESSIVE PENALTIES.

Section 4 of the North Carolina act of 1907 (Pub. Laws 1907, p. 250, c. 216), prescribing the maximum rates which may be charged by railroad companies for the carriage of passengers within the state, which provides that any railroad company violating any provision of the act shall be liable to a penalty of $500 for each violation payable to the person aggrieved, and any agent of such company violating the act shall be guilty of a misdemeanor and subject to fine or imprisonment or both, is unconstitutional as a denial to the railroad companies of the equal protection of the laws by subjecting them to excessive and ruinous penalties if they exercise their right to contest the validity of the law in the courts.

[Ed. Note.—Imposition of penalty, extra allowance of damages, costs, or fees as denial of equal protection of law, see note to Williamson v. Liverpool & London & Globe Ins. Co., 72 C. C. A. 547.]

Petition for Writ of Habeas Corpus.

Jas. H. Wood, W. B. Rodman, and Moore & Rollins, for petitioner.
Jas. H. Merrimon, for the State.

PRITCHARD, Circuit Judge. This is an application of the petitioner, Jas. H. Wood, to be discharged on a writ of habeas corpus from the custody of the sheriff of Buncombe county. The petitioner was indicted on a charge of having violated the provisions of section 4 of an act passed at the session of the Legislature of North Carolina of 1907 (Pub. Laws 1907, p. 250, c. 216) prescribing the maximum charges railroad companies may make for transporting passengers in North Carolina, tried and convicted, and sentenced to a term of 30 days' imprisonment to be worked upon the public roads of Buncombe county.

Some time since suits were instituted in the Circuit Court of the United States for the Eastern District of North Carolina by several railroad companies against the Corporation Commissioners of North Carolina, the Attorney General, and the Assistant Attorney General of that state, for the purpose of obtaining protection of the fourteenth amendment to the Constitution of the United States against an act of

the Legislature of North Carolina establishing maximum rates which such companies claimed to be confiscatory, and, on a prima facie case, a motion was made for interlocutory injunctions. Accordingly, on the 29th of June, injunctions pendente lite were issued enjoining the defendants and all other persons from putting the rates into effect during the inquiry as to the constitutionality of the same, and from instituting prosecutions or attempting to impose penalties upon the companies, or their employés, for a failure to put into effect the statutory rates which are being contested. The court amply preserved the rights of the traveling public by requiring a coupon to be given to each purchaser evidencing the amount to be refunded to him in the event the rates should be upheld, and to secure the same ample bond and security were given. This was in accordance with the law of North Carolina where a rate made by the Commission is attacked. Thereupon the matter was referred to a master to ascertain the facts and report his conclusions, and, to avoid delay, he was required to make his report by the 25th of September, and the hearing was fixed for the first Monday in October, so as to give the parties an opportunity to have the questions involved finally determined by the Supreme Court at the earliest possible moment. There was nothing unusual in the proceedings instituted by the several railroad companies in the state. Similar suits have been instituted in the state of Alabama, where Judge Jones issued an injunction, and also in the state of Georgia, where Judge Newman pursued the same course. Notwithstanding the United States Circuit Court had thus taken jurisdiction of the whole matter and was proceeding in an orderly way with its consideration, the evidence shows that the Governor of North Carolina has issued an address to the judges of the superior courts of the state, questioning the authority of the court to make the order referred to, and asking them to see that indictments against the agents and employés of the railroads and its officials be sent before the grand jury in order that the state may undertake the prosecutions which are enjoined in my order, and stating that, as chief executive of the state, he stands ready to aid them in enforcing the law. In accordance with this policy, a number of indictments have been found and prosecutions begun in defiance of the order of injunction issued by this Circuit Court. If these prosecutions are permitted and continued, the result will be to nullify the injunction which was granted by the court, and to practically defeat its jurisdiction. Not only are the rights of litigants involved, but the dignity and authority of the Circuit Court of the United States as well. These prosecutions and arrests, taking place in widely separated portions of the state, present serious difficulties in the matter, and this court is confronted with open and avowed opposition by the powers of the state. Obstacles are being thrown in the way of inquiry by this court on writs of habeas corpus into the legality of arrests, and this seems to be the deliberate policy of those representing the state. The court does not wish to be understood as imputing improper motives to the Governor or other state officials. The penalties prescribed by the state statute for charging more than the statutory rates are so enormous that, if permitted to be enforced, they would practically bankrupt the railroad in an exceedingly brief time,

and before a final hearing could be had in the cause, and thus place the complainant in a position where it would be powerless to assert a right which is guaranteed to it by the Constitution of the United States. If the criminal prosecutions against the agents, conductors, and employés are permitted to continue, the managers of the railroads cannot successfully operate their trains, carry the mails, or continue their usefulness as common carriers doing an interstate business.

The Constitution of North Carolina contains ample provision for the protection and preservation of the liberty of the citizen.

Article 1, § 18, contains the following:

"Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed."

Section 21 of the same article also provides:

"The privileges of the writ of habeas corpus shall not be suspended."

Section 1821 of the Revisal of North Carolina of 1905 is as follows:

"Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter or on any pretense whatsoever, except in cases specified in the succeeding section, may prosecute a writ of habeas corpus according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal, to be delivered therefrom."

Section 1828 of the same chapter is the only law of which the court has any knowledge that imposes upon a judge a penalty for a failure to perform a judicial act. The section in question reads as follows:

"If any judge authorized by this chapter to grant writs of habeas corpus shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand and five hundred dollars."

Thus it will be seen that the state Constitution of North Carolina, as well as the statutory law, affords ample protection to every person who is deprived of his liberty without due process of law, and, such being the case, it is remarkable that any one representing the state should be opposed to the granting of the writ of habeas corpus. Likewise, the Constitution of the United States and the Revised Statutes afford every citizen of the Union when imprisoned contrary to law protection to the fullest extent by the writ of habeas corpus.

Article 1, § 9, cl. 2, of the Constitution of the United States, is as follows:

"The privileges of the writ of habeas corpus shall not be suspended unless in cases of rebellion or invasion, the public safety may require it."

Section 751 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 592] contains the following provisions:

"The Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus."

"The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." Rev. St. § 752.

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained." Rev. St. § 755.

Notwithstanding the plain provisions and enactments contained in the Constitution and Revised Statutes of the United States, as well as the state Constitution and the statutes of the state, it is seriously contended that the agents of the complainant in this instance, when indicted for the violation of the statute (the enforcement of which has been restrained by this court), are not entitled to a remedy which is afforded to every other citizen of the state. If this policy is to prevail in North Carolina, persons who invest their money in enterprises like that of the complainant will be deprived of the means of protecting their property rights and denied the benefits of the writ of habeas corpus which is intended for the preservation of the liberty of every citizen. It will be a sad day for the people of North Carolina when its citizens are prohibited by the acts of the Legislature from asserting any right guaranteed to them by the Constitution of the United States. Suits of this character have been brought in different states of the Union, and in every instance the federal courts have proceeded to determine the questions involved without interference, hindrance, or delay by the legislative or judicial authorities of such states. The equal protection of the law is guaranteed to every citizen of the United States, and I shall employ all means within the power of the court to secure to persons who invoke the jurisdiction of this court such rights to the fullest extent of the law. If the law is construed in a spirit of fairness and impartiality, there can be no conflict of jurisdiction between the state courts and the courts of the United States.

Much has been said in regard to the power of a court of equity to enjoin the prosecution of a criminal case. In the case of Dobbins v. Los Angeles, 195 U. S. 241, 25 Sup. Ct. 18, 49 L. Ed. 169, Mr. Justice Day, who delivered the opinion of the court, in discussing this phase of the question, said:

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings, under a void law, or ordinance, may be reached and controlled by a decree of a court of equity. Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 23 Sup. Ct. 498, 47 L. Ed. 778, and cases there cited."

In this instance the federal court has not been the aggressor, but has simply adopted the regular practice and procedure which has been approved by the Supreme Court of the United States in cases of a like nature, and, while the court is not inclined to do anything that will produce an unseemly conflict, nevertheless it is incumbent upon it to protect the rights of the parties to this controversy as well as maintain the dignity and authority of this court, and this cannot be accomplished without preserving to the fullest extent the jurisdiction of the court in determining the question which has been submitted to it for consideration. If, in pursuing the usual and well-defined practice and procedure in such cases with the sole view of maintaining the jurisdiction of this court, at any stage of the proceeding, conflict must come, and I trust that it may not, I shall not evade the responsibility which is imposed upon me as the presiding officer of this court.

Much has been said about the sovereignty of the state. That question does not arise in this controversy. This court having assumed jurisdiction of the subject-matter involved in the original suit, wherein the

railroad companies are complainants and the railroad commissioners and others are defendants, the real question is as to whether this court shall be denied full and complete jurisdiction of the subject-matter at issue in that suit. If the contention of the counsel representing the state be true, then this court can be deprived of its jurisdiction by the multiplication of criminal prosecutions in the state courts against the complainant, its agents, and employés to such an extent as to finally place it in a position where it will be deprived of a larger amount than that which is involved in the original controversy, and thus, by indirection, the complainant will be denied a right which is guaranteed to it by the Constitution of the United States. This proposition is inconsistent with the well-established rules of judicial procedure, and does not commend itself to this or any court sitting as a court of equity. It excludes the idea of comity between the courts of concurrent jurisdiction.

Suppose complainant had instituted its suit in the state court, instead of applying to this court, and that court had granted an injunction in pursuance of the laws of the state, could it be seriously contended that the state court, after having taken jurisdiction of the questions involved in the civil action, thus instituted, would permit the complainant to be subjected to criminal prosecutions and suits for the recovery of the enormous penalties enumerated in the statute of the state during the pendency of the action, and before there could be an ascertainment as to the rights of the parties to the original suit? The state court, under such circumstances, would undoubtedly preserve the rights of the parties until the final hearing, and any other course would be without precedent in the judicial history of the state. Notwithstanding this, we are confronted with an attempt on the part of those representing the state to do that which, if successful, would render this court powerless to grant the same relief that would be granted as a matter of course in another court of concurrent jurisdiction. The law provides that in all cases where the federal courts have concurrent jurisdiction with the state courts that such courts shall have power and authority to adjudicate any question that may come before such tribunals and to protect the rights of litigants to the same extent as that of the state courts. The suits out of which this controversy arose were instituted in the same manner as other suits are instituted, and involving, as they do, the validity of a statute of North Carolina, it necessarily follows that all matters connected with the enforcement of such statute, during the pendency of that suit, are under the control and jurisdiction of the court wherein the questions involved are being litigated. The court in the original suit having assumed jurisdiction of the questions at issue in that controversy, and having entered a decree wherein, among other things, the complainant and its agents were directed to employ certain means and do certain things in respect to the sale of tickets during the pendency of that suit, the court thereby assumed control of, and dominion over, the management of the business of the complainant in so far as intrastate transportation is concerned in the same manner as if the court had appointed a receiver of the property of complainant.

As a general rule, the Circuit Courts of the United States will not

issue the writ of habeas corpus in cases where persons are indicted and imprisoned in pursuance of a statute of a state. However, it must be remembered that this is not an attempt on the part of the state to enforce a law which has for its object the preservation of the peace, protection of the morals, or the general welfare of the public, and it cannot be insisted that these prosecutions are necessary to promote the welfare of the public in view of the fact that this court has amply protected the rights of those who may purchase tickets by requiring the complainant to give bond amply sufficient to secure the payment of any damages that may be sustained; but, on the other hand, is a penal statute, enacted with the sole view of enforcing obedience to the first section of the act which undertakes to fix maximum passenger rates. Therefore, inasmuch as the validity of the act which prescribes passenger rates is being contested, and the court has by injunction restrained the enforcement of the same, there is every reason why this court should exercise its discretion in granting writ of habeas corpus, when it is apparent that prosecutions of the complainant and its agents are being instituted solely for the purpose of deterring the complainant from prosecuting its original suit. In view of this situation, the court is called upon to determine the question whether the petitioner is entitled to be discharged, inasmuch as it appears to the court that the act, on account of which he was indicted, was committed in pursuance of an order and decree of this court.

Section 753 of the Revised Statutes of the United States is as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, in its custody for an act done or omitted under any legal right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The provisions of the foregoing section are so plain that there can be no doubt as to the true intent and meaning of the same. It is provided in express terms that the writ of habeas corpus shall extend to one who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof.

In the case of State v. Boone, 132 N. C. 1108, 44 S. E. 595, Chief Justice Clark, who delivered the opinion of the court, in discussing the Neagle Case, among other things, said:

"No such doctrine is found in Neagle's Case [Neagle's Case, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55] for it only holds that what the federal government enjoins as a duty the state cannot punish as a crime."

This court by proper order having directed that the complainant should provide a ticket with a coupon attached thereto representing the difference between the present rate and the proposed rate, it thereby

became the duty of the company and its agents to strictly comply with the requirements of such order, and any failure on their part to observe the same would render them liable to an attachment for contempt, and under such circumstances, the duty being enjoined by this court, the performance of the same by the complainant and its agents would not render them liable to punishment under the statute of the state. Any attempt to punish the company or its agents for the observance of the order and decree of this court would be in utter disregard of the comity which should exist between the state and federal courts, as well as an absolute nullity. If the state courts possess the power to indict persons acting under the directions of the federal court for the performance of a duty enjoined upon them in a suit which may be brought in such court, then the power of the Circuit Courts of the United States would be completely paralyzed, and such courts would be rendered unable to proceed to the determination of any question involving the validity of the statute of a state Legislature.

While the court is of the opinion that the petitioner is entitled to be discharged for the reasons hereinbefore stated, nevertheless there is another phase of this question which should be considered, in order that there may be a proper determination of the matter in controversy and in the consideration of which it is incumbent upon the court to pass upon the validity of section 4 of the act in question, which reads as follows:

"That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this state having competent jurisdiction thereof. And any agent, servant, or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court."

The foregoing section, among other things, provides that the company or its agents shall pay a penalty of $500 for each failure to comply with the requirements of the act. It has been held that no state can constitutionally close the doors of the courts to a judicial inquiry into the constitutionality of the rates it fixes. In the case of Railroad Company v. Minn., 134 U. S. 456, 10 Sup. Ct. 702, 33 L. Ed. 970, it was held by the Supreme Court of Minnesota that the act in fixing rates was conclusive, and there could be no inquiry into such rates by judicial tribunals. Accepting this construction of the Minnesota act by the Supreme Court of that state, the Supreme Court of the United States declared the act unconstitutional, because it denied the railroad company a judicial investigation into the validity of the rates. If this cannot be accomplished directly, it cannot be done indirectly. It is well settled that what cannot be done by express enactment cannot be done by device or indirection. Therefore any system of penalties which is intended to have the effect, and which is so framed as to have the effect of closing the doors of the courts to a judicial inquiry as to rates, is in consequence of that fact unconstitutional and void. Section 4 of the act in question clearly attempts to do this. It imposes upon the company as a penalty for an unsuccessful attempt to appeal to the court, no matter how bona fide this bill is made, such enor-

mous fines and penalties in favor of individuals as to burden the challenger of the act in the courts so as to make it, if the penalties were valid, practically impossible for such an appeal to be made.

In the case of Cotting v. Kansas Stockyards Co., 183 U. S. 100, 22 Sup. Ct. 39, 46 L. Ed. 92, Mr. Justice Brewer, who delivered the opinion of the court, in discussing this phase of the question, said:

"It may be said that this is a penal statute, and therefore it is to be construed in favor of the delinquent, and that we have a right to expect that the state courts will construe the penalty as not attaching to the charge for each head of stock, but only to that upon the separate bunches shipped by different individuals. But is the language so clear that there is no doubt as to the construction? Is there not enough in it to justify a construction which may be accepted by the trial courts and approved by the Supreme Court of the state, and the construction of a state statute by the Supreme Court of the state is in a case like this conclusive upon us? Must the party upon whom such a liability is threatened take the chances of the construction of a doubtful statute? If the one construction is placed upon it, then obviously, even accepting the largest estimate of value placed by any witness upon the property of the company, a single day's violation of the statute would exhaust such entire value in satisfaction of the penalties incurred. In this feature of the case we are brought face to face with a question which legislation of other states is presenting. Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that, upon failure to make good that claim or defense, the penalty for such failure either appropriates all of his property, or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought.

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are open to hear his claim or defense is not sufficient, if upon him, and upon him alone, there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? Take still another illustration: Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty, then even, if, as all litigants were treated alike, it could be said that there was equal protection of the laws, would not such burden upon all be adjudged a denial of due process of law? Of course, these were extreme illustrations, and they serve only to illustrate the proposition that a statute (although in terms opening the doors of the courts to a particular litigant), which places upon him as a penalty for a failure to make good his claim or defense, a burden so great as to practically intimidate him from asserting that which he believes to be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offense, and simply imposes punishment for such offense; that it is within the competency of the Legislature to prescribe penalties for all offenses, either those existing at common law or those created by statute; and, further, that, although that the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penal-

ties, for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation whose assets amount to millions would not be very deterrent from disobedience. It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations; and, if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

The evidence shows that one case under this provision of the act has already been tried in the superior court of Wake county against the complainant as a corporation and one of its agents at that place. In that case the court imposed a fine of $30,000 against the company, and notified the agent that, if he would stop selling tickets at a price that was authorized by the decree of this court, the judge would impose a nominal punishment, but, if he did not, the court would not say what it would do until it had received an answer. In making this reference the court does not wish to be understood as criticising the state court, for there is no one in the state for whom the court entertains a higher regard than Judge Long. It is also shown by the uncontradicted evidence in this case that at least 5,000 tickets are sold daily by complainant at its various offices in the state, in its intrastate business, thereby making it possible for it to be sued 5,000 times in one day for penalties amounting to $500 in each instance on account of its failure to comply with the statute fixing passenger rates. Thus it will be seen that by an enforcement of the statute judgments can be obtained against the complainant for the sum of $2,500,000 for each day. The aggregate penalties for which judgment could be obtained for one day would amount to a sum more than eight times as much as the sum involved in the original suit would be for one year.

This system of legislation is also condemned by Judge Lacombe, in the case of Consolidated Gas Co. v. Mayer (C. C.) 146 Fed. 150, and the conclusion is irresistible, from what this distinguished jurist has to say that such a system of penalties is unconstitutional and void. This not only applies to penalties in favor of individuals against the company, but also as to penalties against agents of the company which would render it utterly impossible for the company to carry on its business while having an orderly inquiry made by the courts as to its constitutional rights.

The court, therefore, is of the opinion that the section of the act attempting to impose penalties and fines is unconstitutional and void upon its face. For the reasons hereinbefore stated, the petitioner will be discharged. An order discharging the petitioners from the custody of the officers of the state court will be entered and a copy of the same will be certified to the police justice of the city of Asheville and the sheriff on Buncombe county.

QUIRK v. QUIRK.

(Circuit Court, E. D. Pennsylvania. July 10, 1907.)

No. 44.

1. EQUITY—OBJECTIONS TO JURISDICTION—TIME FOR TAKING.
In a suit in equity for an accounting by an agent, the objection that equity is without jurisdiction because of the adequacy of the remedy at law can only be interposed in the earlier stages, and will not be considered after the case is at issue and has been heard by a master.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 495.]

2. WORK AND LABOR—PARENT AND CHILD—SERVICES BY SON TO FATHER—IMPLIED PROMISE TO PAY.
Services rendered by a son to his father in the collection of rents do not raise an implied promise on the part of the father to pay for them.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 17.]

3. PRINCIPAL AND AGENT—RIGHT OF AGENT TO COMPENSATION—FORFEITURE BY MISCONDUCT.
Where a son who was agent for his father to collect rents and deposit the same in bank to the father's credit kept no proper account of his collections, and did not deposit all of the money collected, but mixed a part with his own funds and converted the same to his own use, he thereby lost his right to any allowance for his services if otherwise entitled thereto.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 211, 212.]

4. SAME—ACCOUNTING BY AGENT.
An agent on an accounting for money collected for his principal will not be allowed for disbursements claimed to have been made by him where he failed to keep proper accounts, and the testimony in support of his claim is vague and unsatisfactory.

5. GIFT—FORGIVENESS OF DEBT—EVIDENCE TO ESTABLISH.
While a creditor may make a present to his debtor of the amount due him, nothing less than a delivery of the note or a receipt for the amount will support such gift.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gifts, §§ 95–99.]

In Equity. Final hearing on exceptions to master's report.

Maurice G. Belknap and E. Spencer Miller, for complainant.
Edgar W. Lank, for respondent.

J. B. McPHERSON, District Judge. I have read attentively all the evidence in this case, and have considered it in the light of the exceptions filed by the respective parties, but in my opinion none of the exceptions should be sustained. When it is remembered that the master saw and heard the witnesses, his valuation of their testimony should receive much respect, and, so far as I am able by reading the stenographer's notes to judge of the weight that should be given to what they have said, I agree fully with his estimate.

The exceptions are accordingly dismissed for the reasons given by the master, whose reports are adopted as the opinion of the court. A decree may be entered for the sum recommended in the supplemental

report. The master is directed to give the parties notice and make a recommendation on the subject of costs on or before July 25th.

The reports of the master (Henry B. Robb, Esq.) are as follows:

Report of Master.

To the Honorable the Judges of Said Court:

The master appointed by your honorable court in the above proceeding to state an account begs leave to make the following report:

That in pursuance of his appointment, attached hereto, marked "Exhibit A," he served 10 days' notice upon counsel for plaintiff and defendant. That in pursuance of said notice a meeting was held at the office of Maurice G. Belknap, Esq., northeast corner Thirteenth and Chestnut streets, Philadelphia, May 18, 1904, at 3 p. m., and subsequent meetings were held from time to time, at which counsel for the plaintiff and defendant with their witnesses were present. After several meetings, at which testimony was taken, the plaintiff and defendant each filed with the master an account of the transactions between them, exceptions were filed to both the accounts, and subsequent meetings were held from time to time for the purpose of taking further testimony. Your master has carefully reviewed the testimony and the arguments of counsel, and respectfully submits his findings herewith.

The bill of complaint (Exhibit B) sets forth in the first three paragraphs that the plaintiff is a citizen of the state of Maryland, and the defendant a citizen of the state of Pennsylvania; that the plaintiff on the 15th of July, 1899, appointed the defendant his agent to collect his (plaintiff's) share of the personal estate of John Quirk, deceased; that on or about the 20th of November, 1900, plaintiff became the owner of premises 2041–43 Mt. Vernon street, in the city of Philadelphia, and authorized the defendant to collect the rents of the said houses, and that it was agreed that the moneys collected by the defendant should be deposited at the Union Trust Company in the name of the plaintiff; that the defendant received money from time to time to be so deposited, had charge of the deposit book, which he retained, together with all checks drawn against it by the plaintiff and returned to the defendant at the various settlements of the account with the bank.

The fourth paragraph sets forth that he loaned the defendant certain sums of money out of the said funds deposited at the Union Trust Company, and delivered to the defendant in September of 1902 $375 additional in cash for deposit to his credit in the said account.

In the fifth paragraph plaintiff alleges that he demanded an account, the surrender of the bank deposit book and the checks, which were refused by the defendant.

The sixth paragraph sets forth the execution of a bond and warrant of attorney in the sum of $6,500 by the plaintiff in favor of the defendant, alleging undue influence.

The seventh paragraph alleges that the amount involved in this suit is upward of $2,000, and that he has no adequate remedy at law.

The prayers of the bill are, first, that the defendant, John S. Quirk, be required to state an account of money received by him from the plaintiff or on his account, and of all rents and income from the property, and all taxes and repairs paid on account thereof, and pay the balance thereof to the plaintiff; second, that he be required to deliver up to the plaintiff the paid checks described in the bill; third, that the alleged bond and warrant of attorney be declared null and void and delivered up for cancellation; fourth, general relief.

The bill was amended by leave of court on the 8th day of March, 1905 (Exhibit C), by striking out all of the sixth paragraph and the third prayer thereof.

The answer of the defendant (Exhibit D) admits the facts set forth in the first three paragraphs of the bill as amended, admits the loan of $1,500 set forth in the fourth paragraph, but claims a set-off, denies the loan of $100 therein mentioned, and further denies that he is indebted to the plaintiff in any sum, and avers that the plaintiff is indebted to him in the sum of $8.75. The defendant further admits that he collected as rents $2,405.50, and

appends a statement of the same without the names of the persons from whom received. He admits the receipt of the several sums collected from the estate of John Quirk, deceased, claiming, however, that he deposited them in the plaintiff's account at the Union Trust Company. He denies the allegations in the sixth paragraph of the bill which becomes immaterial by the aforesaid amendment. Plaintiff filed a general replication (Exhibit D½).

At the argument counsel for defendant raised the question of jurisdiction, and based his argument upon the fact that the bill does not allege there is any money due from defendant to him, and that plaintiff has an adequate remedy at law. No formal motion was made at any time during the proceedings to dismiss the bill, but a great amount of testimony was taken on both sides, and formal accounts were filed by both parties.

Your master finds this to be a case for an accounting upon the authorities hereafter mentioned; that the defect in the bill, if there is one, may be cured by amendment since he finds a balance to be due plaintiff by defendant; and that this is a case where want of jurisdiction can only be interposed in the earlier stages of the proceeding after the bill is filed, and before the cause has been fully heard by the master.

In Bank of U. S. v. Biddle, 2 Parsons, Eq. Cas. (Pa.) 31, Parsons, J., at page 56, states one of the rules governing such cases to be:

"In cases arising ex contractu or quasi ex contractu, but involving accounts, courts of equity have exercised a general jurisdiction, among which arising from the cognizance of this court are agencies, claims against attorneys, consignees, receivers, and stewards. * * * In agencies of a simple nature, such as a single consignment, or the delivery of money to be laid out in the purchase of an estate, or in a cargo of goods to be paid over to a third person, although a suit at law may be maintainable, yet, if the thing lie in privity of contract and personal confidence the aid of a court of equity is often indispensable, it may be exceedingly convenient and effectual and prevent a multiplicity of suits—and the party in such case often has an election of remedy, 1 Story, 443."

A bill in equity was sustained against an agent for account in Persch v. Quiggle, 57 Pa. 247.

In Bradly v. Jennings, 201 Pa. 475, 51 Atl. 343, the court held that a bill would lie as against one of the defendants on the ground of agency.

In Fowle v. Lawrason, 5 Peters (U. S.) 503, 8 L. Ed. 204, Mr. Chief Justice Marshall says:

"In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted. It is the appropriate tribunal."

See, also, Mitchell v. Great Works, 2 Story, 648, Fed. Cas. No. 9,662.

In Kilborn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005, Mr. Chief Justice Fuller says:

"* * * Where it is competent for the court to grant the relief sought, and it has jurisdiction of the subject-matter, this objection should be taken at the earliest opportunity and before the defendants enter upon a full defense. * * * There cannot be real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law." 1 Story's Eq. Jur. § 450.

After the defense has been filed, it was held that the court is not obliged to entertain an objection to the jurisdiction, even though if taken in limine it might have been worthy of attention. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934.

Objection that the proceeding should have been begun on law side will not be entertained, unless made within a reasonable time after the bill is filed. Dorff v. Schminck, 197 Pa. 301, 47 Atl. 113; Shillito v. Shillito, 160 Pa. 167, 28 Atl. 637; Penna. v. Bogert, 209 Pa. 589, 59 Atl. 100.

In Mintz v. Brock, 193 Pa. 294, 44 Atl. 417, after answer filed and while the court below was hearing testimony in support of a prayer for preliminary injunction, it was agreed by the parties that the defendant should file an account within 30 days. After the accounts were filed and testimony taken for and against exceptions to the said account, the defendant moved to dismiss the bill, which was refused. The court said:

"The question of the defendant's liability to account, etc., as prayed for in the bill, is thus definitely settled by this decree to which both parties consented. * * * At the trial the burden of sustaining his account was on the defendant. The result was unsatisfactory to him, and he therefore took this appeal."

It was held the court was not in error in refusing to dismiss the bill.

Taking up the merits of the controversy: After several meetings at which testimony was taken, the parties each voluntarily filed accounts with your master.

The plaintiff's account (Exhibit E) shows a balance due him by the defendant in the sum of $3,371.79, to which exceptions (Exhibit F) were filed by defendant, and a counter account (Exhibit G) was then filed by the defendant, showing a balance due him by plaintiff in the sum of $236.33, to which exceptions (Exhibit H) were filed by plaintiff. The case was therefore reduced to one of accounts, and the subsequent testimony submitted by plaintiff and defendant was confined to the items of the said accounts, and the exceptions thereto. By the testimony subsequently taken, all of the items in both accounts to which exceptions were filed were satisfactorily proved by vouchers or admitted by counsel for the respective opposite parties, except as hereinafter set forth, and counsel for all parties conceded that the only questions (so far as the merits are concerned) to be considered are the following exceptions:

"(1) Plaintiff excepts (No. 1) because defendant failed to charge himself with the following item: '1901. Mar. 18. To cash one-half of two years and 2 mos. rent at $25 per mo. for premises 920 Fairmount Ave., $325.00.' This is the basis of defendant's first exception to plaintiff's account.

"(2) Plaintiff excepts (No. 2) to each and all of the following items of credit in the rent account and asks that the same shall be proved (all of which were admitted and proved except): '1903. Dec. 5. By cash paid commissions on collections $3,089, $154.45.'

"(3) Plaintiff excepts (No. 4) to each and all of the following items of credit in the 'general account,' and asks that the same shall be proved (all of which were proved and admitted except): '(a) 1899. Apr. By moneys advanced by J. S. Quirk in the matter of contest of the will of John Quirk, deceased, $489.60. (b) 1902. Nov. 26. By gift from B. B. Quirk of balance due on accounts, $1,489.94.'"

Your master has carefully considered said exceptions, and his conclusions thereon are as follows:

1. Plaintiff excepts (No. 1) because defendant failed to charge himself with the following item: "To cash one half of two years and two months rent at $25 per mo. for premises No. 920 Fairmount Avenue $325.00"—and defendant excepts (No. 1) to plaintiff making such charge in his account.

Upon this point your master finds as a fact that there was not any express agreement by the defendant to pay the plaintiff any rent for premises No. 920 Fairmount avenue during the two years and two months they were occupied by him after the death of his grandfather, John Quirk.

He further finds that the evidence upon this point is vague and indefinite, and not sufficient to base a claim against the defendant for the use of the premises.

The only evidence upon this question was that given by Alfred Moore and the plaintiff, which was vague and indefinite. The sum of the testimony of Alfred Moore was that in the settlement between one John B. Quirk and Benjamin B. Quirk, plaintiff, in the division of the property of the estate of John Quirk, deceased, $325 was deducted by John B. Quirk from the sum due Benjamin B. Quirk, who was represented by John S. Quirk, the defendant. There was no evidence to show the terms of the whole settlement between John B. Quirk and John S. Quirk. The defendant, John S. Quirk, was the agent for the plaintiff, with full power to make the best settlement he could in the adjustment of the estate of John Quirk, deceased, the grandfather of the defendant, and in the discharge of his duty in this respect there never had been any complaint by the plaintiff. In fact, he has been well satisfied with the way the settlement of the estate was conducted by the defendant and his counsel. The evidence further shows that 920 Fairmount

avenue was originally owned by the grandfather and occupied by the grandson, John S. Quirk, the defendant, prior to his grandfather's death, and after his death until the settlement of his estate. No claim is made in the bill for this item. While we concede that the mere fact that no claim is made in the bill for this rent would not preclude the plaintiff from recovering it, the fact that the plaintiff omitted to claim this item in his bill, or by an amendment to charge fraud against the defendant in the settlement of the estate of John Quirk, deceased, raises a strong presumption against the claim of the plaintiff, and looks as if it were but an afterthought. The plaintiff himself says on pages 114, 115, 116, and 117 that he was not the owner of the property, and that the defendant occupied the premises under an arrangement with his grandfather during his lifetime in consideration of free board for a brother and sister of defendant, children of plaintiff, and he himself had no knowledge whether defendant paid John B. Quirk rent while he occupied the premises. John B. Quirk was not called. He surely must have been able to throw more light on the question than any of the witnesses who were called, and it would be unjust to the defendant to allow the plaintiff to recover upon such uncertain and vague evidence, especially when the absence of better testimony is not accounted for.

Your master finds that the exception (No. 1) of the plaintiff should be dismissed, and the first exception of the defendant be sustained.

2. Plaintiff excepts (No. 2) to the commission on collection $3,089.

Your master finds as a fact that the defendant was agent to collect rents for his father, and that he did not keep any books of account, that he mingled the moneys of the plaintiff with his own and did not deposit all of the moneys collected as rent in the Union Trust Company in accordance with the agreement between the parties, but converted part of the money to his own use, and, when called upon for an account, omitted items amounting to more than $600.

This credit is based upon a claim for commission of 5 per cent. of the amount of the rent which it is agreed by both parties was collected by the defendant. The plaintiff objects to this item on the ground, first, that the services having been rendered by a son to a father do not raise an implied promise to compensate in money; and, second, because he has forfeited his right to them by bad faith to his principal.

There was no special promise to pay the defendant for his services in collecting rents and taking care of the plaintiff's real estate, and this exception might be ruled upon the authority of Hertzog v. Hertzog, 29 Pa. 468, which holds that services performed for a parent by a son do not give rise to an implied promise to pay for them. The conduct of defendant, however, was such that, even though a promise to pay the defendant for his services were implied, the master is of the opinion that he has forfeited his right to commissions by bad faith to his principal. The reason is that defendant attached to his answer what purported to be an accounting of his rent collections from February 7, 1900, to December 5, 1903, wherein he shows the amount collected to be $2,465.50, which he states to be to the best of his knowledge, remembrance, information, and belief, but after the evidence was partly taken, and it was discovered that accounts must be filed and it was shown how much had been received by him, in his counter account he charged himself with rents collected in the sum of $3,089, being the identical sum charged against him in the account filed by the plaintiff, thereby showing a discrepancy of something over $600 which he had previously omitted. Although he agreed to collect the rent and deposit the money to the plaintiff's account in the Union Trust Company, defendant never kept any books showing the sums of money received as rent, and did not deposit the money regularly in the bank as he agreed to do, but mingled it with his own. He tried to shift the responsibility of keeping the books and depositing the money upon his sister Nellie, but her testimony is clear that she was simply his clerk, and he cannot charge to her his own misuse of trust moneys and negligence in not seeing that she kept books for more than two years.

In Berryhill's Adm'x's Appeal, 35 Pa. 245, it was held that misconduct in a trustee is always followed by a loss of commissions, especially when it is

willful. See, also, Clausers' Estate, 84 Pa. 51; Landis v. Scott, 32 Pa. 495; Milligan's Appeal, 97 Pa. 525.

Your master therefore finds that plaintiff's exception (No. 2) should be sustained and defendant surcharged with this item, to wit, $154.45.

3 (a). The plaintiff excepts (No. 4a) to credit of moneys advanced by John S. Quirk in the matter of the contest of the will of John Quirk, deceased, in the sum of $489.60.

Your master finds that the evidence offered in support of this payment is vague and uncertain; that credit is asked in defendant's account as if it were made in April of 1899, and the receipt produced is dated August 21, 1903; that it is impossible from the evidence to determine what, if any, sum was advanced by the defendant on account of the plaintiff in the will contest. He further finds that the defendant did not keep any account of such expenditures.

John S. Quirk, the defendant, was the attorney in fact for his father in the matter of the contract arising out of the will of John Quirk, deceased, and, as we have already said, the conduct of the defendant in connection with this matter was such as to win the approval of his father, and he was entitled to credit for any sum which was legitimately expended in connection with the contest. Under the will of John Quirk the plaintiff would have received an annuity of about $300 a year, but in consequence of the efforts of his son, the defendant, with counsel employed by him and paid out of the fund collected, plaintiff secured about $28.000 as his interest in his father's estate. The defendant claims that he paid one James O. Jones, who was out of the jurisdiction of the Pennsylvania courts, for his services in connection with the will contest the sum of $489.60. There are two or three important considerations to be borne in mind in connection with this claim: First, By the agreement between the parties all moneys received by John S. Quirk, the defendant, were to be deposited in the plaintiff's account in the Union Trust Company, where they could have been drawn upon only by the plaintiff himself or by a check drawn by some one as his authorized agent. It does not appear from the testimony whether the defendant used the money collected from rents to pay Jones or drew it from bank as required, but your master is led to infer that he appropriated it from moneys in hand, instead of depositing the money in bank, as he had agreed. The difficulty which faces the defendant, therefore, is not his right to collect the necessary expenses in the will contest, but whether he has such vouchers which will entitle him to recover the sum he claims. Herein his case is weak. The master has no doubt that he was put to some expense to obtain the testimony of the witness, Jones, but the testimony both of the defendant and Jones is so vague and uncertain that it is impossible to determine what sum, if any, should be allowed him. In the defendant's answer (Exhibit D) he asks credit for "1899. April. By moneys advanced to B. B. Quirk in the matter of the contest of the will of John Quirk, deceased, $489.60."

In his counter account he sets forth the same item. In the testimony taken January 11, 1906, he produced a receipt as follows:

"Gainsville, Florida, August 21st, 1903.

"Received of John S. Quirk from time to time by my wife and me four hundred and eighty-nine dollars to reimburse me for services in late John Quirk's will case, $489.60. James O. Jones."

The only testimony of defendant as to the payment of this sum was that he paid some in cash and some in checks, but no checks for any of this sum were ever produced by defendant, nor were any dates given when payments were made other than said receipt.

James O. Jones, to whom this money is alleged to have been paid, was called by defendant to testify. He said: "The receipt was given for money he [defendant] had loaned me and advanced me in the case of his grandfather's will in his father's interest, but he could not give the items. He said he had them once, but destroyed them." Jones was simply a witness in the will contest, and lived part of the time in St. Mary's county, Md., and part of the time in Florida. His business in Maryland was wharf agent, and he made about five trips to Philadelphia. The receipt was not given as

the money was advanced; but about two years after the last payment was made the defendant wrote to Jones in Florida asking him for a receipt for the money advanced him, and he sent the above-mentioned receipt.

It seems strange that this claim should not have been settled at the time the money was collected from the estate of John Quirk, deceased, because, if it were bona fide, there was plenty of money in hand to pay it. The master is of the opinion that no reliance whatever should be placed on the testimony of James O. Jones, who had previously pleaded guilty to a charge of forgery in the District Court of the United States for the District of Maryland on the 4th of October, 1901 (Exhibit J). It was incumbent upon the defendant to keep accurate accounts of such of his expenditures as he desired should be paid by his father.

"Since a trustee is chargeable with all he has received in order to be given credit in his accounts, he must show by affirmative proof what he has expended, and he must sustain the burden of proving that his disbursements are proper. A trustee is bound to keep clear and accurate accounts, and whatever doubts and obscurities appear will be construed against him." 28 Am. & Eng. Ency. p. 1095; McCullough v. Tomkins, 62 N. J. Eq. 262, 49 Atl. 474; Welsh v. Brown, 50 N. J. Eq. 387, 26 Atl. 568; White v. Rankin, 18 App. Div. (N. Y.) 293, 46 N. Y. Supp. 228, affirmed 162 N. Y. 622, 57 N. E. 1128. Section 332: "Thus, for example, it is ordinarily the duty of agents to keep regular accounts and vouchers of the business in the course of their agency; and, if this duty is not faithfully performed, the omission will always be construed unfavorably to the rights of the agent, and care will be taken that the principal shall not suffer thereby. Indeed, cases may occur of such gross neglect and misconduct of agents in this respect as to amount to a complete forfeiture of all compensation which would otherwise belong to the agency." Story on Agency, § 332.

Your master, therefore, finds that the plaintiff's exception (No. 4a) should be sustained, and defendant be surcharged with the amount of the said item $489.60.

(b) The plaintiff's next exception (No. 4b) is to the following item:

"1902. Nov. 26. By gift of B. B. Quirk of the balance due on account. $1,489.94."

Your master finds that the plaintiff did not make a gift to the defendant of the sum of $1,500, or the balance due on account, $1,489.94; that the plaintiff did not return to the defendant any note or any other paper releasing the defendant from any debt which he owed him November 26, 1902: and that the plaintiff and defendant did not strike a balance of their accounts on the said 26th of November, 1902.

The defendant asks this credit, claiming that on November 26, 1902, plaintiff gave the defendant the balance due on their general account amounting to $1,489.94. A significant fact in connection with this claim is that nowhere in the answer of John S. Quirk, the defendant, is any credit taken for this gift of about $1,500. The first intimation is in the counter account filed some time after the suit was brought.

Defendant testified: That Thanksgiving Eve, 1902, he (plaintiff) said to defendant that he had given his (defendant's) brother George a farm valued at $9,000 and $3,000 worth of stock and his sister a farm, and that the difference between him (plaintiff) and defendant, which was $1,500, he would make a gift to defendant. This was in the presence of his (defendant's) wife and Mr. and Mrs. Heilman. That he had given his father a note for $1,500, but he did not know whether he (the father) destroyed it afterwards or not. Mrs. Heilman testified that she heard plaintiff say that what he (defendant) owed him he was welcome to it, the $1,500, but she did not say what $1,500 was meant. Laura J. Quirk (defendant's wife) and Joseph F. Heilman corroborated Mrs. Heilman, and neither of them knew anything about a note.

The testimony for plaintiff was that Emma did not get a farm and George did not get a farm until November, 1903, a whole year later, and then all he got was a loan of $415 toward the purchase of it. The plaintiff denies making the gift, as well as the whole incident related as happening on Thanksgiving Eve, 1902, except that he was present at defendant's home. From the accounts as submitted by the defendant, your master is of the opinion that on

Thanksgiving of 1902 neither the plaintiff nor the defendant knew how the accounts between them stood, and, as said above, it is remarkable that, if the gift had been made as claimed, the defendant should not have asked for the allowance in the account attached to his answer. The defendant in his answer admits that on the 15th of September, 1899, the plaintiff loaned him $1,500 and says to secure the payment of which he gave plaintiff his promissory note in the sum of $1,500, it being expressly understood between himself and plaintiff when said note was given that said note was to be paid by him at his convenience, but nowhere in his answer claims credit for it as a gift. The exception might be sustained on what has been said, but a more serious obstacle confronts the defendant in the form of a question of law. The acts of the plaintiff as testified to by the defendant were not sufficient in law to make a gift by him of the amount due. It is well settled that, while a creditor may make a present of the debt to his debtor, yet nothing less than a delivery of the note or a receipt as the case may be is sufficient to support the gift.

In 14 Am. & Eng. Ency. of Law (2d Ed.) p. 1031, the principle is stated as follows:

"A debt due from the donee to the donor may be the subject of a gift to the same extent as a debt due from a stranger. Such a gift when fully consummated by the destruction or surrender of the evidence of the debtor, the giving of a receipt will operate as an extinguishment of the debt, and a subsequent promise by the debtor to pay the debt is not enforceable for want of consideration.

"As in the case of other gifts, the intention of the donor to make the gift must be fully accomplished by a delivery, either by surrendering to the donee the evidence of the debt or by giving him a receipt for the amount."

2 Schouler's Personal Property says.

"Section 97. A gift transaction is sometimes sustained on the ground of the forgiveness or discharge of a debt. Here the surrender of the note, or other evidence of the debt, or, if there had been no such writing, some instrument of discharge, or in general a receipt in full from the creditor, would seem to be the usual and proper means of evincing the act of donation. Indeed, the rule has long been that no merely oral declaration will transform a debt into a gift." In Re Campbell's Est., 7 Pa. 101, 47 Am. Dec. 503, (1847) Gibson, C. J., says:

"The notes in question could have been discharged only by a sealed release or by a parol gift of them. The disposition insisted on by the accountant was neither [here holder of notes directed that they be burned or given to debtor]. A gift is a contract executed; and, as the act of execution is delivery of possession, it is of the essence of the title. * * * The gift of a bond, note or any other chattel therefore cannot be made by words 'in future' or by words 'in præsenti' unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable. * * * Nothing discharges it while it remains in the creditor's possession and power." Appeal of John Horner, 2 Penny. (Pa.) 289; Kidder v. Kidder, 33 Pa. 268, Fassett's Appeal, 167 Pa. 448, 31 Atl. 686.

"Where a father loaned money to his son and afterwards refused to take security, saying that the interest would be at a certain rate if he should want it, and that his decease would be the end of the transaction, there was no gift of the debt." Doty v. Wilson, 5 Lans. (N. Y.) 7.

"The declarations of a deceased lessor that she intended to release the lessee from liability for rent do not of themselves amount to a release, as a gift of a debt owing from the donee can be made effective only by the delivery to the donee of a receipt or some instrument equivalent to it." In re Gregg's Estate, 32 N. Y. Supp. 1103, 11 Misc. Rep. 153.

And, if the words used by defendant in his testimony are noted carefully, it will be seen that they do not necessarily express more than the expectation and promise to forgive the debt.

Your master therefore finds that the plaintiff's exception to the said item should be sustained, and the defendant be surcharged with the amount thereof, viz., $1,489.94.

Plaintiff's counsel submitted formal requests for findings of fact and law attached hereto, marked "Exhibit K," which the master has deemed unnecessary to specifically pass upon, in view of the foregoing findings upon the several matters herein.

Your master has stated the account between the plaintiff and defendant in accordance with his findings, and attached the same hereto, marked "Exhibit L," which shows a balance due to plaintiff by the defendant in the sum of $1,897.66, and submits the following form of decree, to wit:

Decree.

And now this ——— day of ———, in consideration of the within report, it is hereby ordered and decreed that the said defendant John S Quirk pay to the plaintiff Benjamin B. Quirk the sum of $1,897.66, the sum found to be due said plaintiff herein.

Supplemental Report of Master.

To the Honorable the Judges of the Said Court:

Your master having given notice to counsel for all parties that he would file his report on the 27th day of October, 1906, exceptions were filed, on behalf of the plaintiff hereto attached, marked "Exhibit M," and on behalf of the defendant hereto attached marked "Exhibit O." Your master has carefully reviewed the testimony and law raised by the said exceptions and begs to report as follows:

Referring to defendant's Exception X·

"Because the learned master erred in overruling defendant's objection to testimony of Emma Quirk and George Quirk. Pages 85–94, testimony."

Your master is of the opinion that the testimony of these witnesses was admissible, although he was not influenced by their testimony in reaching his conclusions of fact and law as stated in his report. This exception is therefore dismissed.

Referring to defendant's Exception XIV:

"Because the learned master erred in not giving defendant a credit of fifty-two dollars and sixty-two cents ($52.62) in account stated by the master," etc.

This item was not in the account of either plaintiff or defendant, and was overlooked by the master in stating his account. It was proved by a voucher, and a credit should have been allowed the defendant for the said sum. This exception is therefore sustained, and an additional credit is allowed to the defendant of the said sum of fifty-two dollars and sixty-two cents ($52.62), thereby reducing the amount due to the plaintiff by the defendant to the sum of eighteen hundred and forty-five dollars and four cents ($1.845.04).

Your master has carefully considered the remaining exceptions of the defendant and the exceptions of the plaintiff, and is unable to discover any reason why he should disturb his former findings, and accordingly he dismisses all of the said exceptions for the reasons stated in his original report. He therefore recommends that the form of decree contained in his original report be amended by substituting the sum of eighteen hundred and forty-five dollars and four cents ($1,845.04) in place of the sum therein mentioned, which is the sum now found to be due the said plaintiff by the defendant in this suit.

BILLINGS MUT. TELEPHONE CO. v. ROCKY MOUNTAIN BELL TELEPHONE CO.

(Circuit Court, D. Montana. July 15, 1907.)

No. 736.

TELEGRAPHS AND TELEPHONES—RIGHT TO USE OTHER LINES—MONTANA STATUTES.

Const. Mont. art. 15, § 14, provides that any person, or corporation organized for the purpose, "shall have the right to construct or maintain lines of telegraph or telephone within this state and connect the same with

other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section." Civ. Code Mont. § 1001, after repeating such provision, provides that, "in case such persons or corporations cannot agree as to the compensation to be paid for the privilege of such connection, the acquiring of the right by the one to use the line of the other may be had * * * as provided in the Code of Civil Procedure." Code Civ. Proc. Mont. § 2213 (5), relating to proceedings under the right of eminent domain, provides that "all rights of way * * * and any and all structures and improvements thereon * * * must be subject to be connected with. * * * They must also be subject to a limited use, in common with the owner thereof, when necessary." *Held*, that under such provisions a telephone company operating a local exchange, on payment of compensation to be ascertained as provided by the statute, could require another company operating long distance lines to permit a connection with such lines, and also their "use," by receiving and forwarding messages through such connection from subscribers of the other company substantially as it did messages tendered by its own local subscribers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 16.]

O. F. Goddard, for complainant.
McIntire & McIntire and Geo. Y. Wallace, Jr., for defendant.

HUNT, District Judge The plaintiff is a telephone company operating about 350 telephones in use in its exchange in Billings, Mont. The defendant owns and operates a long-distance telephone line and local exchanges in many cities within Montana. The defendant conducts a general long-distance telephone business, and maintains a local exchange business in the city of Billings Plaintiff has endeavored to make some agreement with the defendant company by which it could connect its telephone line with the line of the defendant, so as to acquire the use of the long-distance line of the defendant for transmitting messages, for the convenience of the business of the plaintiff and its numerous customers, and for the convenience of the public generally in the city of Billings and throughout the state of Montana; but the defendant has refused to grant plaintiff the privileges of a connection and use of its line in any manner so as to allow plaintiff to connect its telephone system with the long-distance line of the defendant. The complaint asks the court to decree to plaintiff a right to connect its telephone line with the long-distance telephone line of the defendant at Billings, upon such terms and for such compensation as the court may deem just, and plaintiff prays that the court may proceed by law to determine the right to connect and the value of the service and use of defendant's line.

The defendant answered by admitting that the connection with and use of defendant's lines by the plaintiff would increase the revenue of the plaintiff and accommodate its customers; but it denies that the use of defendant's lines by plaintiff is necessary to the proper operation of the telephone line of the plaintiff, and alleges that such connection is desired by plaintiff to save it the great expense of building its telephone lines through the territory covered by the telephone lines of the defendant. It denies that connection of the lines of the plaintiff with those of the defendant would be a great or any convenience to the public generally in Billings, and alleges that the public generally would

not be afforded any greater facilities in the use of telephones, in event of the connection desired by plaintiff being made, than the public now have. Defendant alleges that the plaintiff and the defendant have competing telephone lines in and about Billings, but that the defendant's lines reach through a large territory not reached by the lines of the plaintiff, and that the plaintiff seeks to have the use of defendant's lines throughout the sections of country not reached by plaintiff's lines, solely for the pecuniary benefit and business convenience of plaintiff. Defendant further avers that such connection and use by the plaintiff of defendant's lines are not authorized by law. It alleges that the taking sought is not necessary, and that its lines are already appropriated to the public use, and that they cannot be taken or appropriated except for a more necessary public use, and that the connection and use sought are not authorized by the laws of the state of Montana. For further answer, the defendant alleges that its telephone lines and system run into several states, so that telephone connection can be had by persons within the said several states, and that use of its lines at any times, and in any manner that the plaintiff might see fit to make use of them, without the intervention of the employés or other instrumentalities of the defendant, would greatly interfere with defendant's lines and business, and would result in great loss to it, and that defendant would be obliged to construct additional lines at great cost, and that foreign electrical currents would injure and destroy the property and business of defendant, and that such use and connection as plaintiff desires is against the laws of the state of Montana, and contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

The plaintiff moved the court, under the pleadings, for findings under the provisions of title 7 of the Code of Civil Procedure of the state of Montana, entitled "Eminent Domain," and also asked the court to appoint three competent persons as commissioners to ascertain and determine the amount to be paid by the plaintiff to the defendant as damages, by reason of the appropriation and use by the plaintiff of the defendant's telephone lines at Billings, Mont. Before the motion was submitted, the court requested the respective parties to produce testimony as to how, if at all, a connection could be had between the systems of plaintiff and defendant companies, and generally upon the technical matters involved in the proposed connection and use of the lines of the defendant by the plaintiff. In accordance with this request by the court, a number of skilled telephone engineers and practical telephone men gave their testimony. Thereafter argument was had, and the matter submitted to the court.

The constitutional and statutory provisions pertinent to the issues are as follows:

Section 9, art. 15, Const. Mont.:

"The right of eminent domain shall never be abridged, nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals; and the police power of the state shall never be abridged, or so construed, as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state."

Section 14, art. 15, Const. Mont.:

"Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section. No telegraph or telephone company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph or telephone company owning or having the control of a competing line, or acquired by purchase or otherwise, any other competing line of telegraph or telephone."

Section 1001, Civ. Code Mont.:

"Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph or telephone within this state, and connect the same with other lines, and in case such persons or corporations cannot agree as to the compensation to be paid for the privilege of such connection, the acquiring of the right by the one to use the line of the other may be had in proceedings under the Code of Civil Procedure and the damages assessed, and the right of connection granted, as provided in the Code of Civil Procedure."

Code Civ. Proc. § 2211:

"Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * *(7). Telephone or electric light lines."

Code Civ. Proc. § 2212:

"The following is a classification of the estates and rights in lands subject to be taken for public use: (1) A fee simple when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet, for a flow, or a place for the deposit of débris or tailings of a mine. (2) An easement, when taken for any other use."

Code Civ. Proc. § 2213:

"The private property which may be taken under this title includes: * * * (5) All rights of way for any and all the purposes mentioned in section 2211, and any and all structures and improvements thereon, and the lands held and used in connection therewith must be subject to be connected with, crossed, or intersected by any other right of way or improvements or structures thereon. They must also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections must be made in manner most compatible with the greatest public benefit and least private injury. (6) All classes of private property not enumerated may be taken for public use, when such taking is authorized by law."

Code Civ. Proc. § 2214:

"Before property can be taken it must appear: (1) That the use to which it is to be applied is a use authorized by law. (2) That the taking is necessary to such use."

Code Civ. Proc. § 2220:

"The court or judge has power: (1) To regulate and determine the place and manner of making the connection and crossings, and employing the common uses mentioned in subdivision 5, section 2213, of this title, and of the occupying of canyons, passes and defiles, for railroad purposes, as permitted and regulated by the laws of this state, or of the United States. (2) To determine whether or not the use for which the property is sought to be appropriated, is a public use within the meaning of the laws of this state. (3) To limit

the amount of property sought to be appropriated, if in the opinion of the court or judge, the quantity sought to be appropriated is not necessary. (4) If the court or judge is satisfied that the public interests require the taking of such lands, it or he must make an order appointing three competent persons, residents in said county, commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other person interested in such property, as damages, by reason of the appropriation of such property, and specify the time and place of the first meeting of such commissioners, and fixing their compensation. Any party may object to the appointment of any person as a commissioner on the same grounds that he might object to him as a trial juror."

It is very clear that plaintiff has a right, under the Constitution of the state (section 14, art. 15), to connect its telephone line with defendant's. "Full effect," by uniform law providing reasonable regulation, is required to be given to the provision giving the right to connect. Certainly some force and effect to this constitutional right of connection were intended by the action of the legislative assembly in enacting section 1001, Civ. Code, proceeding under the mandate of the Constitution. The question is therefore: What effect has been given, and to what extent has legislative action been had?

A mere physical connection of telephone systems is of no advantage, unless right of use is enjoyed. By the very nature of the property, the only substantial way to enjoy the connection is to be able to use the lines when connected. I am disposed to think, upon full consideration, that the right of connection granted by the Constitution means in telephony more than mere mechanical union, and contemplates use as a necessary incident to the right to connect, and that the statute, in employing the word "use," might be accepted as an interpretation of the constitutional right of connection. But, if my interpretation of the constitutional authority is too broad, it cannot be doubted that the Legislature kept within its power when it provided for acquiring a right of use, even though such right might be an extension of constitutional authority. Atchison, Topeka & Santa Fé Ry. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291.

The right to be acquired must be regarded in its relation to the character of the thing used, and, while rights of property should always be scrupulously protected, by strict construction of laws conferring power of appropriation of the property of a person for public use, no construction of a substantial privilege should be adopted which, in its practical effect, would deny the benefit expressly and clearly intended. I think that the use that may be acquired by the plaintiff company is such as is practicable by a connection like that had in the every day service with defendant's own connections. This is feasible by a plan of trunking between the exchanges, where the respective switch or toll boards are maintained. The defendant company would then receive the business from the plaintiff as it now receives business coming from one of its own subscribers. Electricians of experience say that it is neither against scientific rules, nor uncommon, in practical telephony, to find one telephone plant connected with toll lines of other systems; that the matter of current is practically the same in talking on all systems; and that, if the established circuits cannot do the business, the method of taking care of increased business or an overload is by string-

ing more circuits. The operators of defendant company would have to be made use of to make such service practical; the additional service that the defendant's operators would have to perform being that of "plugging in," answering, and getting the connection. But, in effect, the same process is required to be used for a patron of the defendant company's exchange, so that the question is really resolved into one of detail, and is not one of practicability. It may even be that, owing to possible differences in the switchboards of the two companies, an auxiliary apparatus will be necessary; but that is also a matter of mechanical adjustment, not unusual or at all difficult of arrangement.

The right to use is the thing the law has said may be acquired. Therefore, where appropriate proceedings are instituted, as in this case, it is this right of use that is to be acquired; and the reasonable, practical method by which the right may be enjoyed is use by a connection made so that the one company, by its operators, may call the operators of the other company, which must receive the long-distance business of the subscribers of the plaintiff company and care for the same very much as it would like business of its own patrons. In other words, where two companies owning different lines of telephones in Montana cannot agree upon the compensation for the privilege of connection and use, the law of Montana obliges the one to submit to connection with the other, and (upon payment of damages to be assessed), to accept a patronage, and to submit to a necessary use that it might not wish to accept or allow, and probably could not be compelled to accept or allow, were it not for the provisions of the Constitution and laws of the state.

It would be too narrow a view of the constitutional provision and the law to say that right of connection and use is satisfied by mere physical union of the telephone wires and mere adjustment of the same. Right of connection and use means the privilege of having the business proffered accepted and efficiently cared for by the receiving company, through its agents or operators, substantially as would be the business proffered by one of its own subscribers.

No questions of complicated traffic arrangements enter into the consideration of the matter as it now stands before the court. Difficulties of such a nature may arise hereafter, but they can be surmounted when the principle is recognized that the spirit of the Constitution and the letter of the laws of the state, in which defendant operates its lines, compel it, under its primal duty to the public, to yield to the right of plaintiff company to connect its line with defendant's, and to enjoy the use thereof in a reasonable and effective way, provided, of course, damages are paid, as required by law. Atlantic Coast Line R. Co. v. N. C. Corporation Commission (June 1, 1907) 27 Sup. Ct. 585, 51 L. Ed. 933; Campbellsville Tel. Co. v. Lebanon L. & L. Tel. Co., 80 S. W. 1114, 84 S. W. 518, 118 Ky. 277.

From these views it follows that plaintiff is within its rights when it invokes the power of eminent domain for proposed long-distance telephone connections, which constitute a clearly defined public use. The use sought is convenient and of great benefit to the public. There will be no taking in the sense of exclusion of defendant company from enjoyment or control of its property; but rather a limited use such as a

company operating a telephone system offers to and necessarily surrenders to a patron when its lines are being used for conversation.

Defendant, having erected its system subject to reasonable impositions that might be put upon it by the Constitution and laws of the state, is under a duty to allow such a connection and use as is outlined above.

The motion is granted.

SHALLUS v. UNITED STATES.

(Circuit Court, D. Maryland. July 1, 1907.)

No. 153 (1,686).

1. CUSTOMS DUTIES—CLASSIFICATION—TIN DISKS.

Tin disks, which are cut from sheets of tin plate in the manufacture of cans, in order to leave openings for filling the cans, and which are used to some extent for closing the openings in smaller cans, also for a variety of other purposes for which such disks are needed, and this without further operations, are not "waste," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], but articles "wholly or partly manufactured from tin plate" within the meaning of Schedule C, par. 140, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1639].

2. SAME—"MANUFACTURED"—"WASTE"—INCIDENTAL PRODUCTS.

Articles produced incidentally to the manufacture of other articles, and which are themselves ready to be used for various purposes without further treatment, are under the tariff laws subject to classification as "manufactured," rather than as "waste."

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

Appeal from the decision of the Board of General Appraisers at New York on the protest of the importer from the assesment by the collector of customs at the port of Baltimore of duty at the rate of 1½ cents per pound on merchandise invoiced as 77 barrels of scrap tin circles, weighing 82,800 pounds and valued at $414, imported from Canada.

Walter Evans Hampton and James W. Purdy, Jr., for importer.

John C. Rose, U. S. Atty.

MORRIS, District Judge. It was claimed by the importer that the merchandise should be dutiable at 10 per cent. as waste, under Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1679], or else either at 10 per cent. or 20 per cent., under section 6 of the same act, or at 45 per cent., under paragraph 193, or free under paragraph 683, or dutiable by assimilation of material of chief value under section 7. The merchandise consists of circular tin disks about 1¾ inches in diameter, cut from sheets of tin plate in the manufacture of tin cans for hermetically sealed fruits and vegetables. The top of the tin can must have a hole in it, in order to allow it to be filled, and these disks result from the stamping out of that hole. They can be and are used for a variety of purposes for which a circular disk of sheet tin is needed. For instance: They can

be used for the cap of a can having a hole of somewhat less diameter. They can be used for the tops or bottoms of round tin boxes for salves or medicines or candies. They are largely used by roofers in nailing on sheathing paper, the nail being driven through the disk and affording a more secure hold for the nail head. They are used as caps to the tops of cork stoppers for bottles, and many similar uses. If for these purposes it is essential to have tin disks, and for capping cans they are essential, disks would have to be obtained by cutting them out of sheet tin for the special purpose, if not otherwise obtainable. For this reason, and because they can be so used without undergoing any intermediate process of manufacture, but are fit to use just as they are, they have been held dutiable as an article manufactured from tin plate, under paragraph 140, and not as waste. T. D. 15,786, March 22, 1895; T. D. 24,759, G. A. 5,463, October 31, 1903; T. D. 2,571, G. A. 5,632, April 1, 1904. The collector at the port of Baltimore assessed the merchandise under Act July 24, 1897, c. 11, § 1, Schedule C, pars. 134, 140, 30 Stat. 160, 162 [U. S. Comp. St. 1901, pp. 1638, 1639], at 1½ cents per pound, holding the merchandise to be an article which was manufactured from the tin plate. The protest of the importer was overruled by the General Appraisers.

The facts and the law to be applied are very fully stated in the careful opinion rendered by General Appraiser Fischer in a prior case, which is as follows:

FISCHER, General Appraiser. The merchandise consists of tin disks about 1¾ inches in diameter, upon which duty was assessed at the rate of 1½ cents per pound under the provisions of paragraphs 134 and 140 of the act of July 24, 1897, and which are claimed to be dutiable properly at 10 per cent. under paragraph 463, as waste, or at 10 or 20 per cent., under section 6, or at 45 per cent., under paragraph 193, either directly or by virtue of section 7, or free of duty under paragraph 683. We find from the record, including testimony given by the witnesses for the importer, and from the official samples, that the articles in question are of the precise character and description of those which were the subject of the board decisions in G. A. 5,463 (T. D. 24,759), and G. A. 5,632 (T. D. 25,171). The latter decision is as follows (T. D. 25,171; G. A. 5,632):

"Fischer, General Appraiser. The merchandise is described in the collector's report as 'circular tin disks (new) varying in diameter from 1½ to 3 inches.' Duty was assessed thereon at the rate of 1½ cents per pound under the provisions of Act July 24, 1897, c. 11, § 1, Schedule E, pars. 134, 140, 30 Stat. 161, 162 [U. S. Comp. St 1901, pp. 1638, 1639]; and the importer claims, among other things, that they are properly dutiable as waste, at 10 per cent., under paragraph 463, or at 45 per cent., under paragraph 193. Inasmuch as the importer does not dispute in any way the accuracy of this description, but submits his case solely on the question of law involved, we find the facts to be as stated in the collector's report, and we find, further, that the goods are similar in all respects to those which were held in G. A. 5,463 (T. D. 24,759) to be dutiable at the rate herein assessed. The question of the proper rate of duty on this class of merchandise was decided in the decision just mentioned, after hearing much testimony and on a very complete record, and this protest would be overruled on the authority of said decision without further argument, but that the counsel for the importer in his brief has abandoned his claim under paragraph 463 and has urged with some ingenuity and much pertinacity the claim under paragraph 193—a contention not hitherto much pressed in the various cases of this character that have been passed on by the board. The only question to be decided, therefore, is whether the articles fall properly within the provisions of paragraphs 134 and 140, which read, respectively:

"'134. Sheets or plates of iron or steel, or taggers iron or steel, coated with tin or lead or with a mixture of which these metals or either of them is a component part, by the dipping or any other process, and commercially known as tin plates, terne plates, and taggers' tin, one and one-half cents per pound.'

"'140. No article not specially provided for in this Act, which is wholly or partly manufactured from tin plate, terne plate, or the sheet, plate. hoop, band, or scroll iron, or steel herein provided for, or of which such tin plate. terne plate, sheet, plate, hoop, band, or scroll iron or steel shall be the material of chief value, shall pay a lower rate of duty than that imposed on the tin plate, terne plate, or sheet. plate, hoop, band, or scroll iron or steel from which it is made, or of which it shall be the component thereof of chief value.'

"Or under paragraph 193, which reads:

"'193. Articles or wares not specially provided for in this Act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum or other metal and whether partly or wholly manufactured. 45 per centum ad valorem.'

"The first point counsel for the importer advances appears to be that the disks are made from tin cans, and that they are, therefore, articles made from articles that are made from tin plate, and that they are not articles made from tin plate. This argument is not founded on fact. In the process of manufacturing tin cans the piece that forms the body of the can is first bent and secured in cylindrical shape, then the bottom is put on, and finally the top, which is a circular piece of tin plate, with a circular piece cut out of the center; the diameter of the cut-out being in proportion to the size of the can. The purpose of cutting this piece out is to permit the filling of the can, which being accomplished, a larger piece than that cut out is soldered on to close the aperture. It is the tin disks thus obtained which, it will be noted, are cut from the tin plate before it becomes part of the can, that form the subject of the importation now in question.

"Another argument of counsel for the importer is that, because the production of these disks was not the primary object of the manufacturing process to which they owe their existence. the main purpose being the fabrication of tin cans. they are, therefore, not dutiable as 'articles manufactured from tin plate.' This contention is untenable. It is probably safe to assume that the counsel for the importer will admit that the tin cans produced as described are articles made from tin plate. To assume the contrary would be absurd. And, this granted, how can it be said that the tin disks made from the same sheet of plate, and at the same time, are not equally 'articles made from tin plate'? That two merchantable articles, each useful for different purposes, can be made at one operation, is a tribute to modern mechanical ingenuity and economical methods of production; but it is not a reason for classifying one of the articles at a lower rate of duty than the other, when the explicit provisions of the same tariff paragraph cover both. A reference to the decision of the Supreme Court in Junge v. Hedden, 146 U. S. 233, 13 Sup. Ct. 88, 36 L. Ed. 953, amply demonstrates that the word 'articles' is broad enough to cover these disks, irrespective of the manner in which they were manufactured. That a by-product, or incidental product, occurring in a manufacturing process, may nevertheless be 'a manufactured article,' was decided in the case of Standard Varnish Works v. United States. 59 Fed. 456, 8 C. C. A. 178, wherein the Circuit Court of Appeals for the Second Circuit, in passing upon candle tar, a residuum or by-product in the manufacture of candles, says: 'The process of distillation to which the tallow, grease, or oil is subjected is apparently not undertaken with the intention thereby to obtain this new article. What is sought for is the glycerine and fatty acid to be made into candles. * * *' As the goods are manufactured articles made from tin plate, they fall precisely within the provisions of paragraphs 134 and 140, and there is no need of recourse to the 'basket clause.' Paragraph 193. It is quite conceivable, and, indeed, it was intimated by a witness in one of the hearings held by the board on other protests on the same class of goods, that these disks are sometimes stamped directly out of tin plates or sheets, in which case it is certainly not open to argument that they are anything else but 'articles manufactured from tin plate.' If, then, the contention of the

importers should prevail in this instance, we should have two different rates of duty for the same article; for it must be remembered the disks, in the condition as imported, differ in no respect whatever, being complete articles fully finished and ready for use just as they are for the various purposes cited in G. A. 5,463.

"The third point urged by the counsel for the importer is that, if the assessment as made is affirmed, the result will be that, owing to the low price of these disks consequent on the circumstance of their production, the duty levied thereon will be considerably higher ad valorem than the more valuable articles made from tin plate pay. This result, however inequitable it may seem, is not an unusual concomitant of subjecting goods to duty at specific rates. It is not within our jurisdiction to assume to readjust the tariff schedules on equitable principles. That function belongs to the lawmaking power. It is urged that to affirm the assessment of duty as made would work an injustice and absurdity, and cases are cited to show that an interpretation of a statute that would so result should be avoided. What amounts to an 'injustice' or 'absurdity' is a matter of opinion. Where the statute is so explicit, and without ambiguity, either latent or patent, as the one under which these goods were assessed, there is no need of any strained construction. The statute interprets itself. In Thornley v. United States, 113 U. S. 310, 5 Sup. Ct. 491, 28 L. Ed. 999, the Supreme Court said: 'Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for its construction.' And in Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513: 'Where the language of a statute is transparent and the meaning clear, there is no room for the office of construction. There should be no construction where there is nothing to construe.' Note, also, Marine v. Packham, 52 Fed. 579, 3 C. C. A. 210, and Coles v. Collector, 100 Fed. 442, 40 C. C. A. 478.

"We are of the opinion that the contention of counsel for the importer is clearly not maintainable. The protest is accordingly overruled, and the decision of the collector affirmed."

The testimony taken in the case under consideration leads us to no different conclusion from that arrived at in the previous cases, and, following the decision quoted, we overrule the protest and affirm the assessment of duty as made by the collector.

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

In re HARRIS.

(District Court, N. D. Alabama, S. D. July 13, 1907.)

No. 7,640.

1. BANKRUPTCY — INVOLUNTARY PROCEEDINGS — AMENDMENT OF ANSWER BY CREDITOR.

   Formal amendments to an answer filed by a creditor to a petition in involuntary bankruptcy against his debtor may be made at any time before adjudication.

2. SAME—AMENDMENT OF PETITION.

   A petition in involuntary bankruptcy cannot be amended to allege additional acts of bankruptcy after the time for pleading thereto has passed and the alleged bankrupt by making default has confessed the acts charged.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 126–129.]

3. SAME—PROCEDURE WHEN TWO OR MORE PETITIONS ARE FILED.

   Rule 7 of the general orders in bankruptcy, which provides that where two or more petitions in bankruptcy are filed against a debtor alleging separate acts of bankruptcy, and the debtor shall appear and answer such

petitions, the one which charges the earlier act of bankruptcy shall be first heard and determined, applied only where the defendant takes issue on both or all of the petitions. Where two petitions are filed alleging different acts of bankruptcy, and the defendant answers but one, which charges the earlier act, the rule has no application, and the case will proceed upon the petition which is confessed; the other remaining in abeyance.

4. SAME—ANSWER—SUFFICIENCY.

Where a petition in bankruptcy charges as an act of bankruptcy a transfer of property by the defendant, while insolvent, to a creditor in payment of his debt with intent to prefer such creditor, an answer, which in effect admits the insolvency and the act charged, but merely denies the intent, raises no issue upon which the defendant is entitled to a jury trial.

In Bankruptcy. Involuntary proceeding.

Brown & Murphy, for first petitioning creditors.

Thompson & Thompson and Blackburn & Powell, for second petitioning creditors.

Z. P. Rudolph, for W. G. Harris, bankrupt.

Sterling A. Wood, for R. H. Eggleston, receiver.

HUNDLEY, District Judge. Stated in chronological order, in so far as is necessary for the purposes of this decree, the record in this case shows the following: On the 6th day of June, 1907, one of the creditors of W. G. Harris filed a petition in due form, praying for an adjudication in involuntary bankruptcy against said Harris. Upon the filing of this petition, a receiver of the estate of said alleged bankrupt was duly appointed. On the 8th day of June, 1907, other creditors of the alleged bankrupt filed a petition praying an adjudication in bankruptcy, and averring acts of bankruptcy prior to the acts of bankruptcy as averred in the petition filed on the 6th day of June, 1907. On the 24th day of June, 1907, Jacob Epstein, trading as the Baltimore Bargain House, an alleged creditor of said W. G. Harris, filed his answer denying that said Harris had committed any act of bankruptcy, as averred in the first petition. On the 29th day of June, 1907, W. G. Harris, the alleged bankrupt, filed an answer purporting to controvert the acts of bankruptcy averred in the second petition filed by one of the creditors. Concurrent with the filing of this answer, said Harris demanded a trial by jury. On the 2d day of July, 1907, the Southern Art Glass Company, one of the creditors of the alleged bankrupt, filed a contest of the acts of bankruptcy as averred and set forth in the second petition filed by creditors.

On the hearing of this cause, the creditors filing the second petition, moved to strike out the answer and demand for a jury, filed by the alleged bankrupt; and the creditors, who filed the first petition, moved to strike from the files the answer filed by Jacob Epstein, contesting the acts of bankruptcy averred in the first petition. On the hearing of this cause, the first petitioning creditors also asked to amend their original petition by averring acts of bankruptcy prior to those averred in the second petition.

Amidst all this maze of petition and counter petition, motion and counter motion, I shall endeavor as best I can to sift the wheat from the chaff, and come direct to the vital questions presented in this case.

However worthy and commendable it may be for attorneys to use skill and energy in protecting the interests of their clients, and thus indirectly, if not directly, protecting their own interests in the matter of fees in bankruptcy cases, yet it is the duty of the court, without regard to any of these considerations, to so construe the bankruptcy law and proceedings thereunder as to best conserve the purposes for which this law was enacted.

The motion of the creditors filing the first petition, to strike from the files the answer filed by Jacob Epstein, is sustained, because said answer filed by said Jacob Epstein is not sworn to as required by law. The motion of the said Epstein to amend his answer by filing the proper affidavit thereto is allowed, and said original answer as filed by him, with amendment as to affidavit, is therefore before the court for consideration in these proceedings as if the affidavit was originally attached thereto. Amendments of this character may be made at any time before adjudication. Section 59f, Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]); In re Stein, 105 Fed. 749, 45 C. C. A. 29; In re Mackey (D. C.) 110 Fed. 356. The amendment filed by the first petitioning creditors, seeking to amend their first petition so as to aver acts of bankruptcy prior to the acts of bankruptcy averred in the second petition, is overruled. This amendment comes too late, and cannot properly and lawfully be allowed. The debtor having failed to answer or plead to the first petition, the averments therein are taken as confessed against him. To permit the amendment proposed would be, in effect, to permit the making of an entire new case, and that, too, after the time for pleading has expired.

I now come to the consideration of the really important and vital issue in this case; that is, whether that petition which was first filed shall be first heard, or whether the petition which was afterwards filed, on the 8th day of June, alleging acts of bankruptcy prior to those alleged in the first petition, shall first be heard and tried. It is contended by counsel for the second petition that this petition should be heard, first, because, under and by virtue of rule 7 of the general orders in bankruptcy, that petition which avers prior acts of bankruptcy must have priority of consideration. The proper decision of this question requires me to construe the purport, meaning, and intention of said rule 7 of the general orders in bankruptcy. It is true that, where two or more petitions are filed by creditors against a common debtor, alleging separate acts of bankruptcy, this rule does provide for the hearing and determination of that petition which avers the earlier act of bankruptcy; but this is not a general right conferred under that rule in all cases where two or more petitions are filed, but the right of priority can only be secured by the happening of certain contingencies set forth in the rule. The rule must be strictly construed. What the rule intends, and what right, if any, the rule actually confers, must be gathered from the four corners of the rule itself.

Now, in the first place, how is this rule called into action? How can the rights thereunder prescribed be obtained, and by whom? Can that rule be called into action by the alleged bankrupt alone, or by the creditors of the bankrupt alone? I submit that a careful reading of the rule itself is only necessary for the determination of this question, and

that it clearly appears that the rule can be put in motion only by an act of the creditors and debtor jointly.

The mere filing of two or more petitions, one of which avers a prior act of bankruptcy, cannot put in action the enforcement of this rule. By reference to the rule, it will be seen that there are two things absolutely necessary to bring this rule in force: First, two or more petitions must be filed by creditors against a common debtor, alleging separate acts of bankruptcy committed by said debtor; and, second, "the debtor shall appear and show cause against an adjudication in bankruptcy against him on the petitions." Rule 7, Collier on Bankruptcy (6th Ed.) p. 638.

It will be noted that the plural is used, and reference is made to petitions, and not to a petition or any one of these two or more petitions. There being two petitions only in this case, to bring in action this rule, it was necessary for the debtor to answer both of these petitions. Had there been three petitions, it would have been equally necessary for the debtor to have answered all three of the petitions. In fine, if the debtor does not appear and show cause on all of the petitions, the cause proceeds as it would in the ordinary course of legal procedure, without regard to the rule. It follows, therefore, that the answer of the debtor and his demand for a jury must be stricken from the files: First, because the answer does not controvert the allegations of both petitions; and, second, because of the grounds averred in the motion of the creditors filing the second petition, to wit, that the said answer of the bankrupt is insufficient, in that it does not controvert the allegations of bankruptcy alleged in the second petition.

It is true that the debtor denies that he committed any act of bankruptcy as alleged in said petition, and, if this were all, it would be treated as a sufficient answer or denial of bankruptcy, but the debtor goes further, and endeavors to set out such facts upon which this denial is predicated, and those facts, when construed, construing the pleading more strongly against the pleader, in reality admit the insolvency of the debtor, and also admit the acts of bankruptcy averred in the second petition, but seeks to avoid them by stating that they were done without "any intention of preferring his creditors." To permit a debtor to bring in issue before a jury the intention alone, with which the debtor, while insolvent, permits any creditor to have a preference, would be to permit him to present an issue not warranted by the bankrupt law. Where an insolvent debtor transfers to one of his creditors personal property sufficient in value to satisfy the debt in full, his "intent to prefer such creditor over his other creditors," necessary to make such transfer an act of bankruptcy, will be presumed; the preference being the natural result of the transfer. Johnson v. Wald et al., 93 Fed. 640, 35 C. C. A. 522; Rex Buggy Co. et al. v. Hearick et al., 132 Fed. 310, 65 C. C. A. 676, and numerous other cases there cited.

It is contended by the debtor that he should be permitted to contest any one of the petitions alleging acts of bankruptcy that he may desire, and this contention is urged, in that he does not desire to be adjudicated a bankrupt upon any untrue averment. The debtor has a right to bring in issue such a question as this, but not in this manner, for he has confessed the acts of bankruptcy averred in the first petition.

If he is adjudicated a bankrupt upon a petition stating acts of bankruptcy of which he was not guilty, he would still have his day in court after adjudication, by taking action to cause such adjudication to be annulled or vacated. This right is provided for and conserved under rule 7.

It must not be forgotten that it is the creditors who filed the second petition, who have filed the motion to strike from the files the answer of the debtor, Harris, and his demand for a jury. With the answer of the debtor and demand for a jury stricken from the files, we have left only the two petitions and the contest thereof, filed by the creditors Epstein and the Southern Art Glass Company. With the contest by the debtor out of the way, rule 7 has no application whatever in these proceedings, and hence it follows that the two petitions filed by the creditors must be considered in the order of their filing.

It is therefore ordered, adjudged, and decreed that the first petition filed by the creditors on the 6th day of June, 1907, and the answer thereto filed by Jacob Epstein, one of the creditors, be, and the same are hereby, referred to the referee in bankruptcy at Birmingham, to wit, Alex C Birch, with instructions to give notice and set a day to take testimony on the issues raised by the said first petition and the creditor's answer thereto. It is further ordered, adjudged, and decreed that the said Alex C. Birch report the evidence to the judge of this court at Huntsville, on or before the 25th day of July, 1907, that on such evidence adjudication be made or not as the same may warrant. All proceedings and questions in relation to the second petition, and the answer thereto, are held in abeyance until the final hearing on the first petition.

ST. LOUIS & S. F. R. CO. v. HADLEY, Atty. Gen., et al. (and 17 other cases).

(Circuit Court, W. D. Missouri, W. D. June 17, 1907)

No. 2,988.

1. EQUITY—PLEADING—SUPPLEMENTAL BILL.

Where suits by railroad companies to restrain the enforcement of a state statute fixing freight rates, on the ground that it was confiscatory and unconstitutional, were pending in a federal court at the time of the enactment of a second statute fixing passenger rates, the question of the constitutionality of the second act may properly be raised and determined in the pending suits on supplemental bills.

2. COURTS—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

Where bills were tendered for filing in a federal court pursuant to notice previously given, and while leave was not then granted because of the absence of defendants, restraining orders were issued by the court based thereon, the court obtained jurisdiction over the subject-matter of the suits from such time, which was not ousted by the institution of suits in a state court subsequently, but before the formal filing of the bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1346, 1347.]

3. SAME—JURISDICTION OF FEDERAL COURTS—SUITS TO ENJOIN ENFORCEMENT OF STATE STATUTE.

A federal court of equity has jurisdiction of suits to determine the constitutionality of state statutes regulating railroad rates which are at-

tacked on the ground that the rates fixed are unremunerative to the railroad companies, and that their effect, if enforced, will be to deprive the companies affected of their property without due process of law, and such suits are appropriate means for determining the question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 820, 823.

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. C. C. & S. Min. Co., 35 C. C. A. 7.]

4. CARRIERS—STATUTE REGULATING RAILROAD RATES—PRELIMINARY INJUNCTION TO RESTRAIN ENFORCEMENT.

Preliminary injunctions to restrain the putting into effect of a state statute fixing maximum rates of passenger fares on railroads denied to await a demonstration of the reasonableness or unreasonableness of such rates by actual trial for a reasonable length of time.

In Equity.

Frank Hagerman, for complainants.

Herbert S. Hadley, John Kennish, Sanford B. Ladd, and F. W. Lehmann, for defendants.

McPHERSON, District Judge. These cases were argued on Saturday and taken under advisement until this time. The situation is such that I must decide the questions to-day. Limited as the time has been, I have an abiding conviction of what should be done, even if the reasons therefor may not be stated with the fullness that the importance of the matters requires. I have been much aided by the arguments, which were strong, eloquent, and powerful, by counsel representing both sides, and, as it seems to me, every phase of the questions was so illuminated by the arguments that all possible questions are at an end of debate. The real question here is: Has this court jurisdiction over the passenger fare law of 1907 of the Missouri Legislature, by which it is declared that the legal fare be two cents per mile? A question connected with that is whether the bills tendered are supplemental bills to those filed in the 18 cases two years ago to enjoin the enforcement of the freight tariff law of 1905 now pending before the master.

A supplemental bill usually is where there has been some change in the rights or status of the parties which must be carried forward by a supplemental bill, and usually, when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. These discussions as to supplemental bills, as well as to other bills, are exceedingly technical. It seems to me that the test is, not so much in the way a pleading is styled, as what the allegations of the pleading are. Formerly, discussions as to various bills in equity gave rise to great delay; the results being that years and years would elapse before a chancery case could be concluded. Looking back at those old discussions, it now seems to have been a folly to thus waste the time and energies of the judges and of counsel in determining such technical questions. Such must have been the belief of the Supreme Court when a code of rules in equity was established; the purpose no doubt being to get rid of the old technicalities which served no useful purpose. By the adop-

tion of the rules in equity, we have a system of fact pleading, covering almost every phase of equity pleading and practice; and it is only when some question of practice is not covered by the rules that we go back to see what the practice of the High Court of Chancery in England was, and then not as positive rules, but as furnishing just analogies. Rule 90 thus providing was adopted in the year 1842, and the Supreme Court has decided that, when we go to the English Chancery practice, we must take the practice as it existed in England in 1842, when this rule was adopted. By rule 57 it will be seen that the supplemental bill is allowed when any material event has happened after the filing of the original bill. In 1905, the Legislature of Missouri enacted a maximum freight tariff statute as to several commodities. The railways contested the validity of that statute in the 18 actions above referred to, and these actions are still pending. By the act of 1907 the Legislature declared that all railways should charge but two cents per mile per passenger. It seems to me that this is an event happening since the institution of the original suits, and an event that is germane to the original controverted questions. But I do not deem it of much importance to determine whether the pleadings tendered for filing are supplemental bills, or whether they are original bills.

On Tuesday, the 11th inst., the complainants gave notice of filing these bills on Friday, the 14th inst. On Thursday, the 13th inst., the railway companies asked leave to file them. Solely out of courtesy to the Attorney General, who was not then present, this was refused, but the court on its own motion issued restraining orders to keep the matters in statu quo. At the time fixed, Friday the 14th inst., the matter was again delayed for a day at the request of the Attorney General; he still being absent. And on that day bills were filed in the state courts at Saint Louis and Kansas City; the purpose being, as it is said, to bring about the enforcement of this statute in question. And the argument now is that, as these cases were filed in the state courts on Friday the 14th inst., the day before the arguments were had in this court, the same subject-matter was pending in the state courts, and that the state courts would take jurisdiction to the exclusion of this court; the cases being there first pending. But the above statement of facts shows that the cases were pending in this court from Tuesday, the 11th inst., and that orders were made on Thursday, the 13th inst., the day before the cases were lodged in the state courts. If these matters could not be covered by supplemental, they could be covered by original, bills, and they were presented prior to the institution of the cases in the state courts. It is not material whether these supplemental bills, so called, are full and complete as original bills. Defects could be cured upon exceptions or demurrers, or by complainants on their own motion before the filing of an answer. Nor is it material whether these pleadings are filed in the original cases or separately docketed, because, if separately docketed, they will at once for trial purposes be consolidated with the old cases pursuant to section 921 of the Revised Statutes [U. S. Comp. St. 1901, p. 685]. And whether the contention of counsel for the state officers be technically correct or not, the contention is without substantial merit as to the

rights of the parties. These pleadings should be filed and regarded as having been filed on Tuesday, the 11th inst.

The fixing of rates by the Legislature is presumptively correct, and the railway companies have the burden of proof of showing that the statute is not remunerative. That the fixing of rates is a legislative act, all agree; but that such rates must be reasonably remunerative cannot longer be discussed. The railways are entitled to cost and a reasonable profit, and no fair-minded man disputes it. How to arrive at the cost and a reasonable profit is a most difficult problem. But, if the statute is challenged, it must be ascertained, and this ascertainment can only be by judicial proceedings, and must be determined by the courts, and ultimately by the Supreme Court of the United States. No skill of the draughtsman by the use of words or phrasing can take this question from the courts. It can never be settled in a criminal case by arresting ticket agents and conductors. The Supreme Court in the end must have the evidence with the right to make the ultimate findings of fact. There is but one orderly and seemly way, and that is in equity with the right of appeal to the Supreme Court, as has been said by that court over and over again. All contentions that the courts of the state can decide these questions as well as can the United States courts is not a question for argument, because it is a question of jurisdiction, and in my judgment in these cases this court has jurisdiction, and, having jurisdiction, the jurisdiction should be exercised.

There seems to be much feeling in the minds of many as to where these cases should be adjudicated, but why the feeling I do not understand. And yet I recall the historical facts that at various times since the organization of this government the feeling has run high as to whether the federal or state courts should adjudicate matters of importance to the public. No one doubts that the states have a right to manage their own local affairs, and to have matters growing out of their own local affairs determined by their own courts. But it is too late to seriously complain, because the United States courts take and exercise jurisdiction under the constitutional provision providing for the courts, and the enactments thereunder. The United States courts, regardless of the citizenship of the parties, will take and exercise jurisdiction in actions of a civil nature when the provision of the United States Constitution is invoked, as has been done in this case. The Constitution provides for this, and Congress has provided the procedure. The commerce clause of the United States Constitution has been invoked, as is the fourteenth amendment. These are national questions, and the Supreme Court will hold the scales of justice with the evidence before it, and why there should be any excitement or feeling about this is beyond my comprehension. I do not know, and of course do not state, that the state Legislature has wronged these railways, because that is the question to be decided when deciding the merits of the case. The railways say that they are being wronged, and they should have a hearing, and the hearing should be on the evidence, and that evidence carried in the record to the Supreme Court. And if upon the evidence the railways are being compelled to transact business at a loss, no one ought to doubt but that the Supreme Court will hold the statute void. If the rates fixed are remunerative, no

one ought to doubt but that the statute will be upheld. It is too late to talk about the alleged wrongs of the Supreme Court declaring statutes void. That question was fought out 100 years ago, and from the organization of the Supreme Court, down to the year 1888, being the period covering the first 100 years of the United States Supreme Court, that court held 20 United States statutes void. During the same period, that court held 181 state statutes void, of which 14 were Missouri Statutes. See Appendix to volume 131, U. S. Reports. How many statutes have since been declared void by that court I have not taken the time to ascertain. Some of the statutes thus declared void were railway rate statutes enacted by the states.

These questions are of the greatest importance. There are many complications arising. Much is to be considered besides the mere rates or fares. There must be equality of rates—the treatment and charging of all alike. No rebates, no discriminations must be allowed. Safety of the public, including passengers and employés, must be considered. And as of much importance as any other question, if not the greatest of all, is the question of efficient service. Rapid and prompt delivery of freight must be had. Fast passenger trains, with but few stops, for passengers going a considerable distance, are demanded. Local trains for local passengers are required. To have such efficient service, reasonable compensation must be paid. All these questions are involved in the fixing of rates. Between the cities of St. Louis and St. Joseph, one line of railway is wholly within the state, while another and competing line a part of the distance is within the state of Kansas. A like situation exists between Kansas City and St. Joseph, and another like situation exists between Kansas City and Joplin. Possibly there are other like situations. In the case of Hanley v. Railroad, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, the Supreme Court decided that a railway connecting two points within a state, and doing business between the two points, but with a line outside of the state a part of the distance, was engaged in interstate commerce controllable only by enactments of Congress. What about the Missouri statute fixing rates over the one line wholly within the state, as against a competing line a part of the distance outside of the state? I do not intimate the conclusion, but that there is a question cannot be doubted. And, if the statute is void in part, is it separable, leaving the valid parts to stand with the void parts eliminated? I simply mention these questions to show the gravity and importance of these cases, without in the slightest degree intimating the conclusion, often discussed by men of great ability, but upon which as yet there has been no conclusion reached, so far as I know, by any of the courts.

It is urged with much plausibility that by reason of the case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, that, because penalties are affixed to the statute of 1907, the criminal courts of the state only can take jurisdiction. I do not stop to review the various Missouri statutes upon the subject of both passengers and freight, all of which must be considered as in pari materia; but it is sufficient to say that the inflicting of penalties is not the only remedy. The Attorney General and railroad commissioners still have much to do with the enforcement of these statutes which the railways contend

are void in part. These matters were considered, and a conclusion reached adversely to the contention of the officers of Missouri, by the Supreme Court of the United States, sustaining Judge Philips when presiding in this court, and reversing the Supreme Court of Missouri. Railroad v. Missouri R. Commissioners, 183 U. S. 53, 22 Sup. Ct. 18, 46 L. Ed. 78. As I understand, in the original 18 cases now pending in this court, the question was and is whether all the earnings in the aggregate are remunerative. That theory being, I suppose, by reason of the case of Smythe v. Ames (decided by the Supreme Court), 18 Sup. Ct. 418, 169 U. S. 466, 42 L. Ed. 819, and that question is still present under the General Statutes of Missouri, the Statutes of 1905, and the Statute of 1907 in question. The time is not far distant when the question will be raised, and possibly in these very cases, as to whether the statutes can stand, if some rates are too high, if the rates within the state in the aggregate are remunerative. The question will arise whether one person can have less than reasonable rates, and another be compelled to pay more than reasonable rates. Will it be a sufficient answer to say that in the aggregate the rates are remunerative? Or is that a question only between the individual and the railway company? Upon this question I intimate no ruling, but the importance of the question cannot be overestimated.

These cases will be set down for hearing. The orders heretofore made will stand, except as now modified. The two-cent passenger fare statute should be put in force, and kept in force for some months, with the rights of the railways later on to renew their motions to enjoin the enforcement of the statute. One class of people claim that with the two-cent fare travel will so increase as to make it remunerative. Others deny this. The Wisconsin commission but lately declared, after months of investigation, that in that state a two-cent passenger fare would be confiscatory. Gov. Hughes, by a recent veto message, so declared as against an enactment providing for the two-cent fare in the populous state of New York. It may be that what will be reasonable rates in parts of Missouri on one line will be unreasonable in another part of Missouri on another line. How can these questions be determined? Is it not at present all speculation and guesswork? Of what value will be the testimony of an ordinary business man testifying by way of opinion? And of what value will be the testimony of railway experts giving opinion and illustrating his opinions by the use of many figures? Experience over a reasonable period of time ought to, and no doubt will, settle these questions, at least for the time being, although what may be a reasonable remuneration one year may be unremunerative five years hence. The Supreme Court of the United States, in Smythe v. Ames, referred to, took care of that question by keeping it open, with the right to open up the case from time to time as circumstances required.

Therefore the orders will be that this court retains jurisdiction of these cases, regardless of whether the pleadings tendered are considered as supplemental bills or original bills, and no order will be made for some months with reference to the two-cent fare statute, leaving it for the time being operative and as though in full force.

POOR et al. v. IOWA CENT. RY. CO. et al.

SHILLABER v. MINNEAPOLIS & ST. L. R. CO. et al.

(Circuit Court, S. D. Iowa, C. D. July 11, 1907.)

Nos. 2,452, 2,453.

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.
A federal court is not without jurisdiction of a suit to restrain the enforcement of a state statute fixing railroad rates, to which the officers of the state who are charged with such enforcement are made parties defendant, on the ground that such suit is in fact one against the state.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 844½.
Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

2. CORPORATIONS—STOCKHOLDERS' SUITS—EQUITY RULE 94.
Under equity rule 94, a stockholder in a railroad company cannot maintain a suit in a federal court to enjoin the company from obeying a state statute fixing freight or passenger rates, where the only effort made by the complainant to secure the desired action alleged in the bill was a demand on the directors, and the manner or reason for its refusal are not disclosed, since such refusal may have been a proper exercise of the discretionary powers vested in the directors.

In Equity. On motions for preliminary injunctions.

Geo. H. Carr and Henry V. Poor, for complainants in both cases.
Geo. W. Seevers, for both defendants.
H. W. Byers, Atty. Gen. Iowa, amicus curiæ.

McPHERSON, District Judge. The two cases above entitled are brought by holders of stock in the said two companies. The companies only are defendants. The objects of the bills of complaint are to enjoin the defendants from putting into force and carrying out the provisions of the statute passed by the recent session of the Iowa Legislature and approved by the Governor of the state February 28, 1907, taking effect July 4, 1907, commonly known as the two-cent passenger fare statute. In the case against the Iowa Central, the statute if enforced allows the company to carry passengers within the state for two cents only; but, owing to the classification, and the small earnings of the other company in the other case, two and one-half cents per passenger per mile will be allowed.

The question as to the validity of railroad rate statutes is one of great importance. It is at all times a question of much delicacy when a court is asked to hold as void an act of a state Legislature or of Congress. All doubtful questions are solved by the courts in favor of the validity of such enactments. It is when, and only when, the court has no doubt as to the invalidity, that such a decree is rendered; and, when there is no doubt, courts do not hesitate to so declare. In the so-called Granger Cases, 94 U. S. 113–187, 24 L. Ed. 77, 94, 97, 99, 102, in 1876, the Supreme Court held that a Legislature has the power to enact a maximum rate statute. In case of State v. Railroad Commissioners, 36 N. W. 305, 23 Neb. 117, and Id., 37 N. W. 782, 38 Minn. 281, the Supreme Court of Minnesota held that the rates fixed by the state commission could not be inquired into by the courts. But on writs

of error the Supreme Court of the United States reversed the decision of the Minnesota court. Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970, and Minneapolis E. R. Co. v. Minnesota, 134 U. S. 475, 10 Sup. Ct. 473, 33 L. Ed. 985. From that time until the present, all the courts and the profession have understood that the Legislature, acting directly by statute or through a commission duly authorized, can fix maximum freight and passenger rates, subject to the right and power of the court by appropriate judicial proceedings to declare such statutes or orders void, if such rates are either confiscatory or unremunerative, for the reason that such proceedings are not due process of law, and are the taking of property without compensation, and therefore in violation of the United States Constitution. The Minnesota cases were reversed on the single proposition that the courts of that state had held that the rates thus fixed could not be inquired into by judicial proceedings. In Reagan v. Trust Company, 154 U. S. 362, 412, 14 Sup. Ct. 1047, 38 L. Ed. 1014, and Id., 154 U. S. 418, 14 Sup. Ct. 1062, 38 L. Ed. 1030, and Id., 154 U. S. 420, 14 Sup. Ct. 1062, 38 L. Ed. 1031, on proceedings in equity, the Supreme Court held that the rates thus fixed in the state of Texas were not remunerative, and were therefore void. In Smythe v. Ames, Receiver of the Union Pacific Railway Company, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and Id., 171 U. S. 361, 18 Sup. Ct. 888, 43 L. Ed. 197, the Supreme Court held that the state freight rates thus fixed in Nebraska were void, because not remunerative. And the case of Cotting v. Kansas City Stock Yards, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, in declaring void by a bill in equity at the suit of a stockholder, a Kansas statute regulating and fixing rates of a stock yard company, while not in point on the question now before the court, is one of much importance as illustrating the various phases of the various questions. It would take many pages and much time to properly review those cases to which I have called attention. I have no such purpose. I call attention to them only to state what thus far has been decided. It has thus far been decided that the state Legislature has the power to establish the maximum railroad passenger and freight rates within the state, and that the fixing of such rates, whether done directly by the Legislature, or by a commission, is a legislative act.

It has been decided that such rates thus fixed are presumably fair and remunerative, and therefore valid, and that the company, stockholder, bondholder, or mortgagee challenging such rates has the burden of proof. It has been decided that the Circuit Courts of the United States have jurisdiction in most cases to adjudicate the questions. It is agreed by all that the state cannot regulate or control interstate rates. The business between two points within a state, over a line which a part of the distance is without the state, is interstate business, and therefore beyond the power of the state to control or regulate, as was held by the Supreme Court in Hanley v. Railroad, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333.

It has been stated several times that proceedings in equity are the most seemly and suitable to properly determine the question, and this is so, because then the Supreme Court of the United States would

on the evidence render the final decrees. As that court is the final arbiter of all questions arising under the United States Constitution, it seems to me that all patriotic persons should welcome the opportunity of finally presenting these great questions to that court. Criminal cases against ticket agents, conductors, and other subordinates are unavailing. Decisions of state Supreme Courts, and I mention them with the greatest respect, cannot make a final settlement of the questions. The Supreme Court of the United States only can render the decision, to which all will cheerfully bow and acquiesce. Whether in an equity case tried in the state courts, and taken to the Supreme Court by writ of error, can there be decided on the merits, is a question only to be suggested, and, of course, is beyond the power of this court to decide. And it has been decided that in determining whether the state rates thus fixed are remunerative, the interstate rate receipts cannot be considered. But the question argued on the hearing, of whether when the state rates, by practical effect, directly affect the interstate rates, is a question that has not yet been decided. And the question arises by suggestion of whether one person, whether a passenger or a shipper, can be charged more than a reasonable rate, in order to create earnings to make up the average, by reason of others getting rates at less than that which is reasonable. I only mention these matters to show the great importance of these and like cases. The responsibility resting upon the court is great. When these bills were presented, I directed that the Governor and Attorney General be given notice. This was not done with any thought of making them, or any other state officer, a party to the record. But it was done because there is here presented great public questions, and I deemed it seemly and courteous that those officers be given an opportunity to appear by intervention, if allowable, or otherwise, and be heard.

At this hearing the Attorney General of the state appeared as amicus curiæ only, and made two suggestions:

1. That these actions are collusive. The bills which are under oath, recite that the actions are not collusive. They are signed by eminent and reputable counsel. The only fact at all suggestive of collusion is that, no doubt, the companies will be pleased to have a decree rendered as prayed. But that is often true in judicial proceedings.

2. The Attorney General makes another, and a very important, suggestion; and that is, that this court has no jurisdiction over the state officers to adjudicate the question, even though the state officers were made parties. In my opinon the Attorney General is in error in this contention, and for the following reasons:

By section 2112 of the Iowa Code, the Iowa board of railroad commissioners have general supervision of railroads, and must investigate any alleged neglect or violations of the laws by any railway company. By section 2113, the board must investigate all complaints, and make orders. By section 2119, the state courts will enforce these orders. State officers make the classification on which passenger and freight rates are fixed. The board and other state officers, including the Attorney General, have much to do with enforcing, as well as fixing, rates, and what the earnings within the state will be. And the two-cent

statute and all others in any way affecting the rates must be construed as in pari materia. The Missouri statutes upon the subject are much like the Iowa statutes, and in construing those statutes the Supreme Court of the United States, in the case of Railroad Company v. Railroad Commissioners of Missouri, 183 U. S. 53, 22 Sup. Ct. 18, 46 L. Ed. 78, held that the state in effect is not a party, and that the United States courts would take jurisdiction. The state as a state has no pecuniary interest in the litigation, and that is the test. The fact that it may have costs to pay, or that it may be deprived of fines and penalties does not make the state in effect a party. And by reason of these facts the case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, is not in point, because in that case nothing but penalties was included in the controversy.

But, aside from all the foregoing, in my opinion these actions cannot be maintained. These actions are by stockholders only. The actions are against the companies only. The actions could be, and should be, by the companies against the state officers. The code of equity rules are authorized by statute, and are just as binding on this court, as if they were statutes. Rule 94 is controlling in this case. It allows a stockholder to maintain an action only when he held the stock at the time of the transaction complained of. The bill must be under oath, and must allege that there is no collusion. These things have been complied with. But the bills must go further by showing that demand was made on the companies to refuse to comply with the statute. This has been complied with. But the rule requires still more. The bills must with particularity set forth the efforts made, and the refusal. This requirement the bills do not meet. The allegations are that July 1st instant a written demand was made on the board, and on the same day the board made refusal. Was it by a bare majority, or was it a unanimous vote? There is no showing. Did the board refuse to comply because of a question of policy, or because of a belief that the rates fixed were lawful? The bill is silent, as it is as to the number of members present. The stockholders own the corporate assets, subject to indebtedness. But it is not practicable with any corporation, for stockholders to directly control the affairs, and for that reason directors are elected for limited terms to direct affairs. In the absence of fraud, or self-interest, or oppression, or acts ultra vires, and possibly some other instances, the board of directors must be allowed to control. The remedy, like in all representative government, is with the stockholders at the next election. Otherwise the one stockholder, or a minority thereof, can control the majority, particularly if he can get a single judge to agree with him, and that is substituting the one stockholder for a majority of the board.

Aside from the question as to the validity of this statute, is one of policy as to observing the statute. This, no doubt, the board considered. What other reasons they had does not appear. The demand on the board was July 1st. On the same day these bills were verified. They are printed, thereby showing that they were prepared one or more days before the demand. They were filed two days thereafter, and the next day (July 4th) presented for a restraining order, on which day the cases were set down for hearing on the 9th inst. This is not

a compliance with the rule, and to recognize such a showing would be a repetition of the abuses causing the adoption in 1881 of the rule. What those abuses were, and the reasons for the adoption of the rule, and the proper interpretation of the rule, are all covered by the case of Corbus v. Alaska Mining Company, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256. And what was in that case decided, as well as what was then said by Justice Brewer in writing the opinion, requires this court to hold that on the showing made these actions cannot be maintained. And see Davis v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; Kessler v. Ensley Co. (C. C.) 123 Fed. 546, 551.

Therefore the applications for writs of injunction are denied.

McGUIRE v. GREAT NORTHERN RY. CO.

(Circuit Court, N. D. Iowa, C. D. July 20, 1907.)

No. 296.

CORPORATIONS—FOREIGN CORPORATIONS—SERVICE OF PROCESS ON AGENT.

A railroad company of another state, neither owning nor operating any line of road in the state of Iowa, cannot be brought within the jurisdiction of a state court therein, either under the rule of the national courts or the Iowa statutes relating to suits against foreign corporations, by service made upon an employé, not a general agent, maintaining an office in that state for the purpose of soliciting business to be done outside of the state, where the cause of action has no connection with such office or agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2603–2612.

Service of process on foreign corporations, see notes to Eldred v. American Palace-Car Co., 45 C. C. A. 3; Cella Commission Co. v. Bollinger, 78 C. C. A. 473.]

On Motion to Quash Service of Summons.

Kelly & Kelly and E. A. Morling, for plaintiff.

J. L. Kennedy, for defendant.

REED, District Judge. This case was before the court at a former date upon plaintiff's motion to remand and plea to the jurisdiction of the court, which were denied. 153 Fed. 434. The defendant Great Northern Railway Company, appearing specially for that purpose, now moves to set aside and vacate the service of the original notice of the action against it in the state court, and to dismiss the suit for want of jurisdiction of that court, and of this court over said company. The proceeding is not one in rem, but was brought in the state court to recover a personal judgment against the Great Northern Railway Company, a Minnesota corporation. The original notice of the action in the state court was served upon the Great Northern Company in Woodbury county, this state, by the sheriff of that county. The sheriff's return indorsed upon that notice is as follows:

"This notice came into my hands on the 9th day of July, 1906, and on July 9th, 1906, I served the same on the within named defendant Great Northern Railway Company by reading the within notice to F. A. Hills, district pas-

senger agent of the Great Northern Railway Company, and delivered to him a true copy thereof in Sioux City township, Woodbury county, Iowa."

The grounds of the motion to vacate the service are (1) that the Great Northern Railway Company was not at the time of such service a corporation of Iowa, and did not own or operate any line of railroad in that state and was not engaged in any business therein; (2) that said F. A. Hills, upon whom said notice was served, was not its general agent, or its agent for any purpose for the transaction of business in the state of Iowa; that defendant had no office or agency in said state for the transaction of any business therein; that said F. A. Hills was an employé of the defendant with the title of "District Passenger Agent," but his duties as such employé were limited to the soliciting of business to be done by the defendant outside the state of Iowa, and that he had no other authority or other duties to perform for said defendant; and (3) that the cause of action alleged in plaintiff's petition is not one growing out of or connected with the transaction of any business by the Great Northern Company within the state of Iowa. The motion is supported by the affidavit of said F. A. Hills, which is as follows:

"I, Fred A. Hills, being duly sworn on oath, do depose and say that I am the person on whom was served the original notice against the Great Northern Railway Company, in the case of Susie McGuire, Administratrix of the Estate of P. F. McGuire, Deceased, Plaintiff, vs. Minneapolis & St. Louis Railroad Company, the Great Northern Railway Company and C. A. Ziehlke, Defendants, said case being brought in the District Court of Iowa, in and for Palo Alto county; that I am not the station agent of the said Great Northern Railway Company; that the said Great Northern Railway Company has no line of railway in the state of Iowa, and none in the county of Palo Alto, in said state, and that the Great Northern Railway Company has no office or agency in said Palo Alto county, and that the said suit is not brought on an action growing out of or connected with the business of any office or agency of the said Great Northern Railway Company in said state of Iowa or in said Palo Alto company; that I am not the general agent or a general agent of the said Great Northern Railway Company; that I am not a ticket agent of the said Great Northern Railway Company in said state of Iowa, or a ticket agent, or agent of the said Great Northern Railway Company in Palo Alto county.

"Fred A. Hills."

(Subscribed and sworn to.)

The plaintiff has made no countershowing, and the motion is submitted upon the proofs made by the defendant Great Northern Railway Company.

It is settled by the decisions of the Supreme Court of the United States (1) that a corporation of one state may be legally served with summons or notice of suit in another state only when the corporation is doing business in that state; and (2) that such service to be valid must be made in that state upon an agent who represents the company in its business there. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Peterson v. Railroad Co., 205 U. S. 364, 27 Sup. Ct. 513–522, 51 L. Ed. 841; Green v. Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916.

The provisions of the Code of Iowa (1897) relative to suits against

railway and other corporations in that state, and the service of the notice of such suits, are as follows:

"Sec. 3497. An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, * * * and the lessees, companies, or persons operating the same, in any county, through which said road or line passes or is operated."

"Sec. 3500. When a corporation, company or individual has an office or agency in any county for the transaction of business, any actions growing out of or connected with the business of that office or agency may be brought in the county where such office or agency is located."

"Sec. 3529. If the action is against any corporation or person owning or operating any railway or canal * * * or against any foreign corporation, service may be made upon any general agent of such corporation, company or person wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought, if there is no such agent in said county then service may be had upon any such agent or person transacting said business in any other county."

"Sec. 3532. When a corporation, company or individual has for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made upon any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that agency."

There is proof on behalf of the Great Northern Company, aside from the affidavit of Mr. Hills, that defendant does not and did not at the time of such service own or operate as lessee or otherwise any railway within the state of Iowa; that it had traffic relations only with the Wilmar & Sioux Falls Railway Company, a company operating a line of railroad in Woodbury county, this state, but that defendant was not operating said railroad. Whether or not this is correct, under the proofs submitted, need not now be determined, for it is clear that Mr. Hills when the notice of suit in the state court was served upon him was not such an agent of the Great Northern Company as that service upon him will bind that company either under the Iowa statute, or the rule of the national courts. Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; Wabash Western Ry. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; Green v. Railway Company, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; Peterson v. Railroad Co., 205 U. S. 364, 27 Sup. Ct. 513–522, 51 L. Ed. 841; Elgin Canning Co. v. Railway Co. (C. C.) 24 Fed. 866; Philip v. Covenant Mutual Benefit Ass'n, 62 Iowa, 633, 17 N. W. 903; Barnabee v. Holmes, 115 Iowa, 581, 88 N. W. 1098; State Insurance Co. v. Granger, 62 Iowa, 272, 17 N. W. 504. In the last-named case a question arose as to the validity of the service of a notice of suit against a foreign insurance company doing business in Iowa, which notice was served upon an agent of the company in that state, but who was not the agent nor an employé of the office or agency out of which the transaction involved in the suit arose. In holding such service to be void and unauthorized under the Iowa statute the court said:

"It will be observed that the service must be made on some one employed in such office or agency in all actions growing out of, or connected with, the business of that office or agency. As we understand, service could be made on Bishop (who was an agent of the insurance company), and the plaintiff bound thereby, in all actions growing out of or connected with his (that) office

or agency. Beyond this the statute does not go. * * * The statutory thought is that, if service on the principal is dispensed with, it should be made upon some one connected with the business out of which it grew. * * * In the case before us, for a time at least, both Shaffer and Bishop were acting as agents for the plaintiff. Both, therefore, had an office or agency. Now, suppose the notice had been served on Bishop while Shaffer was still acting, could it be said that Bishop was employed in the office or agency of Shaffer? Clearly not, we think. * * * Bishop had greater powers than Shaffer, because he could issue policies. Bishop had nothing to do with the application or policy of insurance on which the defendant's action was based. It was not connected with his office or agency Nor did the action grow out of anything done by him, or by any one connected with his office or agency. As bearing on this question, see Upton Manf. Co v. Stuart Bros., 61 Iowa, 209, 16 N. W. 84. The plaintiff, therefore, is not bound by the notice served on Bishop. Such a service has no more force and effect than if made on a stranger. It is not a defective service, but must be regarded as no service."

The other Iowa cases are to the same effect.

Under these decisions, as well as those of the Supreme Court of the United States, the service of the original notice upon Mr. Hills was not sufficient to confer jurisdiction upon the state court of the defendant Great Northern Railway Company. As that company has not appeared generally in the action, the motion to set aside the service must be sustained. Wabash Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431.

It is so ordered.

REED v. AMERICAN-GERMAN NAT. BANK.

(Circuit Court, W. D. Kentucky. July 26, 1907.)

1. BANKRUPTCY—ACTION BY TRUSTEE—JURISDICTION OF CIRCUIT COURT.

A Circuit Court of the United States has jurisdiction of an action by a trustee in bankruptcy against a national bank to recover usurious interest received by the defendant from the bankrupt, in violation of Rev. St. §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493]; such action being one arising under the laws of the United States, which might have been brought in such court by the bankrupt, regardless of the citizenship of the parties.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

2. SAME—RIGHT OF TRUSTEE TO MAINTAIN ACTION TO RECOVER USURY PAID.

Under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], which vests in a trustee all of the rights of a bankrupt in respect to his property, such a trustee may maintain an action to recover usurious interest paid by the bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 231.]

At Law. On demurrer to petition.

W. V. Eaton, for plaintiff.

J. C. Flournoy, for defendant.

EVANS, District Judge. On October 10, 1906, the E. Rehkopf Saddlery Company was adjudicated a bankrupt by the United States District Court for the Western District of Kentucky, and on November 5, 1906, Cecil Reed was appointed its trustee. On April 5, 1907, this

suit was instituted to recover $14,912.06, which the plaintiff alleges the defendant (which, like the bankrupt, had its place of business at Paducah, Ky.) knowingly collected and received as usurious interest from the bankrupt during the two years immediately preceding the bringing of the action. There is no diverse citizenship, and the defendant has demurred to the petition upon two grounds, viz.: (1) That the plaintiff has not capacity to sue; and (2) that this court has not jurisdiction of the action—and has thus raised important and interesting questions, which have received the very careful consideration of the court.

Section 23 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S Comp. St. 1901, p. 3431]), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 8, 32 Stat. 798 [U S. Comp. St. Supp. 1905, p. 686]), is 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.*"

The provision of this section which is particularly material is, therefore, that part of clause "b" which enacts that suits by the trustee shall only be brought in the courts "where the bankrupt * * * might have brought or prosecuted them if proceedings in bankruptcy had not been instituted." If the bankruptcy proceeding had not been instituted, could the saddlery company have brought suit in this court to recover the usurious interest paid to defendant; it being a national banking association organized under a law of the United States, viz., the national banking act? This seems to be the statutory test established for such cases in which, and in those described in the clause of the section which we have italicized and which was added by the amendment of 1903, the right of the trustee to sue in the federal courts does not depend upon the consent of the person sued, though in other cases it does. Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Mitchell v. McClure, 178 U. S. 539, 20 Sup. Ct. 1000, 44 L. Ed. 1182.

Until Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514], which provided that national banking associations should be deemed citizens of the states wherein they were respectively organized, suits by or against them might have been brought in the courts of the United States upon the ground that such associations had their source of organization in federal statutes, and, therefore, that such suits arose under the laws of the United States. The act of 1888 overturned that proposition so far as it rested upon that ground only. Continental National Bank v. Buford, 191 U. S. 123, 24 Sup. Ct. 54, 48

L. Ed. 119; Petri v. Commercial Bank, 142 U. S. 649, 12 Sup. Ct. 325, 35 L. Ed. 1144; Ex parte Jones, 164 U. S. 692, 17 Sup. Ct. 222, 41 L. Ed. 601. But this scarcely reaches the question we are called upon to decide, and we must look further.

Since the passage of Judiciary Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], the Circuit Courts of the United States have had original jurisdiction of suits at law or in equity where the amount claimed exceeds the sum or value of $2,000, exclusive of interest and costs, and arising under the Constitution or laws of the United States In such cases the citizenship of the parties to the suit is immaterial. The case before us is clearly one which arises under the laws of the United States, because the recovery sought and the right to that recovery is based alone upon a statute of the United States, and has no foundation except in that statute. Tennessee v. Davis, 100 U. S. 264, 25 L. Ed. 648; Railroad Co. v. Mississippi, 102 U. S. 141, 26 L. Ed. 96; Bock v. Perkins, 139 U. S. 630, 11 Sup. Ct. 677, 35 L. Ed. 314; Howard v. United States, 184 U. S. 681, 22 Sup. Ct. 543, 46 L. Ed. 754. This being so, it is manifest that the E. Rehkopf Saddlery Company could itself have sued upon the claim in this court before its bankruptcy.

Section 30 of the Act of June 3, 1864 (13 Stat. 108, c. 106), and which, with the amendment thereto presently to be noted, now constitutes sections 5197 and 5198 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3493], is as follows.

"Sec. 30. And be it further enacted, that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under the state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Under the provisions of Act Feb. 18, 1875, c. 80, 18 Stat. 320, to correct errors and supply omissions in the Revised Statutes, there were added to the above section the following words:

"That suits, actions, and proceedings against any association under this title may be had in any Circuit, District, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The court judicially knows that the legal rate of interest in Kentucky is 6 per cent. per annum, and under this statute if any greater rate should be knowingly taken or received by a national banking association the whole interest would be forfeited, and the person paying the same or his "legal representative" may recover the same under the provisions of the national banking act. Whether a trustee in bankruptcy is a "legal representative," within the meaning of the statute, might admit of doubt, though it does not seem necessary to pass definitely upon the point. We say this because the terms "legal representative" and "personal representative," in their commonly accepted sense, mean administrator or executor, though this is not their only definition. They may mean heirs, next of kin, or descendants, and sometimes assignees or grantees. The sense in which the term is to be understood depends somewhat on the intention of the party using it, and is to be gathered, not altogether from its use, but by the surrounding circumstances. 6 Words and Phrases, 5358; Griswold v. Sawyer, 125 N. Y. 411, 26 N. E. 464.

In ascertaining what Congress meant in 1864 in the national banking act, we may recall that there was no bankruptcy act then in force in the United States, and no such person as a trustee in bankruptcy to come within the phrase "legal representative." This might be one of the surrounding circumstances to be taken into consideration, if we were called upon to construe the phrase "legal representative" as used in that act. But, however that may be, we do not suppose that the claim of the plaintiff to a right to sue in this case is necessarily based upon the idea that he is a "legal representative" of the bankrupt in the sense of the national banking act. We assume, rather, that his right to sue is derived from the present bankruptcy act, section 70 of which seems to vest in him all of the rights of the bankrupt himself, and effectively makes him the legal representative of the bankrupt, whatever those words might mean in the other statute by itself. If this be so, he has capacity to bring this action.

Under the judiciary act jurisdiction is given generally to the Circuit Courts of the United States of cases arising under the laws of the United States. The national banking act itself, as amended, gives the Circuit Courts concurrent jurisdiction with the courts of the state having jurisdiction in similar cases of suits to recover interest knowingly collected at a higher rate than allowed by law; and, if this were all, it might well be held that the judiciary act and the national banking act, when construed together, give this court jurisdiction of a case like this. But, as the plaintiff here derives his powers and rights as trustee from the bankruptcy act of 1898, it has seemed to the court that his right to sue must also be tested by the provisions of that act.

As we have seen, section 23b of the bankruptcy act gives him the right to sue here if the saddlery company could have done so, had there been no bankruptcy proceeding. The saddlery company would have had that right, as the claim exceeds $2,000 and arises under the laws of the United States. This court, therefore, has jurisdiction, and the demurrer must be overruled, both because the plaintiff has capacity to sue and because the court has jurisdiction of the action. This

conclusion is well supported by the opinions in Union National Bank of Cincinnati v. Miller (C. C.) 15 Fed. 703, Walker v. Windsor National Bank, 56 Fed. 80, 5 C. C. A. 421, and Auburn Savings Bank v. Hayes (C. C.) 61 Fed. 941.

In re PERKINS.

(District Court, D. Maine. July 24, 1907.)

No. 134.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE.

A bankrupt, who was a dealer in wagons in Maine, bought certain wagons under contracts providing that the title should remain in the seller until they were fully paid for. Such contracts were not recorded in the town where the bankrupt resided, and it was understood between the parties that the wagons might be sold by him in the usual course of his business without restriction. Rev. St. Me. c. 113, § 5, provides that "no agreement that personal property bargained and delivered to another shall remain the property of the seller till paid for is valid unless the same is in writing and signed by the person to be bound thereby," and that, when so made and signed, such agreement "shall not be valid except as between the original parties thereto unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase." *Held*, that both under such statute and Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], such contracts were fraudulent and ineffective to prevent the title to such wagons as remained in possession of the bankrupt at the time of his bankruptcy from passing to his trustee, although they were not fully paid for.

In Bankruptcy. On certificate from referee.

W. J. Fowler, for W. A. Patterson.
R. V. Jewett, for Ernest E. Higgins, Trustee.
Eugene C. Donworth, referee.

HALE, District Judge. This case comes before the court upon the following certificate of Eugene C. Donworth, Esquire, referee in bankruptcy:

"I, Eugene C. Donworth, one of the referees of said court in bankruptcy, do certify that in the course of the proceedings in said cause before me, the following question arose pertinent to said proceedings:

"Trustee has petitioned for authority to sell free from all incumbrances certain wagons claimed as part of bankrupt estate; and W. A. Patterson Company petitions that said wagons be turned over to it as its property, because of the existence of a conditional sale upon which wagons were bought and which was never recorded in town where bankrupt lived.

"Referee dismissed petition of W. A. Patterson Co. and ordered that wagons are property of trustee free from all incumbrances, and W. A. Patterson Company have petitioned for review.

"The referee's opinion, the testimony, the finding of fact and all papers in the case are sent up; and said question and decision is certified to the judge for his opinion thereon."

In the course of his opinion the referee makes a finding of facts which is sufficient for the decision of the case:

"That Perkins ordered through an agent of W. A. Patterson Company (hereafter called the claimant) on October 27, 1904, a number of wagons, eight of those in dispute being among the number, upon a blank form executed in triplicate and signed by bankrupt, the blank form containing these (printed) terms: 'Prices quoted are for goods at factory; all remittances should be made to manufacturers. Title to goods shipped on this order or any subsequent order is to remain in the manufacturers till paid for in money, and should anything occur to affect my commercial standing, or should I become insolvent, any amount still unpaid shall immediately become due and it is agreed and understood that the manufacturers have the right to take possession of the goods.' 'Terms (in writing) notes, due ⅓ July 1, 1905; ⅓ Aug. 1, 1905; ⅓ Sept. 1, 1905.'

"That on or about January 27, 1905, all the wagons on the order were shipped and afterward received by Perkins, and on or about Feb. 11, 1905, Perkins, at the request of the claimant, executed and delivered to claimant three notes for $404 each, payable, respectively, July 1, 1905, August 1, 1905, September 1, 1905. That the July note was paid in full. The August note was retired by Perkins paying one-half cash and giving a new note for $200. The September note was retired by Perkins paying one-fourth cash and giving two notes payable in three and four months, respectively, for $150 each.

"That Perkins supposed and intended that the several notes should be given and accepted in payment for the wagons, but that claimant did not suppose and intend them as such.

"That on or about July 8, 1905, Perkins ordered, by letter, the wagon marked 'No. 11 top buggy,' valued at $75, which he subsequently received. Nothing was said in this letter regarding terms.

"That it was intended both by claimant and Perkins that the wagons ordered and shipped should become part of Perkins' stock in trade, and should be sold by him in the regular course of business to purchasers, free from all incumbrances or claims of claimant, and without limitation by claimant as to purchasers or terms.

"That all the wagons ordered of claimant by Perkins were so sold before bankruptcy, with the exception of the nine claimed in the petition.

"That Perkins resided in Hampden, in said district, at the time his order was given and continues to so reside; but during the past ten years up to November 18, 1905, he has carried on a large business in storing and buying and selling wagons and supplies at Calais, in said district.

"That the order given by Perkins to claimant was recorded in said Calais on September 29, 1905, but never in Hampden.

"That Perkins was adjudicated bankrupt on November 18, 1905, and that petitioner, Ernest E. Higgins, is the duly qualified trustee in bankruptcy of said estate.

"That claimant has never taken possession, either from Perkins or from trustee, of the wagons ordered by Perkins, or of any of them.

"That said nine wagons are in the custody and possession of said trustee, and are part of said bankrupt estate, unless, under the terms of the order given by Perkins to claimant, the latter is entitled to them.

"That the sum of seven hundred and twelve dollars was paid by Perkins to claimant on said order, and the several notes given by Perkins and herewith exhibited are unpaid."

Section 70 of the present bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]) provides that the title of the bankrupt shall vest in the trustee to all "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."

In the case in Re Garcewich, 115 Fed. 87, 53 C. C. A. 510, the Circuit Court of Appeals for the Second Circuit held that where goods were sold to the bankrupt on credit, and with the understanding that the title to such of them as should not be sold by them should

remain in the vendor until the payment of the purchase price, the title thereto vests in the trustee. In speaking for the Circuit Court of Appeals in that case Judge Wallace said:

"It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and, until the performance, the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But, when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. Ludden v. Hazen, 31 Barb. (N. Y.) 650; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Bonesteel v. Flack, 41 Barb. (N. Y.) 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

In the above case Judge Wallace places the conclusion of the court upon the proposition that, when property is delivered to a vendee to be dealt with in any way inconsistent with the ownership of the seller, the transaction must be a fraud upon the creditors of the vendee.

In Flint Wagon Works v. John S. Buttles, Trustee, 153 Fed. 932, in a very comprehensive and well-considered opinion, as yet unpublished, Judge Martin passes upon a case, the facts in which are very similar to the case at bar. He says:

"The whole trend of the 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 at bar there was an attempted lien, absolutely secret, not even 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 time they should remain in the hands of the vendor."

Judge Martin places his decision upon the authority of In re Garcewich, supra.

In the case In re Shaw (D. C.) 146 Fed. 273:

"A bankrupt, who operated a tannery in Maine, some two years prior to the bankruptcy, executed a chattel mortgage to a creditor on all the stock and materials at his tannery and such as should thereafter be acquired. By

agreement the mortgage was not recorded, nor was any possession ever taken thereunder. Subsequently the mortgagee made a mortgage to secure an indebtedness to a bank on certain bark at the bankrupt's tannery, to which it had no title unless by virtue of its own mortgage. Also, by agreement, this mortgage was not recorded, but an attempted delivery of possession was made by going to the tannery, scaling the bark, and placing on each pile a small board, having thereon a letter of the alphabet, and then formally delivering each pile to the agent of the bank, who appointed the bankrupt its custodian. There was no visible change of possession, and the bankrupt's trustee took possession of and sold the bark as assets of his estate."

This court held:

"That under Rev. St. Me. c. 93, § 1, which provides that 'no mortgage of personal property is valid against any other person than the parties thereto unless possession of such property is delivered to and retained by the mortgagee or the mortgage is recorded,' there was no such delivery and retention of possession as to validate either mortgage, but that both were fraudulent as attempted secret liens, and void as against the bankrupt's trustee."

In that case the court took into consideration the fact that there was an express agreement not to record the mortgage, and held that such agreement was a circumstance tending to show actual fraud. The court said:

"The testimony tends to show that, at the time of the giving of the mortgage to the bank, Shaw was insolvent, that there was an obvious attempt to make the delivery to the mortgagee secret rather than open, and that there was a distinct and affirmative understanding that the mortgage was not to be recorded. The case discloses a want of good faith, resulting in an actual fraud upon the general creditors."

Rev. St. Me. c. 113, § 5, provides that:

"No agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby. And when so made and signed, whether said agreement is, or is called a note, lease. conditional sale, purchase on instalments, or by any other name, and in whatever form it may be, it shall not be valid, except as between the original parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase."

The facts in the case at bar disclose that the nonrecording of a "conditional sales contract" was not a mere matter of omission. It was in pursuance of a distinct plan that there should be no record of this contract; but that the wagons should appear to be the property of the vendee. The lien was never attempted to be brought to light until after the failure of the bankrupt and his voluntary assignment. The vendee was put into possession of the wagons, of which he was apparently the absolute owner.

In the Shaw Case, supra, the court cites from Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164, in which, in speaking for the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton said:

"The fact that this was a secret lien gave this property the appearance of being unincumbered, and was the moving inducement of some of his existing creditors to grant delay by extension and renewal. * * * But there is a distinction between a mere negligent failure to record a mortgage or deed and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law. It is, however, a circumstance constitut-

ing more or less cogent evidence of a want of good faith, according to the particular situation of the parties, and the intent as indicated by all of the facts and circumstances of the particular case."

The facts do not bring this case within the law of Hewitt v. Berlin Machine Works, 194 U. S. 297, 24 Sup. Ct. 690, 48 L. Ed. 986, and York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; nor within the recent decisions in this circuit. James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321; Tucker v. Curtin, 148 Fed. 929, 78 C. C. A. 557.

Nor is the case within the law of the very recent case of Loveland, Petitioner, in the Matter of Warren H. Littlefield, Bankrupt, and Alfred W. Putnam, Trustee, Appellant, v. Alice H. Loveland, Petitioner, 155 Fed. 838, in which case, in speaking for the Court of Appeals in this circuit, Judge Lowell remaks:

"Where the trustee in bankruptcy and the transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the bankrupt law which declares what property the trustee shall take."

He also cites York Manufacturing Co. v. Cassell, supra, in which the decision is based somewhat upon Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 660, 49 L. Ed. 577. In that case, in speaking for the Supreme Court, Mr. Justice Peckham 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."

But the case at bar is not "unaffected by fraud." The facts bring it distinctly within the rule given by Judge Wallace in Re Garcewich, supra. In coming to a conclusion, the court gets little assistance from the line of cases which hold that, in equity, for certain purposes, the trustee merely stands in the shoes of the bankrupt, and takes all property subject to valid liens; for the case at bar does not disclose a "valid lien," but rather an attempted lien which is invalid and fraudulent.

In reference to the last wagon ordered by the bankrupt in July, 1905, the referee finds a different state of facts from that in relation to the other eight wagons. From the facts which he has found, however, I agree with his conclusion touching this last wagon, as I do also with his decision as to the others.

The finding of the referee in his report is confirmed.

It is ordered that all the wagons named in the petition be sold by the trustee free from all liens and incumbrances.

THE BENCLIFF.

(District Court, E. D. Pennsylvania. July 22, 1907.)

No. 11 of 1904.

1. SHIPPING—CONSTRUCTION OF CHARTER PARTY—DISCHARGE BY CHARTERER.
Under a charter party which required the vessel to discharge by night, as well as by day, if required by the charterer or consignee, but also gave the charterer the option to provide the stevedore for discharging, for which the vessel agreed to pay at not exceeding a specified rate, where he exercised such option, he is not entitled to charge for discharging a sum exceeding the stipulated rate because of night work, especially where by means of it he earned dispatch money under the charter.

2. SAME—SUIT TO RECOVER FREIGHT—ISSUES NOT MADE BY PLEADINGS.
In a suit in personam by a vessel owner to recover freight money from a charterer, the claim that under the cesser clause of the charter the sole remedy of the libelant was in rem against the cargo cannot be urged as a defense where it was not raised by the pleadings.

3. SAME—LIABILITY FOR PORT CHARGES.
Where a charter party provided that the freight specified should be "in full of primage, consulage, port charges, etc., as customary," and also that the vessel should, if required, discharge by night, as well as by day, she is liable for extra port charges incurred by reason of night work, although the discharging was done by the charterer under a provision giving him that option at a specified rate to be paid by the vessel.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 183.]

In Admiralty. Suit to recover freight. On final hearing.

Charles R. Hickox, for libelant.
Henry Flanders, for respondent.

J. B. McPHERSON, District Judge. This is an action in personam, brought by the libelant to recover from the respondent two sums of money that are averred to have been improperly deducted by his agent at his direction from the freight due for the carriage of a cargo in the steamship Bencliff. Originally it was sought to recover three items, but the dispute concerning one of them was settled after the suit was brought.

The facts, which are not in controversy, are as follows: In July, 1902, the libelant and the respondent entered into a charter party, whereby it was agreed, inter alia, that the Bencliff should proceed to the port of Bilbao and there load from the respondent's shippers a cargo of ore, which she was to deliver as directed by him at whichever of four specified ports in the United States he might select. Perth Amboy having been chosen, the cargo was in due season delivered at that port; and it is for certain stevedores' charges and for fees paid to the customs officials that the present suit is brought. These sums were deducted by the respondent's orders when his agent settled for the freight with the master, and the libelant contends that the deductions were improperly made; the argument being that under the charter party the payments in question should fall upon the respondent and not upon the ship.

Unquestionably, if the agreement of the parties had embraced nothing more than an undertaking on the part of the ship to carry and

deliver the cargo, and an undertaking on the part of the respondent to pay a specified sum as freight, the freight would not have been earned until the cargo was delivered, and the ship would have been bound to make whatever payments were necessary in order to enable her to fulfill the obligation to carry and deliver. But the agreement contains other provisions which modify the respective obligations to deliver and to pay, and it is by the construction of these provisions that the present dispute must be determined. Instead of undertaking to do the actual work of delivery herself, the ship gave to the respondent "the option of providing stevedore for discharging the cargo at port of discharge," but agreed to pay the cost of doing the work at the "current rate of 40 cents if discharged at New York or Perth Amboy." The respondent exercised this option, and employed a stevedore to do the work at a rate that is not disclosed by the evidence, but in all probability did not exceed 40 cents. Moreover, as the charter party further provided that the "ship is to load and discharge as rapidly as possible (if required), by night as well as by day, when required to do so by charterer, shipper or consignee," the respondent took advantage of this additional option—being probably stimulated thereto, in part at least, by a provision for "despatch money at the rate of 15 pounds sterling per day of twenty-four hours for any time saved in * * * discharging, payable by the ship to * * * charterer at discharging port"—and required the stevedores to work by night as well as by day. The result was that the cargo was unloaded quickly, and that the respondent earned thereby £207 10s. dispatch money, which was duly allowed by the ship and deducted from the freight without question. But, of course, work by night must be paid for, since a day's wage does not of itself compensate for such labor, and the men who work by night are not the same as those who work by day; and it is for the additional amount paid to the stevedores' servants for discharging the cargo at night that the libelant claims in the first item of the present suit. The respondent paid the money to the stevedore, but deducted it from the freight, claiming that a custom of the port authorized him so to do. There is no proof whatever of such a custom, and the final reluctant acquiescence of the master in the deduction does not bind the owner, if the respondent's claim was clearly erroneous. In my opinion nothing has been shown to justify it. As I have just said, there is no evidence whatever of such a custom—I lay aside a feeble effort to prove it by the obviously incompetent testimony of one witness—and the provisions of the charter party negative the claim decisively. The respondent was not bound to unload the cargo. He was merely permitted to do so, and, if he chose to undertake the work, the price he was to be allowed for it was distinctly specified. How he spent this money, whether in work by day or in work by night, or in both, was no affair of the ship. Her obligation to deliver was transferred to the respondent when he undertook the unloading himself in consideration of being paid a rate of 40 cents, and thereafter it was the respondent's duty, and not the ship's, to pay the wages of the men who handled the cargo. He could compel work by night as well as by day, but, if he chose both varieties of labor, he, and not the ship, was bound to pay for both. Moreover, he was earning dispatch money by this haste

in discharging, and he has, therefore, no equities to urge in his favor, even if the construction of the agreement were doubtful. In that event, also, as the charter party is one of his own printed forms, presumably prepared and adopted with his approval, any ambiguity in its provisions would be ordinarily resolved against him. But I see no ambiguity that calls for the application of this rule. It seems to me that the agreement is plain. The ship was bound to discharge if the respondent did not exercise his option. If he did exercise it, he was to receive 40 cents, which he could spend as he pleased, but the duty of discharging became thereupon his own, and the ship was relieved from this obligation.

The respondent's principal defense to this item, as it appeared upon the argument of the case, is the cesser clause of the charter:

"It is agreed that the charterer's liability as to all matters, before and after the shipping of the said cargo, shall cease as soon as the cargo is shipped, it being agreed that the captain shall have a lien on the cargo for freight, dead freight and demurrage."

This provision, it is argued, confined the remedy of the ship to an action in rem, and relieves the respondent from liability in the pending action. It is, I think, a sufficient reply to this defense to say that it was made too late. The answer did not set it up either originally or by amendment. The libelant's attention was not directed to it while the testimony was being taken; and it would, I think, be inequitable to permit the respondent to bring forward at the argument a substantial defense which is not included in the issues raised by the pleadings and the testimony. Moreover, it deserves careful consideration, which may well be deferred until the question is squarely raised and thoroughly argued, whether the cesser clause applies to a situation where the charterer is also the consignee, and, having obtained delivery of the cargo without paying the freight, afterwards makes a disputed claim growing out of the delivery itself. I express no opinion on this question, as the point has not been properly raised.

The respondent's claim for night work must therefore be disallowed.

The second item is for the fees paid for a customhouse permit to discharge at night, and for the services of the government inspectors and weighers during the same time. These charges were also paid by the respondent and deducted from the freight. In my opinion they stand on a different footing from the stevedores' wages and were properly deducted. They seem to me to be included in another clause of the charter party, which provides that the specified rate of freight shall be "in full of primage, consulage, port charges, trimming, pilotage, towage, etc., as customary." The items in question are certainly "port charges," and have nothing to do with the wages to be paid to the master stevedore and his men. The ship agreed to permit discharge by night as well as by day, and, if the result of this permission was to subject her to additional "port charges," she was bound to pay them because she had contracted to pay all such charges, and had made no exception whatever. If she had been delivering the cargo herself, and had been obliged to carry out the obligation to work by night as well as by day, I think her liability to pay these fees could scarcely be questioned; and I cannot see how she is relieved from the express agree-

ment to pay them, by transferring a separate obligation—to deliver the cargo—to the shoulders of the respondent. The second item of the libelant's claim must therefore be disallowed.

A decree may be drawn in accordance with this opinion, the total costs to be equally divided between the parties.

SOCIETA et al. v. UNITED STATES.

(Circuit Court, E. D. Pennsylvania. July 16, 1907.)

No. 91.

SHIPPING—CHARTERS—CONSTRUCTION — PARTIES — UNAUTHORIZED ATTEMPT TO BIND THIRD PARTY.

The United States through its navy department entered into a contract with a firm doing business in New York for the transportation by a named steamship owned by plaintiff of a cargo of coal from Baltimore to Yokohama, Japan. The coal delivered was short of the quantity loaded as checked by the representative of the government and shown by the bill of lading and for which it paid the contractor, and the government deducted the value of the quantity short from the freight, which it paid to the contracting firm. Plaintiff brought suit against the United States to recover the freight so withheld, the charter party having been signed by the firm "by authority of United States government." *Held*, that the transaction did not authorize such signature, nor make the United States a party to the charter, and that whatever right of action plaintiff might have was against the firm, which was, in fact, the charterer.

On Trial by the Court Without a Jury.

Henry R. Edmunds, for petitioner.

Walter C. Douglas, Jr., and J. Whitaker Thompson, for the United States.

J. B. McPHERSON, District Judge. This suit was brought by the corporate owner of the Austrian steamship Klek to recover from the government two items claimed to be due under a charter party, dated March 26, 1901, signed by the owner's agent at Philadelphia, and purporting to be signed, also, by an accredited agent of the United States, the latter signature being as follows:

"By authority of United States Government,
"Flint, Dearborn & Co.,
"H. E. D. Jackson, Treasurer."

The first item is for $397.60, two days' demurrage at the port of Baltimore, where the cargo—which was wholly of coal—was loaded; and the second item is for $824.15, the value at Baltimore of 235½ tons of coal, which the government deducted from the freight claimed by Flint, Dearborn & Co., on the ground that the quantity of coal delivered at Yokohama, the port of discharge, was only 5,256½ tons, while the bill of lading and other evidence showed that the vessel had taken on board at Baltimore 5,492 tons.

The coal was intended for the use of the navy, but this fact of itself does not determine the government's liability in this action. Whether such liability exists depends upon the true character of the transac-

tion that took place between the officials of the United States and the other persons interested; and, as the government denies that Flint, Dearborn & Co. were authorized to enter into any agreement on its behalf, the evidence upon this fundamental point must be carefully scrutinized. From the papers and the testimony that were offered at the trial I find the facts to be as follows:

In March, 1901, the United States desired to have a cargo of coal (bought, or to be bought, by it from the Consolidation Coal Company) transported from Baltimore to Yokohama, and this desire came to the knowledge of Hopkins & Co., the Washington agents of Flint, Dearborn & Co., who were a firm in New York, and had apparently been in treaty with the Philadelphia agent of the Klek before Hopkins & Co. made any proposal to the government. It will be observed that the charter party is dated March 26th, whereas the following letter was not written until March 27th. On the latter date Hopkins & Co. addressed this communication to the Bureau of Equipment:

"Sir:

"1. On behalf of the Austrian steamer 'Klek' we respectfully offer to transport a cargo of about 5,500 tons of coal (the government to supply the coal) from Baltimore, Maryland, to Yokohama, Japan, at $8.00 per ton freight, loading and discharging to be done by the vessel, both within reach of her tackles.

"2. Steamer to load between April 15th and May 15th, and as much earlier as possible, and to sail immediately after loading, it being agreed that she shall be given steamer despatch loading upon reporting ready to load.

"3. The hatches of the vessel to be sealed if practicable, and to remain sealed until opened by the direction of the Senior Naval Officer present, at Yokohama, to whom she will report.

"4. The government to take coal from the vessel at the rate of 350 tons per day, according to the customs of the port.

"5. Cargo to be delivered on board any ship, lighter or wharf where the 'Klek' can safely lie afloat, as may be directed by the Senior Naval Officer present.

"6. Freight to be payable upon receipt of cable advices of delivery, and only for amount certified to have been delivered.

"7. The government to pay demurrage at the rate of eight cents per ton per day, on net registered tonnage for any detention (caused by the government) within the terms of this tender, the same to be settled here.

"Respectfully, Hopkins & Co.,
"Agents for Flint, Dearborn & Co., for S. S. Klek.

"Rear Admiral Royal B. Bradford, U. S. N.,
"Chief Bureau of Equipment."

On the same day Admiral Bradford replied as follows:

"Department of the Navy, Bureau of Equipment.
"Washington, D C., March 27, 1901.

"Gentlemen:

"1. The Bureau accepts your offer of the 27th instant for charter of the Austrian steamer 'Klek', to transport a cargo of about 5,500 tons of George's Creek coal from Baltimore to Yokohama, Japan, at $8.00 per ton freight, to load between April 15th and May 15th, or earlier if possible.

"2 Requisition will follow.

"Very respectfully, R. B. Bradford,
"Chief of Bureau.

"Messrs. Flint, Dearborn & Co.
"Care Hopkins & Co.,
"Washington Loan & Trust Building,
"Washington, D C."

On April 17th a formal proposal on an official form was sent to Flint, Dearborn & Co. from the Navy Pay Office in New York, and was accepted by them on the same day. The essential parts of the proposal follow:

"U. S. Navy Pay Office.
"Stewart Building,
"280 Broadway, P. O. Box 1900.
"New York, April 17, 1901.

"Flint, Dearborn & Co.:

"Please return this proposal, duly signed, by return mail, with prices entered opposite each item named below, for delivery, free of charge, as stated below, subject to the conditions printed on the back of this form.

"Respectfully, Henry M. Denniston, Pay Director, U. S. Navy.

"Articles Required.	Total Amount of Each Item.
"Requisition No. Bu-116, Bureau of Equipment	
"For General Service	
"1. Transportation of about 5,500 tons best quality George's Creek coal, run of mine, from Baltimore, Md. to Yokohama, Japan, at per ton	$8.
"2. Shipment to be made in the Austrian steamer 'Klek,' the coal to be supplied by the government.	
"3. Steamer to load between April 15th and May 15th (earlier if possible) it being understood that upon reporting at Baltimore ready to load she shall be given steamer despatch, and upon completion of loading to sail for Yokohama, and upon arrival there to report to the U. S. Naval Attache at Tokio, Japan, and be subject to his orders in the matter of discharge.	
"4. All expenses of loading and discharging to be borne by the ship.	
"5. Cargo to be received and delivered within reach of the ship's tackle.	
"6. The government agrees to take discharge of the coal from the ship at the rate of 350 tons per day, according to the customs of the port, or pay demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel (net registered tonnage 2,485 tons) for any detention caused by the government (through fault of its own), not receiving the coal at the above mentioned rate, it being understood that 24 hours' notice of arrival shall be given before lay days commence.	
"7. Cargo to be delivered on the wharf at Yokohama, or on board any ship or lighter in the harbor where the vessel can safely lie afloat, as may be directed by the U. S. Naval Attache.	
"8. Payment to be made upon receipt of cable advice from the Naval Attache, and only for amount certified to have been delivered, but under no circumstances shall payment be made for freight on any quantity in excess of the bill of lading weight.	
"9. Any question of demurrage to be settled at Washington.	
"Order to be placed with Messrs. Flint, Dearborn & Co. of New York.	
Aggregate amount of proposal	$44,000

"——— do hereby agree to furnish within ——— days, and in conformity with this proposal, the above articles at the prices affixed thereto. Articles not delivered within the time specified herein may at the option of the purchasing officer, be obtained elsewhere, any difference in price to be charged to ——— account.

Flint, Dearborn & Co.,
"H. E. D Jackson, Treasurer.
"11 Broadway, N. Y. City."

On April 18th this proposal was formally accepted by Pay Director Denniston, and the contract between the United States and Flint, Dearborn & Co. was thus completed. The latter agreed to furnish transportation in a specified steamship, and the former agreed to pay a definite price therefor. The Klek thereupon proceeded to Baltimore, began to load on April 24th and finished taking in cargo on May 4th. During four days of this time the weather was cold and rainy, the coal was wet, the ship's officers refused to receive it in that condition, and the work of loading was necessarily suspended. The first item of the plaintiff's claim was for demurrage during two of these 11 days at the rate named in the charter party; the averment being that the delay was the fault of the government. This averment, however, is not supported by the evidence, even if the charter party bound both the parties to this suit. It appears affirmatively by the testimony of two of the ship's officers that the unfavorable weather was the sole cause of the delay, and there is no evidence of fault on the part of the United States. Moreover, the charter party upon which this action is based does not bind the government. There is no evidence that Flint, Dearborn & Co. had any authority to represent the government in chartering the ship, and the Bureau of Equipment had therefore no special concern with the terms of that instrument. The United States did not charter the Klek, and did not deal with the owner's agent. Its agreement was solely with Flint, Dearborn & Co., and while, of course, as was perfectly proper, its representatives were present at the loading and superintended the work, checking the weights delivered by the Coal Co.'s cars, and overseeing the shipment, these facts did not change the contractual relations which had theretofore been completed between the United States and Flint, Dearborn & Co. Perhaps, if the government had unwarrantably interfered with the loading of the cargo, it might have been liable in damages for detention, but there is no evidence to sustain such a claim, as I have already stated, or to sustain the claim that is made under the charter party in the present action. Indeed, the first item was practically abandoned at the trial, and nothing more need be said about it. The claim for demurrage is disallowed.

The second item must be similarly treated. The weight of the coal taken on board at Baltimore was not checked by any representative of the ship, but was checked solely by persons representing the government. By these persons the weight was reported as 5,492 tons, and in accordance with their report bills of lading were issued of which the following is a copy:

"Shipped by the Consolidation Coal Company, in good order, in and upon the Aust. S. S. called the Klek, of Fiume, whereof Kisselich is master, now lying in the port of Baltimore, Md. and bound for Yokohama, Japan, fifty-four hundred and ninety-two tons George's Creek Big Vein Cumberland Coal, from the mines of the Consolidation Coal Company (as per margin), to be delivered in like good order at the aforesaid port of Yokohama, Japan (the dangers of the seas only excepted), unto U. S. Naval Attache, Tokio, Japan, or to his or their assigns, he or they paying freight for the same at the rate of eight dollars U. S. gold per ton of 2,240 lbs. coal delivered, and all other conditions and clauses as per charter-party dated Philadelphia, Pa. March 26, 1901.

"In witness whereof, the master or agent of said vessel hath affirmed to 8 bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated at Baltimore, Md., May 3rd, 1901. A. Kisselich.

"Weight and quality unknown."

When the ship arrived at Yokohama early in August, the cargo was unloaded under the supervision of the government and also of the vessel, and these representatives agreed in reporting that only 5,256½ tons were discharged, showing an apparent deficiency of 235½ tons. Being notified of this fact by cable, the Bureau of Equipment sent the following letter to Flint, Dearborn & Co.:

"Department of the Navy, Bureau of Equipment.

"Washington, D. C. Aug. 5, 1901

"Gentlemen:

"1. You are informed that the Bureau is advised by cablegram of the discharge of 5,256½ tons coal at Yokohama, per S. S. 'Klek' chartered of you in April, 1901, under requisition #113, 1901.

"2. This ship carried out from Baltimore 5,292 tons, and the discharge of the quantity stated above shows a shortage of 235½ tons.

"3. Your attention is invited to the fact that the 'Osborne' also chartered of you for same place delivered 50 tons short of bill of lading weight, thus showing a loss on the two cargoes of 285½ tons.

"4. The Bureau states that payment was made to the contractors furnishing the coal for the quantity shown by the bill of lading, viz., 5,492 tons, and it cannot view with complacency the loss of so great a quantity in shipment.

"5. The Bureau requests to be informed as to what proposition you have to submit in the premises.

"Very respectfully, R. B. Bradford, Chief of Bureau.

"Messrs. Flint, Dearborn & Co.,

"11 Broadway, New York City."

To this communication, Hopkins & Co. replied on August 7:

"Hopkins & Co., Washington Loan & Trust Building,

"Washington, August 7, 1901.

"Sir:

"Referring to conversation on the subject of shortage cargo per S. S. 'Klek,' we desire to state as follows:

"If the bureau thinks it is justified in holding over from the freight money now due the value of the 235½ tons of coal short of bill of lading weight, it is respectfully requested that payment of freight be immediately made, less the value of this shortage.

"Very respectfully, Hopkins & Co.

"Rear Admiral Royal B. Bradford, U. S. N.

"Chief Bureau of Equipment, Navy Department."

The government made settlement with Flint, Dearborn & Co. on this basis, and thus closed the transaction with them. The transaction was closed, also, in my opinion, so far as concerns the present suit. The plaintiff's contract for the payment of freight was not with the United States, but with Flint, Dearborn & Co., and whatever claim it may have on this account should be urged against that firm. It is not material, therefore, to find the facts concerning the apparent discrepancy between the weight of the cargo at Baltimore and at Yokohama. If the ship really took on board 5,492 tons, and really discharged that amount, in spite of the evidence to the contrary, its claim for unpaid freight is against the other party to the charter, and not against the United States,

whose agreement with Flint, Dearborn & Co. only bound it to pay for "amount certified to have been delivered"—an agreement that has been faithfully carried out.

Judgment may be entered in favor of the defendant, with costs.

THE LADY PALMERSTON.

(District Court, E. D. Pennsylvania. July 24, 1907.)

No. 44 of 1905.

SHIPPING—CHARTER PARTY—LIABILITY OF VESSEL FOR BROKER'S ATTENDANCE FEE.

A vessel was chartered at Rio de Janeiro to carry a cargo of ore from that port to Philadelphia. The charter party provided that "the vessel to be consigned to charterer's agents at the port of discharge, paying usual commission not exceeding 2½ per cent. at this port." Such commission of 2½ per cent. was paid to the charterer before the vessel sailed. *Held*, that it was in effect an "address commission" which went to the charterer in reduction of freight, and did not cover the attendance fee of the agents at the port of discharge, which is a broker's fee for the transaction of the vessel's inward business at that port, and that, in the absence of agreement otherwise, they were entitled on rendering or tendering the service to collect such fee from the vessel at the customary rate.

In Admiralty. Suit to recover balance of freight.

Henry R. Edmunds, for libelant.
H. Alan Dawson, for respondent.

J. B. McPHERSON, District Judge. This suit was originally brought against the Carnegie Steel Company to recover the balance of freight due for carrying a cargo of manganese ore from Rio de Janeiro to the port of Philadelphia in the summer of 1905. The whole balance having been paid over by the steel company to their agents, Peter Wright & Sons, by whom a part was retained to satisfy a disputed claim of their own against the ship, the agents were also made parties respondent under the analogy of the fifty-ninth rule, and have appeared and taken defense. Since the suit was brought, the owner of the bark, who resides in Christiania, has, without objection so far as appears, accepted payment from Peter Wright & Sons of the freight, with interest, less the amount of the claim in controversy, and therefore it is this amount only for which the action is now urged.

The facts are few, and easily understood. In June, 1905, Carlos Wigg, a merchant of Rio, chartered the bark in that port to carry a cargo of ore to Philadelphia, and deliver it in conformity with the bills of lading at a freight rate of 10 shillings sterling. It was further provided that:

"The vessel (is) to be consigned to charterer's agents at the port of discharge, paying usual commission not exceeding 2½ per cent. at this port. What cash the master may require for the ship's ordinary disbursements at port of loading to be advanced by charterers, subject to 5 per cent. for all charges, and the balance of the freight to be paid on unloading and right delivery of the cargo, in cash at current rate of exchange on London."

The bills of lading called for delivery to the Carnegie Steel Company, "he or they paying freight for the same as per charter-party dated Rio de Janeiro 15th June 1905, and all clauses thereof," etc. Upon this bill was indorsed "Address commission paid here," and the fact is that the commission of 2½ per cent. was duly paid (or settled for) in Rio to Carlos Wigg before the vessel sailed. Peter Wright & Sons had been the charterer's agents in Philadelphia for a number of years, and they were accordingly notified that the Lady Palmerston might be expected in due course, and that they should attend to the usual business required by the vessel in this port. The present difficulty would probably not have arisen if the master had not conceived the idea that the "usual commission not exceeding 2½ per cent.," which was paid to the charterer, or settled for, at Rio, was intended to pay also for all services to be rendered at the port of discharge, and had not therefore declined to recognize the claim of Peter Wright & Sons to be paid a fee of 10 guineas for attendance upon the ship in Philadelphia, and the transaction of her inward business. The master evidently supposed that the "address commission" included pay for attendance and services at Philadelphia, but in this I think he was mistaken. The charter party makes no provision for the payment of these services. It has been proved to my entire satisfaction that the "usual commission not exceeding 2½ per cent." is identical with the "address commission," and has nothing to do with the attendance fee which is charged by ship brokers for doing the business of the vessel. The "address commission" always goes to the charterer, or to his agent for him. It is paid sometimes at the port of loading and sometimes at the port of discharge, but, wherever paid, it is essentially a device to reduce the nominal rate of freight agreed upon in the charter. Usually it is 2½ per cent., but the rate may differ as the parties agree. An "attendance fee," on the contrary, has nothing to do with the rate of freight. The charterer does not receive it—unless by special agreement—for he does not perform the services. It belongs to the broker to whose care the ship may be committed, whether by the charter itself, or by the master, if the charter is silent upon the subject.

In this case the charter provided that "the vessel (was) to be consigned to the charterer's agents at the port of discharge," and she was therefore put into the hands of Peter Wright & Sons (who were the charterer's agents in Philadelphia) by this express agreement of the parties. It is an awkward addition to the clause to say in that connection, "paying usual commission not exceeding 2½ per cent. at this port," and the master may be pardoned for his erroneous construction of the sentence, taken as a whole. When it is considered, however, that the "usual commission" means the "address commission," and under either name is a disguised deduction from the freight, it is clear that the sentence deals with two distinct subjects. It provides in the first clause for the person or persons who shall look after the ship at the port of discharge, saying nothing about his pay, and it provides in the second clause for a specified deduction from the freight, to be paid at Rio to the charterer himself.

This leaves the amount of the broker's attendance fee to be fixed either by subsequent agreement, or by the custom of the port. As I have already stated, the charter put the vessel into the hands of Peter Wright & Sons, and the master should have recognized and acted upon the agreement. Acting upon his erroneous understanding, however, he refused to accept certain services at the hands of Peter Wright & Sons, although he did accept other services, and attempted to transfer the ship's business to another firm. There was no dispute concerning the amount of freight that was earned, and the steel company sent a check for what was due to Peter Wright & Sons, who were agents for the steel company as well as for the bark, and the balance, allowing for certain deductions that were admitted to be correct, and also for the disputed attendance fee, was tendered to the master, who declined it for the single reason that the fee had been improperly deducted. He thereupon sued the steel company, claiming that the payment should not have been made to Peter Wright & Sons, because they did not represent the ship and therefore had no authority to receive the freight; but, as already explained, the controversy has now taken such a shape as to involve nothing more than the attendance fee of 10 guineas that is still in the possession of the respondent firm.

In my opinon they had a right to retain it. The testimony shows clearly—in spite of a few dissenting, but I think mistaken, voices—that the customary attendance fee at the port of Philadelphia is 10 guineas, and that this fee is earned by the ship's agent if he offers his services and is ready to transact the ship's business, although the master may decline to accept him, and may employ a broker of his own. Of course, I am speaking of a case where a particular agent or broker has been agreed upon by the parties—here, for example, it was the "charterer's agents at the port of discharge"—for, if there is no such agreement, the master may employ whomsoever he will. The testimony shows, also, that nearly all of the Lady Palmerston's inward business was, in fact, attended to by Peter Wright & Sons. As one of the firm testified—and I find the facts to be so—

"I know that one of our clerks went down in a tug below the mouth of the Schuylkill and boarded the vessel, actually boarded the vessel, and delivered orders to that vessel to go into Girard Point, where a berth had been secured at which her cargo of ore was to be discharged, and where arrangements had been made with the Pennsylvania Railroad Company to have cars in readiness for her, to have that load weighed and everything ready to dispatch the vessel's cargo as soon as it could be unloaded from her. * * *

"In this particular instance I sent an account. I was cognizant of the different payments as made. The inward pilotage of the vessel, amounting to one hundred and some odd dollars was paid, the inward towage of the vessel was paid by us, and eventually the stevedore's bill, at the rates of discharge stipulated for in the charter party, was paid by us. The bills for pilotage and towage were signed by the captain. Without his approval we should not have paid them.

"Q. To whom was the cargo in this case consigned?

"A. To the Carnegie Steel Company.

"Q. Were you notified before the vessel arrived that you were the charterer's agents to attend to her business?

"A. Yes; on receipt of a copy of the charter party from Mr. Wigg, the cargo to be delivered to the Carnegie Steel Company.

"Q. Who collected the freight from the Carnegie Steel Company?
"A. Our usual course is we remit them a bill, and by return mail they send us a check.
"Q. Was that done in this case?
"A. That was done in this case, and I saw the check, handled the check."

Further discussion seems to be unnecessary. The retention of the attendance fee by Peter Wright & Sons was justified by the charter and by the custom of the port, and, as the owner of the bark has received whatever else is due, the libelant is not entitled to recover.

A decree may be entered in favor of the respondents, with costs.

ELDREDGE et al. v. WARD, Collector, etc.

(Circuit Court, N. D. New York. August 1, 1907.)

INTERNAL REVENUE—STAMP TAXES—BUCKET SHOP TRANSACTIONS.

A bucket shop which made contracts for the purchase and sale of stocks and commodities with customers, and which executed such contracts by pretended purchases and sales through another bucket shop, which had no relations or dealings with such customers, *held*, under the evidence, not to be an agent of the latter, but to conduct a separate business, so that both transactions were subject to the stamp tax imposed by War Revenue Act June 13, 1898, Schedule A, subd. 3, c. 448, 30 Stat. 458, as amended by Act March 2, 1901, c. 806, 31 Stat. 943 [U. S. Comp. St. 1901, p. 2302].

Action to recover money paid under the provisions of subdivision 3 of Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458, c. 448), as amended by the act of March 2, 1901 (31 Stat. 943, c. 806 [U. S. Comp. St. 1901, p. 2302]). The amount involved is about $1,804.88 aside from interest.

Eugene D. Flanigan, for plaintiffs.
Taylor L. Arms, Asst. U. S. Atty., for defendant.

RAY, District Judge. On the trial of this action a wide latitude was given the reception of evidence that all the facts might fully appear. That the plaintiffs at the time or times in question were engaged in running or conducting what is commonly known as a bucket shop and bucket shop business is clearly shown by the evidence, and, to my mind, cannot be questioned. That the so-called "Stock, Grain & Provision Company" was at the same time running and conducting an independent bucket shop and bucket shop business in the city of New York clearly appears. It clearly appears that the plaintiffs were not agents or servants of such Stock, Grain & Provision Company. They were not responsible to it, or subject to its control or directions. Neither party could have called the other to account in any of the matters involved in this controversy, or in the transactions in which they were engaged, except, probably, for the profits if any. They dealt with each other in a way. The agreement between them reads as follows:

"The Stock, Grain & Provision Company of New York, Limited.

"Dealers in Stocks, Bonds, Grain, Provisions and Oil.

"Capital $100,000. (Full Paid.)

"Memorandum of Agreement.

"Made this twentieth day of May 1901 between the Stock, Grain & Provision Company of New York, Limited, party of the first part, and Eldredge & Co. of Albany, N. Y., party of the second part, witnesseth, that the said parties do mutually agree as follows:

"1. That the following are the terms and conditions upon which all contracts between them shall be had, unless others shall be agreed upon in writing.

"2. It is herein agreed that the Stock, Grain & Provision Company of New York (Limited) will make actual delivery of all bonds, stocks and produce and all other properties they trade in, and will pay cash for all the above named articles sold for immediate, or future delivery when properly transferred and delivered to this company.

"3. That all property sold by either party to the other is to be delivered as hereinafter stated on payment of the contract price.

"4. That if the advance or decline in the market price of any property beyond the contract price equals or exceeds the cash credits of the party of the second part with the party of the first part, the party of the first part shall thereupon be at liberty to close and terminate the contract as to that property; and any credits the party of the second part may have with the party of the first part may be applied by the party of the first part to any indebtedness of the party of the second part to the party of the first part and the party of the first part may close and terminate any or all other contracts and apply the payments or deposits and profits to the payment of any such indebtedness.

"5. That the place of delivery of grain and provisions is Chicago, at such houses as the party of the first part may elect, and of all other property the office of the party of the first part in New York City.

"6. That Chicago warehouse receipts for grain and provisions, and National Transit Co. Pipe Line certificates for oil may be delivered in lieu of the property represented by them.

"7. That the party of the second part has and shall have no authority to act as the agent of the party of the first part, and that he shall in no way hold himself out or represent himself to be the agent of the party of the first part.

"The Stock Grain & Prov. Co.

"C. Wesley, Holland, Mang.

"Eldredge & Co."

It is seen it was expressly provided that Eldredge & Co. were not the agents of Stock, Grain & Provision Company. It seems the business was done in about this way: A person desiring to speculate in stocks would go into plaintiffs' place of business in Albany, they being known as Eldredge & Co., and say buy so many shares of such a stock. Eldredge & Co. would telegraph Stock, Grain & Provision Company buy so many shares of such stock for number so and so giving a number. The customer was required when giving his order to Eldredge & Co. to put up "a margin" and also the amount of the war revenue tax on the transaction. This sum it appears was put to the credit of Stock, Grain & Provision Company. Of this, however, the customer had no knowledge. Stock, Grain & Provision Company would telegraph back "bought." That company did not buy the stock or any stock, or have any to sell, or sell any. Eldredge & Co. would then give the customer a slip as follows:

Stock, Grain and Prov. Co.
Dealers in
Stocks, Bonds, Grain and Provisions.
10 Wall St., New York.
No. ———

Eldredge & Co.
Correspondents
71 State St.,
Albany, N. Y.
Both Phones 798

Mr. ————

As per your order, have bought for your account and risk for delivery.
——— Shares ———— @ ————Deposited on account ————
*Carried to ————
Duplicate
Original Stamped

*The right is reserved to sell the above in case sufficient money is not deposited to carry said stock below market value.

—with the blanks filled. The customer was not informed he was dealing with any one except Eldredge & Co. If the stock went up, the customer could say sell, in which case Eldredge & Co. would telegraph "sell," and Stock, Grain & Provision Company would telegraph back "sold," when, in fact, no sale was made, and it had nothing to sell. In such case the gain to the customer on the wager or bet on the rise or fall of the market, if any, would be paid by Eldredge & Co. If the market went down and the customer did not keep his margin good, of course, he was out what he had put up and the money stood to the credit of Stock, Grain & Provision Company and was divided between it and Eldredge & Co. Each day Stock, Grain & Provision Company sent Eldredge & Co. a statement as follows:

Cable address: Willianna. We have no Agents.
Long Distance Phone.
The Stock, Grain and Provision Company, Of New York, Limited.
Capital $200,000. Full paid.
Dealers in Stocks, Bonds, Grain and Provisions,
10 Wall Street, Established 1893.
New York, ———— 190

C. Wesley Holland, Manager.
Walton O. Snyder, Secretary.

Dear Sir:—We solicit and will receive no business except with the understanding that the ACTUAL DELIVERY of property bought or sold upon orders is in all cases contemplated and understood. Our transactions with you today are as follows:

Numbers	We sell to you	We buy of you	Article	Price	E. & O. E. Deposit

As per our written agreement.

Remarks	Deposit	Number	Price	Settlements

—the blanks being filled. Stock, Grain & Provision Company would stamp a duplicate of this with the proper war revenue stamps. Eldredge & Co. did not stamp or at the time pay the tax on the transaction at their end of the line. Subsequently they were required to do so, and under protest did pay, and then brought this action to recover back the money paid as tax.

The contention of plaintiffs is that there was but one business carried on and but one transaction; that they were mere agents of Stock,

Grain & Provision Company and that it was all one thing, and that, as Stock, Grain & Provision Company paid the tax by putting stamps on the statement of each day's business, the full tax was paid, and Eldredge & Co., mere agents, assistants, servants, in the transactions and business, could not be required lawfully to pay a second tax. I hold under the evidence that Eldredge & Co. were not agents or servants of Stock, Grain & Provision Company; that they carried on a separate and distinct business. True, the two bucket shops aided each other and divided the profits, but there was "a business" at each end of the line subject to tax. Eldredge & Co. dealt with customers at their end, Albany, and Stock, Grain & Provision Company dealt with Eldredge & Co. independently. There was no contractual relation between these customers and Stock, Grain & Provision Company.

The complaint must be dismissed, with costs.

DOVER v. GLOUCESTER ELECTRIC CO.

(Circuit Court, D. Massachusetts. June 29, 1907.)

No. 245.

1. ELECTRICITY—DANGEROUS WIRES.
   A man who climbs a telephone pole in the rightful performance of his duty is not charged with knowledge that its rightful use is for uninsulated wires carrying a dangerous current of electricity.
2. ELECTRICITY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   In an action for injuries to a telephone lineman by a shock received by an uninsulated highly charged electric wire as he was climbing a pole, whether he was negligent in failing to discover the defect and danger before ascending the pole *held* for the jury.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]
3. DAMAGES—EXCESSIVENESS—PERSONAL INJURIES.
   Plaintiff, a telephone lineman, who had been a foreman, while climbing a telephone pole, received nearly 2,000 electric volts from a wire from which the insulation had worn, which caused plaintiff to fall from the pole, a distance of 25 feet. Prior to his injury he had been in good physical condition, but had been continuously sick thereafter, and nearly two years after the injury there was still evidence of inflammation, adhesions in the vicinity of the liver, and neurosis. One physician of high skill and character testified there was nothing the matter with plaintiff which could be attributed to the accident, but there was other medical evidence to the contrary. *Held*, that a verdict in favor of plaintiff for $5,200 was not excessive.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 357, 365, 367, 368.]

Action by Joseph R. Dover against the Gloucester Electric Company. A verdict was rendered in favor of plaintiff for $5,200, and defendant moved for a new trial. Denied.

William A. Pew, for plaintiff.
John Lowell, for defendant.

HALE, District Judge. This case now comes before the court upon a motion by the defendant for a new trial, upon the ground that the

verdict is against the law and the evidence, and that the damages are excessive. The defendant contends that, while there might have been a scintilla of evidence upon which the jury could base a verdict, the overwhelming weight of the evidence is that the plaintiff was guilty of such negligence as to preclude recovery.

The plaintiff was an employé upon the lines of a telephone company. He had been a foreman, and had experience in the class of work committed to him. In the course of his employment he was required to climb a pole on which were telephone wires, and also highly charged wires of the defendant company. The insulation had been worn from one of the defendant's wires, and the wire had become an object of danger. It appears from the plaintiff's testimony that he approached the pole, in the ordinary course of his employment, walking upon a wall on the side of the road; that it was impossible for him, from the wall, to detect the absence of insulation on the wire, or to see a burnt place which the uninsulated wire had made upon the pole. There is evidence, however, that by going a little distance into the road he might have seen the defective conditions. He did not see them; but proceeded to climb the pole, having his right hand around the pole and sliding it up the pole as he ascended. With his left hand he was preventing the kinking of the cable which other telephone men were running from pole to pole. According to his testimony, he had ascended some 24 or 25 feet when he felt the pole sway as if the men working on the cable had given a sharp pull, and that was the last he knew. A burn was apparent upon the plaintiff's right wrist. His shoe was produced in court, and appeared to have been burned through, under the climbing spur. There was evidence tending to show that the pole was swayed by the pulling of the cable by the telephone linemen.

Plaintiff admitted that he had been instructed generally that, before climbing a pole, he should see that such pole was safe; but he had never worked near this pole before, and his attention had not been called to the defective wire or to the burn on the side of the pole. He had seen other workmen going up and down the pole in safety. He was called upon to climb it in the course of his business. He approached it in the way I have described, and did not, as a matter of fact, see the defects, either before beginning to climb the pole or during his ascent. It is earnestly contended by the defendant that, if he had gone a little distance into the road, he could have seen the defective conditions, and that, if he had been in the exercise of due care during his progress up the pole, he would have seen those conditions.

This was the second trial of the cause. At the first trial the plaintiff obtained a verdict. Judge Brown, the learned judge before whom the cause was tried, refused to set that verdict aside as being against the law and the evidence. He did, however, grant a new trial on the ground of excessive damages, unless the plaintiff should remit a certain sum. In refusing to grant a new trial for errors in law, he made a comprehensive reference to the testimony which was before the jury on that trial. He also commented on Chisholm v. New England Telephone & Telegraph Co., 176 Mass. 125, 57 N. E. 383, and Law v. Central Dist. Printing & Telegraph Co. (C. C.) 140 Fed. 558. I agree

with his comment upon those cases, and with his conclusion that it is the duty of the court to leave to the jury the question of due care under the special circumstances of each case. I think it will be seen that this is the only way in which such a case can be passed upon competently, in order to do full justice in the premises. It is true that in railroad cases the dangers upon a railway are so well known that failure to look and listen is as a matter of law held to be negligence; but a railroad track is for the purpose of the running of railway trains. The man who approaches it has full knowledge that such is its primary and rightful use; and the use of it by him is subject to its dominant use. On the other hand, the man who climbs a telephone pole is not charged with knowledge that its rightful use is for uninsulated and dangerous wires. He knows, on the other hand, that there is a duty to keep the wires insulated; and that, while the purpose for which the structures are used renders some danger from electrical currents unavoidable, he has some reason to expect that the wires will be kept protected. He knows, to be sure, that it is difficult to do this, and that there is liability that there may be a lack of insulation of some wire; but the risk of defective insulation varies with the circumstances, as Judge Brown has pointed out. And the case is not like that of a railroad track, where the danger is always well known, distinct, and incident to its lawful use.

After Judge Brown's decision in the matter of a new trial, this case went to the Circuit Court of Appeals. In speaking for that court, Judge Aldrich said:

"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. * * * 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 testimony upon which the jury found this verdict is not the same as that upon which the Court of Appeals passed in arriving at their conclusion; but, in my opinion, it is not so different as to require a different rule of law. For the purposes of this case, I must assume that the decision which I have cited states the doctrine of the federal courts upon this subject. In accordance with Judge Aldrich's opinion, I think this court must say that the question of due care of the plaintiff in a case like this must properly be left to the jury to decide under the special circumstances of each case. I decline to grant a new trial for error of law.

The defendant contends, also, that the damages are excessive. The date of the injury was August 18, 1905. Before that time the plaintiff was in good physical condition. He has been sick ever since. The evidence shows that he received nearly 2,000 electric volts, and fell at least 25 feet, and that from that time he has suffered. He has now the pained and pinched appearance of a sick man. The testimony tends to show that there is still inflammation, that there are adhesions in the vicinity of the liver, and that there is some evidence of neurosis. Some

of the evidence indicates a permanent injury. There is, however, a conflict of testimony. One doctor of great skill and learning, of the highest character and of unquestioned honesty, testified that there was nothing the matter with the plaintiff which could be attributed to the accident. When he testified, I could see that his testimony did not tend to persuade the jury; but that, on the other hand, it prejudiced them against the witness, on account of the summary and severe view which he expressed, and that it may have influenced them against the defendant. The witness was unquestionably conscientious in his belief; but such belief was contrary to that of the other physicians who testified, and at great variance with the conclusion to which the jury came. It is sometimes the duty of the court to prevent any unfair prejudice from controlling the jury. But in this case the defendant deliberately offered the testimony to which I have alluded. Its prejudicial effect upon the jury cannot be a reason for the court to grant a new trial. While the physician to whom I refer was the only one who testified that the plaintiff was not suffering from the injury which forms the basis of this case, there was much conflict of evidence among the medical men. By his appearance, as well as by his testimony, the plaintiff himself induced the belief in the minds of the jury that he had received a painful and permanent injury. From a careful analysis of the testimony, in my opinion, there was evidence from which the jury could fairly find that his injury was permanent. It is the province of a jury to pass upon cases of conflicting evidence. In this case the jury evidently believed the testimony of the plaintiff and his physicians, and did not give credence to the medical testimony offered by the defendant. After a full examination of all the evidence upon this question, I cannot say that the jury have exaggerated the damages; and I conclude that it is not my duty to disturb the verdict.

The motion of the defendant for a new trial is denied.

TACOMA RY. & POWER CO. v. PACIFIC TRACTION CO. et al.

(Circuit Court, W. D. Washington, W. D. July 30, 1907. On Rehearing, August 10, 1907.)

No. 1,160.

INJUNCTION—GROUNDS—ESTABLISHMENT OF LEGAL RIGHT—NECESSITY.

A street railroad company, whose right to occupy a city street is being contested by the city, which is by statute vested with the control over its streets, cannot maintain a suit in equity to enjoin another company from occupying such street, to which suit the city is not a party; it being impossible for the complainant to establish a legal right in such suit as a basis for the relief prayed for.

In Equity. Suit by a street railway corporation for an injunction to prevent a rival street railway company from occupying a public street in such a manner as to obstruct the complainant in laying tracks for an extension of its system. On final hearing. Injunction refused and suit dismissed.

B. S. Grosscup, A. G. Avery, and C. O. Bates, for complainant.

Ellis & Fletcher, for defendants.

HANFORD, District Judge. The Tacoma Railway & Power Company, complainant, commenced this suit against the Pacific Traction Company, which is a rival street railway corporation, and its manager, B. J. Weeks, and the Independent Asphalt Paving Company, a contracting corporation, which at the time of commencing the suit was engaged in paving Commerce street, in the city of Tacoma, and two other defendants, designated in the bill of complaint by the fictitious names of John Doe and Richard Roe. Pursuant to a stipulation of the parties the case has been dismissed as to the Independent Asphalt Company, and the court has not acquired jurisdiction of the mythical John Doe and Richard Roe. Therefore the case as presented on the final hearing is merely a controversy between two rival street railway companies for the right to occupy with railway tracks the center of a public street.

The complainant's claim to a prior and superior right is based upon an ordinance of the city of Tacoma granting a franchise to a corporation named "Point Defiance Railway Company" for the construction and operation of a street railway system in certain streets of the city of Tacoma, including the street in question, which franchise it claims to own as successor of the grantee, and a permit from the commissioner of public works of the city of Tacoma. The evidence proves that the franchise was granted in 1890. Section 1 of the ordinance comprehended lines of street railway which were at the date of the ordinance already constructed and in use. Section 2 of the ordinance contemplated lines of railway in certain streets between designated points, including that part of Commerce street, north of Ninth street, which is the subject of this controversy. No part of said contemplated lines have been constructed, and the first attempt to construct any part of the same was on the day preceding the date of the commencement of this suit, to wit, June 7, 1907, and the permit from the commissioner of public works did not issue until said date, and subsequent to the time at which the complainant had commenced work. Section 214 of the Tacoma city charter of 1890, which became effective after the grant of the franchise to the Point Defiance Railway Company, provides as follows:

"All franchises or privileges heretofore granted by this city which are not in actual use or enjoyment, or which the grantees thereof have not in good faith commenced to exercise at the time of the adoption of this Charter, are hereby declared forfeited and of no validity, and it shall be the duty of the city council to carry out the provisions of this section by the enactment of ordinances repealing said franchises."

The brief filed in behalf of the complainant contains a statement to the effect that the complainant, after commencing to place its tracks across Ninth street, and extending northward into Commerce street, "continued to work as best it could until the afternoon or evening of said day, when it was enjoined from further proceeding by an injunction issued from the superior court of the state of Washington for Pierce county, at the instance of the city of Tacoma." It is the opinion of the court that the complainant has no standing in a court of equity to obtain an injunction. The fatal point in the case is in the fact that the object of the suit is to obtain an injunction to protect a

disputed legal right. The admission that the city of Tacoma is aggressively opposing the extension of the complainant's tracks in Commerce street, and that it has sued out an injunction against such extension, puts the complainant out of court. Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116.

The long delay of the grantee in commencing to use its franchise, and the declaration of forfeiture in section 214 of the city charter, and the authority of the city government to control the use of its streets, shows that there is probable cause for the suit which the city is prosecuting, and until the issues in that case shall have been adjudicated it will be impossible for the complainant to prove the legal right which is the foundation of its case in this court. By the laws of this state the control of the public streets in incorporated cities is delegated to the city governments, and within the limitations of its authorized powers the legislative branch of the city government of Tacoma is authorized to permit or restrain the construction of railway tracks and the operation of street railways in the public streets of that city. If the city council of Tacoma stands as sponsor for any attempt to deprive the complainant of vested rights contrary to law, the city is necessarily an indispensable party to any suit or proceeding to obtain judicial protection, for the reason that a decree which would not bind the city would be nonenforceable. I have no doubt that this court might grant an injunction to restrain the unauthorized use and occupation of a public street, in such a manner as to interfere with the enjoyment by the complainant of its legal rights. Seattle Gas & Elec. Co. v. Citizens' Light & Power Co. (C. C.) 123 Fed. 588; Gen. Elec. Ry. Co. v. Chicago, I. & L. Ry. Co., 98 Fed. 907, 39 C. C. A. 345, 58 L. R. A. 231. By "legal rights" I mean rights which have been firmly established and are undisputed or indisputable; but it is contrary to the principles of equity to grant an injunction to a complainant for the protection of rights which are disputed and the subject of litigation, when there is no threatened irreparable mischief to be prevented.

It is obvious that a decision of the vital question in this case will not settle the controversy, nor have any effect upon the rights of the parties before the court, otherwise than as a possible make-weight to influence the state court, in which the city of Tacoma is a litigant, in rendering a judgment for or against the complainant. But the court cannot legitimately render an opinion for any such purpose. I consider that it would be impertinent for a court, which does not have jurisdiction of an indispensable party, to volunteer advice to a court which has complete jurisdiction; and, although the parties in court have submitted the case for a decision on the main issue, it must be dismissed, because the case is not cognizable in equity without the presence of the city of Tacoma.

Let a decree be entered, denying the application for an injunction and dismissing the complainant's bill, with costs.

On Rehearing.

The complainant has petitioned for a rehearing; the most substantial ground assigned being error of the court in assuming that there

is litigation pending between the city of Tacoma and the complainant affecting the right to extend its tracks in Commerce street. Conceding the error, and that the supposed lawsuit must be eliminated from consideration, I am nevertheless still of the opinion that the decision heretofore rendered is right. Although the injunction suit has been dismissed, and at present there is no actual litigation, it is still true that there is an unsettled controversy between the city government and the complainant concerning this matter, and the city must be reckoned with or coerced before the tracks can be extended. This court cannot determine that controversy, for the simple reason that the city is not a party to this suit.

Petition denied

In re LEVI & PICARD.

(District Court, S. D. New York. October, 1906.)

BANKRUPTCY—PETITION TO RECLAIM PROPERTY—SUFFICIENCY.

A petition by one who sold goods to a bankrupt firm during several months prior to its bankruptcy, seeking to rescind the sales for fraud and to reclaim all of the goods remaining, will not be considered and referred for hearing, under the peculiar circumstances of the case, unless it not only alleges all the facts necessary to entitle the petitioner to rescind, but also sets out all the transactions and describes the goods in detail.

In Bankruptcy. On petition of American Woolen Company for reclamation of certain goods in possession of the receiver.

For former opinion, see 148 Fed. 654.

Hays & Hershfield (Ralph Wolf, of counsel), for the motion.

James, Schell & Elkus (James N. Rosenberg, of counsel), opposed.

HOUGH, District Judge. Viewing the petition in reclamation as a pleading, it seems to me obvious that it should contain all the allegations necessary to sustain a complaint in trover and conversion, or required by the strictest practice in an affidavit for replevin. This petition rests upon the attempted rescission of a contract which, in the language of the pleader, the American Woolen Company "does now elect to rescind." The ground of rescission is that the contract in question (i. e., a contract of sale) was induced by a false statement of solvency made by the bankrupts to the petitioners, upon which statement the petitioners relied. These facts, if true, are obviously insufficient to warrant a rescission. It must be further alleged and proved as a part of the fraudulent action of the bankrupts that at the time of making the contract of sale, now sought to be rescinded, they did not intend to pay for the goods received in pursuance of said contract. Considering the manner in which this question is brought to the attention of the court, I think the petition should be treated as a pleading objected to by general demurrer.

Under such circumstances every allegation of the complaint is to receive its most favorable intendment for the pleader, and I therefore hold that the statement in the eleventh article of the petition, to the effect that at all times between the 6th of December, 1905, and the

6th of September, 1906, Levi & Picard received goods from the petitioner "with intent to defraud the petitioner," and "concealed the fact of their said insolvency from your petitioner for the purpose of defrauding your petitioner," as a sufficient allegation of intent not to pay. This proceeding is brought, however, in a court having the lawful physical possession of the goods in question, or some of them. The recaption of these goods by the vendor at this stage of the proceeding is a very serious interference with a profitable realization of the bankrupt's assets, and is to be granted only upon equitable considerations to be applied to the circumstances of each case. The facts attending this particular bankruptcy are peculiar. It is needless to recapitulate them, further than to say that the insolvency of the firm came as a surprise, not only to the trade, but, as I believe, to the bankrupts themselves. This petition apparently asks for the return of all goods (found in the receiver's possession) delivered by the woolen company to the bankrupts during a space of nine months. In order to validate a rescission under such circumstances, the referee who tries this reclamation must believe that during all that considerable length of time every piece of dry goods ordered by the bankrupts from the woolen company was so ordered with a contemporaneous intent not to pay for the same.

With this legal necessity obviously existing, I do not consider it equitable to grant the usual order, until the petitioner has much more fully explained to the court, and under oath, the history of those transactions between itself and the bankrupts which are now sought to be rescinded. The application for reclamation will therefore be denied, unless within 10 days from this date the petitioner files as a portion of its moving papers an affidavit, verified by one of its officers, setting forth in detail: First, each sale made by it to the bankrupts between December 6, 1905, and September 6, 1906, showing (a) what goods were sold and delivered; (b) what was the price of the goods so sold and delivered; (c) how much, if any, of said price has been paid by the bankrupts to the woolen company; and, second, showing to what sale item each item of goods now in the possession of the receiver belongs; that is, when each piece of goods now sought to be reclaimed was sold and delivered. This direction is given on the assumption that the petitioner has had an inspection of the goods in the receiver's possession. If no such inspection has been had, one may be granted by the receiver without further direction from the court.

Upon the filing of such affidavit the papers may again be brought to my attention, and I will take the matter up de novo. If no such affidavit be filed within the time now set, an order of course may be entered, denying the application for reclamation.

UNITED STATES v. MARTIN.

(Circuit Court, D. Massachusetts. April 23, 1907.)

No. 18 (1,518).

CUSTOMS DUTIES—CLASSIFICATION—SCAMMONY RESIN—DRUG.

Scammony resin, prepared from gum scammony, or scammony root, and used principally in compounding medicines, is dutiable as a drug advanced in value or condition, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], rather than as a medicinal preparation, under paragraph 67, 30 Stat. 154 [U. S. Comp. St. 1901, p. 1631].

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

In the decision below the Board of General Appraisers sustained the protest of Gustav Martin against the assessment of duty by the collector of customs at the port of Boston. This action was taken on the authority of a former decision of the Board. In re Parke, G. A. 5,010 (T. D. 23,323). The opinion in the former case reads as follows:

SOMERVILLE, General Appraiser. The merchandise in question is known as "scammony resin." It was assessed for duty under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 67, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1631], as a medicinal preparation in the preparation of which alcohol is used, at the rate of 55 cents per pound. The protestants contend that the article is not a medicinal preparation, but a drug, and (1) that it is free of duty under the provision in section 2, Free List, par. 548, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683], for crude drugs "not advanced in value or condition by refining or grinding, or by other process;" or (2) that it is dutiable at the rate of one-fourth of one cent per pound and 10 per cent. ad valorem under Schedule A, par. 20, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], as a drug "advanced in value or condition by refining, grinding, or other process."

The evidence not only fails to sustain the claim that the merchandise is a crude drug, but, on the contrary, shows that it is a manufactured article made of scammony. A witness for the importers testified that the article is the same as that covered by T. D. 6,118, which was "manufactured by digesting scammony root or the crude gum scammony in alcohol until exhausted, removing the alcohol by distillation, and precipitating the resin by the action of water, and then drying the product at a gentle heat." We hold therefore that the article is not free of duty under said paragraph 548 as a crude drug.

The alternative claim of the protestants that the merchandise is dutiable as a drug advanced in value, rather than as a medicinal preparation, is, in our opinion, well founded. Although there is some evidence that the article can be used as a medicine without further preparation than is required to reduce it to a powder, the weight of the evidence is that its chief use is as an ingredient in the preparation of pills and other medicines. One of the witnesses, a druggist of experience, testified that, before it can be used at all, it has to be dried in a kiln and then powdered; that, before it is fit to be used medicinally, it must be compounded with other drugs; and that it is principally employed in the production of calisaya compounds. As imported, it is in the form of flattened rolls about a foot in length, wrapped in coarse paper, and its appearance would indicate that it is not intended for use as a medicinal preparation without further manipulation. It satisfactorily appears to be an article from which medicines are to be made, rather than a medicinal preparation itself. This view is supported by the statement in the United States Dispensatory, under the head "Resina Scammonii," that:

"When rubbed with unskimmed milk, the resin of scammony forms a uniform emulsion undistinguishable from rich milk itself. This is an excellent

mode of administration. The resin should always be given either rubbed up with some mild powder or in emulsion."

In U. S. v. Merck, 66 Fed. 251, 13 C. C. A. 432, it was held by the Circuit Court of Appeals for the Second Circuit that elaterium imported in little cakes, which was not used in that form as a medicine, but was an article from which medicinal preparations were made, was not dutiable as a medicinal preparation. Note, also, In re Dodge, G. A. 4,859, where guarana, an article that is not used as a medicine without being first prepared, was held not to be dutiable as a medicinal preparation.

Although both of the articles covered by the decisions cited were held to be free of duty as crude drugs, the present case is distinguishable from those, in that the drugs then in question were in a crude condition, while the article now under consideration is not crude, but, as stated above, is prepared from scammony by an elaborate process of manufacture.

We hold that the merchandise is dutiable under said paragraph 20, as a drug advanced in value or condition.

The protest is therefore sustained in so far as it makes this claim, and the decision of the collector reversed, with instructions to reliquidate the entry accordingly.

William H. Garland, Asst. U. S. Atty.

Charles P. Searle (Edward S. Hatch, on the brief), for importer.

BROWN, District Judge. The decision of the Board of General Appraisers is affirmed.

J. C. PUSHEE & SONS v. UNITED STATES.

(Circuit Court, D. Massachusetts. July 29, 1907.)

No. 37 (1,575).

CUSTOMS DUTIES—CLASSIFICATION—BRISTLES IN BUNCHES.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 411, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1673], relating to "bristles, sorted, bunched, or prepared," and in section 2, Free List, par. 509, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1682], relating to "bristles, crude, not sorted, bunched, or prepared," the distinction made is between absolute crudeness and advancement one or more steps in preparation for the arts; and bristles that have been tied in separate bundles, with their butt ends together, in preparation for brushmakers, are subject to duty under the former provision.

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

For decision below see G. A. 5,483 (T. D. 24,797), affirming the assessment of duty by the collector of customs at the port of Boston.

Searle & Pillsbury, for importers.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

COLT, Circuit Judge. In the tariff act of July 24, 1897, crude bristles, which are not sorted, bunched, or prepared, are admitted free of duty under paragraph 509 of the free list (Act July 24, 1897, c. 11, § 2, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1682]), while bristles which are sorted, bunched, or prepared are subject to a duty of 7½ cents per

pound under paragraph 411, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1673]. These paragraphs are as follows:

"509. Bristles, crude, not sorted, bunched, or prepared."

"411. Bristles, sorted, bunched or prepared, seven and one-half cents per pound."

When we consider the various conditions in which crude bristles are imported into this country, it seems clear that the distinction which Congress intended to make in these paragraphs is between crude bristles consisting of a mass of different sizes, with their butt ends and flag ends mixed together indiscriminately, and crude bristles which have been in any way sorted, bunched, or prepared—in other words, between absolutely crude bristles and those which have been passed through one or more steps in the process of preparation for use in the arts; the former being admitted free of duty, while the latter are subject to a duty of 7½ cents per pound.

In the present case the imported bristles are in the form of small bunches, with a string tied around each bunch to hold the bristles together. In these bunches the butt ends and the flag ends are not mixed indiscriminately, but substantially all the butt ends lie together, and all the flag ends. There is evidence that each bunch is the product of one hog, and that the bristles are in the condition in which they were taken from the back of the hog. The important fact, however, is that the bristles are tied up in separate bunches, with their butt ends lying together, and therefore in a partial state of preparation for the brushmaker.

In holding these bristles dutiable at 7½ cents a pound, the Board of General Appraisers said:

"The merchandise as shown by the sample consists of bunches of bristles carefully put up with the roots all placed together at one end. The evidence discloses the fact that each bunch represents the crop gathered from one hog and that it is tied up in the manner above described at the time that the bristles are taken from the hog's back, so as to keep each lot separately and distinctly by itself. The sample shows that as a result of this operation the bunch consists of one class of bristles of fairly uniform size, and while it is true that they have not been sorted into exact sizes, yet they are undoubtedly bunched so as to make them marketable for brushmakers' use. From these facts we are of opinion that they fall within the express language of both provisions making them dutiable."

This reasoning of the Board of General Appraisers seems to me conclusive.

There is no evidence in support of the contention of the importers that the word "bunched" in the foregoing paragraphs means "bundled," and hence that it signifies bristles which have been subjected to the entire process of dressing as known to brushmakers. On the contrary, the evidence shows that the term "bunched" is used in its ordinary meaning, and therefore as signifying "a collection, cluster, or tuft, properly of things of the same kind, growing or fastened together." It follows that these bristles, by the clear and express language of the statute, are subject to a duty of 7½ cents a pound.

The decision of the Board of General Appraisers is affirmed.

In re BURT et al.

(District Court, E. D. Pennsylvania. July 24, 1907.

No. 2,554.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—PROPERTY HELD UNDER CONDITIONAL SALE.

Bankrupts at the time of the filing of the petition against them had been for more than 30 days in possession of machinery which had been shipped to them under contracts by which they agreed to pay for the same within one year from shipment, and which provided that a retention of the property after 30 days from date of shipment should constitute a trial and acceptance. *Held*, that such contracts constituted conditional sales, and not bailments under the law of Pennsylvania, and the property, being subject to transfer by the purchasers or to seizure and sale by their creditors under such law, passed to their trustee in bankruptcy under Bankruptcy Act July 1, 1898, § 70a (5), c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 199.]

In Bankruptcy. On report of referee

E. H. Hall, for petitioners.

Edwin S. Dixon, for trustee.

HOLLAND, District Judge. At the time the petition in bankruptcy was filed in this case the alleged bankrupts were in possession of machinery received by them from Fay & Eagan Company upon three different contracts, all of similar tenor. A copy of the first is as follows:

"Subject to strikes, accidents or other delays beyond your control, please ship in good order the following machinery, delivered f. o. b. Philadelphia, Pa., about ———— 190

"One No. 156 new cabinet smoothing planer with set of knives, wrenches, countershaft and all complete to dress material 24" wide and 7" thick divided feed roll. One No. 146 bank rip and re-saw with two three inch blades and brazing tools. For which we agree to pay within one year after date of shipment, eleven hundred and sixty ($1,160.00) dollars. In case payment is divided, to be made as follows, the deferred payment to be evidenced by notes bearing date of shipment and interest: (1) Payment, two hundred dollars ($200.00) to be 30 days after receipt of tools (without interest). (2) Payment three months from receipt of goods evidenced by note $240.00. (3) Payment six months from receipt of goods evidenced by note $240.00. (4) Payment nine months from receipt of goods evidenced by note $240.00. (5) Payment twelve months from receipt of goods evidenced by note $240.00.

"It is agreed that title to the property mentioned above shall remain in the J. A. Fay & Eagan Co. until fully paid for in cash, and that this contract is not modified or added to by any agreement not expressly stated herein, that a retention of the property forwarded after thirty days from date of shipment, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and void all its contracts of warranty express or implied. It is further agreed that the purchaser shall keep the property fully insured for the benefit of J. A. Fay & Eagan Company, and that the said machinery shall not become a fixture to any realty on account of being annexed thereto."

It will be noticed that the bankrupts in this form of order and agreement requested the Fay & Eagan Company to ship to them the machinery, for which they agreed to pay in one year after date of shipment the amount specified, and it is further stipulated:

"That a retention of the property forwarded after thirty days from the date of shipment shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor."

The order, the mode of payment, the 30 days' trial to consummate the sale, and make it binding after that date, and the whole tenor of the contract are such as to indicate this to be a conditional sale of the property, and not a bailment, under the Pennsylvania law. The fact that there was a stipulation by the purchaser that the title might remain in the vendors until paid for does not entitle them to prevail, because under section 70a, par. 5, of the act of 1898 (Bankr. Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), property which prior to the filing of the petition he (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial proceedings against him will pass to the trustee in bankruptcy. In Pennsylvania, property in the possession of a creditor on conditional sale can be levied upon and sold under judicial proceedings, and comes clearly within the definition of property which passes to the trustee.

In the case of Louis Fabian, Bankrupt (D. C.) 151 Fed. 949, the agreement was a consignment of goods to be sold for the account of Schleestein, Cohn & Co., and was clearly not a conditional sale, as was held by Judge McPherson, and, as the property was that of the claimant, it was in that case properly held that no title passed to the bankrupt; and the case of York Co. v. Cassel, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, s. c. 15 Am. Bankr. Rep. 633, was entirely in point, and ruled the case, but has no application in case of a bailment in Pennsylvania. The agreement is clearly a conditional sale. Title passed to the bankrupts upon the delivery of the machinery, and a trial and retention for 30 days bound the bankrupts to retain and pay for the property. At any time this machinery could have been levied upon by creditors and sold under judicial proceedings and upon the institution of proceedings in bankruptcy passed to the trustee.

The report of the referee is affirmed.

JOHNSTON v. FORSYTH MERCANTILE CO.

(District Court, S. D. Georgia, W. D. June 29, 1907.)

BANKRUPTCY—FRAUDULENT TRANSFER OF PROPERTY—SUIT BY TRUSTEE TO SET ASIDE.

A sale by an insolvent company in bulk of its stock of merchandise, which constituted practically all of its property, the transfer having been made secretly, at night, to a purchaser which knew of the insolvency, and the proceeds in part used to pay certain creditors, *held* to have been made with intent to hinder, delay, and defraud its creditors, and to be voidable at suit of its trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 248.]

In Equity. Suit by trustee in bankruptcy to set aside an alleged fraudulent transfer.

For former opinion, see 127 Fed. 846.

George S. Jones and Smith, Hammond & Smith, for plaintiff.
Robert L. Berner and Walter J. Grace, for defendant.

SPEER, District Judge. The findings of the court upon the issues presented by the pleadings and proof are as follows:

The Stewart-Taylor Company upon proper involuntary proceedings had been adjudged bankrupt. E. P. Johnston, the complainant above mentioned, had been elected its trustee, and was thereupon authorized by the court to institute a suitable proceeding in equity against the Forsyth Mercantile Company to recover certain assets of the bankrupt, which it was prima facie made to appear had been collusively and fraudulently conveyed for the benefit of the defendant company and to the injury of creditors. This had been accomplished by a certain sale and transfer by the bankrupt of the entire stock of merchandise. The ground of this proceeding was that the transfer was made by the bankrupt to the defendant with the intent to hinder, delay, and defraud the creditors of the bankrupt, in violation of the bankruptcy act. A demurrer was interposed to the proceeding brought by the trustee, and after full hearing it was overruled. Answers were thereupon filed by the Forsyth Mercantile Company and the bankrupt. The cause, being then at issue, was referred to Alexander Proudfit, Esq., referee in bankruptcy, as special master, "to proceed with the hearing of the testimony, and to report to the court his findings of law and fact thereon." No objection was made to the reference, and it was ratified by the action of the parties. It was, however, not intended by the court to commit the final determination of the cause to the master, and, his report coming in, exceptions thereto were filed. The full case has been heard by the court upon the pleadings, the proofs, the master's report, and the exceptions. From the entire record the court has reached its conclusion.

It appears, as found by the master, that the Stewart-Taylor Company on June 21, 1903, the date of the beginning of the transaction complained of, was insolvent. Its indebtedness approximated $10,034. Its assets consisted of its stock of goods, which at market cost on that date appeared by inventory to be worth $5,034.52, besides a few notes and accounts of insignificant amount. It further appears that A. M. Taylor, one of the bankrupt concern, through the president and the secretary and treasurer of the defendant company, consummated the transfer complained of. This was done at night behind closed doors, and under circumstances which must have put the defendant on notice that it was done out of the ordinary course of business. We find, therefore, that the Forsyth Mercantile Company was not a purchaser in good faith of the property. It was bound by the action of its officers, and participated in the transaction to defraud the creditors of the bankrupt. It appears from the evidence that it was fully aware of the insolvent condition of the Stewart-Taylor Company. It is further shown that the sale was made in a quick and unusual manner, with the evident disposition to consummate it before its interruption by legal proceedings could be accomplished. This was all done only two days before the proceedings in bankruptcy were filed.

We further find that the amount paid by the defendant company for the property was 70 per cent. of the invoice cost of the dry goods and notions, 75 per cent. of the invoice cost of the shoes, and 50 per cent. of such cost of the millinery. This aggregated $3,444.10. In addition to this, there was a shipment of shoes at the depot, not yet taken out, which passed under the transfer, making a total of values of $3,584.05. This appears to be a fair valuation of the goods and merchandise thus conveyed by the bankrupt to the defendant company. We find that the bulk sale, thus secretively and injuriously conducted, and evidenced by bill of sale executed on the very date of the bankruptcy proceedings, was intended to delay, hinder, and defraud the creditors. With the proceeds of this sale in part, the bankrupt proceeded to settle the claims of certain banks against it, and the master recommends that the Forsyth Mercantile Company, which was the purchaser fraudulently, as we have seen, should be subrogated to the claims of such banks against the bankrupt itself. Upon this subject it will suffice to say that the banks are not parties to this litigation, there are no suitable averments or prayers, and no decree at this time can be made to affect this issue. Upon a general review of the record it appears, therefore, that the bill of sale of such assets, set forth in the pleadings, should be delivered up and canceled, and the delivery of the goods and merchandise therein made should be decreed to be null and void, and that the complainant, viz., E. P. Johnston, trustee, is entitled to recover the value of the assets of the bankrupt, which were thus unlawfully transferred to the Forsyth Mercantile Company.

It is further found that E. P. Johnston, as trustee in bankruptcy of the estate of Stewart-Taylor Company, bankrupt, should be decreed to be vested with the title of said property as trustee, and the same, so far as any of it may now be held by the Forsyth Mercantile Company, should be adjudged and decreed as held in trust for said E. P. Johnston as trustee, and for the purpose of his duties as such trustee, as regards the creditors who may be entitled to distribution thereof. We further find that decree should be taken directing the Forsyth Mercantile Company to account to E. P. Johnston as such trustee for all goods and merchandise purchased by it from the Stewart-Taylor Company under said fraudulent bill of sale and under the transaction which has been described; and, further, that, if the said Forsyth Mercantile Company shall be unable to return such goods and merchandise so fraudulently conveyed and transferred, Johnston as trustee shall recover of the Forsyth Mercantile Company the sum of $3,584.05, as a fair valuation thereof.

Complainant is further entitled to a decree to the effect that the costs and expenses of this cause in equity shall be taxed by the clerk of the court against the defendant; and, further, that the compensation of Alexander Proudfit, Esq., for his services as special master shall be fixed at the sum of ——— dollars, to be paid as part of the costs and expenses herein.

In re CRENSHAW.

(District Court, S. D. Alabama. August 1, 1907.)

No. 493.

BANKRUPTCY—EXAMINATION OF BANKRUPT—RIGHT PRIOR TO ADJUDICATION.

Bankruptcy Act July 1, 1898, § 21a, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], providing for the examination of witnesses "concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act," does not authorize an order in involuntary proceedings in which there has been no adjudication requiring the alleged bankrupt to appear and submit to an examination.

In Bankruptcy. On motion for an order to examine the alleged bankrupt and other witnesses.

Stevens & Lyons, for petitioners.

TOULMIN, District Judge. There has been no adjudication of bankruptcy in this case and no receiver appointed in the meantime. Bankruptcy Act July 1, 1898, § 21a, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], providing for such an order, authorizes the court, which is administering the estate, and "in the process of the administration," to make such an order. The examination is in aid of the administration. Bankruptcy Act, § 21. The decree of adjudication operates in rem and from the moment of adjudication the bankrupt's estate is in the custody of the court—in custodia legis—and from that time may be said to be in process of administration.

The case of Fixen & Co. (D. C.) 96 Fed. 748, is cited in support of this motion. As I understand that decision, it is, in substance, that the court had the power to appoint a receiver prior to an adjudication and the election of a trustee; that a receiver has authority to institute suits to recover property of the bankrupt if necessary to get possession of it; that a receiver was an "officer" in contemplation of the bankrupt act who was authorized by section 21 of the act to apply for an order to examine the bankrupt and others, as witnesses, pertaining to the bankrupt's property, etc., and that it was not necessary there should be a suit pending to authorize such examination.

These seem to have been the points raised and controverted in the case. While it is true the order for the examination was made before adjudication—some four days before—no question was raised as to its being premature, no suggestion as to its invalidity on that ground, and no reference to or notice taken of it by the court except the statement of it as a fact. We may find in some instances that the courts say there is nothing in the act which limits the examination of the bankrupt to any particular time or occasion, yet they uniformly say, when they make any expression on the subject, that an examination may be ordered at any time during the pendency of the bankrupt proceedings, while the bankrupt's estate is in process of administration. Can the bankruptcy court administer the estate of one who has not been adjudicated a bankrupt? In the case of an involuntary bankrupt proceeding, like the one under consideration, a petition is filed, and it may be said that the bankrupt proceedings are pending, non constat

the alleged bankrupt may never be adjudicated a bankrupt. It appears clear to me that the court should not order an examination "concerning the acts, conduct, or property of a bankrupt" before the party concerning whose acts, property, etc., it is proposed to examine has been adjudged a "bankrupt." However, when we consider those sections of the bankruptcy act which pertain to the subject under consideration, and which should be construed together, with the forms which relate thereto, I think it manifest that both the act and forms imply that such examination is to be had subsequent to the adjudication. The sections of the act referred to are 21, 58, and 7, and Forms Nos. 28 and 30. Section 58 provides that creditors shall have at least 10 days' notice of all examinations of the bankrupt. In re Price (D. C.) 91 Fed. 635. How are the creditors to be known except as they appear in the list of creditors of the bankrupt, or make themselves known after due notice by publication under the order of the court?

The motion is denied.

In re BELL PIANO CO.

(District Court, S. D. New York. February 5, 1907.)

BANKRUPTCY—DECLARATION OF DIVIDENDS—TIME FOR FINAL DIVIDEND.

Where all the known assets of a bankrupt estate have been collected and reduced to money, a final dividend may be declared, under Bankr. Act July 1, 1898, c. 541, § 65b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], as amended in 1903 (Act Feb. 5, 1903, c. 487, § 15, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690]), at any time after the expiration of three months from the declaration of the first dividend; and any creditor who has not then proved his claim is debarred from participating in the fund.

In Bankruptcy. On review of referee's decision.

Stern, Singer & Barr, for the Motion.

HOUGH, District Judge. In my opinion the decision in Re Stein (D. C.) 1 Am. Bankr. Rep. 662, 94 Fed. 124, states the true interpretation of the act, and the amendment of Act July 1, 1898, c. 541, § 65b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], by Act Feb. 5, 1903, c. 487, § 15, 32 Stat. 800 [U. S. Comp. St. Supp. 1905, p. 690], strengthens Judge Baker's opinion. To say that the final dividend shall not be declared within three months after the first dividend is declared does, in my judgment, hold by implication that a final dividend may be declared on the expiration of three months from the time of the first dividend. All creditors must have notice of the final meeting, and if the creditors who have not yet proved their claims do not then prove them they may then lawfully, as well as justly, be debarred from participation in the funds in hand when the final meeting is held.

The matter is remanded to the referee, with instructions to comply with the petition of the trustee.

HOPPER v. DENVER & R. G. R. CO.*

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

No. 2,414.

1. DEATH—STATUTES—CONSTRUCTION.

Mills' Ann. St. Colo. § 1508, creates an action for death negligently caused by a public carrier, and declares that it shall forfeit for every person and passenger so injured or killed not more than $5,000, nor less than $3,000, which may be sued for and recovered: (1) By the husband or wife of deceased; or (2) if there be no husband or wife, or he or she fail to sue within a year after such death, then by the heir or heirs of the deceased, or, if the deceased be a "minor or unmarried," then by the father and mother, or, if either of them be dead, then by the survivor. *Held* that, if the deceased left a husband or wife, the sole right of action was in such survivor, save that as against children the right would be lost unless asserted within a year; if there was no surviving husband or wife, or the survivor failed to sue within a year, then the sole right would be in the children; and if there was neither surviving husband nor wife nor any children, then only would the right of action be in the father and mother, or the survivor; so that where an unmarried adult female is killed by the negligence of a carrier, and she leaves neither husband, child, nor mother, the right of action is in her surviving father.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 35–46.]

2. SAME—PECUNIARY INJURY.

When decedent, an unmarried female 19 years of age at the time of her death, was two years old, her mother died, and she was taken by plaintiff, her father, to reside with her aunt, with whom she lived until she was 16, when she was sent by him to school to fit herself for teaching. She was sympathetic, ambitious, industrious, of good health, and fond of her father, who paid the expenses incident to her education, and desired to keep house for him, but he, being a farm laborer and traveling machinist, had not married again, and, at the time of his daughter's death was 60 years of age. *Held*, that evidence of these facts, in the light of the natural influence or promptings of filial ties, was sufficient to sustain a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 20.]

3. CARRIERS—INJURY TO PASSENGERS—DEATH—NEGLIGENCE—PRESUMPTION.

In an action for death of a passenger by the alleged negligence of a carrier's servants, evidence that plaintiff was a passenger, and that her death resulted from an accident to the train, was sufficient to establish a prima facie case of the carrier's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1307–1314.]

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

James H. Teller (J. H. McCorkle, on the brief), for plaintiff in error.

Henry A. Dubbs (Thomas H. Devine, J. W. Preston, Joel F. Vaile, C. W. Waterman, and E. N. Clark, on the brief), for defendant in error.

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

VAN DEVANTER, Circuit Judge. This was an action under a statute of Colorado by a father to recover damages of a railroad company for the death of his daughter, alleged to have been caused by

*Rehearing denied September 30, 1907.

the negligence of the company while she was a passenger upon one of its trains. At the conclusion of the plaintiff's case in chief, the court upon the defendant's motion, directed a verdict in its favor, and we are now called upon to consider whether or not that ruling was right.

The statute of the state under which the right of action was asserted is as follows (Gen. St. 1877, §§ 877–879; Mills' Ann. St. §§ 1508–1510):

"Sec. 1508. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employé, whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any coach or other public conveyance whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employé, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any such injury is received, and resulting from or occasioned by defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand (5,000) dollars, and not less than three thousand (3,000) dollars, which may be sued for and recovered:

"First—By the husband or wife of deceased, or

"Second—If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased, or

"Third—If such deceased be a minor or unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant for his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency.

"Sec. 1509. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured.

"Sec. 1510. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act, and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand (5,000) [dollars], with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default."

The words "heir or heirs," in the second subdivison of section 1508, mean child or children, that is, lineal descendants (Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235); and, though some of the printed statutes of the state make the words "father and mother" in the next subdivision read "father or mother," the first reading is correct (Pierce v. Conners, 20 Colo. 178, 183, 37 Pac. 721, 46 Am. St. Rep. 279).

The evidence disclosed that the deceased was 19 years old, and so was an adult under the laws of Colorado (3 Mills' Ann. St. Rev. Supp.

§ 4699); that she was unmarried; and that she left surviving her a father, the plaintiff, but no husband, child, or mother. If, therefore, her death was otherwise one for which the defendant was required to respond in damages, the third subdivision of section 1508, if read literally, gave the father a right of action; but the Circuit Court, being of opinion that the words "minor or unmarried" in that subdivision must be read "minor and unmarried," held that no right of action was given for the death of an adult leaving no surviving spouse or child; and this was one of the reasons assigned for directing a verdict for the defendant.

As no right to recover damages resulting from death was recognized by the common law, the father's right in this instance, if he had any, must arise entirely from the state statute. Hindry v. Holt, 24 Colo. 464, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235; Swift v. Johnson, 71 C. C. A. 619, 138 Fed. 867, 1 L. R. A. (N. S.) 1161. As written, it plainly confers such a right upon him, for not only does it, by the use of the terms "any person," "any passenger," "every person and passenger," and "every such case," manifest a purpose to cover every instance of death caused in the manner specified, and not within the qualification expressed in Atchison, etc., Co. v. Farrow, 6 Colo. 498, whether the deceased be a minor or an adult, married or unmarried, but it in terms gives the right of recovery to the father where, as here, he is the only surviving parent, and the deceased leaves no surviving spouse or child. Thus far there is no conflict, nor any difficulty in applying the statute. But it is said that conflict and difficulty are encountered when the third subdivision of section 1508, respecting the right of the parents, and the two preceding subdivisions, respecting the rights of the surviving husband or wife and the children, are read together, because a minor may die leaving a husband or wife and also parents; and it could have been added that an unmarried person may die leaving children and also parents, as in the case of a widower, widow, or the mother of illegitimate children. See In re Kaufman, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292; Mills' Ann. St. §§ 127, 1533; Mills' Ann. St. Rev. Supp. § 4658; Marshall v. Wabash Ry. Co., 120 Mo. 275, 25 S. W. 179. All of this is undoubtedly true. And it is equally true that, if each subdivision is read literally, they will in the instances supposed give conflicting rights of action to the surviving spouse and to the parents, or to the children and to the parents, as the case may be, when the statute as a whole makes it plain that there shall be but one right of action and but one recovery in respect of any death; that the right of recovery shall be in the surviving spouse, if there be one, and, if not, then in the children, if there be any; and that it shall be in the parents only where there is neither surviving spouse nor child. To obviate the conflict and difficulty thus presented, the Circuit Court construed the words "minor or unmarried" to mean "minor and unmarried," and this construction is now earnestly pressed upon us by counsel for the defendant. But we cannot give it our approval. It does not entirely avoid the conflict and difficulty which make resort to interpretation necessary, and does not give effect to the controlling purpose and spirit

of the statute otherwise made manifest. If it were adopted, these subdivisions would still give conflicting rights of action for the death of one who, although a minor and unmarried, dies leaving children and also parents, as may be the case with a minor who is a widower, widow, or the mother of illegitimate children; and, as held by the Circuit Court, it would defeat a right of action for the death of an adult leaving parents, but no surviving spouse or child, although such a case, as before stated, is within the terms of the statute as written, and also within its purpose and spirit.

But there is another construction, which, while neither excluding any case within the terms used, nor including any not within them, harmonizes the three subdivisions, avoids all the difficulties suggested, and gives full effect to the purpose and spirit of the statute as a whole. The subdivisions are evidently intended to take rank and have effect in the order in which they occur, and their true meaning, as we think, may be stated in this way: If the deceased leave a husband or wife, the sole right of action will be in such survivor, save that, as against children, the right will be lost unless asserted by suit within one year; but if there be no surviving husband or wife, or the survivor fail to sue within one year, then the sole right of action will be in the children; and if there be no surviving husband or wife, nor any child, then, and then only, will the right of action be in the father and mother, or the survivor of them. The first subdivision does not make the right of the husband or wife dependent upon the majority of the deceased, nor does the second make the right of the children dependent upon his majority or upon his being married at the time of his death; and as the third is evidently designed to take rank and have effect in subordination to the other two, we think it should be interpreted as if it read: "If such deceased be a minor or unmarried, and leave no surviving husband or wife and no surviving child, then by the father and mother." In no other way can the three subdivisions be completely harmonized without violating the sense of the statute as a whole. And no little support is given to this construction by the decisions of the appellate courts of the state, covering a period of several years, in which, without discussion of the question, the statute is treated as giving the parents a right of action for the death of an adult child leaving no surviving spouse or child. Denver, etc., Co. v. Wilson, 12 Colo. 20, 20 Pac. 340; Hindry v. Holt, 24 Colo. 464, 468, 51 Pac. 1002, 39 L. R. A. 351, 65 Am. St. Rep. 235; Mitchell v. Elevator Co., 12 Colo. App. 277, 55 Pac. 736.

The statute was largely copied from one in Missouri, which read "minor and unmarried," and this is advanced as a reason for reading the Colorado statute in the same way; but we think it is a sufficient answer to say that, in adopting the statute, the Colorado Legislature not only changed the word "and" to "or," but otherwise modified the language used, and must have intended to give effect to whatever change of meaning naturally resulted therefrom. Crawford v. Burke, 195 U. S. 176, 190, 25 Sup. Ct. 9, 49 L. Ed. 147. One of the other changes is particularly significant. The Missouri statute limited the right of recovery under the second subdivision to the minor

children, and so gave an adult no right in respect of the death of a parent. But the Colorado Legislature, before adopting the statute, changed this subdivision so that it would embrace all children, whether minors or adults; and while this was being done it was not unnatural that the next subdivision should also be changed, as we think it was, so that the parents would have the same right to recover for the death of an adult child as for the death of a minor, that is, wherever there is no preferred beneficiary under the two preceding subdivisions.

We conclude that the Circuit Court erred in its interpretation of the statute.

Another reason assigned by the Circuit Court for directing a verdict for the defendant was that there was no evidence of any pecuniary injury to the plaintiff from the death of the daughter. In substance, the evidence was as follows: When the deceased was two years old, her mother died at the family home in Texas, and shortly thereafter the child was taken by the father to an aunt near Greenfield, Mo., with whom she lived until she was 16. He then sent her to a school at Parkville, Mo., that she might prepare herself for teaching, and he paid the expenses incident thereto. She had been in this school three years and was on a visit to a sister in Colorado when she met her death. She was sympathetic, ambitious, industrious, of good health, fond of her father, and wanted to keep house for him, but had not as yet rendered any service to him or made any contribution to his support. After the mother died, the father continued to reside in Texas, but broke up housekeeping. He was chiefly engaged as a traveling machinist, and sometimes as a farm laborer; his earnings being about $50 per month. He had not married again, and was 60 years old. Considering this evidence in the light of the natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter. Pierce v. Conners, 20 Colo. 178, 182, 37 Pac. 721, 46 Am. St. Rep. 279; Gibson, etc., Co. v. Sharp, 5 Colo. App. 321, 327, 38 Pac. 850; Swift & Co. v. Johnson, 71 C. C. A. 619, 138 Fed. 867.

It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3,000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 246, 57 Am. Rep. 382; Marshall v. Wabash R. Co. [C. C.] 46 Fed. 269; Dale v. Atchison, etc., Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City, etc., Co., 61 Kan. 667, 60 Pac. 747; Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Brady v. Daly, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; Boston & Maine R. R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; McCabe v. American Woolen Co. [C. C.] 124 Fed. 283; s. c. 65 C.

C. A. 59, 132 Fed. 1006; Malloy v. American Hide & Leather Co. [C. C.] 148 Fed. 482; Wharton's Conflict of Laws [3d Ed.] §§ 4b, 480a; Atlanta v. Chattanooga Foundry, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L. Ed. 241; Johnson v. Southern Pac. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363); but the attitude in which the case is presented to us in such that we do not deem the present consideration of these matters necessary or wise.

Some question was raised in argument respecting the sufficiency of the evidence of negligence on the part of the defendant, but this need not be noticed further than to say that the evidence, without exculpating the defendant, and without any suggestion of fault on the part of the deceased, disclosed that her death was caused by an accident to the train on which she was a passenger, and so the case was brought within the rule announced by the Supreme Court in Gleeson v. Virginia Midland R. R. Co., 140 U. S. 435, 443, 444, 11 Sup. Ct. 859, 35 L. Ed. 458:

"That the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. * * * The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred."

See, also, Wall v. Livezay, 6 Colo. 465; Sanderson v. Frazier, 8 Colo. 79; 5 Pac. 632, 54 Am. Rep. 544; Denver & Rio Grande R. R. Co. v. Fotheringham, 17 Colo. App. 410, 68 Pac. 978.

For the error in directing a verdict for the defendant, the judgment is reversed, with a direction to grant a new trial.

POTTER v. LAKE SHORE NOVELTY CO.

(Circuit Court of Appeals, Sixth Circuit. June 26, 1907.)

No. 1,647.

PATENTS—INVENTION—DETONATING DEVICE.

The Potter patent, No. 689,906, for a detonating device for exploding toy torpedoes, is void for lack of invention and anticipation.

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

In Equity. Suit for infringement of letters patent No. 689,906, for a detonating device granted to George M. Potter December 31, 1901.

The following is the opinion of the Circuit Court by Tayler, District Judge:

This is a bill in equity, wherein the complainant claims that the defendant is infringing patent No. 689,906, relating to a detonating device for exploding toy torpedoes, granted to the complainant. The bill asks for the usual relief. The defendant denies infringement, and also the validity of the patent. The case is here on final hearing.

Without going into a recital of the nature of the patent and the testimony introduced on the issues made, it is enough for me to announce my conclusion, as follows:

1. If all that the complainant did was to obtain the patent for casting the partition separating the explosion chamber and the socket integrally, instead of forming the partition from a separate piece and securing it in place by a rivet or set screw, then I find that the complainant was not the inventor of such a method.

2. As to the other claim of novelty and usefulness in the patent, I find that it is not novel, having been anticipated by other patents.

Decree may therefore be entered dismissing the bill, at the complainant's costs.

S. B. Fouts and T. W. Bakewell, for appellant.

H. A. Toulmin, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This cause is affirmed upon the opinion of the court below.

STEEL PROTECTED CONCRETE CO. et al. v. CENTRAL IMPROVEMENT & CONTRACTING CO.

(Circuit Court, E. D. Louisiana. June 14, 1907.)

No. 13,374.

1. PATENTS—ANTICIPATION—CORNER BAR FOR CONCRETE CURBING.
The Wainwright patents, Nos. 428,432, 614,587, and 727,233, all for improvements in the construction of concrete curbing, are void as to the metal corner bar shown therein for protecting the upper and outer corner of the curb, which is mentioned in the first, and shown in the drawings, and forms the subject-matter of the two later patents; the general idea of such a protecting bar having been shown in a patent granted to Coignet in 1869, and none of the Wainwright patents disclosing any patentable improvements thereon.

2. SAME—SUIT FOR INFRINGEMENT—ESTOPPEL.
Quære, whether a defendant sued for infringement of a patent who asserts the validity of a junior patent which is clearly a copy of complainants' is not estopped to deny the validity of the latter.

In Equity. On final hearing.

D. Walter Brown and Rouse, Grant & Grant, for plaintiffs.

J. R. Beckwith, H. L. Lazarus, H. Michel, and E. Howard McCaleb, Jr., for defendants.

SAUNDERS, District Judge. 1. The bill herein alleges that one of the complainants, the Steel Protected Concrete Company, is the owner, and that the other complainant, the Grasser Contracting Company, is the exclusive licensee of three certain patents, taken out by one H. H. Wainwright, for improvements in concrete curb and gutter work; and that the defendant is infringing said patents. The relief prayed for is an injunction, restraining the defendant from further infringements and a decree ordering an accounting by defendant of profits realized from past infringements and payment to complainants of the sum so found to be due. The defendant denies the validity of

the Wainwright patent and claims to be constructing metal protected curbs under a valid patent issued to one Gustave Soniat du Fossat.

2. The Wainwright patents are as follows:

(1) Patent No. 428,432, issued May 20, 1890. Application filed August 21, 1889.

In this patent Mr. Wainwright asserts that he "has invented a new and useful improvement in street curbs. * * * My invention consists of a curb for pavements, roads, lots, etc., embodying a frame for holding a filling, such as artificial stone, or pavement, etc., and an anchor for said frame; the novel features being hereinafter fully set forth and definitely claimed." The claims allowed in this patent are five in number. The first four describe the particular frame and anchor, and the corner bar shown in the drawings. The fifth claim is general:

"5. In a curb, a frame having a corner bar with a tongue on its inner face, substantially as and for the purpose set forth."

The general object of the entire device described in this patent seems to have been to construct a frame in which a concrete curb could be built in situ, and, as one of the incidents of this construction, it was proposed to place a metal bar on or imbedded in the upper outer edge of the curb so as to protect that edge from being chipped and broken by the impact of wheels backed against the curb. "It will be noticed," the patent sets forth, "that the frame, excepting the outer face of the corner bar, is embedded in the composition or filling; said frame thus preventing disintegration of the filling and materially adding to the strength of the curb. The (corner) bar protects the corner of the curb from contact with the wheels of the vehicles, and the curb is firmly supported and sustained, owing to the anchors. * * * It will be seen that I produce a superior curb, the same possessing strength and durability, rendering good service, and avoiding the heavy stone heretofore in use."

The claimed utility of the device is thus seen to consist: (1) In strengthening the entire structure of a curb made of artificial stone or cement; and (2) in protecting the outer upper edge of such a curb from being chipped and broken. The protection of the upper outer edge of the curb is not the sole nor even the special and prominent utility claimed to be effected by the combination. The patentee seems to have imagined that the principal utility of his invention consisted in the supposed strengthening of the mass of the curb by the frame in which it was formed, or the anchors holding that frame. The function of the corner bar is mentioned only in one sentence, and then inexactly.

That the patentee believed that the chief value of his device was due to the frame and anchors, which he described minutely and carefully, becomes more evident on reference to the claims made in his first application. These claims were also five in number, and all of them were concerned solely with the frame, and the corner bar is mentioned only once, and that brief reference is comprised in eight words. The claims in the first application are as follows:

"1. A frame for a curb consisting of uprights, a bar or rod connecting the same, and pieces at the base of said uprights, substantially as described.

"2. A frame for a curb adapted to be filled, substantially as described, provided with a protecting corner piece as stated.

"3. A frame for a curb, adapted to be filled, substantially as described in combination with a supporting anchor as stated.

"4. A curb, consisting of a frame, an anchor supporting the same, and filling material embedding said frame; the parts being combined and substantially as described.

"5. A frame consisting of uprights, a rod or bar connecting the same, base pieces for said uprights and anchors supporting said frame, in combination with filling for said frame, resting on said base pieces and embedding the uprights, substantially as described.

"Henry H. Wainwright."

It is obvious, I think, both from the claims as first made, and from the claims as allowed in the patent, and from the language of the body of the patent, that Mr. Wainwright's idea was that the frame and anchors described in his patent was the feature which gave it value. The corner bar is only an incident. His chief object was to strengthen the mass of the curb, not to protect its outer upper edge. While this fact does not disentitle him to the benefit of any invention he may have made incidentally and as a minor part of his main purpose, it is a material fact in determining the real meaning and extent of his claims.

The patent gives no verbal description of the corner bar used to protect the upper outer edge of the curb, except that it has a tongue at the back of it to enter certain slots or recesses in the arms of the frame. This does not state or imply that the tongue is continuous from one end of the bar to the other. Nor does the description in the patent indicate whether the corner bar is flat or curved. The drawings show a curved corner bar, with a flat tongue between parallel faces, from the point where it leaves the bar. A cross-section of the bar in the drawings shows that it is a section of a pipe. The entire bar as shown in the drawings might be obtained by splitting a small iron pipe and fastening an iron sheet at the middle point of the segment taken and extending to or beyond the center. The only function which is stated to be subserved by the tongue is that it rests in the slots of the arms of the frame. There is no suggestion that more tongue is required than enough to rest in these slots, nor that the tongue helps in any way to hold the corner bar in place.

(2) Patent No. 614,587, issued Nov. 22, 1898. Application filed January 26, 1898.

On January 26, 1898, Mr. Wainwright filed an application for a patent for "Improvements in the means for protecting projecting edges of concrete work." This application was eventually changed so as to read: "Improvements in the construction of concrete curb and gutter work." The first clause in this application as filed read: "This invention relates to improvements in means for protecting projecting edges of concrete work." This clause was also finally changed so as to read: "This invention relates to improvements in the construction of curbing, guttering and similar concrete work." Under this application, Mr. Wainwright made seven claims, as follows:

"1. The combination in concrete work, of a continuous metal bar for protecting the corner of the work, guides for temporarily supporting said bar during construction of the work, and concrete backing laid against said bar,

whereby amalgamation of the concrete and metal surfaces fixes the bar in place, substantially as described.

"2. The combination in concrete work of a continuous metal bar for protecting the corner of the work adjustable guides for temporarily supporting said bar during construction of the work and concrete backing laid against said bar, whereby amalgamation between the concrete and metal surfaces fixes the bar in place, substantially as described.

"3. The combination in concrete work of a continuous galvanized metal bar for protecting the corner of the work and concrete backing laid against the bar, whereby amalgamation of the cement and concrete surfaces fixes the bar in place, substantially as described.

"4. The combination in concrete work of a continuous galvanized metal bar for protecting the corner of the work, guides for the bar consisting of a support and an adjustable bracket thereon, and concrete backing placed around said guides and against said bar, substantially as and for the purpose described.

"5. The combination in concrete work of a concrete curb and gutter, and a continuous metal bar at the front edge of the gutter and between it and the street paving, substantially as described.

"6. The combination in concrete work of a continuous galvanized metal bar for protecting the corner of the work, temporary guides for said bar consisting of supports, j, and brackets, k, adjustably secured to said supports and recessed to receive said bar. substantially as described.

"7. The combination in curbing and guttering of a continuous galvanized metal bar, E, for protecting the corner of the curb, temporary guides for said bar consisting of supports, j, and brackets, k, adjustably secured to said supports and recessed to receive said bar, E, and continuous metal bars, G, at the front edge of the gutter and between it and the street paving, substantially as described."

All the above claims as made were finally rejected by the Patent Office and tacitly abandoned by Mr. Wainwright, who substituted in lieu thereof the following three claims, which were allowed, after considerable time and discussion, viz.:

"1. The combination in curb and gutter work of a continuous galvanized-metal T-bar at the exposed corner of the work, brackets adapted to support said bar during the progress of the work, and concrete backing laid against the said bar and embedding said brackets, substantially as and for the purpose described.

"2. The combination in curb and gutter work of a continuous metal T-bar at the exposed corner of the work, brackets recessed to receive the rib of said bar and support the bar during the progress of the work, and concrete laid against said bar and embedding said brackets, whereby the union between e set concrete and the bar holds said bar in place, substantially as described.

"3. The combination in curb and gutter work of adjustable recessed brackets, a continuous metal T-bar provided with a rib adapted to fit said brackets, and concrete laid against said bar and embedding said brackets substantially as described."

In his specifications in this patent, Mr. Wainwright says:

"When curbs and similar work are constructed of concrete, it is indispensable that the corners of the curbs, etc., shall be protected from breakages due to the collision of vehicles and other objects therewith, and I have devised a system of protecting such corners by practically continuous bars of iron or steel. This system is not broadly herein claimed, since it is the subject of my earlier patent; but I do claim the improvements thereon, hereinafter particularly described. Said improvements, in general terms, comprise the following principles and mechanical elements: The protection of the corners of the work consists of a bar of galvanized iron or steel of peculiar shape [hereinafter described]. "A T-bar, the sections of which are laid with closely abutting ends so that the sections together form a continuous bar. Now, I have

discovered that, when a surface of iron or steel is backed with concrete, such an adhesion or union takes place that the iron or steel is held to the concrete with great tenacity, even when the iron or steel is not imbedded in but merely laid firmly against the concrete backing. I have made a highly useful application of this discovery in my present invention, wherein I first set up brackets containing guide ways. These brackets support the protecting bars, while the cement or concrete backing which forms the curb is being laid, shaped, and set. When set, the union between the cement or concrete and the bars has taken place and said bars are held most firmly in position practically as a part of the structure itself. It is to be particularly noticed here that the structure mentioned presents a very different condition from that exising in a bar of iron or steel, as a stay-bolt or tie rod is embedded in a mass of concrete. The present case is merely a superficial contact on only the back and tongue of the protecting bar and embedding the whole bar in the concrete is impossible, since that would defeat the purpose of the structure, which is that the bar should project or show at the front of the work."

He then goes on to claim the use of galvanized iron bars as part of this combination. Now, obviously, no weight can be given to Mr. Wainwright's statement that he had discovered that concrete adheres with great tenacity to an iron or steel surface on which it is laid, since that fact has been observed and known for centuries. Practically the claimed improvement consists, then, simply in this: That Mr. Wainwright devised a very simple frame to hold in place a bar having a tongue and a convex surface while the cement was hardening on the inner surface of the bar. There was no invention in remarking that the upper outer corner of the curb was liable to be chipped and broken by the impact of wheels against it. There was no invention in the general idea that this upper corner might be protected by a metal covering or bar of some kind. The only question, then, is whether there could be an invention in suggesting that the metal protection for the corner should consist in a solid galvanized iron bar having a convex surface on the outside, with a tongue extending into the cement, and held in position by a frame until the cement hardened. The convex surface of the bar had already been suggested for this very purpose in a patent issued to I. L. Landis for a pavement curb on July 8, 1890, and it had also appeared in the drawings in the first patent issued to Mr. Wainwright, and no invention was claimed. The general idea that the protecting bar should have a tongue set into the concrete also appears, though not clearly, in the drawings to Mr. Wainwright's first patent. As neither the idea of a protecting bar, nor the convex surface of that bar, nor the existence of a tongue extending from it diagonally into the mass of the cement were patentable, it seems to me that there was nothing patentable in the protecting bar shown in Mr. Wainwright's patent, No. 614,587, issued November 22, 1898.

The general idea of protecting with metal pieces the edges and corners of blocks of artificial stone dates back to a patent issued on December 21, 1869, to Francois Coignet. Coignet claimed that his invention consisted in:

"Protecting the exposed corners, sides, edges, or angles of artificial stones by means and with the use of metallic shields fastened thereto in the process of manufacturing said stone, substantially in the manner herein set forth."

The drawings accompanying and showing the Coignet patent show that his proposed edge protector consisted of two metal planes at right

angles and held in place by bolts or rods extending diagonally from the corner into the mass of the concrete. Coignet, it is true, proposed to form the artificial stones in which the corner was protected in molds, from which the stones would be taken and carried to the place where they were to be used. Mr. Wainwright, on the other hand, builds up the stones in the very place and position in which they are used, so that they do not require to be moved, but remain where they set and harden. But the present litigation is not concerned with this aspect of the two inventions. The only matter now under consideration is the feature of the two patents which relates to the protection of the edges of artificial stone with a metal shield or guard of some shape. Clearly Coignet was the first to conceive the general idea of this invention. The only difference between his metal protector and that of Wainwright was that Coignet's metal protector was square-edged, and held in place by bolts or rods with expanded ends, and running diagonally from the corner into the concrete, while Wainwright's metal protector was convex, and was held in place by a continuous tongue extending into the concrete in the same direction as the bolts. Mr. Wainwright's first patent in 1890 shows, but does not claim any invention for, the convex surface of the corner metal protector. This feature of the bar was, therefore, not patentable in the second patent, that of 1898. Besides, the Landis patent, No. 431,898, issued July 8, 1890, shows a metallic edge-protecting bar, having a convex surface at the edge. The use of a galvanized iron bar, instead of a plain iron bar, was certainly not patentable. The use of a continuous expanding tongue to hold the metallic edge protector in place while the concrete is hardening, and to help hold it in place after the concrete has set, is shown in a patent issued to R. S. Griffin on April 16, 1872, for holding a corner head of wood on the edge of a body of plaster. In any case it does not seem to me that the substitution of a continuous tongue in place of the bolts and stays shown in Coignet's patent presents patentable novelty.

(3) Patent No. 727,233, issued May 5, 1903. Application filed March 8, 1900.

In this patent Mr. Wainwright claimed invention for the form of the corner bar and tongue. The only difference between the corner bar and tongue described in this patent and the corner bar and tongue described in the patent of 1898 is that the tongue in the 1903 patent is spread out or enlarged at the inner end. I can see no invention in this change of the form of the tongue. The function of the tongue being to help hold the corner bar tight to the curb, it was so obvious that this function would be better performed if the end of the tongue were enlarged that it would occur to any mechanic of the most ordinary capacity and skill to enlarge it. Nor would any mechanic, so enlarging the tongue, dream that he had thereby invented anything worth patenting.

So far as concerns the metal protecting corner bar, all three of the patents taken out by Mr. Wainwright seem to me to be merely slight modifications of Coignet's construction. The only features in the Wainwright construction of the corner bar for which patentability could ever have been claimed—and the claim for them would have

been of very doubtful validity—were the substitution of the convex corner bar for the square edged corner bar and the continuous tongue for the bolts and stays of the Coignet bar. But these features appeared for many years in Wainwright's patents before he attempted in the 1903 patent to patent them. It was then too late. They had become common property. In Coignet's patent the drawings exhibit the bolts enlarged at the end to hold them more firmly in the concrete. It was inevitable almost to adopt the same construction, when a continuous tongue was substituted for the separate bolts. The imbedded end of the tongue would be enlarged to make it more difficult to draw the tongue out of the concrete, just as the imbedded end of the bolt had been enlarged for precisely the same purpose. As regards the corner bar, my conclusion therefore is that none of the patents issued to Mr. Wainwright show invention or novelty, and that they are all void.

This conclusion necessarily results in the rejection of plaintiff's demand. I was strongly inclined to hold that the defendants were estopped from contesting the validity of the plaintiff's patents by reason of the fact that the defendants set up a patent which is nothing more than a copy, with immaterial variations, of the 1903 Wainwright patent. This patent of defendants is that issued to Soniat Du Fossat on November 22, 1904, under application filed on November 13, 1903. The Du Fossat patent was applied for more than six months after the issuance of Mr. Wainwright's last patent. Du Fossat's construction is so obviously copied from the last Wainwright patent that its nullity is beyond question. But can the defendants deny patentability in the Wainwright patent, when they claim patentability for an illegal imitation of that patent? I am strongly inclined to hold that they cannot. I would so hold if there were authority for thus deciding this controversy as between plaintiffs and defendant. On reflection, however, I have concluded that the evidence does not necessarily implicate the defendant in fraud. They took advice of reputable patent lawyers as to their rights and seem to have acted in good faith. Mr. Mioton, who was instrumental in procuring the Du Fossat patent, says he never examined the Wainwright corner bar until he had filed application for the Du Fossat patent.

On the whole, I have concluded that the only judgment I can render is one based on the invalidity of the Wainwright patents. There must, then, be a decree in favor of defendants, rejecting plaintiff's demands.

BLAKE & KNOWLES STEAM PUMP WORKS v. WARREN STEAM PUMP CO.

(Circuit Court, D. Massachusetts. August 2, 1907.)

No. 167.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.

Where a patented structure, although a combination of old elements, is new, and capable of a use which is new and of special utility, and in such use constitutes an important advance in the art, it cannot be denied

patentability because other uses are also claimed for it, in which it is not a substantial advance on the prior art.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 49.]

2. SAME—INFRINGEMENT—PUMPING ENGINE.

The Whiting & Wheeler patent, No. 526,913, for a pumping engine intended for use as an air pump for withdrawing the water and air from the condenser of a steam engine, was not anticipated and discloses patentable novelty and invention. The Hall & Gage patent, No. 522,938, for a combination which includes a special valve movement for use in connection with such pump, also *held* valid, and both patents *held* infringed.

In Equity.

Philipp, Sawyer, Rice & Kennedy, for complainant.

George L. Roberts & Bro., for defendant.

BROWN, District Judge. The bill charges infringement of two letters patent; the earlier in date of application being No. 526,913, granted October 2, 1894, for the invention of Whiting & Wheeler, and No. 522,938, granted July 10, 1894, for the invention of Hall & Gage. Both patents relate to pumping engines. It clearly appears from the specification of each patent that the devices claimed were intended for use as "air pumps" for withdrawing the water and air from the steam engine condenser, to maintain a partial vacuum in the condenser and exhaust piping of the engine. The efficiency of the complainant's pump for this purpose is well proved, and is not denied. The defense is based largely upon the fact that the pumps were also intended for use as water pumps, or as combined air and water pumps. I agree with the complainant's criticism of the defense, that it is based on a false position and incorrect interpretation of the patents in suit.

The defendant is obliged to concede that the exact combinations claimed in these patents are not anticipated in the prior art. Furthermore, it has not been able to deny complainant's proof that the pump embodying these features produces a novel and useful result, namely, the production of a higher vacuum than was produced by any of the prior combinations or devices.

The efficiency of complainant's pumps is shown by most convincing testimony, and by their adoption as air pumps on the United States vessels Minneapolis, Columbia, Indiana, Massachusetts, New York, and Brooklyn, and on the steamships Kaiser Wilhelm der Grosse, Hamburg, Princess Irene, Koenig Albert, Deutschland, New York, Philadelphia, etc., and in many electric lighting and traction plants.

The defense is most elaborate, but is so thoroughly permeated by a fallacious interpretation of the patents that the case may be most conveniently considered by disposing of this fundamental question at the outset. The defendant's brief states:

"The structure to which the subject-matter of these claims purports to appertain constitutes a vertical twin steam pump wherein buckets are contained in the pump cylinders, but are to subserve any of the uses of which they are capable.

"This * * * is manifest from the language of the specification of the Whiting & Wheeler patent, which explicitly declares (page 1, lines 22–32; page 2, lines 17–28) that the two bucket pumps of the structure therein described and shown may be used either both for pumping air (meaning the mingled air and water coming from the steam condenser), or both for pumping water,

or one for pumping water and the other for pumping air; so that the subject-matter of neither of the claims of this patent, at least, can be characterized by any function which is not common to all these three modes of use."

A consideration of the logical and legal validity of this contention may obviate the necessity for considering in detail much of the defendant's argument. The defendant's brief concedes that what is claimed is a structure. It is also conceded that the same group of features has not been contained in previous devices. The exact structure is new, and, when used as an air pump, is so great an improvement on the air pumps of the prior art that it has largely displaced them and has gone into extensive use. The defendant, nevertheless, argues that the device of each patent is not novel in the sense of the patent law, nor in a substantial sense, because, considered as a water pump, or as pumping water in one pump cylinder and air in another pump cylinder, it is in substance anticipated by combinations using, instead of buckets, plungers or pistons. It is thoroughly proved that, for air pump use, buckets have great advantages, which cannot be secured by pistons or plungers, and that these are not equivalents for buckets in air pump use, though they may be for other purposes.

The defendant makes the remarkable contention that the evidence of the utilities of the patented structure as an air pump is wholly immaterial, because these utilities do not also appertain to it as a water pump, or as a combined air pump and water-circulating pump. This is to say that if the structure is new, and capable of three uses, one of which is of special utility and constitutes an important advance in the art, and two of which are of no substantial advance on the prior art, the invention is to be judged by leaving out the inventor's novel contribution to the art, merely because he says that his new machine will also do what old machines have done as well. This proposition is reiterated by the defendant in various forms:

"All the evidence, therefore, which the complainant has adduced to show the alleged merits and utilities of the twin air pumps manufactured by it under the patents in suit, is wholly immaterial and wide of the mark. It is not equivalent to showing what merits or utilities, if any, the structures described, shown and claimed in the patents sued upon, have by virtue of what is common to all their modes of use in comparison with other prior pumping engines. Neither the question of their utility nor the question of their novelty can be settled by consideration only of one of their modes of use. The inquiry in each case is concerned solely with what is characteristic of the structure when put to all the uses of which it is capable."

It is a distinctive characteristic of the patented structure that, when used to pump air, it will create a high vacuum, and, in my opinion, there is no practical reason, and no reason in law or logic, which will permit a court to disregard this fact or to deprive an inventor of the benefit of this fact through any language used in the specification. The defendant offers no authority and no argument to support such a rule of construction, but throughout its brief assumes that the correctness of its position is self-evident. To all of the prior devices presented to show noninvention, the complainant replies that they are not capable of the results which the device of the patents in suit attains, and the sole reply to this is that it is immaterial. The defendant treats the claims of the Whiting & Wheeler

patent as if they were for an abstraction of that which is common to all the uses of the claimed structure, instead of for a claimed structure which is capable of three uses, one of which is proved to be of special value. It is a remarkable argument to say that, although Whiting & Wheeler show a structure and claim a structure which unquestionably is designed and intended to be operated as an air pump, they are not entitled to show the advantages from such operation, because they do not exist when the structure is used for a water pump, or do not wholly exist when one of the buckets is used for a circulating pump. The proposition that no novelty is to be attributed to Whiting & Wheeler which is not contained in all the uses of their device is clearly contrary to the decisions in this circuit. Forsyth v. Garlock, 142 Fed. 461, 73 C. C. A. 577; Watson v. Stevens, 51 Fed. 757, 2 C. C. A. 200; Davey Pegging Machine Co. v. Isaac Prouty & Co., 107 Fed. 505, 509, 46 C. C. A. 439; Consolidated Car Heating Co. v. American Electric Heating Corporation (C. C.) 82 Fed. 993, affirmed on appeal 85 Fed. 662, 29 C. C. A. 386.

A second question arises as to the construction of the Whiting & Wheeler patent. The general structure claimed in this patent may be understood from the following claims:

"1. The combination with the two vertical pump cylinders and their lifting buckets and valves, of direct acting steam cylinders and pistons with their piston rods in line and connected to the rods of the buckets, a frame and columns connecting with the pump cylinders and on which frame the steam cylinders are directly connected, a walking-beam between the pump and the engine and a pivot for the same upon a bearing extending down from the frame, and link connections at the respective ends of the walking-beam to the cross-heads of the piston rods for unifying the action of the engine directly upon the lifting buckets, substantially as set forth.

"2. In a direct acting pumping engine, the combination with a pair of pump cylinders having lifting buckets and valves and valves in the lower part of the pump cylinders, of steam cylinders and piston rods connecting the buckets of the pump and the pistons of the engine, a walking-beam between the pump cylinders and the steam cylinders, links connecting the ends of the walking-beam with the piston rods, and a frame extending up from the pumps and to which the steam cylinders are directly connected and which frame also supports the pivots of the walking-beam, substantially as set forth.

"3. The combination in a pumping engine of two vertical pumping cylinders, buckets and rods for the same, a frame upon the pump cylinders, and steam cylinders directly connected to and supported by the frame, the piston rods of the engine being in line with and directly connected to the rods of the pumps, a walking-beam between the pump and the engine and links connecting the walking-beam and the cross-heads of the piston rods, the parts being arranged so that the links are in the same plane or nearly so as the piston rods at the termination of the respective strokes, substantially as set forth."

The complainant says that this patent is on the general combination of the pump proper with the direct acting steam engine by which it is actuated, and the structure of the whole pump, and that the Hall & Gage patent is on the combination of the Whiting & Wheeler air pump with a special steam valve movement, by which important results are secured in certainty and efficiency of action. The general character of the Hall & Gage patent may be gathered from claims 1 and 2:

"1. The combination of two pump cylinders, two steam cylinders arranged in line respectively with said pump cylinders, buckets in said pump cylinders, pistons in said steam cylinders, and piston-rods connecting said pistons and

buckets, valves for said steam cylinders to control the admission of steam thereto and the movements of the pistons therein, a valve-driving engine connected with and to positively move said valves, a valve mechanism for said valve-driving engine, a rocking beam pivoted at its middle and connected at its ends with and to be rocked by said piston-rods, and a connection between said beam and valve mechanism whereby the movements of the valve-driving engine are positively controlled by the vibration of the beam and the movements of the main steam valves for the steam cylinders by the valve-driving engine, substantially as described.

"2. The combination of two pump cylinders, an entablature supported above the same and sustaining thereupon two steam cylinders in line respectively with said pump cylinders and having their pistons connected with buckets in said pump cylinders by common piston-rods, a bracket on the under side of said entablature, a beam, D, comprising two members pivoted in said bracket and having its opposite ends connected with and at opposite sides of the said piston-rods, a valve-driving engine having its valve mechanism connected with and operated by said beam, and valves to control the admission of steam to the steam cylinders respectively actuated by said valve-driving engine, substantially as described."

The term "direct acting engine" is proved to have been long used in the engineering art to exclude engines with a crank and fly wheel and other rotative parts, and the Whiting & Wheeler specification states:

"The devices for actuating the steam valves may be of any desired character, so long as they are positive in action; i. e., without 'dead center,'" etc.

While there is evidence from the defendant tending to show that this usage of the term "direct acting" is not uniform, it is not necessary to determine which usage is the more general or better It is enough if the patentees have used terms which are warranted by good usage to limit the character of the engine named in the claims. The complainant's expert testimony is sufficient to show that, upon a fair construction of the claims and specifications, the patentees intended to use an engine which works without the use of crank and fly wheel or other device for producing rotary motion. Pumping engines controlled in operation by crank and fly wheel are therefore not relevant to limit the claims, and it is well proved that they are not adapted, to secure the advantages of the complainant's device.

The pumps constructed according to the patents in suit are controlled in speed and length of stroke solely by the pressures in the steam and pump cylinders, instead of by a crank and fly wheel, and it is abundantly proved that from this difference follow practical results of importance.

Another feature of the device of the Whiting & Wheeler patent in suit is that in one mode of use pointed out in the patent it is not only entirely independent and free from control by crank and fly wheel, but is free from control by a circulating pump, presenting for the first time in the art, so far as appears from the evidence in this case, an absolutely independent air pump. While the patentees have said in the Whiting & Wheeler patent that:

"The circulating water that passes through the condenser can also be advantageously pumped by the same independent engine that operates the air pump."

And also:

"The object of our invention is to apply a direct acting engine to the air pump or combined air and circulating pump in such a manner that the whole will occupy very little space and at the same time to furnish facility for access to the valves and other parts of the pumping engine"—

and while the patentees considered that their invention was present when the pump was a combined air and circulating pump, yet they clearly show and clearly direct the use of the patented structure in such manner that it is entirely free from any control by the circulating pump.

The advantages which are proven to result from the use of the structure as an air pump, free from the impediment of control by the main engine, of crank and fly wheel, or of the circulating pump, are:

"First. The movement of the buckets is controlled by the pressure in the air pump cylinders, so that, the pressure being small at the beginning of the stroke, on account of the air in the cylinders, a jump of each bucket during the first part of the stroke takes place, this jump being very quick and extending through a large portion of the stroke, until the bucket strikes the water on the down stroke or the water strikes the head valves, if these be used, on the up stroke, when the bucket slows down and moves very slowly during the rest of the stroke. This jump is of great importance in securing a high vacuum, by acting to open the valves in the bucket quickly and thus getting the air out of the condenser quickly.

"Second. The air pump automatically adjusts itself to the varying conditions of the condenser, the speed varying with the amount of air and water coming from the condenser, and the pump slowing up in case of gulps of water coming over, so as to avoid shock and strain. This automatic adjustment aids greatly in maintaining a high vacuum and preventing damage to the pump.

"Third. The speed of the pump, apart from this automatic adjustment, may be readily regulated to the speed which is found best suited to the running conditions of the condenser and engine with which the pump is used. The speed is not dependent upon crank and fly wheel operation, nor upon the speed of a circulating pump, as in the Aries and Coryell pumps."

These statements, which I quote from the complainant's brief, are fully proved, and there is no substantial denial of these advantages. The Coryell pump of the prior art resembles the complainant's device in the use of twin bucket pumps. This device was a combined air and circulating or water pump, and was constructed in accordance with patent No. 306,467, October 14, 1884. In this patent there is indicated no perception of the advantages resulting from freeing the action of the pump from the control of the water circulating pumps. It is said by the defendant:

"The Coryell patent, on the contrary, makes a merit of such an arrangement; for it states that the water cylinder of the pumping engine renders the movements of the steam engine and air pump very uniform."

It is quite true that the Whiting & Wheeler patent in suit does not specifically point out the advantages which will follow from operating the pump as an air pump, nor does it state the specific mode of operation of the parts. It makes no express reference to the fact that its operation will be different when it is used solely as an air pump from its operation when it is used as a water pump or as an air and water pump. It makes no express reference to the fact that its

rate of speed may be such as is suitable for pumping air only, and need not be such rate of speed as is required for a circulating pump. The defendant insists that the complainant is attempting to support a claim for invention upon an obscure mode of operation, which merely lurked in a particular use of the thing claimed, but which did not belong to all its uses, and was not even indicated or suggested as appertaining to it, and that this is not countenanced in the administration of the patent law.

Nothing is clearer, however, than that these patentees have specifically suggested the entirely independent use of the structure of the patents in suit as an air pump. The complainant has proved that in such use it is an air pump which is superior to those of the prior art. The descriptions by the experts of the novel operations whereby this important result is reached are not expert attempts to read into the patent what it does not contain, but are merely explanations of a mode of operation whereby the machine described differs in operation from the devices of the prior art and whereby superior results are attained. The complainant's brief states:

"The invention in issue involves a novel idea, which is the operation of the direct-acting bucket air pump without control by a crank and fly wheel or a circulating pump. The idea is new, and the fact that the means for carrying out the ideas were all old does not negative patentability, in view of the new use to which they were adapted, new functions, and the great utility of the combination. It is not conceivable that the combinations by which this important advance in the art was made were obvious."

I am of the opinion that the record in this case fully warrants the above statement of complainant's counsel. The evidence of the long-continued attempts to produce a satisfactory air pump, and that it was previously considered necessary or advantageous to control the pump either by attachment to the main engine, or by a crank and fly wheel, or by circulating pumps, and the practical results following from securing a really independent pump controlled only by the pressures in the steam and pump cylinders, in my opinion, is sufficient to establish invention in the Whiting & Wheeler patent against all the devices produced by the defendant to show that all Whiting & Wheeler did was to make a permutation of devices of the prior art. The ultimate position of the defendant is that there are two aspects of the want of substantial novelty in the structure of the patents in suit: (1) That by substitution in a particular structure, like the Chiswick pumping engine, of homologous features taken from other twin steam pumps, the complainant's structure might have been produced as a mere matter of modification of structural details; or (2) that the Aries direct acting single steam pump, or the wrecking bucket water pump duplicated and twinned together by the same means exemplified in other twin steam pumps, would have produced the pump of the patent in suit without the use of the inventive faculties. It is finally said:

"The issue of patentable novelty in the case at bar is resolved into the question whether, given a considerable number of instances of prior vertical steam pumps all fundamentally alike and containing certain subordinate structural features, there was any invention in transferring either or any of these features to a vertical twin steam pump of the same kind, to perform therein exactly the same functions as before."

This statement erroneously assumes that the functions of the features combined in the Whiting & Wheeler patent in suit are exactly the same as before. It is well proved that the pumps which are the ultimate factor in exhausting the condenser are made to operate in a different way from the pumps of prior devices, and that this operation is more efficient in securing a vacuum, and that this superior efficiency is due to a new combination of old elements.

In Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 616, 27 Sup. Ct. 307, 310, 51 L. Ed. 645, it was said:

"It is well settled by numerous decisions of this court that, while a combination of old elements producing a new and useful result will be patentable, yet where the combination is merely the assembling of old elements producing no new and useful result, invention is not shown."

The principal basis for the contention that the complainant's devices have produced no new and useful result is the erroneous argument that the patent cannot be so construed as to give the complainant the advantage of new and useful results in air pump use. As I am of the opinion that the complainant is entitled to a construction of the patents which secures to it the structures claimed for all the uses of which they are capable, the present case falls into that class of cases where a combination of old elements producing a new and useful result is regarded as patentable.

The contention that the Whiting & Wheeler patent is invalid by reason of prior personal knowledge of the individual patentees is based upon a drawing of a proposed combination of air, circulating, and feed pumps; but there is shown in this device no conception of a completely independent air pump, or of the novel ideas which are characteristic of the Whiting & Wheeler structure, when employed as the patent directs for air pump use. The same argument as to equivalency or approximate equivalency of prior structures and the same peculiar interpretation of the Whiting & Wheeler patent underlies the contention that the patent is invalid by reason of prior personal knowledge as underlies the main proposition that there is no substantial novelty in the Whiting & Wheeler patent.

As to the Hall & Gage patent, the defendant contends that the structure is the same as that described and shown in the Whiting & Wheeler patent, with the sole exception of the addition of a connection between the walking-beam and the valve-driving engine.

The complainant insists that it cannot be properly said of the claims of the Hall & Gage patent that they are merely for combinations of old elements, since the valve movement, which is one element, is itself novel, apart from its combination with the direct acting bucket air pump, and also because with this novel element combined with the direct acting bucket air pump there is produced a structure in which the elements coact to secure a single result; that is, absolute certainty and reliability of operating the separate steam valves of the two cylinders instantaneously and at exactly the same moment, and under positive control as to time of operation by the pumps through the beam regardless of the variation of speed or jump of the buckets.

In both patents the framework is of such character as to permit of a compact and self-contained construction, so that the jar and

shock from the peculiar action of the buckets is taken up by the frame and not transmitted to cause strain upon the steam pipes or upon the operating parts. I am of the opinion that both patents are for true combinations, and that the contention that they are merely for pseudo combinations involves a disregard of the fact that all of the features named in the claims contribute to a unitary result.

The criticism that the claims specify "merely an assemblage of structural features, among which some are functionally independent of the others and have no mutual influence or effect upon one another," does not present a proper test of the existence of a true combination. It is admitted that there is one sense in which all parts of such a structure are combined, namely, in the sense of sharing the strain derived primarily from the exertions of power by the steam engine; but it is said this is incident to all machinery whatsoever. The practice of patent solicitors, however, to claim, in the manner of the patents in suit, those elements which are useful and which co-operate in the structure, even performing merely the function of support or resistance to strain, is common; and it would be introducing an impractical refinement to reject elements whose function was not novel or merely incidental to machinery in general, and for such reason to invalidate claims which are drawn in a usual, practical, and convenient form. The argument of the defendant fails to recognize and to meet the practical proposition that the parts enumerated are suitable and proper parts, each having its greater or lesser share in the improved work performed by a novel structure.

A further consideration of the details of the very elaborate defense, in my opinion, is unnecessary. I have very carefully examined all the defendant's contentions, and I find nothing therein sufficient to overcome the presumption of validity of the patents in suit. If, indeed, it is true that the devices of the prior art are in substance the same as the devices of the complainant, the defendant will be still at liberty to use them. The very strong preponderance of practical testimony is to the effect that they are not the same, and that the complainant's devices owe their value to those variations from the prior art which the defendant disparages as trivial.

I am of the opinion that both patents are valid and are infringed, and a decree may be entered accordingly.

Decree for complainant.

GENERAL ELECTRIC CO. v. E. B. LATHAM & CO.

(Circuit Court, S. D. New York. July 23, 1907.)

No. 9,155.

PATENTS—ANTICIPATION—ELECTRICITY METERS.

The Duncan patent No. 550,823 for improvements in electricity meters of the motor type claims 1 and 8, the essential feature of which is a magnetic shield inserted between the armature and the damping magnets to protect them from the influence of the field coils, are void for anticipa-

tion and lack of patentable novelty in view of the prior art and publications.

In Equity. On final hearing.

Kerr, Page & Cooper (Thomas B. Kerr and Drury W. Cooper, of counsel), for complainant.

Seward Davis (Lynn A. Williams and Charles A. Brown, of counsel), for defendant.

HAZEL, District Judge. This is a patent suit for injunction and accounting based upon the alleged infringement of letters patent No. 550,823, to T. Duncan, dated December 3, 1895, for improvements in electricity meters. The patentee assigned the patent to the Siemens & Halske Electric Company, which subsequently assigned the same to the complainant corporation, which is the present owner thereof. The principal defenses are denial of patentability of the alleged invention and anticipation by the prior art. The patent relates to integrating watt meters of the motor type, which are used to measure the electric current flowing through the circuit to which they are connected. Improvements relating to the construction of the armature, commutator, and brushes are covered by the patent, but such improvements are not included in claims 1 and 8, which alone are involved in this cause. Such claims read as follows:

"1. In an electric meter, a magnetic medium or shield interposed between the drag or damping magnets and the field coils or other external fields or source of magnetism, adapted to receive the stray lines of magnetism from the said field coils or other external source, and thereby protect the said magnets from the effects of external magnetism, as and for the purpose described."

"8. In an electricity meter, the combination with a motor, and integrating or indicating mechanism, of a retarding device consisting of a movable aluminum or copper disk or cylinder, being cut in its motion by the magnetism of a plurality of magnets, having their field approaching a right angle to the axis of the external magnetic field, from which they are intended to be shielded, and an iron or other suitable protector of convenient form for shielding said magnets, as and for the purpose set forth."

As will be observed, the first claim relates to a magnetic shield inserted between the armature and the damping magnets. The eighth claim relates not only to the shield for protecting the damping magnets, but also covers such an arrangement of the latter as to have their "field approaching at right angle to the axis of the external magnetic field." The specification alluding to the feature of novelty of the quoted claims, says:

"Fourth, the method of preventing deterioration in strength of the magnets employed to produce the necessary brake force by shielding them from the influence of the field coils of the meter; fifth, the further elimination of the weakening of the drag magnets by setting them at right angles to the axis of the field coils."

The complainant claims, and it is not controverted, that in the use and operation of the series coils of the patent in suit there is created a variable magnetic field dependent in its variation upon the amperes or the amount of current flowing through them, and, further, that the rotatable armature, which is necessarily connected in shunt with the

primary circuit, also creates a magnetic field in its immediate locality controlled by the voltage or pressure of the current passing through it. The electricity meter in question is applicable to both alternating and direct current circuits, the different parts being mounted upon a metal ring-shaped frame. The field coils and rotatable armature are adjusted in parallel relation, and by their co-operation cause the rotation of the armature, its velocity being accelerated or retarded according to the current passing through the field coils. The dials of the meter are connected with a spindle or shaft bearing the rotatable armature by the revolutions of which a train of gears is actuated registering the current passing through the circuit. To correctly record the current utilized, a method of retarding the revolutions of the armature is necessary, as otherwise its speed would unduly increase, and the usefulness of the meter become jeopardized if not rendered wholly impracticable. The effect of a retarding device upon the armature is to proportionately increase or diminish its rotation as the current is consumed by the user. The prior art concededly disclosed watt meters, which employed a rotatable disk mounted upon an armature shaft between the jaws of the permanent magnets, which were of different configuration than the magnets in suit, and it is undeniable that by the prior methods of influencing the velocity of the armature interfering or so-called eddy or Foucault currents were generated in the disk which affected the accuracy of the meter and frequently caused it to run fast. Hence, the patentee sought to overcome all such retarding or weakening influences upon the drag magnets by the field coils of the meter, and also to protect such drag magnets from the demagnetization due to stray lines of current. As already indicated, to accomplish the object of the alleged invention the patentee provided a shield for the drag magnets to serve as a protection from the field coils and set the drag magnets at right angle to the field coils. The shield preferably consisted of an iron or steel hood, which partially surrounded the magnets and disk, but according to the specification the patentee did not limit himself as to its form. He positioned a cup-shaped shield between the drag magnets and the series coils, and so arranged the drag magnets as to cause their magnetic field to operate substantially at right angle to the magnetic field of the coils. He was not the first in this field of invention. Various patents for measuring the amount of electric current flowing through a circuit are found in the record. Was Duncan the first to conceive the idea of employing a shield or bar in the manner described in the specification? Did he solve a problem entitling him to the protection of the patent laws? It was old to screen or shield a mechanism which was apt to sustain injurious effects from stray lines of current. The art was familiar with the deterrent effects produced by a magnetic shield inserted between permanent magnets and a detrimental force. It may be presumed that claim 1 read in connection with the specification is for a combination of elements, although the single element emphasized therein was well known at the time it was conceived by the patentee. Its value as an invention, therefore, must depend entirely upon whether a new result was produced by its use in combination with a watt meter.

In the Giles patent reference is made to "a magnetic medium or

shield interposed between" the hair spring of a watch and "external fields or sources of magnetism." The Weston patent describes an instrument for measuring electricity, which includes the element of an iron plate surrounding a magnetic bar to shield the magnetic needle from exterior magnetic influences. The shield was interposed between the permanent magnet and "any field created by any means whatsoever other than that created by the permanent magnets." In the British patent to Crompton & Kapp, No. 4,453 of 1883, is found a magnetic shield inserted between a permanent demagnetized bar of steel to protect the same from external fields or sources of magnetism. Complainant contends that these applications relate to a different art. Nevertheless, I am of opinion that the use of the shield found in the publications mentioned was analogous to the use by complainant. This court is not unmindful of the rule that a simple change or alteration in a mechanism may oftentimes produce valuable results not before known; and, where the prior art discloses a defective mechanism, invention unquestionably may be involved by the adaptation of a practical method. Yet, assuming there were inaccuracies of measurement by prior watt meters due to eddy currents, the effect of such currents was well understood by the skilled in the art and were guarded against by the use of protecting shields. In such circumstances it is thought questionable whether the adaptation by the patentee of the protecting shield in question was patentable. But this court does not decide the submitted question of invention on that ground. Claim 1 is thought to be anticipated by the British patent to Teague of 1891. That patent was an integrating watt meter, and was correctly regarded at the hearing by both sides as the defendant's best reference. The patentee, after stating in the specification the manner in which the magnetic needle should be mounted upon the revolving spindle of the meter, says:

"Between the needle and the mercury trough, magnets, or other disturbing portion of the apparatus is interposed a magnetic screen f, adapted to screen the needle from stray lines of force, and formed with a small hole in the center through which the spindle b will pass freely. The screen f is shown as flat, and supported on small brass pillars, but it may be dished or made funnel-shaped to drain back any mercury displaced from its trough. The cover of the case a is of some suitable nonmagnetic material, and to the outside of the case is mechanically secured a frame g, which contains a suitably arranged train of wheels or integrating gear (not shown), actuated from a suitably mounted rotatable spindle h, and to this second spindle h is attached an outer magnetic needle i or a piece or pieces of soft iron. The latter needle or iron is mounted as close to the inner needle as possible, so that when the latter rotates by the actuating devices of the meter the outer needle is also rotated by magnetic induction only, acting through the case without any mechanical connection."

The location of the magnetic shield is not dissimilar to the location specified in claim 1. It is not enough to assert that the Teague device was a different style of meter, that it relates to a mercury meter, or that the patentee merely intended to remove disturbances affecting the magnetic needle as distinguished from harmful effects upon the drag magnets. The particular object of the screen f, as heretofore observed, was to shield the magnetic needle from stray lines of force. This likewise was the object of claim 1 in suit based upon the principle disclosed

by the Teague patent. Hence, such claim is anticipated by the Teague patent.

The eighth claim is specifically descriptive of the Duncan watt meter in the light of the fourth and fifth feature of the specification for protecting the permanent magnets. In approaching the consideration of this claim, I conceive the principal question to be whether the prior art disclosed a "plurality of magnets having their field approaching at right angle to the axis of the external field from which they are intended to be shielded." Upon this point the complainant's witness Ackerman, speaking of the Duncan meter, says:

"The lines of magnetic force from the fields cut the armature in a direction at right angles to the windings and that the direction of the lines of force of the permanent magnets, being from pole to pole, are at right angles to those of the field coils."

This version is also in harmony with the view of defendant's expert witness. The patentee asserts that in meters wherein the field coils and magnets were parallel to each other the stray flux interferes with the drag or braking magnets, and therefore the meter inaccurately registers the current flowing through it. Assuming that if claim 8 were unanticipated by the prior art a patentable improvement would be apparent, yet at the date of the invention in suit it was not new to arrange the drag magnets and the field coils in an angular relation, as will be observed by an examination of the prior publications hereinafter mentioned.

In the patent to Elihu Thompson, No. 432,654, the arrangement of the parts is such as to create a magnetic flux at right angles to the axis of the field coils. That the patent relates to a type of meter of an oscillating structure and not to a rotating armature is not thought important. In the Thompson patent, No. 448,894, is shown an integrating meter with a rotating armature mounted between the field coils, the armature being mounted upon a spindle which also bears a commutator and a counting train. The specification shows a retarding device in the form of a rotatable disk positioned below the armature and field coils while the poles of the permanent magnets embrace said disk, the resultant of the angular arrangement being that the field of the magnets is perpendicular to the axis of the field coils. In the patent to Scheefer, No. 530,351, which is a close reference, is shown an angular arrangement together with the axis of the field coils perpendicular to the permanent magnets and the flux in the air gaps. Complainant insists inter alia that in the Scheefer patent there is no magnetic shield, that the windings of the field coils are around an iron core, and also that the so-called perpendicular lines are those which stray out from the sides of the core and not from the magnetic field induced by the field coils. The testimony of the expert witnesses upon the latter point is widely discrepant and difficult to harmonize, but the testimony of the defendant is thought to fairly indicate that by the Scheefer arrangement of the field coils and the drag magnets, as indicated by the explanatory figures 2, 3, and 4 of the illustrative drawings found in defendant's brief, the drag magnets are at right angle to the axis of the field coils and the flux in the air gap is likewise at right angle to the field coils.

Without deeming it necessary to discuss the question raised by the defendant that claim 8 is for an aggregation and not for a combination, or to answer the arguments in opposition to the claim of anticipation, I have concluded on the whole record that said claim contains no patentable novelty. The principle of both claims, in my opinion, is disclosed in the prior art.

The bill lacks equity, and is therefore dismissed, with costs.

HOTEL SECURITY CHECKING CO. v. LORRAINE CO.

(Circuit Court, S. D. New York. July 2, 1907.)

1. PATENTS—NOVELTY—METHOD OF ACCOUNT CHECKING.
The Hicks patent, No. 500,071, for a method of and means for cash registering and account checking, designed to correctly check the account of each individual waiter and of the cashier employed in a hotel or restaurant, and to prevent peculation and collusion between customers and waiters to defraud the proprietors, is void for lack of patentable novelty and invention; the method shown differing in no patentable sense from those previously in use.

2. SAME—EVIDENCE OF INVENTION—EXTENT OF USE OF PATENTED ARTICLE.
Where there is no invention, the extent of the sales and use of the patented article is immaterial to sustain the patent.

In Equity. Suit for infringement of patent. On final hearing.

Albert Francis Hagar (Robert N. Kenyon and Richard Eyre, of counsel), for complainant.

George D. Beattys and George B. B. Lamb, for defendant.

HAZEL, District Judge. The patent in suit, No. 500,071, granted June 20, 1893, to John T. Hicks, is for a "method of and means for cash-registering and account-checking." The specification substantially states that the object and general purpose of the alleged invention is to correctly check the account of each individual waiter and of the cashier employed in a hotel or restaurant, and to prevent peculation and collusion between customers and waiters to defraud the proprietors. According to the patent, the said object is accomplished as follows:

"I provide each waiter with slips of paper bearing some mark which shall distinguish the slips from those used by any other waiter in the same establishment, and I provide the person in charge of each department, which fills an order given by waiters, with a sheet or sheets of paper also so marked that a particular sheet or column shall be appropriated to each of said waiters and to him only. These marks may be the name of the waiter, or a number, or the color of the paper, or any arbitrary symbol, though, in practice, I have given a number to each waiter, and required him to wear a badge showing it, and provided one sheet for each department to be ruled lengthwise into parallel columns, each headed with a corresponding number, and believe this to be the easiest and simplest way of connecting the waiter, the slip used by the same waiter, and the sheet or column appropriated to him by each department."

The claims of the patent, two in number, read:

"1. The herein-described improved means for securing hotel or restaurant proprietors or others from losses by the peculations of waiters, cashiers, or

other employés, which consists of a sheet provided with separate spaces, having suitable headings, substantially as described, said headings being designatory of the several waiters to whom the several spaces on the sheet are individually appropriated, in conjunction with separate slips, each so marked as to indicate the waiter using it whereby the selling price of all the articles sold may be entered in duplicate, once upon the slip of the waiter making the sale, and once upon his allotted space upon the main sheet, substantially as and for the purpose specified.

"2. The herein-described improvement in the art of securing hotel or restaurant proprietors and others from losses by the peculations of waiters, cashiers, or other employés, which consists in providing separate slips for the waiters, each so marked as to indicate the waiter using it, and in entering upon the slip belonging to each waiter the amount of each sale that he makes, and also in providing a main sheet having separate spaces for the different waiters and suitably marked to correspond with the numbers of the waiters and of their slips, and in entering upon said main sheet all the amounts marked upon the waiters' slips so that there may thus be a duplication of the entries, substantially in the manner and for the purpose specified."

Claim 1 points out how the benefits of the patent may be secured to hotel and restaurant proprietors, while claim 2 indicates what must be done to effectuate the purpose of the patentee. Importance is placed by the complainant upon the requirement that the so-called checker must enter in duplicate the articles purchased upon the waiter's slip and upon the main sheet under the number or symbol of the waiter. The method adopted and described in the patent apparently consists of a system of charging the waiter with the articles purchased by a guest upon the main sheet, and, assuming the vigilance and rectitude of the checker in charge of the main sheet, a correct detailed statement or total amount of the purchases by the guest may be kept.

The means for accomplishing the object of the patentee principally consists of utilizing a printed sheet of paper appropriately ruled into vertical columns, having the number, name, or other means of identifying a waiter printed thereon, and using in conjunction therewith a ruled slip or sheet of paper also having printed thereon the number of the waiter or any other arbitrary individual designation. The checker sits at a table in or near the kitchen with the main sheet before him, and as each waiter passes to supply the guest he inspects the articles on the waiter's tray, and in duplicate enters the prices thereof in the proper column upon the main sheet, and writes or stamps the prices upon the printed slip of the waiter. It was claimed at the hearing that users of the patent in suit are practically secured against loss by peculation, but of this I am not convinced. Dishonesty of the waiter or checker is not prevented by the use of the patent in suit, and to stop pilfering by the waiter or collusion with a customer the users, in fact, must rely upon the uprightness and accuracy of the checker. Neither does the record disclose means to prevent the latter from combining with a waiter to cheat and defraud the employer. The system undoubtedly has advantages which are useful, but the interesting question here is whether the means specified produce a patentable result. I am of the opinion that nothing of patentable novelty is disclosed. The entire scheme and its adaptability apparently depends upon a rule of conduct consisting of the correct use by the checker of the main sheet, the vigilance and carefulness of the em-

ployer; and, moreover, without conforming to the precise steps pointed out in the specification to secure the asserted advantages, there is nothing disclosed by the patent but the printed slips with the waiter's number and the vertically ruled main sheet. It is doubtful whether such slips and main sheet, with their spacings or printing thereon for columns, figures, and writing, together with the promulgation of rules for their proper use, disclose invention. United States Credit System Co. v. American Indemnity Co., 59 Fed. 139, 8 C. C. A. 49; Munson v. Mayor, 124 U. S. 601; United States Credit System Co. v. American Indemnity Co. (C. C.) 51 Fed. 751.

The case at bar seems to me similar to Hocke v. New York Central & H. R. R. Co., 122 Fed. 467, 58 C. C. A. 627, where the Circuit Court of Appeals for the Second Circuit, speaking by Judge Wallace, says:

"It [the patent] purports to disclose to the public, and especially to that part of the public engaged in the business of shipping and transportation, an improved method of preventing and rectifying mistakes in the transaction of their business. Such improvements generally suggest themselves as their necessity becomes apparent to the intelligent and enterprising men who usually conduct this kind of business, and it would be surprising, indeed, if the long and extensive experience of forwarders and carriers had not discovered so obvious a method as that which is disclosed."

This principle is thought applicable here, in view of the evidence showing that prior to the patent in suit a patent was issued to George D. Smith, No. 449,973, which indicated means for securing to a proprietor the amounts collected for food served by waiters. In the Smith patent a single sheet having spaces and coupon headings for designating the waiters was used by the waiter. Although there are no parallel columns on the sheet, and no designation or number printed thereon when the sheet is delivered to the waiter, yet the elements of this method would seem to correspond to those of the patent in suit. No main sheet is used, but the coupon attached to the waiter's slip apparently serves a similar purpose. The rules of conduct for successfully carrying out the object of the Smith patent are also unlike those adopted by Hicks, but any dissimilarity is not of conspicuous consequence. The specification of the Smith patent shows that the amount of each purchase is entered upon a sheet attached to a coupon or waiter's check upon which the total amount only is placed. True, in the Hicks method the main sheet remains in charge of the checker, who duplicates the individual charges or the total, yet, assuming the claims patentable as to subject-matter, I am unable to perceive any advance in the art other than would occur to persons engaged in the business requiring the use of such a method. This conclusion also finds persuasive support in the oral evidence found in the record showing the prior use of various methods to accomplish the identical object in suit. Such methods are not thought essentially different in a patentable sense from the patent in suit. Furthermore, it is evident, as hereinbefore suggested, that the printed slips and main sheet of the Hicks patent do not positively secure the prevention of peculation by waiters and checkers. The integrity of the checker in charge of the main sheet and the watchfulness and carefulness of the employer himself or some trusted employé acting in his behalf

are essential elements to its success, and these elements cannot be considered in determining the question of patentable invention.

In view of the foregoing, the asserted extensive use into which the device has gone and the large amounts in royalties that have been paid to complainant cannot be considered as giving the device patentable novelty. Upon this point, the adjudications uniformly hold that, where there is no invention, the extent of the sales and use of the patented article is immaterial. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Adams v. Bellaire Stamping Co., 141 U. S. 539, 12 Sup. Ct. 66, 35 L. Ed. 849; Peoria Target Co. v. Cleveland Target Co. (C. C.) 47 Fed. 725; Olin v. Timken, 155 U. S. 155, 15 Sup. Ct. 49, 39 L. Ed. 100.

The bill is dismissed, with costs.

WESTON ELECTRICAL INSTRUMENT CO. v. EMPIRE ELECTRICAL INSTRUMENT CO. et al.

(Circuit Court, S. D. New York. February 18, 1907.)

No. 7,968.

PATENTS—SUIT FOR INFRINGEMENT—INCREASE OF DAMAGES.

The conduct of defendants in a suit in equity for infringement of a patent *held* to have been such, in deliberately and intentionally infringing, in purposely protracting the litigation, and in transferring the property of the corporation, which was the principal defendant, for the purpose of rendering a recovery nugatory, as to warrant the court in imposing triple damages, under Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395.]

In Equity. Suit for infringement of letters patent No. 497,482, for a shunt for electric light and power stations, granted to Edward Weston May 16, 1893. On report of master.

For former opinion, see 131 Fed. 82.

Kenyon & Kenyon, for complainant.

Philip Mauro, for defendants.

HOLT, District Judge. I am satisfied that this was a case of deliberate and intentional infringement by all the original defendants, who knew that they had no right to manufacture or deal in the Weston shunts, and that they have defended the suit with the purpose of protracting the litigation as much as possible while they continued to infringe, and of ultimately transferring the assets of the Empire Company, if judgment should go against them, and thus, if possible, render any recovery nugatory. The defendants' conduct on the accounting appears to have been equally blameworthy. They have pursued a policy throughout the proceedings on the accounting of obstruction and concealment of the facts, and in my opinion this is a proper case to impose upon the defendants triple damages. I do not think that the statute permits the court to impose triple costs. The fact that in the interlocutory decree no judgment was entered against the defendant Cooke prevents, in my opinion, any recovery against him on the case as it now stands; but, as the facts elicited on the accounting

make it appear probable that Cooke was an actual party to the original infringement and to the proceedings by which the Empire Company parted with its assets, I direct that the case be referred back to the master, if the complainant so elects, with instructions to take any additional testimony which the defendant Cooke or any of the parties may desire to offer, and to report, upon such testimony and all the other testimony already taken in the case, whether judgment should be entered in this case against the defendant Cooke, as well as against the two companies held liable upon the interlocutory decree. If the complainant does not elect to take further proceedings before the master against the defendant Cooke, final judgment may be entered confirming the master's report, and for triple damages and the costs as taxed against the two companies held liable by the interlocutory decree.

The foregoing remarks as to the conduct of the defendants do not, of course, apply to the counsel representing them.

HAVANA COMMERCIAL CO. v. NICHOLS et al.

(Circuit Court, S. D. New York. June 19, 1907.)

1. TRADE-MARKS AND TRADE-NAMES—NAMES SUBJECT TO APPROPRIATION—"LA CAROLINA."

The name "La Carolina," as a trade-mark for cigars, is not invalid as either the name of an individual or a geographical name, and is infringed by the name "La Coralina," used also for cigars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 68, 72.

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

2. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

While mere delay or acquiescence will not defeat the right to an injunction to restrain infringement of a trade-mark, it may afford good ground for denying a preliminary injunction to put a stop to an established business prior to a final hearing.

In Equity. On motion for preliminary injunction.

Wise & Lichtenstein, for complainant.

Hotchkiss & Barber, for defendants.

LACOMBE, Circuit Judge. This seems to be a properly registered trade-mark, under the act of 1905. It is not the "name of an individual"; at least the court is informed of no individual, historical or other, whose name was or is "La Carolina," and neither the affidavits nor the briefs disclose the existence of any such person. Nor is it a "geographical name or term." Defendant's counsel was unable upon the argument to identify geographically any place as "La Carolina," although reference was made to North Carolina and South Carolina and to the Caroline Islands. The term "La Coralina" is manifestly an infringement. The mere transposition of the vowels "a" and "o" effects a change hardly appreciable by either the eye or the ear.

It appears, however, by defendants' affidavits, that they began the puting up and selling of cigars under that term 19 years ago, that they advertised them extensively, and that their sales have been large and continuous. Complainant asserts that this was without the knowledge

of itself or its predecessors; but it is thought that all questions can better be determined at final hearing upon pleadings and proofs, when the facts will be more satisfactorily presented. It is no doubt well settled that mere delay or acquiescence will not defeat the remedy by injunction, although it may debar complainant from any recovery of profits or damages. Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526. But such laches may, in proper cases, afford good ground for further delay in putting a stop by injunction to an established business.

It would seem that the equities can be more satisfactorily considered at final hearing than upon motion on affidavits, and for that reason the present application is denied.

NADAY & FLEISCHER v. UNITED STATES.

(Circuit Court, S. D. New York. June 28, 1907.)

No. 3,918.

CUSTOMS DUTIES—CLASSIFICATION—TRIMMINGS.

While ribbons that must be made up into bows, rosettes, and the like before being used for purposes of trimming or ornamentation are not dutiable as "trimmings," under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670], goods are so dutiable which are manufactured with ornamentation and characteristic design to be used as a trimming, and intended to be so used without anything further being done to them.

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

For decision below, see G. A. 5,923 (T. D. 26,049), affirming the assessment of duty by the collector of customs at the port of New York.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge. This is an appeal from the decision of the Board of General Appraisers at New York, affirming the action of the collector in the assessment of duty on certain articles at the rate of 60 per cent. ad valorem, under the provisions of paragraph 390 of the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 187 [U. S. Comp. St. 1901, p. 1670]), or, if wool is a component material, under paragraph 371 of said act.

In argument before me it was contended on the part of the importer that the articles in question are ribbons, made of silk as the component material of chief value, containing two or three colors in the filling, and not especially provided for in any paragraph of the tariff act, except in paragraph 391, and therefore dutiable at 50 per cent. ad valorem under the provisions of said paragraph 391. The government claims that the articles in question are trimmings, and therefore especially provided for in paragraph 390. It has become well established that ribbons that must be made up into bows, rosettes, and the like before being used for the purposes of trimming or ornamentation are not to be included

under the provisions of paragraph 391 as trimmings; but if the article in question is manufactured with ornamentation and with characteristic design, to be used as a trimming and intended to be sewed directly upon a garment, without being made into something else before being appended thereto, it is specifically provided for in paragraph 391 as a trimming.

The case presents more a question of fact than of law. I have carefully studied the record and reviewed the evidence, and especially that taken since the decision of the Board of Appraisers, and find, from the whole evidence and the exhibits, that the facts remain as was found by the Board of Appraisers; and therefore I affirm its decision.

MOXIE NERVE FOOD CO. OF NEW ENGLAND v. MODOX CO. et al.

(Circuit Court, D. Rhode Island. June 22, 1907.)

No. 2,659.

TRADE-MARKS AND TRADE-NAMES—SUITS FOR UNFAIR COMPETITION—COSTS.

In a suit for unfair competition in trade where the charge made against the defendant is established, but, owing to fraudulent representations made by complainant in respect to its goods, it is not entitled to relief in equity, neither party will be allowed costs.

In Equity. On defendant's motion for entry of final decree.

For former opinion, see 152 Fed. 493.

Roberts & Mitchell, for complainant.

Charles A. Wilson and George H. Huddy, Jr., for defendants.

BROWN, District Judge. I am of the opinion that the bill should be dismissed without costs, in accordance with the rule stated in Daniell's Chancery Practice (1st Ed.) p. 1540:

"Where the conduct of both parties has been equally reprehensible, the court will also abstain from giving costs in favor of either party."

The following authorities, cited by counsel for the complainant, seem to show a settled practice to deny costs in cases like the present case: Fetridge v. Wells, 13 How. Prac. (N. Y.) 385; Leather Cloth Co. v. American Leather Cloth Co., 33 L. J. Ch. 199; Nixey v. Roffey, W. N. 1870, p. 227; Rodgers v. Rodgers, 31 L. T. N. S. 285; Ripley v. Bandey, 14 R. P. C. 591; Newman v. Pinto, 57 L. T. N. S. 31; Estcourt v. Estcourt, L. R. 10 Ch. App. 276; Warsop v. Warsop, 21 R. P. C. 481; Tallcot v. Moore, 6 Hun, 106; Lever Bros. v. Bedingfield, 16 R. P. C. 3; Borthwick v. Evening Post, 37 Ch. D. 449; Ainsworth v. Walmsley, L. R. 1 Eq. 518; Thornloe v. Hill (1894), 1 Ch. 569; Hostetter v. Van Vorst (C. C.) 62 Fed. 600; Edgington v. Edgington, 11 L. T. N. S. 299; Bass v. Dawber, 19 L. T. N. S. 626. See, also, 2 Daniell's Chancery (6th Am. Ed.) *p. 1397; Kerly on Trade-Marks (2d Ed.) p. 433; Hopkins on Trade-Marks, § 173; Paul on Trade-Marks, § 327; Sebastian on Trade-Marks (4th Ed.) p. 236.

A decree may be entered accordingly.

UNITED STATES v. STANDARD OIL CO. OF INDIANA.

(District Court, N. D. Illinois. August 3, 1907.)

1. CONSTITUTIONAL LAW—INTERSTATE COMMERCE LAW.
Neither the Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154] nor the amendatory Elkins' Law Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], is unconstitutional on the grounds either (1) that in requiring all shippers to pay the published rates for transportation it deprives them of a natural right to make private contracts in respect thereto and therefore of their property without due process of law; nor (2) that by authorizing carriers to establish rates binding on shippers it confers upon them legislative power; nor (3) that it deprives shippers of the right to invoke the judgment of the courts as to the reasonableness or unreasonableness of rates; nor (4) that in making it a criminal act for a shipper to accept rebates Congress exceeded its power under the commerce clause of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 847, 92.]

2. COMMERCE—INTERSTATE COMMERCE—CARRIERS SUBJECT TO REGULATION.
A connecting railroad carrier over whose line an interstate shipment passes is engaged in interstate commerce with respect to such shipment and subject to the law regulating the same, although its line may lie wholly within one state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 26.]

3. SAME—COMMON ARRANGEMENT FOR THROUGH CARRIAGE.
That a defendant made contracts for the through carriage of interstate shipments, and settlements therefor, solely with one railroad company, although such shipments passed over the lines of other companies also, sufficiently proves a common arrangement between the carriers for a continuous carriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 26.]

4. SAME—LAWFUL RATES—CONNECTING CARRIERS.
Where a railroad company published and filed a schedule of rates between points on its line within a state, and also procured and filed as its own the schedules of rates of a terminal company for the carriage of property from one of such points into another state and made contracts for through carriage and collected the freight therefor, it was an interstate carrier as to such shipments, and the lawful rate was the sum of the rates shown by the two schedules.

5. CARRIERS—PROSECUTION OF SHIPPER FOR OBTAINING ILLEGAL CONCESSION—EVIDENCE.
On the trial of a shipper charged with having obtained a concession from the lawful published rate on interstate shipments in violation of the federal statute, the fact that another railroad may have had a published rate approximately as low as that received is immaterial.

6. SAME—KNOWLEDGE OF LAWFUL RATES—PRESUMPTION.
A shipper is chargeable with knowledge of the lawful rate on his shipment where it has been published and filed as required by law, where it is accessible to the public, unless he was misled after using proper diligence to ascertain such rate.

7. SAME—VIOLATION OF LAW—NUMBER OF OFFENSES.
Under the provision of the Elkins' Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], that "every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor," where a shipper has been continuously receiving concessions from the lawful rate from a railroad company, the government is not limited to a prosecution for a single offense, nor will the obtaining of a concession

to remain in force for a year render all shipments made thereunder one offense nor the rendering of monthly freight bills reduce the number of offenses to the number of such bills, but each shipment made at the illegal rate constitutes a separate offense, and where the published rate is on car lots, and the reduced rate is granted on the same basis and a separate charge made for each car, in the absence of evidence showing to the contrary, each car constitutes a separate shipment.

8. CRIMINAL LAW—SENTENCE—EVIDENCE TO AID COURT IN EXERCISE OF DISCRETION.

Where it rests in the discretion of the court to fix the punishment for a criminal offense after conviction, the court has power to subpœna and examine witnesses or take into consideration other evidence as to matters which may be in aggravation or mitigation of the offense, although not admissible on the issue of guilt or innocence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 977.]

For former opinion, see 148 Fed. 719.

Edwin W. Sims, U. S. Atty., and James H. Wilkerson and Harry A. Parkin, Sp. Asst. U. S. Attys.

John S. Miller, Virgil P. Kline, Alfred D. Eddy, Moritz Rosenthal, and Chauncey W. Martyn, for defendant.

LANDIS, District Judge. This is a prosecution of the Standard Oil Company of Indiana for alleged violations of the act approved February 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], known as the "Elkins' Law." The charge is that the defendant's property was transported by the Chicago & Alton Railway Company at rates less than those named in the carrier's tariff schedules published and filed with the Interstate Commerce Commission, as required by law. The offenses are alleged to have been committed during the period from September 1, 1903, to March 1, 1905. The indictment contains 1,903 counts, each charging the movement of a car of oil. Certain of the transportation is alleged to have been from Whiting, Ind., to East St. Louis, Ill., the remaining counts covering transportation from Chappell, Ill., to St. Louis, Mo. The plea was "not guilty." On the trial 441 counts were withdrawn from the consideration of the jury on grounds not going to the ultimate questions involved in the case. On 1,462 counts the verdict was "guilty." Motions for a new trial and in arrest of judgment having been overruled, the matter is now before the court for the imposition of the penalty authorized by law.

The statute is as follows:

"And it shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier 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. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The provisions requiring the publication and filing of tariff schedules are as follows:

"Every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public, and can be conveniently inspected.

"Every common carrier subject to the provisions of this act shall file with the commission hereinafter provided for copies of its schedules of rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes made in the same."

It was proven on the trial that the defendant, a corporation of Indiana, operates an oil refinery at Whiting, Ind.; that the Chicago & Alton Railway Company, a corporation of Illinois, operates a line of railroad from Chicago to East St. Louis, Ill.; that the Chicago Terminal Transfer Railroad Company operates a switching road from Whiting across the state line into Illinois, intersecting the Alton road at a station called Chappell, a short distance from Chicago; that there are three companies operating terminal roads from East St. Louis, Ill., across the Mississippi river to St. Louis, Mo.; that prior to the occurrences upon which this prosecution is based the Chicago & Alton Company had filed with the Interstate Commerce Commission and distributed to its various freight agencies tariff schedules showing the rate for the transportation of oil in car lots from Whiting, Ind., to East St. Louis to be 18 cents per 100 pounds and the rate for like transportation from Chappell to St. Louis, Mo., to be 19½ cents per 100 pounds. These schedules were as follows: Class tariff No. 24 issued by a number of carriers, including the Alton, operating between Chicago and East St. Louis naming a rate of 18 cents per 100 pounds on oil from Chicago to East St. Louis; a joint tariff of the Chicago Terminal and Alton companies providing that the rate from Whiting to East St. Louis shall be the same as the rate from Chicago to East St. Louis, and specifically enumerating class tariff No. 24 above mentioned; schedules of the three St. Louis terminal companies fixing a rate of 1½ cents per 100 pounds from East St. Louis to St. Louis.

It also appeared that the shipments were made over the route covered by these schedules; that is to say, from Whiting to Chappell via the Chicago Terminal road, from Chappell to East St. Louis via the Chicago & Alton road, and from East St. Louis to St. Louis over the lines of the three St. Louis terminal companies. For this service the defendant paid the Alton 6 cents per 100 pounds on the traffic to East St. Louis and 7½ cents for the shipments to St. Louis, bills at

these rates being rendered by the Alton Company to the defendant semimonthly. Out of the moneys it received from the defendant the Alton Company paid the terminal companies for their part of the service. With these terminal companies the defendant had no relations whatever save only that the shipments were delivered to the Chicago Terminal Company at Whiting, the point of origin. At no time did the defendant apply to either of these companies for a rate covering the service they performed, nor did they render any bills to the defendant. Their dealings were exclusively with the Chicago & Alton Company, to which company, as the defendant's testimony showed, it applied for the through rate from Whiting to destination.

On these facts the court denied defendant's motion that the jury be peremptorily directed to return a verdict of not guilty. Whereupon, as justifying and excusing the use of the 6-cent rate, the defendant's traffic manager testified that in December, 1902, 1903, and 1904, he applied to the chief rate clerk at the office of the general freight agent of the Chicago & Alton Company for the rate on oil from Whiting to East St. Louis for each succeeding year; that on each occasion the clerk handed him a document purporting on its face to be a special billing order, as follows:

"The Chicago & Alton Railway Company.

"Traffic Department.

"Special Billing Order.

"Issued ————. Effective Jan. 1, 1903.
"From ————, Chicago, Ill.
"To Alton Granite City and East St. Louis, Ill. via ————.
"On oil and Petroleum Products C L in tank cars. Rate 6 cents per cwt.
"Expires Dec. 31, 1903. Unless sooner revoked.
"Collection to be made through Auditor's office. Chas. A. King,
"General Freight Agent."

This witness also stated that when these special billing orders were delivered to him he received from the rate clerk an Alton tariff schedule called an "application sheet," applying Chicago and East St. Louis rates to similar traffic from Whiting to East St. Louis; that at each of said times the traffic manager inquired of the rate clerk whether the rate had been filed, and was assured by him that it had; that the traffic manager was thus misled by the rate clerk into the honest belief that the rate of 6 cents per 100 pounds as shown by the special billing order from Chicago to East St. Louis had been filed with the Interstate Commerce Commission, and that, acting in this honest belief, payments at the 6-cent rate to East St. Louis and 7½ cents to St. Louis were made. This special billing order was not and did not purport to have been filed with the Interstate Commerce Commission, nor was it distributed by the Alton Company to any freight agent for use in quoting rates to the general shipping public, with the single exception that, as the rate clerk testified, a copy was retained in the tariff files at the general freight office. Nor did the application sheet contain any reference to the special billing order, but it did specifically enumerate the Chicago-East St. Louis tariff 24 above mentioned, which tariff 24 showed the Chicago-East St. Louis rate to be 18 cents per 100 pounds. This alleged occurrence between the

traffic manager and the rate clerk will receive more detailed consideration hereafter.

It is the position of the defendant that the Elkins' law and certain pertinent portions of the Interstate Commerce Law of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], are unconstitutional for the following reasons: First, that the defendant has a natural, inherent right to make a private contract for a railroad rate, of which right the Elkins' law would deprive the defendant by requiring it to pay the rate published and filed by the carrier, and making a failure so to do criminal, in violation as is claimed of the fifth amendment to the Constitution of the United States, which provides that "no person shall be * * * deprived of life, liberty or property without due process of law"; second, that by authorizing common carriers to establish rates, which when published and filed shall be binding upon the shipper, the law delegates to the carrier legislative power, which section 1 of article 1 of the Constitution confers upon Congress exclusively; third, that the law vests in the Interstate Commerce Commission the power to pass ultimately upon the question of reasonableness or unreasonableness of freight rates as established by a carrier, thereby depriving the defendant of its right to invoke the judgment of the courts in respect thereto, in violation of section 1 of article 3 of the federal Constitution, which vests the judicial power of the United States exclusively in the courts; fourth, that paragraph 3 of section 8 of article 1 of the Constitution, commonly known as the "Commerce Clause," does not empower Congress to forbid and make criminal the act of the defendant in accepting from the carrier a less rate than that published and filed by the carrier as required by section 6 of the Interstate Commerce law.

With respect to the second proposition, it need only be said that the Supreme Court of the United States has in a number of instances ruled adversely to the defendant's contention, in cases where the same question arose on state statutes empowering railroad commissions to fix rates. And the third objection is not sound for the reason that the interstate commerce law does not purport to deprive the courts of their jurisdiction at the suit of a shipper to ultimately determine the question of reasonableness or unreasonableness of a rate.

Respecting the defendant's alleged natural right to make a private contract for a secret railroad rate, candor obliges the court to say that he knows of nothing to support the proposition but the eminence of counsel who advance it. In such case, as in all others, it would require two parties each competent to contract, and, considering the nature of the thing to be contracted for, the railway common carrier is fundamentally incompetent. This is so for the reason that the railway company is a public functionary and is enabled to construct and operate a railroad only by its exercise of the power of eminent domain, which is a sovereign power of government. Thus, by condemnation proceedings, such a corporation may take the real property of the individual citizen, even his homestead, against his will and protest. The theory upon which government authorizes this to be done is that it is necessary for the public welfare, and nothing can

possibly be more plain than that property thus acquired must be used for the benefit of the public; not part of the public, but all of the public. Under the doctrine insisted upon by the defendant, the railway company might give the Standard Oil Company a very low transportation rate, and, by contract, obligate itself to withhold the same rate from the very man the taking of whose property by condemnation rendered possible the construction of the road. A more abhorrent heresy could not be conceived. There is no more reason for the claim of natural right to private contract for the exercise by a railway company of the public power with which it is endowed than there would be for the claim of similar right to private contract with the collector of customs or tax assessor for a secret valuation of property.

It is the defendant's position that the commerce clause does not empower Congress to forbid and make criminal the defendant's act in accepting from the carrier a less rate than that published and filed by the carrier, as required by law. In the court's view, the only point involved in this proposition is whether Congress has authority to require that railroad rates shall be uniform. It being now settled that Congress has this power, it necessarily follows that to preserve uniformity that body may prohibit the doing of any act or thing whatever by any person or corporation calculated to impair uniformity, and may enforce such prohibitions by such penal provisions as Congress may deem requisite.

The defendant maintains that the interstate commerce law does not apply to the Alton Company's connection with the transportation of defendant's property, inasmuch as the road it operates lies wholly within the state of Illinois. The theory is that the haul by the Chicago Terminal from Whiting across the Illinois line to Chappell, and the haul by the St. Louis terminal from East St. Louis across the Missouri line to St. Louis, are each interstate, and therefore subject to federal control, but that the Alton Company's intrastate haul of the same property from Chappell to East St. Louis is beyond the reach of federal authority. The trouble with this contention is that it ignores the basic proposition underlying the whole question, and confuses the intrastate character of the carrier with the interstate character of the commerce in which the carrier is engaged. The true and primary test is whether the commodity to be transported is to pass from one state into another state. If it does so pass, then it is interstate commerce, regardless of whether the rails over which it moves be operated by one or many carriers. And when this commodity begins to move, interstate commerce has begun, and interstate commerce it continues to be until it reaches destination. If in such continuous line there be a road lying wholly within a county in a state, the carrier operating such road, in respect to the movement of that commodity, is engaged in interstate commerce, as clearly as if its line extended from the origin to the destination of the shipment, and is therefore as to such transportation subject to federal control. To adopt the views contended for by defendant, namely, that Congress may prescribe the rate which the shipment must pay for the movement from Whiting to Chappell, and from East St. Louis to St. Louis, and that the Legislature of Illinois may prescribe the rate effective on the link con-

necting these two ends of the route traveled by the commodity, would be to create a situation impossible in practice as it is illogical in theory.

It was insisted by the defendant that the evidence did not show any common arrangement between the Chicago & Alton and the Chicago Terminal companies for a continuous carriage from Whiting to East St. Louis, as charged in the indictment. The evidence did show the filing and publication of a joint tariff schedule of the Chicago & Alton and Chicago terminal companies, putting in force from Whiting to East St. Louis the 18-cent rate, shown by tariff 24 to be the Chicago-East St. Louis rate. Furthermore, these two companies maintained a joint agency at the intersection of their roads at Chappell for the transaction of the business of both at that point, which consisted largely of the Standard Oil traffic from Whiting to East St. Louis. In addition to this, the evidence shows the movement of the defendant's property by the Chicago Terminal Company, that company not looking to the defendant for its compensation but relying solely upon the Alton Company therefor. The whole course of business from the publication and filing of the joint schedule to the payments of the freight charges conclusively shows that these two companies were operating under a common arrangement for the transportation of this property.

The defendant also contends that, inasmuch as the name "Chappell" does not appear on the schedules, there was no lawful rate between Chappell and St. Louis. The evidence does show, however, that tariff 24 named the rate to East St. Louis from Chicago and suburban stations within the Chicago switching district, including the station immediately beyond Chappell from Chicago. Moreover, on the face of the Alton-Chicago Terminal joint schedule appeared the following: "Agents are strictly prohibited from quoting or using a higher rate for a shorter than for a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance." This would seem to clearly exhibit the rate from Chappell. Certainly it would be ample, and to no extent misleading, notification to any shipper consulting the schedule in good faith to learn the lawful rate.

The defendant claims that the evidence fails to sustain the charge in the indictment that the Alton Company was engaged in the transportation of property from Chappell to St. Louis, and that it had published and filed tariff schedules showing the rate in force between said points to be 19½ cents. As before observed, the Alton Company published and filed tariff 24 showing a rate of 18 cents from Chappell to East St. Louis. The evidence also shows that the Alton Company procured copies of the tariff schedules of the St. Louis terminal companies, showing their rate to be 1½ cents from East St. Louis to St. Louis, and filed these schedules in its own name with the Interstate Commerce Commission, distributing the same to its freight agencies where they were kept for the use of the general shipping public. Having thus published and filed the rate covering the entire route, and having actually seen to it that the property reached its St. Louis destination, as its general charter powers authorized it to do, and as the defendant looked to it to do, and paid it for doing, the court is of the opinion that the evidence clearly shows the Alton Company was possessed of a

railroad route from Chappell to St. Louis over which it had established a rate for the transportation of oil as required by law.

If a carrier enters the field for traffic destined to points beyond its line, and a shipper turns his property so destined over to it, such traffic is as clearly subject to the requirements of the Interstate Commerce Law as would be the case if the carrier owned and operated the line through to destination.

In the absence of a formal agreement establishing a joint through rate effective over a through route made up of the connecting lines of more than one carrier, the lawful rate in force over such through route is the sum of the local rates lawfully established by the several connecting carriers over their respective roads. The Alton Company and the St. Louis terminal companies had no joint through agreement, as at their election under the law they might have had. However, it would be wholly inadmissible to hold that the interstate traffic handled by them was immune from federal regulation merely because of this omission.

The defendant offered certain tariff schedules as tending to show that during the period covered by the indictment there was in force by the Chicago & Eastern Illinois Railroad from Whiting to East St. Louis a rate on oil of 6¼ cents, which it was claimed, owing to certain terminal charges at East St. Louis, to which the Alton traffic was subjected, was equal to the 6-cent rate via the latter route. This evidence was offered to etablish an absence of motive on the part of the defendant to accept an unlawful rate from the Alton, but was excluded by the court, as not being admissible on the question of the defendant's guilt or innocence in accepting the unlawful rate from the Alton Company, the court announcing that, if it should subequently appear that there was in force such open, published, filed rate via the Chicago & Eastern Illinois Railroad available to the general public, that fact would be considered by the court in mitigation of punishment. Motive is not material in a case where the proof is clear that it was the defendant who committed the crime. Motive may be inquired into when necessary to determine the ultimate fact, when in dispute, as to who committed the crime. Schmidt v. U. S., 133 Fed. 263, 66 C. C. A. 389.

The real question is whether the defendant accepted the concession knowingly, and in determining this it need not be affirmatively shown that the defendant had actual knowledge of the lawful rate. The defendant must be presumed to have known that which a diligent endeavor made by an honest man in good faith to ascertain the lawful rate would have disclosed to him. The burden of this diligent endeavor is not to be diminished or increased by the supposed existence or absence of a lawful rate on some other road equal in amount to the rate accepted by the shipper. To adopt defendant's contention would be to impose upon the occasional shipper who cannot employ a traffic manager, and who is not expert in traffic matters, a more rigid requirement than that imposed upon the continuous shipper, by excusing the latter on account of what his large business might enable him to know of rates on other roads from penalties which would be imposed upon the former for the same act. Moreover, it is to be observed that what

a shipper might know respecting rates in force on one road would not inform him of what rates were lawfully in force on another road. The most that can be said for the defendant's contention in this regard is that the shipper might assume the same rates to be in force on competing lines. But the law does not allow him to assume. He must know what he can ascertain by inquiry. The rate once established and available to him on application, he must pay.

The court is not impressed by the doleful predictions of counsel for the defendant as to the hardships upon the honest shipping public to be anticipated from the enforcement of this rule. The honest man who tenders a commodity for transportation by a railway company will not be fraudulently misled by that company into allowing it to haul his property for less than the law authorizes it to collect. For the carrier thus to deceive the shipper would be to deliberately incriminate itself, to its own pecuniary detriment, which it may safely be trusted not to do. The only man liable to get into trouble is he who, being in control of the routing of large volumes of traffic, conceives a scheme for the evasion of the law, and connives with railway officials for its execution.

The defendant argues that the Elkins' law authorizes prosecution for but one offense, and maintains that there can be a conviction on but one count—citing decisions of courts supporting the propositions in cases arising on other statutes. However, in this as in all other cases involving statutory construction it is solely a question of legislative intent. The language of the laws is:

> "Every person or corporation who shall offer, grant or give, or solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

As the court reads this enactment, the offense is complete whenever any property is transported at less than the lawful rate. If this be true, the law is violated every time any property is so transported. There is nothing in these words deliberately employed by Congress to indicate its intention to be that, if a defendant shall offend habitually, he shall have immunity save only as to one violation. Nor will the court indulge the supposition that this could have been the unexpressed intention of Congress, to be judicially interpreted into the law, in opposition to what appears to be its plain meaning, because such a rule would encourage him who had violated the law on one occasion to disobey it by wholesale in order to thereby accumulate a large fund for his own purse, after paying the fine imposed for the single penalty.

It is also urged that, if this construction be not adopted, the number of penalties should be limited to three, on the theory that but one concession was granted by the railway company and accepted by the defendant each year; the point being that the 6-cent rate was given to the defendant to be effective throughout each one of the three years covered by the indictment. If this theory be not accepted, it is maintained that the number of penalties should be limited to 36, that being the number of bills rendered by the Alton Company at the

6-cent rate, and paid by the defendant; it being urged that the offense, if any, was committed when the money was paid. But the court is unable to accept any of these theories. The offense was committed when the property was transported at the unlawful rate, and the parties could not limit their liability by entering into an agreement to disregard the law for a long period of time, nor by settling their accounts at stated periods. It is the substance of the thing, and not the mere form, with which the law is concerned. The defendant here is in precisely the same position it would occupy if it had paid the Alton Company at the unlawful rate each time a car was shipped. If none of these theories obtain, it is the defendant's position that the number of penalties should be limited to the number of shipments as distinguished from the number of cars transported; the argument being that, inasmuch as the evidence shows that in many instances more than one car of defendant's property went forward in the same train, it must be inferred that in such cases the several cars constituted one shipment, which the defendant contends is the unit contemplated by the law. However, the course of dealing of the parties seems to forbid the application of this rule. The legal rate was established by the railway company on a car-lot basis. The unlawful 6-cent rate was granted and accepted on this basis, and bills were rendered and paid at that rate per car lot, each car being specifically itemized. Moreover, the mere fact that more than one car went forward in the same train would not require the inference that they were all part of one shipment, any more than would the fact that if a shipment of five cars on one order should happen to be moved in five different trains resolve that transaction into five separate shipments. The proof is silent as to what number of cars, if more than one, constituted shipments on specific orders, no evidence having been offered by either party on that point. Because of this the defendant's counsel urged the court to grant a new trial, the claim then being that such a showing was a necessary part of the government's case. In the opinion of the court, the evidence fully justified the jury in finding the defendant guilty on each of the 1,462 counts.

Respecting the defendant's claim that the representations by the Alton rate clerk had misled it into the sincere belief that the Alton 6-cent rate had been filed with the Interstate Commerce Commission, it is proper to recall here that in the opening statement of its case to the jury the defendant asserted its position to be that under the statute the rate need not be filed to make lawful its acceptance by a shipper. Thereafter, during the introduction of defendant's evidence, and while the court was hearing argument with reference to the admissibility of testimony offered by the defendant as tending to show that the railway rate clerk had represented to the defendant's traffic manager that the rate had been filed with the commission, the court asked defendant's counsel whether the traffic manager was in fact so misled. That gentleman being then in court was called into conference by the defendant's counsel, at the end of which counsel stated to the court that the traffic manager "tells me he assumed that the Alton Company did its legal duty in that regard." At the conclusion of the argument the court ruled that, inasmuch as the law required the car-

rier to keep the schedule at its freight office for public inspection, and made it a misdemeanor for the shipper to accept a rate that was not thus published by the carrier and filed with the Interstate Commerce Commission, it was the defendant's duty to make a diligent endeavor in good faith to ascertain at the carrier's office whether the rate had been so filed; that the defendant was chargeable with such knowledge as this inquiry would have disclosed; and that, therefore, evidence was admissible tending to show that the defendant made the inquiry and was misled by the railway company into innocently believing that the rate had been filed, it being for the jury to determine whether such testimony exhibited the truth of the transaction. Thereupon the traffic manager was called to the stand, and testified that on each of the three occasions when he received the special billing order naming the 6-cent rate he had inquired of the rate clerk whether the rate had been filed and was informed that it had been. It was because of these occurrences, some of which took place in the absence of the jury, that the court directed the jury to subject to very careful scrutiny the testimony of the traffic manager and the rate clerk on this subject. If the traffic manager merely assumed the rate had been filed, of course he did not on three occasions specifically ask whether it had been filed. A jury is not required to accept an obviously improbable thing as true, merely because in a lawsuit a witness may testify to its having happened.

In the federal court, on a verdict of guilty, it is the duty of the court to fix the punishment. The defendant having offered certain tariff schedules on the trial as tending to show that during the period covered by the indictment there was available to it and the general shipping public via the Chicago & Eastern Illinois road an open, published, lawful rate of 6¼ cents from Whiting to East St. Louis, which rate it was represented was equal to the 6-cent rate via the Alton road, owing to certain terminal charges to which traffic via that route was subject at East St. Louis, and the court being of the opinion that this fact if true should be considered in mitigation, although inadmissible before the jury on the question of guilt or innocence, the court after verdict directed the production of all schedules bearing on the Chicago & Eastern Illinois rate. From these it appeared that in September, 1895, the Eastern Illinois Company, in connection with the C. C. C. & St. L. and other railway companies, issued and filed with the Interstate Commerce Commission joint tariff No. 7,986. This was a class tariff, and fixed a rate of 18 cents per 100 pounds on oil from Chicago to East St. Louis. On October 9, 1895, the Eastern Illinois Company issued and filed with the Interstate Commerce Commission its commodity tariff No. 8,073 fixing a rate of 6¼ cents per 100 pounds on oil from Dolton, Ill., to East St. Louis, and providing that out of this rate a switching charge of not to exceed three dollars per car would be absorbed on shipments from Whiting, Ind. July 1, 1903, 60 days prior to the beginning of the period covered by the indictment in this case, the Eastern Illinois Company issued its joint tariff No. 17,679. This general class tariff provided that between Chicago suburban stations, including Whiting, Ind., and East St. Louis, Ill., "the current rates in effect from Chicago, Ill., should apply, ex-

cept on coal, coke, grain, and grain products, lumber, and articles taking the same rates or arbitraries higher, live stock, and hay." Oil was not included in the commodities thus excepted from these class rates. Among the tariffs specifically named in connection with which this schedule was to be effective were tariff No. 7,986, above mentioned, which fixed a rate of 18 cents per 100 pounds on oil from Chicago to East St. Louis, and tariff No. 24 hereinbefore referred to, to which the Eastern Illinois road was a party, which is described as a tariff on "classes and commodities between Chicago and East St. Louis," and which also showed the rate on oil to be 18 cents.

This tariff 17,679 was distributed by the Eastern Illinois Company to all of its freight agents, and filed with the Interstate Commerce Commission. Its effect was to exhibit to the general shipping public a rate of 18 cents on oil from Whiting to East St. Louis. It was not, however, included among the schedules offered in evidence by the defendant for the purpose of establishing a 6¼-cent rate on oil.

On July 7, 1903 (one day after this tariff became effective), the Eastern Illinois Company, apparently recognizing that the effect of this tariff was to nullify the 6¼-cent rate shown by its schedule No. 8,073 effective in October, 1895, issued what it denominated "amendment No. 1 to tariff No. 7,986," that being the Eastern Illinois class tariff of September, 1895, which had fixed a rate of 18 cents per 100 pounds on oil from Chicago to East St. Louis and which was embraced within the general class tariff 17,679 above referred to. This amendment purported to cancel the 6¼-cent Whiting-East St. Louis oil rate shown on tariff 8,073 filed with the commission in October, 1895, and named a commodity rate on oil of 6¼ cents per 100 pounds from Chicago and Dolton Junction, Ill., to East St. Louis. However, this amendment No. 1 was not filed with the Interstate Commerce Commission until March, 1906, one year after the expiration of the period covered by the indictment, and nearly three years after its issue. In view of these facts the Eastern Illinois situation cannot serve the purpose in this case of excusing, or to any extent palliating, the defendant's acceptance of the unlawful Chicago & Alton 6-cent rate.

For the guidance of the court in determining the penalty to be fixed in this case, the court requested counsel to furnish information as to what, if any, corporation held the stock of the defendant Standard Oil Company of Indiana, what the outstanding capital stock of such holding company was, and what its net earnings and dividends were for the three years covered by the indictment. This information which the court deemed it to be his duty to obtain in order that he might advisedly exercise the discretion required by law in fixing the punishment, the defendant's counsel, after deliberation, refused to give. The court, therefore, caused subpœnas to be issued requiring the presence here of the principal officers of the Standard Oil Company of Indiana and the Standard Oil Company of New Jersey. Defendant's counsel thereupon applied to the court to recall these subpœnas, representing that such principal officers were not in possession of the information sought by the court, and suggesting that the subpœnas be limited to a certain person who, it was stated, had the information, and whose name counsel offered to give to the

court. In response to the court's inquiry, however, as to whether such person would testify or refuse to answer, should this course be adopted, the statement was made that he might decline to answer on the advice of counsel. Therefore, being of the opinion that if there was to be such refusal to testify it ought not to come from some subordinate selected by the defendant for that purpose, the court declined to recall the subpœnas. Accordingly, they were duly served. On the examination of the president and secretary of the Standard Oil Company of New Jersey, it appeared that a very large proportion of the stock of the defendant Standard Oil Company of Indiana was held by individuals for the stockholders of the Standard Oil Company of New Jersey; that the outstanding capital stock of the Standard Oil Company of New Jersey was approximately $100,000,000; that the annual dividends of that company during the three years covered by the indictment were approximately 40 per cent.; and that its net earnings for the period mentioned were approximately $200,000,000. It also appeared from a certified copy of a resolution of the stockholders of the Standard Oil Company of Indiana increasing its capital stock that of its million dollar capital all but four $100 shares were owned by what is called "Standard Oil Trust."

The enforced attendance and testimony of these witnesses was resisted as extrajudicial and unwarranted. The rule governing the proceeding as found in Bishop's New Criminal Law, Vol. 1, §§ 948 and 950, is as follows:

"The entire transaction in which a crime was committed may embrace more of wickedness than the indictment charges; or there may be other circumstances of aggravation on the one hand, or of mitigation on the other. Therefore, if the law has given the court a discretion as to the punishment, in pronouncing sentence it will look into any evidence proper to influence a judicious magistrate to make it heavier or lighter. * * * Or this sort of evidence may be delivered to the jury at the trial if with it is the assessment of the punishment. But we have authority for the proposition that in such a case the aggravating matter must not be of a crime separate from the one charged in the indictment—a rule perhaps not applicable where the court determines, after verdict, the punishment. * * * This evidence, thus addressed to the discretion of the judge, need not be attended by the formalities required on the main issues before the jury. The court will now, if it sees no reason to order otherwise, listen to ex parte affidavits. And even hearsay evidence, inadmissible on general principles, has under special circumstances been suffered on this issue. A witness may be compelled by subpœna to be present."

From the defendant's formal refusal to furnish the court with this information subsequently brought out on the hearing the court quotes the following language of counsel:

"I will not be understood as saying that upon the application for judgment upon the verdict either party may not urge consideration which may be fairly made from the evidence introduced before the court upon the trial. And it is proper for the defendant to present circumstances which he could not introduce in evidence upon the trial in mitigation of the penalty. The defendant here reserves its rights in that respect, and whenever the question is considered as properly arising in the case, whether now or at some later day, the defendant will be prepared to present such considerations as it may be advised are proper, if there is occasion therefor."

In view of this statement, and at the conclusion of the supplementary examination of the officers of the Standard Oil Company of New Jersey, above referred to, the court offered to hear any evidence that might be submitted by the defendant as tending to show that neither it nor the Standard Oil Company of New Jersey had ever violated the interstate commerce law before, such evidence to be considered by the court in mitigation of punishment.

On the following Monday the defendant's counsel presented to the court its formal reply, denying the propriety of such an inquiry, and declining of its own motion to submit anything. From this document the court quotes the following:

"For this defendant now to assert its innocence of matters that it is not charged with, or attempt to show that it has been innocent of any wrongdoing in connection with matters outside of this record, when there is nothing before the court charging it with such wrongdoing, would present a situation unheard of in Anglo-Saxon jurisprudence. This court, in the absence of anything to the contrary, paying no attention to the gossip of the street or the charges of the mob, and guided by the fundamental law of the land, must certainly presume the complete innocence of this defendant of any prior violations of the interstate commerce law, and fix its penalty, if any, solely upon the record in this case."

And again:

"If the occasion, however, shall ever arise in an appropriate proceeding, where this defendant can, without any waiver of its legal rights or legal status, subject itself to an investigation of the question of its having heretofore violated the interstate commerce law, it will avail itself of that opportunity, and it will certainly appear that since the passage of that law there has been no violation of its provisions by either the Standard Oil Company of New Jersey or by this defendant; but on the contrary it has been the fixed policy of these companies since their organization and the passage of the interstate commerce law to strictly observe not only the letter, but the spirit, of all interstate commerce laws, and that such laws have since their passage met with the entire approval of the administrative officers of these companies."

Waiving the question of the studied insolence of this language, in so far as it may be aimed at the present occupant of the bench, the court can, of course, only leave to the discretion of the Standard Oil Company the wisdom and propriety of a hundred million dollar corporation gratuitously inaugurating agitation about the "mob." The point of this incident is that, when in compliance with defendant's previously expressed reservation the court offered to hear evidence going to the question of the Standard Oil Company's prior good behavior, an offer which was announced by the court in the presence of the president, the vice-presidents, and secretary of the Standard Oil Company of New Jersey, their counsel, after conference, declined to present any witness to testify on this subject, choosing rather to stand upon the law's presumption of innocence. Of course, on the trial of a defendant for a specific offense, this presumption is indulged in favor of that defendant as to that offense; but where, as in this case, the crime charged was the acceptance of a preferential railroad rate, in violation of a law that had been on the books for nearly 20 years; where during a period of 18 months 1,900 car loads of property were shipped at an unlawful rate, which amounted to but one-third of the rate available to the general shipping public; where the convicted de-

fendant's transportation affairs were in the charge of an expert traffic official of at least ordinary intelligence and many years railroad traffic experience, and who was a frequent visitor at the general freight office of the railway company; where the unlawful rate was shown only by a paper appearing on its face to be a special billing order, and which directed that settlement for services rendered at the rate which it authorized should be made through the railway company's auditor's office instead of at the railway station or freight office, as is done by the general shipping public; and where the defendant when brought to trial persistently maintains that the Constitution of the United States guarantees to it the right to make a private contract for a railroad rate—this court is obliged to confess that he is unable to indulge the presumption that in this case the defendant was convicted of its virgin offense.

It is the defendant's position that its offense was wholly technical; that nobody has been injured, because there was no other shipper of oil; and that, therefore, the punishment, if any, should be a modest fine. This impresses the court as a peculiar argument. It is novel indeed for a convicted defendant to urge the complete triumph of a dishonest course as a reason why such course should go unpunished. Of course, there was no other shipper of oil, nor could there be so long as by a secret arrangement the property of the Standard Oil Company was hauled by railway common carriers for one-third of what anybody else would have to pay. It requires no very great wisdom to understand that if other men of capital, genius, and integrity should embark in the oil business, and possess themselves of all the facilities known to the trade, the methods unveiled in this proceeding would force them out. The only way for them to stay in the oil business would be for them to adopt the practice of this defendant, and procure the great public power of railway companies to be secretly perverted in their interest. Under no other possible theory could they hope to survive. Nor is this the only injury. To the extent that the Standard Oil Company has not paid what the law required it should pay, the shippers of other kinds of property have had to bear the burden. To the rate which it would be fair for the railway company to charge for the transportation of products of the farm and factory has been added what the Standard Oil Company did not pay for the transportation of its property. And herein lies not the least vicious element of such a system. In addition to this is the question of common honesty among men, which ought not to be altogether ignored in business even in this day. The conception and execution of such a commercial policy necessarily involves the contamination of subordinate officers or employés, even looking to the time when testimony will be required for the protection of the revenues of the offender from the exactions of the law for its violation. We might as well look at this situation squarely. The men who thus deliberately violate this law wound society more deeply than does he who counterfeits the coin or steals letters from the mail.

The nominal defendant is the Standard Oil Company of Indiana, a million dollar corporation. The Standard Oil Company of New Jersey, whose capital is $100,000,000, is the real defendant. This is so for the

reason that if a body of men organized a large corporation under the laws of one state for the purpose of carrying on business throughout the United States, and for the accomplishment of that purpose absorb the stock of other corporations, such corporations so absorbed have thenceforward but a nominal existence. They cannot initiate or execute any independent business policy, their elimination in this respect being a prime consideration for their absorption. So, when after this process has taken place a crime is committed in the name of such smaller corporation, in fixing punishment the law will consider that the larger corporation is the real offender. And where the only possible motive of the crime is the enhancement of dividends, and the only punishment authorized is a fine, great caution must be exercised by the court lest the fixing of a small amount encourage the defendant to future violations by esteeming the penalty to be in the nature of a license. The defendant argues that to hold it for 1,462 offenses would be a violation of the constitutional prohibition against the imposition of excessive fines, and it is urged that Congress could never have intended to confer upon the court such power. It is the view of the court that for the law to take from one of its corporate creatures as a penalty for the commission of a dividend producing crime less than one-third of its net revenues accrued during the period of violation falls far short of the imposition of an excessive fine, and surely to do this would not be the exercise of as much real power as is employed when a sentence is imposed taking from a human being one day of his liberty. In this connection, it may be observed that the figures exhibiting the net earning of the Standard Oil Company of New Jersey during the period covered by this indictment are exceedingly instructive because of the peculiarly intimate relation between the character of the crime and the revenues of the offender.

The law prohibiting preferential railroad rates was passed 20 years ago. Its adoption was preceded by vigorous opposition interposed by those who had been the beneficiaries of the vicious practices its enactment was designed to abolish. Immediately thereafter, these persons set about to devise means for its evasion. The records of the courts and of the Interstate Commerce Commission show the employment of a large variety of schemes to accomplish this result. During the period since 1887 Congress has repeatedly endeavored to effectively amend the law with a view to the accomplishment of its great object. Finally, in 1903 the Elkins' law was passed. The court recalls that at that time the earnest hope was very generally entertained that at last a means had been devised that would put an end to preferential railroad rates, and yet beginning a few months thereafter the Standard Oil Company procured 1,900 car loads of property to be shipped at an unlawful secret rate. And for this offense the Elkins' law authorizes punishment only by fine, an obvious defect, remedied, however, by the present law which prescribes imprisonment in the penitentiary for the like offense. However, it is the business of a judge to administer the law as he finds it rather than to expatiate upon the inadequacy of punishment authorized for its infraction.

It is the judgment and sentence of the court that the defendant, Standard Oil Company, pay a fine of $29,240,000.

One thing remains. It must not be assumed that in this jurisdiction these laws may be ignored. If they are not obeyed, they will be enforced. The plain demands of justice require that the facts disclosed in this proceeding be submitted to a grand jury with a view to consideration of the conduct of the other party to these transactions. Let an order be entered for a panel of 60 men returnable at 10 o'clock on the morning of August 14th. The United States District Attorney is directed to proceed accordingly.

CANTON ROLL & MACHINE CO. v. ROLLING MILL CO. OF AMERICA et al.

STURGISS et al. v. SAME.

(Circuit Court, N. D. West Virginia. August 2, 1907.)

No. 654.

1. FRAUDULENT CONVEYANCES—JURISDICTION OF FEDERAL COURTS—CONDITIONS PRECEDENT.

Section 8 of the judiciary act of March 3, 1875 (18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 513], relating to local suits to enforce liens, etc., does not enlarge the right of an individual to sue, and confers no right upon a simple contract creditor to maintain a creditors' suit in a federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the property afford basis for such a general creditors' suit, since such lien, if valid, may be enforced in rem against the property, regardless of conveyances, whether prior or subsequent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 697.]

2. MECHANICS' LIENS—SUIT TO ENFORCE—SUFFICIENCY OF BILL.

A bill in equity to enforce a mechanic's lien must allege every fact essential to the right to such lien with accuracy and clearness, so that issue may be taken thereon; and a mere allegation that complainant has filed and is entitled to such a lien is insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 494.]

3. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—CREDITORS' SUIT—RIGHT TO MAINTAIN—ESTOPPEL.

A creditors' suit to set aside an alleged fraudulent conveyance of property from one corporation to another and alleged fraudulent issues of bonds by the latter, creating apparent liens upon the property, cannot be maintained after the complainant has sold or assigned its claim to one who advised and was instrumental in bringing about such transfers and participated therein as a stockholder of the purchasing corporation, and is therefore estopped to deny their validity or good faith.

4. MECHANICS' LIENS—SUIT TO ENFORCE—SUFFICIENCY OF EVIDENCE.

Mere allegation and proof that machinery sold by complainant was to be placed or used in a mill are not sufficient to sustain a suit to enforce a mechanic's lien therefor under the statute of West Virginia giving a lien for the price of "machinery for constructing, altering or repairing a house, mill * * * or other structure," without further proof that such machinery was intended to be and was so used as to become a part of the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 51.]

5. SAME—FILING OF CLAIM—ESTOPPEL.

Under a statute requiring a claim for a mechanic's lien to be filed within a stated time after the claimant "ceases to labor or to furnish material or machinery," where a claimant has filed a sworn statement as required, fixing the date when he ceased, he is estopped thereby, and cannot, by a subsequent statement fixing a later date, extend the time for claiming a lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 275, 276.]

6. SAME—VALIDITY—TIME FOR FILING.

A complainant contracted to sell to a corporation certain machinery of a tin plate mill, including a number of rolls to be delivered absolutely and a further number to be delivered, if required by the purchaser. The purchaser transferred its property to another corporation, and was dissolved, and its successor, after completing the mill, was adjudged bankrupt. In the meantime complainant delivered the first number of rolls to the succeeding corporation, and filed a claim for a mechanic's lien therefor, but dismissed a suit to foreclose the same because it was found to have been filed too late under the statute. Thereupon, with knowledge of the dissolution of one corporation and the bankruptcy of the other and without orders, it shipped the additional number of rolls, and filed another claim for a lien, including the entire amount, although the rolls last shipped were not received nor placed in the building. *Held*, that its claim was invalid, not only because the machinery was not so used, and could not therefore be the basis for a lien, but also because its shipment was unauthorized, and could not operate to extend the time for filing a lien for that previously furnished.

7. ESTOPPEL—PERSONS AFFECTED—PERSON ACTING AS ATTORNEY.

One who was attorney for a corporation and its stockholders in suits brought against them to set aside an alleged fraudulent sale of bonds and prepared the answers denying the fraud cannot himself, after the suits have been dismissed and he has become the owner of the claims sued on, attack the validity of the same transaction in another similar suit.

8. SAME—GROUNDS—POSITION IN JUDICIAL PROCEEDINGS.

A trustee in bankruptcy of a corporation who intervened in suits against the company, and by sworn answers affirmed the validity and good faith of certain of its transactions, is estopped to shift his ground in a subsequent suit, begun after the dismissal of the prior ones, and attack the validity of the same transaction.

In Equity.

On June 20, 1904, the Canton Roll & Machine Company, a Pennsylvania corporation, filed its bill in its own behalf and in behalf of all other creditors of the Rolling Mill Company of America who might join therein in this court against the Rolling Mill Company of America, a New Jersey corporation, the Morgantown Tin Plate Company, a West Virginia corporation, Hector M. Hitchings, Melvin J. Palliser, W. J. Logan, Jacob Meurer, Dick S. Ramsey, Andrew Meurer, August Kuhnla, Charles Merrill, W. H. Wells, J. L. Prescott, Wendell J. Wright, and C. H. Young, citizens of New York, in which it alleges: That the Rolling Mill Company of America acquired in the month of May, 1902, a tract of land near Morgantown, W. Va., of about 16 acres, conveyed to it by George C. Sturgiss and wife, by deed dated December 9, 1902. That, after obtaining title, it proceeded to erect a tin plate plant thereon, entering into various contracts for construction and machinery, and incurring large indebtedness. That, among others, it entered into a written contract with plaintiff on December 5, 1901, for the purchase of six hot tin mills complete, six stands of cold mills complete, and other machinery at an agreed price of $35,000. That plaintiff has fully performed said contract furnished the machinery, and has been paid thereon all of the contract price except $14,889.98, which, with interest from March 23, 1904, remains due and unpaid, and for which repeated demand for payment has been made. That said

Rolling Mill Company of America is indebted to others for labor and machinery, and that, being so indebted, it sought and undertook to strip itself of all its property and assets by selling and conveying said property to the Morgantown Tin Plate Company, and fraudulently to distribute the proceeds of sale among its stockholders without paying its said debts. That, pursuant to such fraudulent scheme, it on or about December 19, 1904, did convey and transfer its real estate and plant to said Morgantown Tin Plate Company in consideration of $150,000 of stock of the latter company fully paid, issued direct to the stockholders of the Rolling Mill Company of America, without first paying the indebtedness; that the individual defendants named were at the time of such transfer stockholders of the Rolling Mill Company of America, and Hitchings, Logan, and Wright were directors thereof. That all of said stockholders conspired to commit said fraud, participated therein, and received the benefits thereof. That the stockholders of the Morgantown Tin Plate Company were the same as those of the Rolling Mill Company; that subsequently the Morgantown Tin Plate Company executed a deed of trust to the Federal Savings & Trust Company, as trustee, to secure $150,000 of its bonds, bearing date January 1, 1903, which deed of trust was duly recorded. That the execution of this deed of trust was a further step in the scheme to defraud plaintiff and other creditors, and place the property of the Rolling Mill Company beyond reach of its creditors. That of said bonds, $100,000 in value, were never sold, but were pledged for an alleged indebtedness of the Morgantown Tin Plate Company, amounting to a little over $20,000, and the creditor holding the same as collateral about October, 1903, sold or pretended to sell them at auction in New York City for $22,500. That plaintiff is not informed as to who was the purchaser of these bonds, but he believes such purchaser to be one of the individual defendants or some one holding for their benefit, and it is charged that all of the bonds for $150,000, not held by bona fide holders for value, without knowledge of the illegality, are void. That plaintiff is entitled to and has filed a mechanic's lien against the real estate and plant for its debt and claims a lien thereon by virtue thereof; that each and every creditor of the Rolling Mill Company has an equitable lien upon said property prior to the lien of the trust deed and bonds, except in so far as said bonds are in the hands of bona fide holders for value and without notice of the fraud charged. The prayer of the bill is that plaintiff may be decreed a lien against the land and plant for its debt prior to the mortgage or deed of trust and to all other liens; that bonds secured by said deed of trust be decreed null and void as to creditors of the Rolling Mill Company, excepting only in so far as held by bona fide purchasers for value without notice of the illegality thereof; that liens and claims be ascertained and fixed according to priorities, and be enforced by sale of the land and plant and a distribution of the proceeds; that the individual defendants be decreed liable for and to pay the plaintiff's and other debts of the Rolling Mill Company; that a receiver be appointed, and for general relief.

On November 4, 1904, the defendants, the Rolling Mill Company of America, Jacob Meurer, Hector M. Hitchings, Melvin G. Palliser, Dick S. Ramsey, Wendell J. Wright, C. H. Young, W. J. Logan, and Andrew Meurer, filed their joint and separate answer to this bill, in which they in substance aver: That the Rolling Mill Company was organized under the laws of New Jersey for the purpose of building and operating a plant at Connellsville, Pa., and had commenced the construction of its plant there and expended $17,000 in cash and had in its treasury $100,000 less the $17,000 so expended, when George C. Sturgiss made it a proposition that if a new company should be organized, known as the Morgantown Tin Plate Company, and the plant located at Morgantown, he would procure certain coal lands, gas rights, railroad contracts for cheaper rates and a more favorable charter. These grants and privileges it was estimated would be of $20,000 value, and, in addition, he proposed to pay a bonus of $20,000 to pay for amount expended at Connellsville, and take $50,000 in bonds of the new company. That this proposition was accepted. The new company known as the Morgantown Tin Plate Company was organized. Sturgiss turned over $20,000 in cash and land estimated to be worth $20,000 to $25,000, and the freight and gas contracts and the coal

option as he had proposed. That this contract for organizing anew and transferring the plant was entered into in good faith with no purpose to defraud, and that it was greatly to the benefit instead of to the detriment of creditors of the Rolling Mill Company of America. That all rights and property of the Rolling Mill Company of America were transferred to the Morgantown Tin Plate Company, which latter company assumed all the obligations and liabilities of the former. It is denied: That the Rolling Mill Company acquired title to the land, but, on the contrary, it is charged such title was acquired by the Morgantown Tin Plate Company. That the plaintiff was fully cognizant of these transactions, and, while its contract was with the Rolling Mill Company, yet it, being fully acquainted with the transfer of property and the assumption of contracts, obligations, and liabilities on the part of the Morgantown Tin Plate Company, delivered to the latter all the machinery and materials and received from the latter all the moneys paid on account thereof, and all its business transactions, relations and dealings were had with the Tin Plate Company. That plaintiff knew fully that the Rolling Mill Company had been succeeded by the Tin Plate Company, and that the latter had placed the trust mortgage on the property for $150,000 and had knowingly received proceeds of the bonds. Such acquiescence in the transfer of the rights and property of the Rolling Mill Company to the Tin Plate Company on the part of the plaintiff is charged to be an estoppel of any right on its part to assail the same. It is denied that the Rolling Mill Company acquired the land; that it entered into the various construction and machinery contracts or incurred large indebtedness but that the Tin Plate Company did; that the indebtedness of $14,889.98 claimed by plaintiff is not correct, but only $11,089.98 is due, and $3,800 more than is due is claimed under the contract. It is admitted that the Rolling Mill Company entered into the contract for machinery with the plaintiff, and by its terms it is charged plaintiff was to furnish twelve pair of chilled rolls, six pairs of which were to be delivered without condition or further order, but the remaining six were not to be delivered until required by the purchaser, which provision of the contract constituted a conditional sale of these last six pairs of rolls depending entirely upon future order for delivery, and that the same never were directed to be delivered, but, on the contrary, plaintiff by letter directed to the Tin Plate Company inquiring as to such delivery was, in reply, absolutely instructed not to deliver said rolls. That said rolls were shipped by plaintiff nevertheless, but were not accepted or received, and the same, so far as known, remain in the railroad yards at Morgantown unaccepted, and, for payment of same, defendants are not liable. It is denied that the Rolling Mill Company is indebted to any one, but it is admitted that the Tin Plate Company is indebted to the extent of about $35,000, inclusive of plaintiff's debt. It is denied that any fraud was committed or intended by either the Rolling Mill Company, or by the individual defendants as directors and stockholders thereof, or that it stripped itself of its property and assets for the purpose of defrauding its creditors, or that it had at the time any creditor or debt outstanding, save and except the one due plaintiff, which was assumed by the Tin Plate Company, which latter company, with the full consent of plaintiff, took over the Rolling Mill Company's property and assumed its contracts and debts, whereupon the Rolling Mill Company was regularly dissolved under the laws of New Jersey, the state from which its charter emanated. The execution of the mortgage trust deed upon the estate and plant of the Morgantown Tin Plate Company is admitted, but it is denied that it was executed for the purpose of injuring or defrauding any one, but, on the contrary, its sole purpose was to obtain money to enable said company to continue and complete construction and permit operation for the benefit of stockholders and creditors, That this mortgage was made and recorded with full knowledge of the plaintiff, $50,000 of its bonds were taken and paid for by Sturgiss, and the proceeds thereof were expended in paying debts. Part thereof was applied to plaintiff's debt, and was received by it with full knowledge that it was part of the proceeds of these bonds. That one of the strong reasons for removing this plant and reorganizing under West Virginia law was the fact that these bonds would thus be taken, and it was expected a large part of the balance would be taken by the citizens of Morgantown. That at the time it was im-

possible to manufacture tin plate at a profit, and no outsider could be induced to take the bonds, and the company, being in financial straights, secured from the Kings County Trust Company a loan of $20,000, and the $100,000 of bonds remaining unsold were put up as collateral to secure this loan. That this transaction was in every way bona fide, and the money so borrowed was forwarded to Morgantown Tin Plate Company and used by it in payment of its bills. Nevertheless, the company's financial condition becoming worse, this loan was called by the Kings County Trust Company. The Tin Plate Company could not pay it. In consequence said bonds were sold at public auction in New York City to a person charged to be in no wise connected with the company for $22,500. It is denied that the defendants or any one of them purchased these bonds, or had or has any interest in such purchase, and all allegations of fraud in connection with the transaction are denied. It is denied that plaintiff has any valid mechanic's lien upon the property for its debt under the laws of West Virginia, but, on the contrary, it is alleged in effect that plaintiff undertook to acquire such lien, but, it being found long after the time had expired within which such lien could be filed for record that the lien attempted to be taken was void on its face, the plaintiff, contrary to order and without right, undertook to forward the six pairs of rolls only conditionally bought, in order to furnish it a basis and pretense to file another lien of record, dated from the day of this last unwarranted shipment. The equitable lien claimed by the plaintiff is denied, the personal liability of the individual defendants is denied, and it is finally charged that the Morgantown Tin Plate Company is, and was at the time of the institution of this suit, in bankruptcy with a trustee appointed by the bankrupt court in charge of the property, and it is insisted that plaintiff could and did have full remedy in the latter court to litigate its claim. To this answer replication was filed in the clerk's office and motion subsequently made to strike it from the files as not properly filed in time.

On March 8, 1905, Frank P. Corbin, trustee in bankruptcy for the Morgantown Tin Plate Company, filed an answer to plaintiff's bill, in which he says, while not named a defendant, he has been served with process requiring such answer from him. This answer substantially reiterates the allegations in different form of the joint answer of defendants above referred to, except in certain particular hereinafter set forth. Touching the organization of the Morgantown Tin Plate Company and the transfer of the assets and property of the Rolling Mill Company of America to it, this answer makes substantially the same statements of fact and the same denials of all fraud or fraudulent purpose or intent therein. It admits the execution of the contract by the Rolling Mill Company with plaintiff, but denies the sum claimed by plaintiff to be correct, says all payments were made by the Tin Plate Company, and that the shipments were largely, if not altogether, made by plaintiff to the latter company. It denies the Rolling Mill Company to be at all indebted to plaintiff or any one else, but charges all debts to be due from the Tin Plate Company and that these debts are about $45,000. It clearly and fully sets forth, in accord with the other answer, the facts of the formation of the Tin Plate Company, the transfer and conveyance of the real estate and plant to it in consideration of $150,000 of its capital stock issued to the stockholders of the Rolling Mill Company, and that for this $150,000 was received by the Tin Plate Company the real estate, the machinery, and machinery contracts, the residue unexpended of $100,000 paid into the Rolling Mill Company's treasury as stock subscriptions, the $20,000 bonus paid by Sturgiss, the contracts for freight rates, coal lands, gas, and other rights and privileges which respondent trustee charges were of a prospective value largely in excess of $150,000, and the further consideration was passed whereby the Tin Plate Company assumed all debts and liabilities of the Rolling Mill Company. Touching the mortgage, it agrees substantially with the answer of the other defendants herein referred to, as to the reasons for its execution, that it was executed without fraud or fraudulent intent, and with full knowledge on the part of plaintiff, who made no shipments of material or machinery until after the recordation of the deed to the Morgantown Tin Plate Company and the recordation of this mortgage by the latter to the Federal Trust Company, and that the plaintiff and all other creditors of the Rolling Mill Company ac-

cepted the Tin Plate Company as paymaster, received payments from it, and charges them all to be estopped from denying this acceptance, and of having had full notice of such transfers. Touching the hypothecation and sale, however, of the $100,000 of bonds, this respondent, trustee, assails the same, charging, in effect, that these bonds were sold for $22,500 to one A. K. Bolan, not a bona fide purchaser, but a holder of the same for stockholders, officers, and directors of said Tin Plate Company, and that the hypothecation and sale was in fraud of the rights of creditors and stockholders. His charges, in substance, are based on information and belief, the fact that the name of the purchaser was not disclosed, and he believes certain of the stockholders named caused the hypothecation and the sale to be made thereunder without due notice and advertisement thereof, although the bona fide existence of the loan of $21,500 for the payment of which these bonds were so hypothecated is not disputed or denied.

This answer further joins in denying the validity of the mechanic's lien or other equitable lien claimed by plaintiff, charging that plaintiff filed a pretended lien for that purpose, instituted suit to enforce it, recognized in the progress thereof that such declaration, not conforming to the requirements of the West Virginia statute, was void, and dismissed the suit, and then almost a year after work on the plant of the Morgantown Tin Plate Company had ceased, and about a year after it had been notified by the Tin Plate Company not to ship further materials, had acknowledged said notice, and complied therewith, said plaintiff proceeded to ship to the Rolling Mill Company, an extinct corporation, certain material conditionally bought under terms of the contract solely for the purpose of enabling it to file another declaration of lien including the real account due it, time for securing which by such lien had long since expired. That this shipment was not made until after bankruptcy proceeding had been commenced against the Tin Plate Company, the true owner of the plant and mill. That such material was never delivered at the plant or mill, but is piled up in the railroad yards at Morgantown. He closes by asking that the sale of the $100,000 bonds be set aside as fraudulent, and the sum of $22,500 paid therefor be allowed as a common unsecured debt.

On the 14th day of March, 1906, George C. Sturgiss, and the Farmer's Deposit National Bank of Pittsburg, filed a joint petition in this cause, in which it is alleged, after reciting in substance the pleadings in the cause: That Sturgiss purchased $50,000 of the bonds at par value, paid $20,000 agreed bonus for removal of plant, and for the purpose of protecting his investment since the Tin Plate Company suspended operations and became involved, and after commencement of this suit had purchased a number of liens and claims against the company and property, among which were the lien and claim of the Canton Roll & Machine Company for $14,889.98 (the plaintiff's demand involved in this suit), the lien and claim of the Hoovens, Owens, Rentschler Company for $13,868.09, amounts owed to George J. Humbert $3,746.47, W. L. Sutherland $426.00, W. C. Voight $164.50, and Mike Sarbo $156. That said Tin Plate Company was also indebted to Sturgiss for $17,450 for cash bonus paid by him, the consideration for which wholly failed. That after acquiring these claims and additional ones of the Northern Electrical Manufacturing Company of $1,042.75, and the Dunbar Fire Brick Company of $952.24, he, Sturgiss, borrowed from his co-petitioner bank a large sum of money, and to secure such loan assigned and transferred each and all of said claims to the said bank, as collateral security, in writing, except the last two to the Northern Electrical Manufacturing Company and Dunbar Fire Brick Company, and it is alleged all said claims so assigned have been proved before the referee in bankruptcy, and the bank is entitled to collect same, subject to Sturgiss' equity therein upon payment of his debt to it. It is then charged in this petition: That the Hoovens, Owens, Rentschler Company claim arose from the sale by it to the Rolling Mill Company of several Corliss engines and other machinery which was installed in the plant of the Tin Plate Company. That this sale was a conditional one in writing, reserving title until property was paid for. That in the bankruptcy cause against the Tin Plate Company an order was entered December 5, 1904, that the property should be sold free of liens, and on March 30, 1905, it was sold and purchased by said Sturgiss for $200,200,

which sale was confirmed, and that the proceeds arising from said sale were in the bankruptcy court's registry to probably more than $194,000, after paying costs and expenses, and to pay the bonds and interest would require $177,000. That petitioners are interested in and insist upon the cancellation at least of so much of the $100,000 bonds as exceeds the $21,500 for which they were hypothecated and sold. They ask to be made parties; that a first lien on the funds arising from the sale of the property be declared for the original demand of plaintiff now owned by them; that a lien be declared in their favor for Hoovens, Owens, Rentschler Company claim; that the $50,000 of bonds bought by Sturgiss be paid to them with interest; that the remaining $100,000 thereof be wholly canceled; that their petition be considered as a cross-bill; that this court settle all rights, priorities, interests, liens, and claims in the order in which the same are entitled to be paid.

On October 5, 1904, there was lodged in the clerk's office, and indorsed as filed by the clerk, a written demurrer to the original bill, not sworn to or certified to by counsel, by the defendants who subsequently, on November 4, 1904, filed the answer hereinbefore referred to, in which demurrer they allege the bill not sufficient in law, no sufficient cause of action to be stated therein, and no cause for liability as against defendants to be shown. This demurrer was by order of May 29, 1907, stricken out. On April 8, 1906, was filed by all the defendants, except Corbin, trustee, a written demurrer, properly certified to by counsel, to the petition of George C. Sturgiss and the Farmers' Deposit National Bank, in which it is charged that this court has no jurisdiction of the cause of action, in that all plaintiffs are not citizens of the same state, all parties defendant are not citizens of the same state; that all parties plaintiff do not have a lien upon the real estate set out in the bill and petition; that none of the parties plaintiff have exhausted their remedy at law by obtaining thereat judgment and execution; that on the face of the bill sufficient facts are not stated to constitute cause of action; that the Federal Trust & Savings Company, trustee in the $150,000 mortgage, and the Kings Couny Trust Company, to whom the $100,000 of bonds were hypothecated, are necessary parties; that a misjoinder of actions appears to establish a mechanic's lien to set aside mortgage and bonds and to assert personal liability of stockholders; that the bill fails to show that plaintiffs have tendered back to the purchaser of the $100,000 of hypothecated bonds the sum paid by him therefor, or facts sufficient to show that the hypothecation and sale thereof was illegal, or was then or now of any actual value, or that the property conveyed in exchange for the stock was not its full value, or that the Tin Plate Company is not liable for all the debts, or that it has not sufficient assets to pay the same. To the joint answer of the Rolling Mill Company and others and of Corbin, trustee, replications were filed, subsequent motion was made to strike out the replication to the former as not filed in time, depositions were taken, motions made by plaintiff and petitioners to extend time to take such by plaintiff and by defendants to suppress those already taken by plaintiff and petitioners. These motions to strike out replication and suppress depositions were overruled, and the time was extended to take depositions with right to defendants further to cross-examine certain witnesses introduced by plaintiffs.

A. Leo Weil and B. M. Ambler, for plaintiffs.

Reese Blizzard and Hector M. Hitchings, for defendants.

DAYTON, District Judge (after stating the facts). Every proposition involved in this case has been so bitterly, and, I may say so ably, contested by counsel that upon my former considerations of it I thought it best to postpone all questions of demurrer and other technical objections until final hearing. Nevertheless, I have had grave doubt all along as to whether this bill could be maintained for many, if any, of the purposes for which brought. It is earnestly insisted by counsel that the bill is warranted by section 8 of the jurisdictional act of March 3, 1875 (18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p.

513]), allowing suits "to enforce a legal or equitable lien upon, or claim to, or to remove any incumbrance, lien, or cloud upon title to real or personal property" to be brought in the district where such property is. This statute clearly does not enlarge the right of the individual to bring suit, where before he had no right to sue, but simply allows him, if he has right of action, to bring it in loco rei sitæ. The cases of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 977, 37 L. Ed. 804, and Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, were all decided long since the passage of the act of 1875, and all distinctly hold that no simple contract creditor can maintain in federal courts, under and by virtue of state statutes or otherwise, a suit in equity to set aside as fraudulent a conveyance by his debtor of property, because to allow him to do so would contravene the seventh amendment to the Constitution of the United States, guaranteeing to the defendant, where the amount in controversy exceeds $20, the right of trial by jury to test the validity of such debt demanded of him. If the statute of 1875 did have the scope contended for by plaintiff's bill, it would under these decisions be unconstitutional and void; but to my mind, as above stated, it has no such scope or purpose. I have no doubt that in the preparation of the bill the right of plaintiff to assail, before judgment obtained, alleged fraudulent conveyances, was misconceived, and that its purpose was to rely upon this supposed right. It is true, I think, that a suit in equity can be maintained in the federal court to enforce a mechanic's lien. In Scott v. Neely, supra, Justice Field says:

"It is the existence, before the suit in equity is instituted, of a lien upon or interest in the property, created by contract or by contribution to its value by labor or material, or by judicial proceedings had, which distinguishes cases for the enforcement of such lien or interest from the case at bar."

See, also, Sheffield Furnace Co. v. Withrow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; Idaho, etc., Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; Davis v. Alvord, 94 U. S. 545, 24 L. Ed. 283.

But this last case, to an extent at least, defines the extent to which suit can go in the enforcement of such lien, to wit, that it is "a suit in equity, requiring specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and the sale of mortgaged premises." It is to be remembered that this lien is not a general one like a judgment, binding the property generally of the debtor therein; but, on the contrary, is a limited one against a specific piece of property, and may, according to circumstances, involve no personal liability upon the owner of the property. The holder of such lien can be interested only to the extent of the specific property itself and the order of priority of his lien thereon. If such lien has, by compliance with the requirements of law, attached to the property, it is immaterial to the holder what mortgage or judgment liens may thereafter attach to it, and, I conceive, it is likewise ordinarily immaterial to him what conveyances, fraudulent or otherwise, may be made of the property. In other words, such conveyances cannot affect this specific lien, affecting not the individual, but attaching solely ad

rem, unless such conveyances are made subsequent to the attachment of such lien, and it would be under most extraordinary circumstances, hard to conceive of, if such prior conveyances were duly recorded, and notice thereof thereby given, that the holder of such mechanic's lien could assail them. I am fully persuaded that he cannot in the federal courts, by reason of this limited lien alone, undertake to bring a general creditors' bill, assailing conveyances and seeking to charge defendants individually for alleged personal fraudulent transactions. Again, while these liens must be liberally construed, the statutory provisions by which they are obtained must be strictly complied with, and the claimant thereof in the suit brought to enforce it must prove "all that is essential to the creation of the lien, and that includes proof of the commencement of the work, of its character, and its completion. The commencement of the work must be shown, for from that date the lien attaches, if at all. The character of the work must be shown, for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown, for notice of claiming a lien must be filed in the recorder's office within 60 days from that time. This proof must be furnished by the party who asserts the existence of the lien." So says Mr. Justice Field, in Davis v. Alvord, 94 U. S. 545, 24 L. Ed. 283.

The single allegation contained in plaintiff's bill asserting such lien is in these words:

"(13) Your orator is entitled to and has filed a mechanic's lien for all its said claim of $14,889.98, with interest as aforesaid, against said real estate and manufacturing plant in accordance with the laws of the state of West Virginia, and claims and is entitled by virtue thereof to a lien on said property."

Nothing can be better settled than the principles that every bill in equity must state the right, title, or claim of the plaintiff with accuracy and clearness; that every essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal; that no facts are properly in issue unless charged in the bill; that every material allegation should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry, and may be enabled to collect testimony in order to meet it; and that the bill must show sufficient matters of fact per se to maintain the case, and, if it be defective in this, the bill will be dismissed. Sand's Suit in Equity 10; Story's Eq. Pl. 284; Mitf. Eq. Pl., 125; Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; McGugin v. O. R. R. Co., 33 W. Va. 63, 70, 71, 10 S. E. 36.

Standing alone upon this single allegation and statement of fact in this bill, I have not believed plaintiff could maintain this suit to assert its claim as a mechanic's lien. This allegation states the bare fact that it is entitled to and has filed a mechanic's lien; but does not state when it filed it or where or any other essential facts showing whether it be in such form and substance as to constitute it such lien in fact. It is true that on June 19, 1906, by leave of the court, plaintiff was permitted and did file in the cause what purports to be the record of such lien relied on from the clerk's office of Monongalia county, W. Va., but this was two years after the bill was filed, after Sturgiss and his

co-petitioning bank had intervened, and after original defendants had filed their demurrer to this petition going, in its nature, to the bill also. Unidentified and not referred to or brought in by any amendment either made, asked or in any way sought to be made to the bill, I cannot believe that it can be regarded as curing the defective allegations or lack of allegations therein. It would follow that if I be right in these conclusions that the bill cannot be maintained on its face to enforce a mechanic's lien, and cannot be maintained by plaintiff on the other hand as a simple contract creditor to assail the alleged fraudulent transfers, ordinarily it would seem that I would not be called on to further consider the matter. But this position is, however, so strenuously resisted by so able counsel, and the other questions involved have been so earnestly and extendedly discussed, that I feel compelled to say that, if I should be wholly mistaken in the foregoing conclusions that the bill cannot be maintained and should substantially fall on demurrer, nevertheless, that, on the merits, I do not believe the plaintiff and the intervening petitioners are entitled to the relief prayed for by it and their petition. It seems to me clear that this controversy no longer exists between the original plaintiff in interest and the defendants; that its claim has either been paid by or assigned to petitioner George C. Sturgiss; that the allegations of the original bill charging the transfer of the property of the Rolling Mill Company of America to the Morgantown Tin Plate Company to be fraudulent must fall and drop out of the case, for it is conceded that the organization of the Tin Plate Company and the transfer to it from the Rolling Mill Company of its property and assets was not only known and consented to by Sturgiss, but that all the papers and proceedings necessary to accomplish this result were either prepared or supervised by him as attorney for the parties interested in the two companies; and it is further admitted that he, by transfer from Humbert upon the organization of the Tin Plate Company, became a stockholder of the Tin Plate Company; that he consented to be one of its original incorporators, but was not finally called upon to be such. Under such condition of affairs, it being uncontroverted that he owns the plaintiff's debt, either by assignment or payment, and that this creditor alone has made these charges of fraud, it would be a matter of supererogation to cite authorities to the effect that he is estopped from maintaining himself or having his assignee maintain them for his benefit. Nor is it denied that the mortgage or deed of trust was also advised by him and prepared under his supervision and that he subscribed and took bonds to the amount of $50,000 secured thereby, with full knowledge of all the facts and conditions under which it was executed, and therefore is also estopped from further maintaining the allegations of the bill charging this mortgage or deed of trust to have been executed for fraudulent and corrupt purposes. And, finally, it is admitted that the stock of the Tin Plate Company was issued to the extent of $150,000 to the stockholders of the Rolling Mill Company, with his full knowledge and assent, if not under his direction, in payment of assets and property transferred by the latter to the former company, a part to Humbert from whom he, Sturgiss, took part, and he is therefore estopped, either directly or through his co-petitioner bank, his assignee,

from seeking to hold said stockholders personally liable for the payment of his debt by reason of the alleged fraudulent issue of this stock to them.

Under these circumstances the controversy narrows itself down to two questions upon its merits: First. Can the cause be maintained for the benefit of petitioner Sturgiss to assert a valid mechanic's lien against the property for the debt originally set up in the bill by his assignor, the Canton Roll and Machine Company? Second. Can it be maintained at his instance and for his benefit, and possibly that of other creditors represented by Corbin as the trustee of the Morgantown Tin Plate Company in the bankruptcy proceeding, to assail and set aside the sale in New York of the $100,000 of bonds deposited as collateral with the Kings County Trust Company to secure the notes of the Tin Plate Company for $21,500 borrowed money?

Taking up the first question, there very naturally arises at the very threshold of the inquiry this question: Is it sufficiently shown in the bill, pleadings, or evidence that the machinery furnished was of the character that entitled the plaintiff to a lien? If it can be asserted at all, it must be by virtue of section 3111 of the Code of West Virginia of 1906, which reads as follows:

"Every mechanic, builder, artisan, workman, laborer, or other person, who shall perform any work or labor upon or furnish any material or machinery for constructing altering, repairing or removing a house, mill, manufactory, or other building, appurtenances, fixtures, bridge, or other structure, by virtue of a contract with the owner or his authorized agent, shall have a lien to secure the payment of the same, upon such house or other structure, and upon the interest of the owner in the lot of land on which the same may stand or to which it may be removed."

It will not be contended by any one that this statute can be construed to give a lien to the man who may sell, under contract, the furniture that may go into a house, nor can it be any more seriously contended that this lien can be taken for tools and machinery to be operated in the house, unless they become part and parcel of the structure itself. There is no substantial evidence that I recall in this case that shows that this machinery furnished by plaintiff was to be attached to and made a part of the realty so as to authorize this lien. It might naturally be assumed that some of the heavy machinery was so attached, and, on the other hand, the presumption arises just as strongly that some of it was not to be so attached. For example: The contract provides for twelve pairs chilled rolls, six pairs to be delivered with the mills, balance when required. Manifestly to one unacquainted with these mechanical details it would be assumable that, whether the "mills" were to be incorporated with the structure or not, the rolls could not be, because they could be supplied independently at any time, and as needed. I confess myself in entire ignorance touching this class of machinery, and it certainly cannot be contended that courts must take judicial knowledge of such matters. On the contrary, the burden is upon the person asserting such lien fully to prove the facts and establish the character of the machinery or work; for it is not for all kinds of such that a lien is allowed, as decided by Davis v. Alvord, supra.

In Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961, Mr. Justice Lamar says:

"This lien is a creature of the statute, not recognized at common law. It may be defined to be a claim created by law for the purpose of securing a priority of payment of the price and value of work performed and materials furnished in erecting or repairing a building or other structure, and as such it attaches to the land as well as the buildings thereon. 15 Am. & Eng. Enc. Law, 5. Now, it is not the contract for erecting or repairing the building which creates the lien, but it is the use of the material furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialman and laborer his lien under the statute."

The same principles and conclusions are deducible from the rulings of the Circuit Court of Appeals of this circuit in the cases of Liberty, etc., B. & L. Co. v. Furbush & Son Machine Co., 26 C. C. A. 38, 80 Fed. 631. Withrow Lumber Co. v. Glasgow Inv. Co., 42 C. C. A. 61, 101 Fed. 863, both of which cases arose under the Virginia statute very similar to ours. In the latter case it was attempted, as in this case, to set up an "equitable lien" independent of the mechanic's lien law, but the court expressly holds no such lien has existence at common law or equity except by statute for material or labor furnished. In this case both the validity and existence of this lien were denied and put in issue by the answers. It would therefore appear that the case of Central City Brick Co. v. Norfolk & W. R. Co., 44 W. Va. 286, 28 S. E. 926, is decisive of the point that the mere declaration of the lien on record was not sufficient proof. The Supreme Court of Appeals of this state, without dissent, therein held:

"It is not sufficient to file with such a bill the account filed with the clerk of the county court for the purpose of creating such lien, but the fact that the material was furnished to the contractor, to be used in the construction of the house, in pursuance of a contract with such contractor, must be alleged and proved before such lien will be enforced against the property."

It may be said that this case applies to a case where the material was furnished to a contractor, and not direct to the owner or his vendee as in this case. It is impossible, however, to see why any less proof should be required of the claimant as against the owner building by a contract than should be required of him as against other lienors whose debts may be wholly lost if his be maintained.

But another question comes in this matter, and that is whether the lien claimed in this case was secured by a strict compliance with the requirements of the statute. The allegations of the two answers of the original defendants and of Corbin, the trustee in bankruptcy, are fully sustained by the evidence. Briefly, these facts may be stated to be: That, by the terms of the contract, plaintiff was to furnish, together with other machinery, six pairs of rolls unconditionally, and six additional pairs when required by the purchaser. The first six were furnished, and plaintiff was substantially notified not to furnish the other six pairs. When the plaintiff had furnished all the machinery unconditionally required by the contract, it undertook to file in the clerk's office a declaration of mechanic's lien, which was duly recorded, and suit was brought to enforce it, when it appears to have been discovered that this declaration had been filed 61 days after the last item had been delivered, 1 day too late, and that other defects were apparent on the face thereof. Thereupon plaintiff dismissed its suit, and nearly

a year afterward it shipped to the Rolling Mill Company at Morgantown these six extra rolls, which were never delivered and could not be delivered to the Rolling Mill Company, for it was dissolved and had no existence, were not delivered and could not be delivered to the Tin Plate Company, because its mill, plant, and property was in custodio legis in the bankrupt court. As a result the six rolls remained undelivered in the railroad yards at Morgantown. Within 60 days after this shipment of these last rolls plaintiff filed and had recorded the declaration of lien now in controversy.

Under these circumstances, I do not believe this lien to be valid for several reasons:

First. Because it was not filed within the time required by the statute. It is earnestly insisted by counsel that:

"A contractor is entitled to one valid mechanic's lien, and, if the first one filed is faulty and defective, he may file another and perfect one within 90 days (by our statute 60) from the time the work is finished."

Also:

"When a contractor files a perfect mechanic's lien for work done and materials furnished, as required by statute, such lien is valid, not only against the party with whom the contract was made, but also against its assignee, who takes with notice and who assumes to pay its creditors itself, nor will the fact, if the contractor has accepted money due on his contract from the assignee, affect the validity of the lien against the assignor."

And the case of Williams v. Chicago, etc., Ry. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403, is cited.

Grant these propositions without a moment's hesitation, wherein are they applicable to this case? A contractor is entitled to one valid mechanic's lien if taken within the 60 days after he has finished the work or ceased furnishing the material. If he is not satisfied with his first declaration of lien, or finds it faulty, he may file another within that 60 days. I am not sure but that he may file as many as he desires within such time, and, when he institutes his suit to enforce his lien, may rely on one or all of these declarations so filed. An examination of this Missouri case, so confidently relied on, shows that the contractor filed his faulty declaration on March 13, 1888, and his valid one on April 16, 1888. There is an error in stating this date on page 427 of the report of the case (112 Mo. 20 S. W. 631) as given in 34 Am. St. Rep. It is there given as April 16, 1889, and this may have misled counsel. By turning back to the statement of facts at the top of page 409, and also to page 429, this error is apparent. The date fixed by the contractor upon which he finished work was January 19, 1888, so that both the faulty and valid lien were filed within the period of 90 days provided by the statute. The whole question turns upon the words of the statute:

"Within sixty days after he ceases to labor on, or furnish material or machinery."

Who determines the date of that "ceasing"? The contractor, and he must fix it correctly, at his peril, with no qualifications or reservations, and he must swear to it. The whole proceeding up to the bringing of the suit to enforce is purely ex parte, and, being so, it must be done

in absolute good faith. Who can tell, but the man himself, when he intends to quit finally to work on a job, when he has driven the last nail? Can he swear he has quit and file a solemn legal declaration to that effect, and then, if it suits his purposes and will be to his financial advantage, go back and drive a few more nails and then file another legal declaration that in effect says, "I did not quit, I didn't intend to quit, and I made a mistake when I swore I did"? Who must judge when he has fulfilled his contract in whole or as far as he intends to fulfill it, but the contractor himself? And when he has determined this date and by legal declaration, sworn to, filed, and recorded it, by which act of his he confidently expects to acquire a lien upon the property prior to others, by what principle of common sense, justice, and equity will he be permitted, at his own will and volition, after he finds that, for errors and mistakes committed, he has lost out, to solemnly file another declaration, nearly a year after he has lost his right, which in effect says, "I did not cease, I thought I had, but I found I had not, for I commenced 'furnishing' again"? What a complete mockery of orderly judicial administration of justice it would be to allow such a thing to be done. It seems to me that no better case of complete estoppel could be presented.

Turning again to Davis v. Alvord, we find it distinctly decided that "occasional repairs, if subsequently made, could not be added to the work performed in the erection of the buildings months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs." By a parity of reasoning, I am persuaded that the shipment by this plaintiff of some extra rolls which it knew could not be delivered, and could not in the very condition of things become part of the building or structure, cannot be added to the material and machinery furnished nearly a year before, so as to render the whole one continued performance for which a single lien could be claimed within 60 days after the last shipment. But, again, the statute only gives this lien for machinery used in constructing, altering, repairing, or removing the structure, and I have shown that it must be proved that it is used for this purpose. The evidence shows that these rolls were extra ones; that the mill was complete without them; that they were not fixtures, and in my judgment could not be subjects of this lien if they had been delivered in time. And yet again I do not believe that the contractor, knowing the Rolling Mill Company to be dissolved and its successor, the Tin Plate Company, to be in bankruptcy, could possibly, in good faith, make this shipment with any expectation that it could be used in "the construction" of the mill. For these reasons I think this mechanic's lien void.

And, now, touching the hypothecation and sale of the bonds: It seems to me from the testimony: That Humbert induced these New York men to organize the original company and locate its plant at Connellsville under representation that a six-mill plant there could be built for $100,000. That they subscribed this sum in stock among themselves, Humbert taking $10,000, and paid it into the treasury of this company and that of the reorganized one, the Tin Plate Company, in cash. That Humbert brought to them Sturgiss' proposition

to remove to Morgantown and urged them to accept it, assuring them that a ten-mill plant could be erected there for $150,000, the $100,000 they had subscribed and the $50,000 Sturgiss agreed to take in bonds. That in conveying this proposition Sturgiss constituted Humbert his agent and should be equitably bound by his representations and the inducements held forth by him to effect the purpose designed. That all the details of removal and reorganization were supervised by Sturgiss, who became a stockholder by purchase of part of Humbert's stock, and that the expenditure of the money derived from the stock subscriptions, Sturgiss' bonus, and the sale to him of $50,000 of bonds was to the cent expended by Humbert at Morgantown, under the eye of Sturgiss, while these other stockholders were in New York. That the mortgage had been made for $150,000 under the assumption that the plant would cost $150,000, and would be paid for by the unexpended stock subscription of $100,000 restored to the full amount by the $20,000 bonus, and the proceeds of the $50,000 bonds taken by Sturgiss, and that, for the necessary working capital, the company would have $100,000 of bonds in its treasury to sell. That the representations of Humbert as to the cost of plant proved wholly untrue, and, under his management, the amount stated by him to be necessary for that purpose proved to be wholly inadequate. That after he had expended the $150,000 on the plant, he called on the New York stockholders for money to pay actual outstanding indebtedness, and represented that, if they would furnish $7,500, he could complete and start the plant. That Jacob Meurer, Logan, and Ramsey personally supplied and loaned without security this sum for the purpose. That Humbert's representation in this particular proved to be untrue and the sum inadequate. In consequence he again called upon these New York stockholders for money. That in the meantime a part of the bonds had been sent to Morgantown, and both Humbert and Sturgiss, alike stockholders, had tried to sell them and raise money, but without success. That Jacob Meurer, vice president, proposed to the stockholders that they be assessed on their stock for a sum sufficient to meet the situation, but some of the stockholders objected and refused to submit to such assessment, among the number Sturgiss; that in this emergency, with suits brought by creditors, Jacob Meurer, the vice president, applied to the Kings County Trust Company for a loan upon the bonds of the company as collateral, at least morally binding himself personally to see that the trust company should not suffer loss. That this act on his part was fully known to Sturgiss and Humbert, who had tried to accomplish a loan at Morgantown in much the same way, but had failed. That at first $10,000 was thus secured, sent to Humbert, and expended—this on May 2, 1903. That on May 26, 1903, another $10,000 went the same road, secured in the same way, from the same source and upon the same security, and finally, August 7, 1903, $1,500 more, and still debts multiplied, unpaid, and pressing; that an examination of the books was had, the true condition learned, Logan threw up his hands, resigned the presidency of and his directorship in the company, and went to Europe. These three loans of $10,000, $10,000, and $1,500 were evidenced by demand notes that fully set forth that, if not so paid on demand, the

holders thereof should have full power, "without further demand or notice, to sell, assign, and deliver the whole or any part of such securities, substitutes, or additions, at any brokers board or at public or private sale, at their option, at any time or times thereafter, without advertisement or notice, and also with the right to become purchasers thereof at such sale or sales, freed and discharged from any equity of redemption." These notes subject to this express contract embodied in them, executed with full knowledge of this stockholder Sturgiss, were carried from May 2, 1903, until October 16, 1903, a period of over five months, when demand was made by the borrower upon Jacob Meurer, the then president of the company, for their payment on the 19th, three days following. On October 7th, nine days preceding, Sturgiss had written defendant Palliser a letter in which he said:

"I cannot and will not advance any money to pay off existing indebtedness. Mr. Meurer and his colleagues have put up, as I understand, $100,000 of the bonds as collateral to secure a loan of $20,000. Whether these bonds were put up to secure a loan made to the Tin Plate Company, and were treasury bonds, or were put up by the bona fide holders of the bonds or not, I do not know, but he and his colleagues must take steps at once to protect the property of the company and their associates as stockholders and bondholders from the claims of the parties here who have ordered suits to be instituted."

Did he not know that these bonds were put up to secure a debt of the Tin Plate Company? I think he did. If the bonds had been sold to bona fide holders for money, he would have been very quick, I think, to have demanded the application of the proceeds of sale, if sold below par, to have called for explanation, if at par, to know why any debts were allowed to remain unpaid. As I construe this language, it was a plain declaration to the New York stockholders that they must not only pay this loan without any assistance from him, but continue paying debts of the company out of their personal funds. Was there any obligation due to him as either bondholder or co-stockholder that required them to do this? Meurer very naturally declined to pay these notes on October 19th, and in consequence the $100,000 of bonds were placed in the hands of Adrian H. Muller & Son, auctioneers, and, although expressly by the note contracts not required to be advertised, were so advertised for sale in the Tribune, Post, Times, and Wall Street Journal on the 20th, and sold at public auction on the 21st to R. J. Kimball & Company, brokers. The contention on behalf of defendants is that this broker firm bought these bonds for Frank Logan, and that he is now the owner thereof. On the other hand, it is contended that this sale to Frank Logan is a pretense, that they were, in fact, bought through him by W. J. Logan, the former president and director and then stockholder of the Tin Plate Company, and that the latter so bought them for the benefit of himself and the other New York stockholders, and the sale and purchase were made in fraud of creditors and other stockholders. This contention is now made by Corbin, trustee in bankruptcy, in his answer, and by Sturgiss and his assignee bank in their petition. In this connection, it is proper to consider the facts, shown in testimony by copies from the records, that prior to the bringing of this one in this court, two suits had been instituted in the circuit court of Monongalia county, W. Va., the one by the Dunbar Fire Brick Company and other creditors,

in which the original plaintiff herein intervened and subsequently by order was allowed to withdraw, the other by the Hoovens, Owens, Rentschler Company, the scope of the bills in both of which was an elaborate attack upon the transfer of the property of the Rolling Mill Company to the Tin Plate Company, the execution of the mortgage by the latter, and the sale of the bonds thereunder as being fraudulent and void. To these bills, so similar to the one here, both Sturgiss and Corbin, trustee in bankruptcy, filed elaborate answers, sworn to by them. Sturgiss denies in these answers of his all fraud in these transactions, not referring, however, in detail to the hypothecation and sale of the $100,000 of bonds. On the other hand, Corbin in both answers to these two suits, in direct conflict with the allegations of his answer filed herein, does, in almost if not quite the same words in both, refer specifically to this, and says (quoting from his answer to the Dunbar Fire Brick Company):

"Further answering, respondent says that, for the purpose of completing said tin plate mill, the Morgantown Tin Plate Company borrowed divers and sundry sums of money, namely, of Jacob Meurer $2,500, of W. J. Logan $2,500, and of Dick S. Ramsey $2,500, which remains still due and unpaid, and on the ——— day of August, 1903, it borrowed from the Kings County Trust Company of New York the sum of $21,500 on a promissory note of the said Morgantown Tin Plate Company, and deposited and placed with said trust company as collateral security to further secure the payment of said sum the $100,000 par value of the first mortgage bonds that still remained in its possession and treasury, which note was a demand note, and payment thereof was demanded in October, 1903, and said Morgantown Tin Plate Company was unable at that time to sell the said bonds or raise the money to pay off said note, which, with its interest and renewals of said note or some parts thereof, amounted on the 22d day of October to the sum of $22,055.67, and thereupon said trust company caused said bonds of the amount aforesaid to be advertised and sold at public auction at 12:30 o'clock at the New York Real Estate salesroom, No. 161 Broadway, by Adrian H. Muller & Son, through Andrew J. McCormack, auctioneer, and said bonds were sold on said day, at said time and place, for the sum of $22,500, and the costs and charges for advertising and selling said bonds amounted to $254, leaving a net balance of $190.33, which was paid over by said bank, and the liability and indebtedness of said Morgantown Tin Plate Company to said bank thereby extinguished, and the sum of $190.33 aforesaid was received by said Tin Plate Company by its attorneys. Further answering, respondent says that he is not informed, and does not know, who became the purchaser or purchasers of the said $100,000 of bonds, nor to whom they were delivered by said Kings County Trust Company, nor who is now the holder of the same, but he avers that, so far as the record of said sale discloses, the said bonds were sold in the due and ordinary course of business and according to the custom and practice in such case in the city of New York, and that such hypothecating and pledging of said bonds to secure said loan, and said sale and delivery were upon their face bona fide, and so far as this respondent or the said Morgantown Tin Plate Company is concerned, were in good faith, and not intended to hinder, delay, or defraud the creditors of the said Tin Plate Company, nor to give any preference to any of its creditors over any other creditors, but only to secure the payment of the debt created at the time the bonds were hypothecated or put up with said Kings County Trust Company as collateral security for money said Tin Plate Company borrowed, and which said moneys were actually used by said Tin Plate Company in the construction of its buildings and mill."

But these quoted allegations were not original with Corbin, trustee. They were almost exact copies incorporated in an original draft pre-

pared by Sturgiss, or at least supervised, corrected, and interlined by him, of an answer of the Morgantown Tin Plate Company to the Dunbar Fire Brick Company bill.

After Sturgiss had purchased these claims involved in these two suits brought in the state courts in which these answers were filed, they were, on motion of the plaintiffs and with the consent of defendants, dropped from the docket. The property of the Tin Plate Company was, in the bankruptcy proceeding about June, 1904, appraised regularly by appraisers at a value of $84,100, as shown by a letter of the trustee filed in evidence; that at that time it was not expected to sell at public auction for more than $50,000 to $75,000, and, if the creditors assailing the transfer of the property, the mortgage, and sale of the bonds, on the grounds of fraud, in these two suits in the state court should succeed, little or nothing could be realized on such bonds either those held by Sturgiss or by any one else. It is not denied that Frank Logan, the alleged purchaser of the bonds, is the brother of W. J. Logan, and that doing business with his brother to an extent, at least, the payment therefor was directed to be charged to their funds in bank standing in the name of the brother W. J. Logan.

There is evidence tending to show statements made by Jacob Meurer and Palliser indicating an interest on their part in the purchase and ownership of these bonds, but such interest and the utterances alleged are expressly denied by them. In this condition of affairs, when a sale of the property in bankruptcy proceeding, at a ruinous sacrifice, seemed inevitable, Sturgiss, naturally enough, sought ways and means to save himself. He first sought to buy up the stock and bonds of the company. By communication with Palliser, he ascertained that the latter could control and negotiate a sale of these or a part thereof, and as a consequence he took an option from Palliser to purchase $75,000 of the bonds and 825 shares of the stock for 30 days at $30,000, for which option he paid $1,000. Upon consideration, however, he was not satisfied to buy less than the whole amount of the bonds and forfeited the option. Subsequently he offered $35,000 for the whole $100,000 thereof and said stock. Palliser informed him that his client who held them declined this proposition, and thereupon the negotiation fell through. Sturgiss then entered into some kind of contract, which is not disclosed, with the American Tin Plate Company. By this contract he agreed to buy the property of the Morgantown Tin Plate Company at the sale thereof to be publicly made and sell it to said American Tin Plate Company, it may be assumed, at an agreed price free from incumbrances. This agreed price must have been in the neighborhood of $130,000, for he admits in his testimony that the $200,200 which he paid for the property finally was over $70,000 more than he had agreed to sell it for.

The property was sold in the bankruptcy cause and, to the surprise of all, was knocked down at $154,200 to one John G. Frazer. Sturgiss filed an upset bid of $160,000, and on his motion the bidding was reopened in court, and there sold to him, Sturgiss, at $200,200. Frazer then came in, filed upset bid, and on his motion this sale was set aside, bidding reopened and sale made to Frazer for $220,000, Sturgiss bidding as much as $219,900. This last sale to Frazer was excepted

to, exception was overruled, an appeal thereupon was taken to the Circuit Court of Appeals of this circuit, which reversed the lower court, and directed the last sale to be set aside and the second sale to Sturgiss at $200,200 to be confirmed. See Sturgiss v. Corbin, 72 C. C. A. 179, 141 Fed. 1. It is in evidence here now that in the last sale so set aside Frazer was acting as agent and through orders of the defendants Hitchings and Palliser.

It may be stated, also, that the last sale at $220,000 would have paid substantially all the debts of the company, including the par value of the bonds. It is fairly to be assumed from the evidence that either before or after his purchase of the property, and in view of the probable requirements of his apparently unfortunate contract to buy and sell it to the American Tin Plate Company, that Sturgiss bought up the outstanding debts of the company. Certain it is that by his petition he shows himself to be the owner of all the debts involved here, and the evidence shows that the original plaintiff, the Canton Roll & Machine Company, was but the American Tin Plate Company in fact, all of its stock belonging to and all its acts being controlled by the latter, and that its debt was obtained by Sturgiss through the direction of the latter by assignment by its attorney acting as secretary of plaintiff company under the American Tin Plate Company's directions. Under the circumstances, can Sturgiss successfully assail the sale of these bonds? I think not for several reasons.

First. Because from the evidence I believe Frank Logan to be the bona fide purchaser and owner thereof; at least, I believe the evidence to be wholly insufficient to show the contrary. All the undisputed facts that tend to the contrary can be reasonably accounted for. The fact that he was the brother of W. J. Logan and used his bank account to pay for them is not sufficient, in the absence of any evidence that he was not a man of means and had no authority to do so. It is to be remembered that plaintiff called these defendants, made them its witnesses, and, contrary to all rules of evidence in this state and at common law, proceeded to subject them as its own witnesses to the most extended cross-examination. W. J. Logan was so subjected, yet no effort was made to substantiate these facts. Again, it is no badge of fraud that Frank Logan may have had business connection with Hitchings and Palliser, and was on intimate relations with them. The fact that this was so is a very reasonable explanation of how he was led to purchase these bonds. Finally, the fact that he authorized Palliser to give Sturgiss the option for the purchase of them can very reasonably be explained upon the theory that, finding after his purchase that he was in danger of losing in the transaction, he may have very well concluded that he had better sell $75,000 of them for what substantially he gave for them, but retaining the other $25,000 in hope of a happier turn in affairs. As I have heretofore said, the declaration of Meurer and Palliser tending to show interest are fully denied and on their face seem to me to be improbable. On the other hand, these defendants by answer and in evidence have denied any and all interest in these bonds. They have done so upon their introduction by plaintiff as its witnesses, and I think it must be bound by their statements in regard thereto.

Second. Even if these bonds were bought by Frank Logan for his brother, and these other defendants have an interest in them, I conceive that Sturgiss cannot make this assault because he does not, under all the circumstances, come into this court of equity with clean hands to do so. So long as there was probability of his being able to purchase these bonds at about what they sold for, he stood ready to uphold the integrity of their sale. As attorney, he prepared, or at least supervised, interlined, and added to, the answers to be filed by the Morgantown Tin Plate Company to the suits of some of its creditors pending in the state court, in which in full and specific terms all fraud was denied either in the hypothecation, sale, or holding thereunder of these bonds, and it was only after he had changed his mind about the purchase of the bonds, and had concluded his secret agreement to buy and sell the property to the American Tin Plate Company which involved the purchase of these outstanding debts in order to clear title, that he changed front. It is a source of bitter complaint against defendants that the name of the purchaser of the bonds was not disclosed. On the other hand, it may be pertinently asked if Sturgiss disclosed to his fellow stockholders the fact that he had a contract with this American Tin Plate Company whereby it agreed to pay $130,000 or thereabouts for the property. If he had, possibly a concerted action on the part of all concerned would have led to its immediate sale, a composition with creditors, and an ending of the whole matter, for this price was about twice as much as any one then thought the property would sell for. He did not inform his co-stockholders of this contract; on the contrary, he kept it secret, and its production is refused up to this time. Had he purchased this property at $50,000, which he already had a contract to sell for $130,000 would he, after buying in the debts for a few cents on the dollar which he could then have done, have divided any profit with his co-stockholders? It would seem not. When the shoe gets on the other foot, has he right to say in effect: "I expected to come out in the sale of the property, and left you to try to come out in the sale of the bonds. We both were keeping our plans secret from each other. Your plan was successful, while mine was a dead failure. Now I demand you give me the full benefit your success brought you to save me from the loss my failure brought me"? I think not. It is no longer in effect a question between stockholders and creditors, but between co-stockholders. Had Sturgiss allowed the $220,000 sale last made to Frazer to stand as I have said, all debts would have been paid substantially in full without further controversy.

Third. If it be held that this sale of bonds was in fact made to W. J. Logan and that other New York stockholders have an interest in them, even then I conceive Sturgiss cannot make this assault for another reason. He was an attorney at law, and was clearly acting as such for this bankrupt company and for these nonresident stockholders. He prepared for them substantially the charter papers, revised and corrected the minutes and records of its directors' and stockholders' meetings, prepared the mortgage, defended the suits, and sent written opinions to the New York officers, defendants here, as to the validity of these debts and the liens claimed for them. It

seems to me the relation of attorney and client could not be more fully established. It is well settled that an attorney cannot purchase the debt against which he has engaged to defend and then proceed to prosecute such debt, either in his own or an assignee's name, without the consent of his client. Baker v. Humphrey, 101 U. S. 494, 25 L. Ed. 1065; Chaffin v. Hull (C. C.) 49 Fed. 524. In 4 Cyc. 959, in notes, more than 30 cases are cited from the courts of this country, Canada, and England to sustain this doctrine. Perhaps no court has gone further in this direction than our own Supreme Court of Appeals in Newcomb v. Brooks, 16 W. Va. 32, where Judge Green, in an elaborate opinion, has extended the principle to all fiduciary relations, and has expressed doubt whether an attorney in any case, even with the consent of his client, can purchase property sold for the benefit of his client at judicial sale pending the suits, or on an execution after judgment.

Finally, the Morgantown Tin Plate Company was adjudged bankrupt. By election of creditors Corbin was elected trustee. He thereby became clothed by the bankrupt law with full and plenary power, as the legal representative of these creditors here, to institute suits to recover the bankrupt's property, to set aside its fraudulent conveyances, to intervene in pending suits instituted by others for such purposes, and to contest claims asserted against such bankrupt's estate. In discharge of his duties, and without protest, so far as shown, from any of these creditors whose legal representative he was, he did intervene in the suits pending in the state courts, filed his sworn answers wherein he repudiated all effort to impeach the sale of these bonds, denied all fraud charged, and set forth the details under which it was made. The allegations of his answers in this respect have hereinbefore been set out. He is clearly estopped by this action on his part from now, in this suit, changing front and from assailing this transaction. As well said by Mr. Bigelow in his work on Estoppel (3d Ed.) c. 24, p. 601:

"If parties in court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of courts of justice would in most cases be paralyzed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the courts, and consistency of proceeding is therefore required of all those who come or are brought before them."

And in Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693, Mr. Justice Swayne says:

"When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to amend his hold. He is estopped from doing it by a settled principle of law"—citing authorities.

For reasons indicated, I do not believe this cause can be maintained, either by the original plaintiff or by the intervening petitioners, and it must be dismissed, with costs against them.

HANSON v. W. L. BLAKE & CO. et al.

(District Court, D. Maine. August 3, 1907.)

No. 24.

1. BANKRUPTCY—LIENS—EQUITABLE RIGHTS UNDER UNRECORDED MORTGAGE.

Claimant was given a mortgage on a sawmill building and a part, but not all, of the machinery therein, which mortgage was not recorded in the town where the mortgagor resided, as required by the statute of the state in case of chattel mortgages. The mill burned, and the property was partially destroyed, and several months afterward the mortgagor was adjudged a bankrupt, and his trustee took possession of and sold the remnants of the mill property. After the adjudication claimant recorded her mortgage, but in the meantime took no steps to obtain possession of any of such property or to assert any right thereto under the mortgage. *Held* that, under the facts, she had no equitable claim to the proceeds of such property which could be enforced against the trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 276.]

2. SAME—PROCEEDS OF INSURANCE.

The mortgagor, however, having taken out a policy of insurance on the property payable to the claimant as her interest might appear, in accordance with an agreement made when the debt was created, she had an equitable lien on the proceeds of such policy enforceable as against the trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 295.]

3. SAME—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACTS.

Claimants sold machinery and other supplies to be used in the construction and equipment of a sawmill, taking notes therefor reciting that the title to the property should remain in the sellers until the notes were fully paid. Such notes were not recorded as required by the statute of the state in case of conditional sales. The mill and a part of the machinery were destroyed by fire, and subsequently the purchaser was adjudged a bankrupt, and the remnants, consisting in part of the property sold to the bankrupt by claimants and in part of other property, were sold by the trustee. *Held*, that the facts were not sufficient to impress the fund arising from such sale with an equitable claim in favor of claimants arising out of the conditional sale notes.

4. SAME—PROCEEDS OF INSURANCE.

Where a bankrupt, on a purchase of property under contracts of conditional sale, orally agreed to insure the same for the benefit of the sellers until it should be fully paid for, and actually procured a policy of insurance thereon payable to them as their interest might appear, which was delivered to them, on a destruction of the property by fire the fund arising from the insurance, was impressed with an equitable lien in favor of the sellers arising out of the agreement and enforceable as against the trustee in bankruptcy, even though the bankrupt had a renewal policy made payable to another than the sellers, of which fact they had no knowledge.

5. SAME—PREFERENCE—ASSIGNMENT OF CLAIM FOR INSURANCE.

The assignment by a bankrupt within four months prior to his bankruptcy and while insolvent of a claim against an insurance company for a fire loss to secure a prior indebtedness was void as a preference, and created no legal or equitable lien in favor of the assignee to the insurance money as against the trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 247.]

6. MORTGAGES—CHARACTER OF INSTRUMENT—MORTGAGE OF BUILDING TO OWNER OF LAND.

A mortgage taken by the owner of land on a mill built thereon with his consent, under an oral agreement that on subsequent payment of an agreed price he would convey the title, is not a mortgage of real estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 10.]

7. BANKRUPTCY—AGREEMENT TO INSURE—EQUITABLE LIEN ON INSURANCE MONEY.

An oral agreement by a mortgagor to insure the property for the benefit of the mortgagee whose money was used in its purchase and construction gives the mortgagee an equitable lien upon the proceeds of the insurance after the property has been destroyed by fire, as against the mortgagor or his trustee in bankruptcy, although such agreement was made after the mortgage was given and the policies had been issued which were not in terms for the mortgagee's benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 295.]

In Equity.

George M. Hanson, pro se.
Benjamin Thompson and James H. Gray, for W. L. Blake & Co.
Ashley St. Clair, for Mynia A. Young.
Fred V. Pickard, for Arabella Hicks.
Clement B. Donworth and M. M. McKusick, for E. A. Holbrook.

HALE, District Judge. This cause in equity is heard upon bill and answer and proofs. The bill seeks to determine the rights of the trustee in bankruptcy and of several claimants, who are made respondents, in and to certain moneys arising from the sale of the remnants of a sawmill, its machinery, and appliances, and from the adjustment of certain fire insurance after the loss by fire of the bankrupt's mill.

Statement of the Case.

It appears from the record that the bankrupt, Ira Hicks, was a resident of Calais, Me. In September, 1901, he entered into an oral agreement with respondent, Edward A. Holbrook, and one Charles A. Hunter, respecting the purchase from them of certain real estate situated at Vanceboro, in this district, upon which Hicks then intended to erect a sawmill. Under this agreement, Hicks was to have a mill privilege upon the land of Holbrook and Hunter for the sum of $75. No deed was ever made conveying the property to Hicks. Holbrook testifies that:

"Payment was to be made after he [Hicks] had completed his building, and had run sufficient time so that he could pay for it. The deed was to be given at the completion of payment. The substance was we tried to make it possible for him to pay for it at a time after he had got out of the strain necessary for him in starting, and be able to collect himself and settle. We were not in need of the money and he was."

He thus describes the land:

"A piece of land on the river with a frontage of between 10 and 15 rods extending back to the line of the old New Brunswick Railroad bed; and we took stakes and drove them at the four points of the four corners that would include the lot of land which he should occupy."

Hicks immediately commenced to erect a mill building about 30 by 40 feet in size, and an engine house. In this construction work he

spent about $6,000. The mill began sawing in February, 1902, and continued until August 24, 1903, when it was burned; and the greater part of the mortgaged property was destroyed. Under an order of the court, the remnants have been sold by the trustee for $225, and that amount is now in the trustee's hands. After Hicks had completed his mill, he obtained insurance upon it and upon the machinery in the sum of $2,500. After the loss, the insurance was adjusted for $2,150. The insurance money arising from the loss has been paid over by the several insurance companies, and that sum is now on deposit under a stipulation assented to by all parties in interest, to await the termination of this suit.

Statement of Claims.

The record shows the following claims:

First. The claim of Mynia A. Young for cash loaned, secured by a mortgage upon the mill property, and by a policy of the Liverpool & London & Globe Insurance Company, for $1,000, in which Mrs. Young is named as beneficiary. The following facts appear in evidence in reference to this claim: On January 7, 1902, Ira Hicks made and delivered to Mrs. Young a mortgage for $600 on the following property, namely: The sawmill building, occupied by said Hicks, on the shore of the St. Croix river, at Vanceboro, Me., two cylinder stave machines, lathe machine, and shingle machine therein, and all shafting, belting, and other running gear. Hicks declined to give Mrs. Young security on the boiler and engine, for the reason that some other person had a claim upon them. As a part of the consideration for the loan, Hicks agreed to take out insurance for the benefit of Mrs. Young, and Melville L. Young, the husband of the mortgagee, testified that that was the only condition upon which the loan was made.

This mortgage was recorded at Vanceboro on January 8, 1902; and, after Hicks' adjudication in bankruptcy, it was also recorded at Calais, the residence of Hicks. The evidence shows that, pursuant to the agreement made at the time of making the loan, Hicks obtained insurance upon the property; and one policy was payable to Mrs. Young.

It also appears from the testimony of Ashley St. Clair, agent for the Liverpool & London & Globe Insurance Company, that this policy at the time of its renewal was also made payable to Mrs. Young, and that the loss under it was adjusted, after the fire, for the sum of $1,000.

Second. W. L. Blake & Co. also make claim to the remnants in the trustee's hands. They claimed to have an equitable lien upon a portion of the insurance money.

The record shows the following facts respecting this claim: On October 22 and December 14, 1901, Hicks entered into agreements with W. L. Blake & Co. for the purchase of certain machinery, such as boiler, engine, steam pump, smokestack, and other personal property, for the equipment of his mill, of the value of $1,350; and the property in question was delivered by Blake & Co. to Hicks, under two Holmes notes, or conditional contracts, which recited, in substance, that the title to the property was to remain in W. L. Blake & Co. until the notes were fully paid. Hicks agreed to obtain insurance for the benefit

of Blake & Co. to protect them for such time as the indebtedness remained unpaid. Both of these conditional contracts were recorded in the town clerk's office at Vanceboro, the location of the mill; but neither of them was recorded in Calais, the residence of Hicks. The evidence also shows: That on January 7, 1902, Hicks wrote to Blake & Co. that he had placed insurance upon the property to the amount of $1,000 for their benefit, and again on January 20, 1902, he wrote Blake & Co.:

"I insured the mill in your favor costing me $80 which makes you secure for your debt."

That on March 9, 1902, he wrote Blake & Co.:

"I have got the mill insured for $1,000 to protect you from loss, which cost me $80."

That on January 4, 1902, Hicks obtained from Hanson & St. Clair, agents for the Hamburg-Bremen Insurance Company, a policy of insurance in that company which covered the following property:

"Frame steam sawmill building and additions, metal roof, full arch front stationary boiler, 72 in. in diameter and 16 ft. long and all fixtures attached. One plain slide valve crank engine, 14 in. cylinder, 36 in. stroke, 3½ in. new stop motion governor, all oil cups, governor belt, and fixtures with guy wires. Shafting as follows: One main shaft $3^7/_{16}$ in. in diameter and 30 ft. long; one 24 in. by 10 in.; one 24 in. by 9 in.; all pipes, fittings, valves, whistle, tube scraper, and other shafting and belting as attached to the mill.

"One No. 3 Deane Steam pump and fixtures.

"Payable to W. L. Blake & Company."

This policy was sent by Hanson & St. Clair, the agents of the insurance company, to Blake & Co. It remained in the possession of Blake & Co. until July, 1902, when the Hamburg-Bremen Insurance Company withdrew its agency from Hanson & St. Clair. Thereupon Hanson & St. Clair, as agents of that company, wrote to Blake & Co.:

"We have been directed by Hamburg-Bremen Ins. Co. to cancel Hicks risk at Vanceboro. To protect you we have issued policy in L. & L. & G. for same amount, etc. Kindly return to us the policy of the Hamburg that you now hold."

On July 28, 1902, Hanson & St. Clair substituted for the policy in the Hamburg-Bremen Company a policy in the Liverpool & London & Globe Insurance Company for one year, which covered the identical property mentioned in the Hamburg-Bremen in the same sum, and which was also payable to W. L. Blake & Co. as interest might appear. This policy was also forwarded to Blake & Co. On August 9, 1902, Hanson & St. Clair wrote to Blake & Co.:

"I inclose policy on Hicks mill. Kindly return policy you hold in Hamburg-Bremen."

On April 13, 1903, Hicks again wrote Blake & Co.:

"You are well secured by insurance which cost $100, so that you might be safe."

On June 29, 1903, Blake & Co. wrote Hanson & St. Clair:

"We notice, on looking up the Ira Hicks matter, that the insurance expires July 28th. Will you kindly advise us if he has made arrangements to have this renewed."

On June 30, 1903, Blake & Co. wrote Hicks:

"Kindly not overlok the fact that your insurance runs out July 28th. We suppose you have made arrangements with Hanson & St. Clair to renew this."

On July 2, 1903, Hanson & St. Clair wrote Blake & Co.:

"Replying to your favor of June 30, we have to say that Mr. Hicks has instructed us to renew all insurance as it expires."

On July 28, 1903, Hanson & St. Clair renewed the policy in the Liverpool & London & Globe Insurance Company for the same amount, covering the same property. This policy did not contain the names of W. L. Blake & Co. as beneficiaries, but contained the words:

"Payable in case of loss to Arabella Hicks as interest may appear."

The agent testified that the name of Blake & Co. was left out because Hicks came into the office a few days before the policy run out, and told him that he did not want the policy payable to Blake & Co., as he should have them all paid up within a few months, and that this conversation occurred after his firm had written Blake & Co. that Hicks had requested all policies renewed. Hicks states that, when this policy run out, he changed it to his wife's name, as she had more money in the concern than Blake & Co. No notice of this change was sent to Blake & Co.; and Mr. St. Clair also testified that Mrs. Hicks was not present at the time the policy was renewed. The testimony further shows that Blake & Co. did not have any knowledge that the renewal policy issued on the 28th day of July, by the Liverpool & London & Globe Insurance Company, was not issued as agreed, namely, making them beneficiaries, until the receipt of a letter from Hanson & St. Clair, dated August 24, 1903, as follows:

"The Hicks mill at Vanceboro burned Sunday morning. Looking at the policy register, I see his wife's name is substituted for yours. As she has no mortgage interest this will not affect your lien, but you should give the statute notice. As we understand the arrangement between you and Mr. Hicks, your claim was regarded as a mortgage. Kindly send amount of claim and bill of sale, and we will see that notice is given."

The loss under this policy in the Liverpool & London & Globe was adjusted at the sum of $650.

Third. Arabella Hicks, the wife of Ira Hicks, claimed the insurance received from the Liverpool & London & Globe Insurance Company, which was originally made payable to Blake & Co., and also the insurance received from the Capital Insurance Company. The evidence shows that in November, 1901, she loaned her husband $1,000, and on February 15, 1902, she made a further loan of $500, for which she took his notes, payable two years after date, and the moneys so received by Hicks were used in his business. There is no evidence that there was ever any agreement to insure for her benefit, or that she should have any security for either of the loans so made by her. Mrs. Hicks, however, testified that the insurance policy in the Liverpool & London & Globe was changed to her name to secure her against loss, and that the assignment made on August 25, 1903, of the claim against the Capital Fire Insurance Company, due and owing Hicks

by reason of the loss which occurred on the 23d day of that month, was made to protect her for the moneys which she had let her husband have, and he thought she ought to be secured, and that her husband told her about it, and that she saw and read the policy over. The bankrupt himself testified that, when the policy in the Liverpool & London & Globe expired, he had it changed to his wife's name, because she had more money in his business than Blake & Co. did, that his wife had no mortgage or security on the mill property, and Mr. St. Clair, the agent of the insurance companies, stated that Hicks wanted the policies made payable to his wife, and that this talk occurred after he (St. Clair) had written Blake & Co. that Hicks had requested the policies to be renewed. It also appears that none of the parties to whom the policies were made payable were present when the renewals were issued.

Fourth. Edward A. Holbrook also made claim to the proceeds in the hands of the trustee, and sought to enforce an equitable lien upon all of the insurance money by virtue of the statutes of Maine giving a mortgagee of real estate a lien upon insurance placed thereon by the mortgagor, and further claimed that he was entitled to an equitable lien on the insurance moneys by reason of a promise to insure for his benefit upon the part of Hicks. The evidence shows that on February 25, 1902, Hicks gave Holbrook two notes for $250 in consideration of advances; that on the 21st day of March, 1902, Hicks was indebted to Holbrook for more than $2,000, and that, on that date, he gave Holbrook six notes of $250 each; that on the same day, namely, March 21, 1902, Hicks made and delivered a mortgage to Holbrook to secure the payment of the eight notes. The property described in the mortgage is as follows:

"The mill building and all machinery thereto connected, comprising a steam mill plant with its complement of shafting, two stave machines complete, one shingle machine complete, the boiler and engine, together with any and all machinery belting and outfit for operating, now in said mill, all situated in said Vanceboro, on lot of land bargained for of the said E. A. Holbrook and Chas. A. Hunter, lying west side of St. Croix river, north of Maine Central Ry, and east of old line of New Brunswick Ry."

The condition of the mortgage was that Hicks should pay Holbrook $2,000 in several notes maturing at various times, the last of them at seven months, with interest at the rate of 6 per cent. per annum, payable annually. The mortgage was recorded in the town clerk's office at Vanceboro on March 21, 1902, and in the registry of deeds for Washington county on March 24, 1902. After the adjudication of Hicks as a bankrupt, it was recorded in the city clerk's office in Calais on January 30, 1904. The only interest which Hicks had in any of the real estate was that which has already been alluded to in my statement of the case, namely, the oral agreement to purchase, but without any deed or writings conveying the property. Mr. Holbrook testified that he had no knowledge or intimation that there was any incumbrance on any of the property put into the mill. The evidence does not show that anything was said at the time of giving the mortgage to Holbrook respecting any insurance to secure him. But Mr. Holbrook testified that he told Hicks, after the giving of the mortgage, that:

"We wanted him to protect us by the assignment of the policy. He was going to have it done. * * * Some months later he said he had not done so, but would."

Holbrook testified that he never had in his possession any policy of insurance on the property.

In respect to other insurance, the testimony is that in addition to the policies of insurance already mentioned, on May 1, 1903, the bankrupt obtained a policy in the Capital Insurance Company insuring him for a term of one year from the 1st of May, 1903, to the 1st of May, 1904, as follows:

"$150.00 on his frame steam sawmill building and additions with metal roof. $250.00 on his two cylinder stave machines, including saws, shafting, belting, gearing pulleys and connections. $50.00 on his lath machine contained therein, including saws, shafting, belting, gearing, pulleys and connections. All the above property is situated at Vanceboro, Maine, on the bank of the St. Croix River sixty rods north of the railroad bridge and is occupied by the assured for sawing green lumber into staves, laths and shingles. Other insurance permitted. Lightning clause attached. $50.00 on shingle machine contained therein."

This policy was not made payable to anybody, and had no connection with the others, but it covered part of the same property covered by the policy originally payable to Blake & Co., the loss under this policy was adjusted for the sum of $500, and that this is the insurance covered by the assignment from Ira Hicks to Arabella Hicks, dated August 25, 1903.

1. In considering the claim of Mynia A. Young, it is necessary to pass upon her rights under the mortgage to the fund derived from the sale of the remnants of the mortgaged property, and to consider also her rights under the insurance policy.

(a) Has she a claim under her mortgage?

It appears by the testimony that the mortgage was made January 7, 1902, and was recorded at Vanceboro January 8, 1902; that the bankrupt at the date of the giving of the mortgages, and at all times thereafter, was a resident of Calais; that, after the adjudication in bankruptcy, it was also recorded in Calais on February 18, 1904; that the petition of the bankrupt was filed December 2, 1903, and he was adjudged a bankrupt December 5, 1903. Section 1 of chapter 93 of the Revised Statutes of Maine provides:

"No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by, the mortgagee, or the mortgage is recorded by the clerk of the city, town or plantation organized for any purpose, in which the mortgagor resides when the mortgage is given."

Section 67a of the bankrupt act of July 1, 1898 (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449]), provides:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 70a of the bankrupt act provides:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation

of law with the title of the bankrupt, as of the date he was adjudged, 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."

Under the facts disclosed in the record, can the claim of Mrs. Young be enforced in equity, in a bankruptcy court, upon the fund derived from the sale of the mortgaged property?

Her mortgage was not recorded in the town in which the mortgagor resided when the mortgage was given. It was recorded at Calais, but not until after the adjudication in bankruptcy. It is clear that her rights are determined by the date of the filing of the petition in bankruptcy. The language of section 70a of the bankrupt act, which I have quoted, makes this clear. The decisions of the federal courts also make it clear that the rights of creditors to insolvent estates, administered in equity, relate to the time of institution of proceedings in bankruptcy. The mortgage, not having been recorded before the filing of the petition in bankruptcy, may be treated as an unrecorded mortgage. It will be noted that the bankrupt act of 1898 defines the rights in property which pass to a trustee in different language from that employed by the law of 1867 in defining rights which pass under that act to an assignee in bankruptcy. So that the long line of decisions under the act of 1867 do not apply.

The case of Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, is often cited in the federal courts as deciding that the state law controls in this matter. In that case the court held that:

"Whether the taking possession of after-acquired property within four months of the filing of the petition in bankruptcy, under a mortgage made in good faith prior to that period, is good or is void as against the trustee in bankruptcy, depends upon whether it is good or void according to the law of the state. Held, that such a taking is under the circumstances of this case good according to the law of Massachusetts as construed by its Supreme Judicial Court."

In speaking for the court, Mr. Justice Holmes said:

"The question, then, is one of Massachusetts law, and unfortunately the decision does not leave us free from doubt, upon that point. If hereafter the Supreme Court of the state should adopt a different view from that to which we have been driven, this case would cease to be a precedent. The language of the Massachusetts statute is: 'Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited (fifteen days) shall be void.' Mass. Rev. Laws, c. 198, § 1. There are cases which indicate that an assignee in bankruptcy is a universal successor, like an executor or a husband, and so that, as it is put in Lowell, Bankruptcy, § 309, the assignee is the bankrupt. * * * But it is the settled law of Massachusetts that such a fictitious identity does not satisfy the statute that the trustee in bankruptcy is 'a person other than the parties thereto,' and that, therefore, as against him, the mortgage is void. Bingham v. Jordan, 1 Allen (Mass.) 373, 79 Am. Dec. 748; Blanchard v. Cooke, 144 Mass. 207, 226, 11 N. E. 83; Haskell v. Merrill, 179 Mass. 120, 124, 125, 60 N. E. 485. Haskell v. Merrill is cited and relied on in the Supreme Court of the state, and we assume that it and the other cases cited still correctly state the law. It is clear under these cases that recording or taking possession after the qualification of the trustee would be too late, and it certainly would seem not illogical to hold that as against him the mortgage was to be treated as nonexistent at any earlier date

until the things were done which made it good under the act. In this case the court speaks of 'the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition,' which at least suggests, if it does not adopt, the idea that the mortgage then first came into being as against the trustee."

But in some late decisions in this circuit the Court of Appeals does not treat Humphrey v. Tatman as decisive of the question that the state law is controlling; but tends to the doctrine that in equity this question is a federal question, and that equitable rights of claimants and of the trustee should be settled under the federal decisions, and without reference to local statutes and decisions. Upon an examination of Humphrey v. Tatman, supra, it will be found that it relates to the title to chattels which were added to a stock of merchandise after it was mortgaged. It raises the issue whether a mortgagee gets any title to subsequently acquired property; but some of the language which I have quoted from that opinion relates to the question of how far creditors can seize that which is not the property of the bankrupt. The case turned on the question of the mortgagees having taken possession of the property. If the mortgagee had not taken possession, and the question had arisen whether the mortgagee could then hold the after-acquired property in question, as against the trustee in bankruptcy, the rule might have been stated differently. In any event, the Court of Appeals in this circuit tends to hold the question as one having nothing to do with local statutes, but as presenting an equitable question, which should be settled without reference to the statutes of the state where the question arises. In the late case of Alice H. Loveland, Petitioner, in the Matter of Warren H. Littlefield, Bankrupt, and Alfred W. Putnam, Trustee, Appellant, v. Alice H. Loveland, Petitioner (wherein the opinion is as yet unpublished), the Court of Appeals sustained a claim in equity under an unrecorded mortgage of real estate, and held that the mortgagee had a lien superior to the rights of the trustee in bankruptcy. In speaking for the court, Judge Lowell said:

"The general principles of equity, as recognized in the federal courts, give effect to the intention of parties who intend to create a lien under the circumstances of this case, notwithstanding that their agreement by reason of its informality is invalid at law. In York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court had to deal with an unrecorded conveyance in a state whose statutes required a record, and the title of the transferee was held to be superior to that of the trustee in bankruptcy. The statute there in question, as construed by the state court, made an unrecorded mortgage void as against certain classes of creditors, while leaving it valid as against other classes. The state statute before us makes the unrecorded conveyance void as against creditors without notice, leaving it valid as against those creditors who have notice of it."

See, also, James v. Gray, 131 Fed. 401, 65 C. C. A. 385, 1 L. R. A. (N. S.) 321; Tucker v. Curtin, 148 Fed. 929, 78 C. C. A. 557; Hewit v. Berlin Machine Works, 194 U. S. 296, 302, 24 Sup. Ct. 690, 48 L. Ed. 986.

I have referred to the above cases as showing the current of late decisions of the federal court in this circuit, touching matters relating to rights under unrecorded mortgages, conditional sales, and statutes of fraud.

In Atchison Railway Co. v. Hurley, 153 Fed. 503, in an opinion just sent down by the Circuit Court of Appeals for the Eighth Circuit, that court enforces an equitable lien upon very broad equitable principles, holding that 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 to recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable or both. The court recites the line of authorities to which I have already referred, and says:

"Whatever rights the third party had against the property of the bankrupt before the 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."

Previous to these late decisions the federal courts have often held that the state law in reference to unrecorded mortgages was conclusive in construing the bankrupt act relating to this subject; and in the Loveland Case, supra, Judge Lowell remarks:

"Where the trustee in bankruptcy and the transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the bankrupt act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt and is interpreted by the state court. The other law regulates its passage to the trustee and is interpreted by the federal court."

The only case that has arisen in this district touching the question of an unrecorded mortgage was In re Shaw (D. C.) 146 Fed. 273. In that case—

"a bankrupt who operated a tannery in Maine, some two years prior to the bankruptcy, executed a chattel mortgage to a creditor on all the stock and materials at his tannery, and such as should thereafter be acquired. By agreement the mortgage was not recorded, nor was any possession ever taken thereunder. Subsequently the mortgagee made a mortgage to secure an indebtedness to a bank on certain bark at the bankrupt's tannery, to which it had no title unless by virtue of its own mortgage. Also, by agreement, this mortgage was not recorded, but an attempted delivery of possession was made by going to the tannery, scaling the bark, and placing on each pile a small board, having thereon a letter of the alphabet, and then formally delivering each pile to the agent of the bank who appointed the bankrupt its custodian. There was no visible change of possession, and the bankrupt's trustee took possession of and sold the bark as assets of the estate."

And this court held:

"That under Rev. St. Me. c. 93, § 1, which provides that 'no mortgage of personal property is valid against any other person than the parties thereto unless possession of such property is delivered to and retained by the mortgagee or the mortgage is recorded,' there was no such delivery and retention of possession as to validate either mortgage, but that both were fraudulent as attempted secret liens, and void as against the bankrupt's estate."

And the court said:

"The testimony tends to show that, at the time of the giving of the mortgage to the bank, Shaw was insolvent, that there was an obvious attempt to make the delivery to the mortgagee secret, rather than open, and that there was a distinct and affirmative understanding that the mortgage was not to be recorded. The case discloses a want of good faith, resulting in an actual fraud upon the general creditors."

It will thus be seen that the court placed weight upon the fact that there was an express agreement not to record the mortgage, and that this agreement was a circumstance tending to show actual fraud. In such a case, even under the recent decisions, the court must hold that the lack of record of a mortgage is a circumstance showing fraud. So that, whatever may be the condition of the law, the Shaw Case was decided in accordance with the principles of equity; and so it is in line with the cases to which I have referred. The cases cited in the Shaw Case show the current of decisions up to that time. The case to which I shall refer later in this opinion, In re Garcewich, 115 Fed. 87, 53 C. C. A. 510, is in line with the Shaw Case, and refers to a secret lien.

Later in this opinion I shall discuss other cases bearing upon unrecorded Holmes notes and notes relating to conditional sales. In those citations I shall refer to some federal decisions previous to the late decisions in this circuit.

The question, however, relating to the claim of Mrs. Young to the fund derived from the sale of the mortgaged property does not necessarily depend upon the record of the mortgage; for, in any event, sufficient facts are not disclosed to sustain the equitable lien of the claimant upon the fund. The fund in question arises from the sale of the remnants of the whole of the mortgaged property. The mortgage of Mrs. Young was upon a portion only of the property. Further than that no possession was taken by the mortgagee; and no efforts were made by her to enforce her equitable rights. Under the facts disclosed by the record, her claim cannot be enforced to the fund of $225 derived from the sale of the remnants of the mortgaged property.

(b) What are the equitable rights of the claimant, Mrs. Young, in and to the fund arising from the adjustment of the fire insurance?

The record shows that at the time the loan was made there was an agreement that it was to be secured by an insurance policy, and that the only condition upon which the loan was obtained was the consideration that the property should be insured for the benefit of Mrs. Young. In pursuanec of that agreement, the bankrupt had the property insured. One of the policies, for $1,000, upon its renewal, January 4, 1902, was made payable to Mynia A. Young. She was the beneficiary as her interest might appear. Does the testimony give her an equitable lien?

It will be noted that we are not now discussing "property" within the meaning of the bankrupt act; but merely a contract to indemnify the insured in the event of a loss by fire. It is evident that a fire insurance policy is not an asset to which the purchaser could look for security until the occurrence of the loss by fire.

Did, then, an equitable lien exist, in consequence of the agreement, upon the policy and the money received therefrom?

In Wheeler v. Insurance Company, 101 U. S. 439, 25 L. Ed. 1055, it was held that:

"Where by his covenant or otherwise a mortgagor is bound to insure the mortgaged premises for the better security of the mortgagees, the latter have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken out by him."

In speaking for the Supreme Court, Mr. Justice Bradley said:

"It is settled by many decisions in this country that, if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. * * * And this equity exists, although the contract provides that in case of the mortgagor's failing to procure and assign such insurance the mortgagee may procure it at the mortgagor's expense."

It will be observed that in the claim now before the court the mortgagee is made the beneficiary in the policy, so that she has a stronger claim than arose in the case which I have just cited. She has substantially the same claim in equity that she would have had if the insurance policy had been taken out in the name of the bankrupt, and had then been assigned to her.

See, also, Richardson v. White, 167 Mass. 58, 44 N. E. 1072; Stearns v. Quincy Ins. Co., 124 Mass. 61, 26 Am. Rep. 647, and cases cited.

The federal courts have held, in a consistent line of decisons, that in circumstances like those in the case at bar the recording of an equitable lien is not necessary.

In Re Little River Lumber Co. (D. C.) 92 Fed. 585, the court said:

"The transfer of these policies was not required by any law to be recorded or registered in order to give notice. * * * Prior to the fire these policies were not assets, like notes, mortgages, and other choses in action, to which creditors could look for security. Indeed, the company could not collect them. There had been no loss, and their collection depended on the loss. * * * Is the equitable assignment thus made of the proceeds of a policy thus pledged more than four months before bankruptcy, in violation of the bankrupt act? If so, of what provision? * * * In the first place, these insurance policies were not property within the meaning of the bankrupt law. They were mere contracts to indemnify the assured in the event there was a loss by fire. They were not an asset to which creditors could look for any security until a loss had occurred. * * * They were, however, assignable in equity, and, before the loss, had been hypothecated to O'Dwyer & Ahern as collateral. But, if the policies were property, in order to contravene the section referred to they must have been transferred 'with intent to prefer such creditors over his other creditors.' * * * When the original pledge was made, the evidence shows the company was solvent. It was insolvent when most of the policies were renewed, and most of them were renewed more than four months prior to the bankruptcy of the company."

In the claim now before me the facts stated in the record show that, as a condition for making the loan, there was an agreement to insure for the benefit of the claimant, and that the policy and the renewal of it were taken in her name as her interest might appear. Her insurable interest appears by the facts found in the statement of the case which I have made. Her equitable interest appears as I have just pointed out.

I find, then, that an equitable lien existed upon the policy for $1,000 to secure the claim of Mynia A. Young to the extent of that claim, namely, the sum of $600, with interest from January 7, 1903, making her whole claim $763.20.

2. The claim of W. L. Blake & Co. is also to be considered in two parts.

(a) Have they an equitable lien upon the fund of $225 derived from the sale of the remnants of the property?

The case shows that in October and December, 1901, the bankrupt made certain contracts with Blake & Co. for the purchase of machinery described in the contracts. He gave Holmes notes, reciting severally that they were given for the property described, and that the title was to remain the property of Blake & Co. until the several notes were fully paid. These notes were recorded in the office of the town clerk of Vanceboro; but were never recorded in the town of Calais, where Hicks lived. Section 5 of chapter 113 of the Revised Statutes of Maine provides:

"No agreement that personal property bargained and delivered to another, shall remain the property of the seller till paid for, is valid unless the same is in writing and signed by the person to be bound thereby. And when so made and signed, whether said agreement is, or is called a note, lease, conditional sale, purchase on instalments, or by any other name, and in whatever form it may be, it shall not be valid, except as between the original parties thereto, unless it is recorded in the office of the clerk of the town in which the purchaser resides at the time of the purchase."

I have already quoted the provisions (sections 67a and 70a) of the bankrupt act. In deciding whether the claimant can enforce an equitable lien upon the fund derived from the sale of the remnants of the mill, it becomes material to inquire whether the property covered by the Holmes notes and the property sold are the same. I find that each note was for a different property. The first was for a boiler, engine, steam pump, smokestack, shafting. The second was for corrugated roofing, piping, and similar supplies. The property from which the fund is derived was the remnant after the destruction of the mill and contents by fire. The chattels covered by the Holmes notes are, then, but a part of the property, the remnant of which has been sold and has become the basis of the fund in question. There being different claimants making claims upon this fund, and there being no identity of property, it is impossible to impress the whole fund with the equities arising from these two Holmes notes. Inasmuch as the case, however, may go beyond this court, it is not wise to dismiss the case by passing upon this mere question of fact, but it is wise to consider what effect the nonrecording of the Holmes notes has upon this subject-matter. Much that I have said relating to the first claim applies to the claim which I am now considering. Notwithstanding the apparently sweeping phraseology of sections 67a and 70a of the bankrupt act, I have already observed that the courts in this circuit have lately shown at least a tendency to hold that these sections of the bankrupt act are not applicable to conditional sales, even though expressly declared by state statutes to be void for lack of record, and that the whole subject is to be treated with reference to the federal decisions and without reference to local statutes or local decisions of the states. Loveland Case, supra; James v. Gray, supra; Tucker v. Curtin, supra; Hewit v. Berlin Machine Works, supra.

A similar question was before Judge Webb in this district in 1899, in the proceedings of George D. Robinson, individually and as a member of the firm of Robinson & Hodgdon. In that case the Abram French Company proceeded against Wilford G. Chapman, as trustee

in bankruptcy of Robinson & Hodgdon, to recover personal property which the company had delivered to the bankrupts. In an unpublished opinion, Judge Webb said:

"The Abram French Company did not sell the articles so specified, but contracted to lease them to Robinson & Hodgdon, upon terms agreed to, by which the lessees would finally become vested with the title to the property upon performing all the conditions agreed to be contained in the lease. * * * The Abram French Company never parted with the title and property in the articles in controversy. Without considering what might have been the rights of attaching creditors of Robinson & Hodgdon or bona fide purchasers for value, since no such question is presented in the case, I hold that the special agreement was valid as between the French Company and Robinson & Hodgdon, that they might at any time have taken possession of the articles, that the title of the trustee is no greater than that of the copartnership and the partners."

He refers to Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816, Dudley v. Easton, 104 U. S. 99, 26 L. Ed. 668, and also adopts the language of the court in Yeatman v. Savings Institution, 95 U. S. 764, 766 (24 L. Ed. 589), in which it was held:

"The established rule is that except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. He takes the property in the same 'plight and condition' that the bankrupt held it."

Judge Webb then proceeds:

"There was delay on the part of Robinson & Hodgdon in executing this lease, among other reasons, because Hodgdon made objection to engaging in a copartnership. Correspondence followed, in which the Abram French Company called attention to the failure to sign and return the lease, and were informed that the draft which was sent had in some way become lost. By the lease a payment of $300 was to be made in cash at once, but it was never made. One hundred and twenty-five dollars was sent with suggestion of other changes in the terms of the lease, especially as to its times and amount of payments. These changes were never assented to by the French Company, who constantly insisted upon a performance by Robinson & Hodgdon of the contract of lease."

In that case it appears that there was no completed contract which could have been recorded; and therefore it could not have been within the provisions of section 5, c. 113, Rev. St. Me. The case is discussed precisely as if the bankruptcy law of 1898 had been the same as the bankruptcy law of 1867, and did not contain the provisions 67a and 70a. But, as I have said, in that case there was nothing to be recorded. There was no agreement calling for any record. While the goods had been forwarded to Portland, the terms under which they had been retained had not been definitely fixed and reduced to writing. And in that case Judge Webb did not discuss the principles laid down in the late cases in this circuit to which I have referred. In another branch of the case at bar I have already commented upon Humphrey v. Tatman, supra, and other cases in which the federal courts have followed the decisions of the state courts, relating to the effect of

unrecorded conditional sales. In the Garcewich Case, supra, Judge Wallace shows the general attitude of the federal courts upon this subject, and especially upon fraudulent conditional sales. He says:

"It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear; but, when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. Ludden v. Hazen, 31 Barb. (N. Y.) 650; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Bonesteel v. Flack, 41 Barb. (N. Y.) 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the montgagor, and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

Dealing with this subject, the following decisions of the federal courts are important, although many of them have taken a different view of the law relating to unrecorded mortgages and conditional sales from that taken by the leading cases in this circuit: Re Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261; Re Josephson (D. C.) 116 Fed. 404; Re Tatem & Ano. (D. C.) 110 Fed. 519; Re Shirley, 112 Fed. 301, 50 C. C. A. 252; Re Pekin Plow Co., 112 Fed. 308, 50 C. C. A. 257; Re Builders' Lumber Co. (D. C.) 148 Fed. 244; Re Foundry & Machine Co., 17 Am. Bankr. Rep. (August, 1906) 291, 147 Fed. 828; Re Bradley, Alderson & Co., 17 Am. Bankr. Rep. 495, 149 Fed. 254; Re Smith & Schuck, 13 Am. Bankr. Rep. 103, 132 Fed. 301; Re Nathan Lukens, 14 Am. Bankr. Rep. 683, 138 Fed. 188; Fisher v. Cushman, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292.

I have referred to these cases, and especially to the recent cases in this circuit, in order to show the present condition of the federal law relating to this subject. I do not base my decision, on this branch of the case, upon the fact of the lack of record of the Holmes notes, but I come to my conclusion, because the facts shown in the record are not sufficient to impress the fund with the equitable claims arising under these conditional sales.

(b) What are the equitable rights of these claimants under their insurance policies?

Upon this point, the record shows an agreement between the bankrupt and Blake & Co. that the bankrupt should insure the property received from Blake & Co.; that the bankrupt took out a policy in the

Liverpool & London & Globe Insurance Company payable to Blake & Co. in accordance with the agreement. This agreement relating to insurance was an oral agreement. Neither the conditional contracts, nor any of the mortgages in the case, contain any agreement relating to insurance. The record further shows that Hicks carried out his agreement to insure. The letters contained in the record show that he did as he agreed, and that the policy was, in fact, taken out and delivered to Blake & Co. in the Hamburg-Bremen Insurance Company, and later in the Liverpool & London & Globe. The claim of Blake & Co. differs from that of Mrs. Young, however, in this: that in her case she was named as beneficiary in the policy. Blake & Co. were not named as beneficiaries in policies which existed at the time of the fire; but, on the other hand, notwithstanding the policy in the Liverpool & London & Globe was originally payable to Blake & Co., at the time of its renewal the bankrupt requested the agent of the company to make it payable to his wife, instead of to Blake & Co., and it was so made in consequence of this request. Blake & Co. knew nothing of this change until after the loss by fire. In consequence of the agreement to insure which the case shows, did an equitable lien exist upon the insurance policies and upon the moneys which have been received from them?

I have already cited and considered Wheeler v. Insurance Company, supra.

In Farmers' Loan & Trust Co. v. Penn Plate-Glass Co. et al., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710, it was held that:

"The rule that, where a mortgagor has covenanted to insure the mortgaged property for the benefit of the mortgagee, a court of equity may impress an equitable lien in favor of the mortgagee upon a fund arising from insurance taken by the mortgagor in his own name, is based upon the existence of an express contract by which the owner agreed to give a lien upon that particular fund, and upon the maxim that equity regards as done that which ought to be done; but, as equity cannot create the lien independently of contract, such rule cannot be applied to the proceeds of insurance taken for his own benefit by a grantee of the equity of redemption in the property subject to the mortgage, between whom and the mortgagee there is no contract with respect to such fund."

In that case, in speaking for the Circuit Court of Appeals for the Third Circuit, Judge Gray quoted the language of the court in Wheeler v. Insurance Company, supra, and said:

"The equitable lien in such case arises from the unperformed contract between mortgagor and mortgagee. Equity regards as done that which ought to be done. And, therefore, if the mortgagor, having so covenanted, fails to make the policy of insurance payable to the mortgagee, or to assign the same, before or after loss, the fund arising therefrom is clearly within the operation of the fundamental maxim just quoted, because the mortgagor was bound to so fulfill his promise to the mortgagee as that funds arising from insurance effected by the mortgagor should belong to the mortgagee, at least to the extent of his (the mortgagee's) interest in the property insured. This promise or executory contract equity will enforce by impressing such funds with a lien in favor of the mortgagee, whether in the hands of the mortgagor, his heirs, executors, or administrators, the insurance company, or voluntary assignees of said funds, or purchasers or incumbrancers thereof with notice. Walker v. Brown, 165 U. S. 654; 664, 17 Sup. Ct. 453, 41 L. Ed. 865; 3 Pom. Eq. Jur. § 1235. But, apart from cases of fraud, it is only when there is such a contract or promise, which can be so enforced, that courts of equity

will recognize for that purpose the existence of an equitable lien. In such case the lien is impressed upon funds or property, which, belonging to the promisor, were the very funds or property which constituted the subject-matter of the contract, or to which the contract or promise related. It is essential, therefore, that the funds or other property which are to be charged with the lien should have, either at the time of the contract or afterwards and while it was still unperformed, belonged to the party against whom the contract is to be so enforced, and be so identified, even though at the time of suit the said funds or property have come into the hands of volunteers, or of others who may be affected with notice. There must, therefore, exist a contract by the party owning, either in præsenti or in expectancy, the property sought to be charged, which directly or by necessary implication expresses the intention to charge such property with the lien, in favor of the other party, to the contract. These requisites to the establishment of an equitable lien are clearly recognized by the Supreme Court in the late case of Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453, 41 L. Ed. 865. The court in that case quote and adopt the language of the Supreme Judicial Court of Massachusetts in Pinch v. Anthony, 8 Allen (Mass.) 536. * * * Equity will, under some circumstances, enforce the performance of a contract, or of a duty growing out of a contract, through the indirect methods of the recognition of an equitable lien or assignment; but it will not, in the absence of fraud, create the duty or obligation independently of a contract, expressed intent, or will, at some time entered into or declared by the party sought to be charged."

This case was affirmed, on appeal, by the United States Supreme Court in Farmers' Loan & Trust Co. v. Penn Plate-Glass Co., 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234. In speaking for the Supreme Court, Mr. Justice Peckham said:

"The case of Wheeler v. Insurance Company is founded upon the existence of the obligation of the mortgagor to insure, and it is said that, under such circumstances, the mortgagee will have an equitable lien upon the money due upon a policy of insurance taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed, and that such equitable lien exists, although the contract provided that in case of the mortgagor's failure to procure and assign that insurance the mortgagee might procure it at the mortgagor's expense. If the insurance had been taken out by this mortgagor company, even in its own name, we would have the same principle as decided in the last cited case, and the complainant herein might, as its counsel claim, have had an equitable lien upon the moneys arising from such insurance to the extent of the loss under the mortgage."

In Walker v. Brown, 165 U. S. 654, 664, 17 Sup. Ct. 453 (41 L. Ed. 865), in speaking for the Supreme Court, Mr. Justice White said:

"The questions which first require solution are: Did the agreement embodied in the letter create an equitable lien, in favor of Walker & Co., upon the bonds of Brown pledged to the Union National Bank? And, if so, were they returned to Brown under such circumstances as to cause the lien, if any existed, to be operative against the bonds in the hands of Mrs. Brown, who holds them under a gift from Brown, and, therefore, subject to such lien, if any, attached to them in the hands of Brown? Before considering the contract itself and the issue of fact which arises, it is necessary to fix the legal principles by which the question of equitable lien is to be determined. It is clear that if the express intention of the parties was to create an equitable lien upon the bonds or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown or against third persons who are volunteers or have notice."

In Wilder v. Watts (D. C.) 138 Fed. 426, it was held:

"Where an alleged bankrupt before insolvency arranged to borrow money to purchase goods under an agreement that he would have the goods insured, and assign the policies to the lenders as collateral security, and loans were made to him, the agreement operated as a valid equitable assignment of the policies, although they were not delivered when issued, nor actually assigned until after loss, when the borrower was insolvent."

Judge Brawley said.

"Here the debtor agreed to insure for the protection of his creditor, in order to obtain the money loaned. He could not have obtained the advances otherwise, and the agreement to transfer the policy of insurance was not an asset on the faith of which he received other credit. There was no proof that other creditors sold him goods on the faith of the insurance policy. * * * It was not an asset available for creditors until the fire, and an effective transfer of the policy could not have been made before the fire, because most of the standard forms of policy forbid an assignment before a loss."

Judge Brawley refers to Swearingen v. Insurance Company, 52 S. C. 315, 29 S. E. 723, in which Chief Justice McIver said:

"While a policy of insurance is purely a personal contract between the insurer and the assured, and hence the mortgagee of the premises insured, merely as such, has no interest, either in law or equity, in a policy of insurance taken out by the mortgagor in his own name and for his own benefit, yet if the mortgagor is bound, either by covenant in the mortgage or otherwise—for example, by a valid verbal agreement—to keep the property insured, as a further security for the payment of the mortgage debt, then the mortgagee is entitled to an equitable lien upon the money due on the policy of insurance, even though taken out in the name of the mortgagor."

In Stearns v. Quincy Insurance Co., 124 Mass. 61, 26 Am. Rep. 647, the action was one of contract to recover upon a policy of fire insurance. The court said:

"The plaintiff relies on the rule that where a promise is made by one person to procure insurance upon property, in which another has some interest, for the benefit of the latter, and then the promisor, with the intention of performing his promise, obtains a policy of insurance in his own name, the party intended to be benefited will have an equitable lien on the policy and its proceeds, which he may enforce against the insurer or the promisor, or may maintain against the creditors of the latter. This rule, and the lien thus created, it is said, will be regarded and enforced both at law and in equity. * * * In all the cases found which support the claim of the mortgagee to insurance obtained by the mortgagor in his own name, the facts were such as to justify the conclusion, by estoppel or otherwise, that such insurance was obtained by the latter as the agent of, or with intent to perform the obligation he had assumed to, the former.". Richardson v. White, supra; James v. Newton, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692; Exchange Bank v. McLoon, 73 Me. 508, 40 Am. Rep. 388; Providence County Bank v. Benson & Trustees, 24 Pick. (Mass.) 204; In re J. F. Grandy & Son (D. C.) 146 Fed. 318; Long v. Farmers' State Bank, 17 Am. Bankr. Rep. 103, 147 Fed. 360.

I have already called attention to In re Little River Lumber Company, supra, and the line of cases which hold that the record of the equitable lien is not necessary.

On a careful examination of the law and of the evidence shown in the record before me, I have no hesitation in concluding that the case shows a clear and distinct oral agreement on the part of Hicks that he would insure the property received from Blake & Co. until his indebtedness was paid in full; that he confirmed this oral agreement by

three letters; that he did insure a part of the property in question in the Liverpool & London & Globe Insurance Company, and a part in the Capital Insurance Company; that an equitable lien in favor of Blake & Co. existed upon such policies, and is impressed upon the fund arising from them, to secure the payment of the indebtedness due to that company. The renewal policies were merely substitutes for the original policies. The fact that Mrs. Hicks' name was inserted as beneficiary in the Liverpool & London & Globe policy at the time of its renewal cannot affect the equitable rights of Blake & Co. As to the effect of inserting her name in the policy, I refer to Wittenberg Veneer & Panel Co. (D. C.) 108 Fed. 593; Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490.

Although these claimants were not inserted as beneficiaries in the final renewals of the policies, equity treats as done what ought to have been done, and what it was clearly the intention of the parties to do. Nordyke & Marmon Co. v. Gery et al., 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

The court finds, then, that an equitable lien is impressed upon the insurance fund to secure the claim of W. L. Blake & Co. to the extent thereof, namely, in the sum of $597.11, due on the 2d day of January, 1904, and interest thereon, making their full claim the sum of $723.70.

3. In respect to the claim of Arabella Hicks, the wife of the bankrupt, the case shows that Hicks assigned to his wife his claim against the Capital Fire Insurance Company. The assignment was originally dated August 28, 1903, and afterwards changed to August 25, 1903. Mrs. Hicks testifies that the assignment of this policy was made to protect her from loss for money which she had loaned her husband, and that her husband thought she ought to be secured. It is unquestioned, however, that this assignment was to secure a prior existing indebtedness. The assignment was made on August 25, 1903. Hicks' petition in bankruptcy was filed in this court December 2, 1903. The assignment was clearly a preference, and was in violation of sections 60a and 60b of the amended bankruptcy act of February 5, 1903 (32 Stat. 799, c. 487 [U. S. Comp. St. Supp. 1905, p. 689]). Mrs. Hicks had no legal claim. She has no equitable lien upon any fund now before the court.

4. The claim of Edward A. Holbrook: The learned counsel for Holbrook contends that his claim to the proceeds of the remnants of the plant and the proceeds of the insurance policy is paramount; that he is a real estate mortgagee to the extent of his claim of $2,000 and interest, and, as such, he was given a statutory lien upon the proceeds of the insurance policy; that, although he made no agreement in writing to convey to Hicks the land on which the mill and plant were erected, yet the oral agreement to that effect, coupled with Hicks' possession, gave Hicks a vested equitable title; that the mortgage from Hicks to Holbrook was a real estate mortgage, and, as such, was properly recorded in the registry of deeds for Washington county; that, although the mortgage did not mention the land, the conveyance

of the buildings carried with it the mortgagor's equitable title to the land.

The learned counsel for this respondent claims, however, that, if Holbrook cannot be held to have a prior claim as a real estate mortgagee, he still has an equitable lien upon the insurance fund.

(a) What are the rights of Holbrook as a real estate mortgagee?

The learned counsel for Holbrook contends that the mortgage from Hicks to Holbrook was intended to be a mortgage of real estate, and that it operated as such a mortgage. He cites the case of Hatch v. Brier, 71 Me. 542, in which the Supreme Judicial Court of Maine held that a deed of the westerly part of a dwelling house and one-half of the cellar conveys the land under the part of the dwelling house conveyed. In this case, in speaking for the court, Mr. Chief Justice Appleton cites Cunningham v. Webb, 69 Me. 93, and says that, in that case, Libby, J., uses this language:

"A grant of a house standing on a lot of land, fenced and used as a house and garden, conveys, not only the house, but the lot of land on which it stands, unless it appears from the deed, or the facts and circumstances existing at the time applicable to the estate, that that was not the intention of the parties."

The Maine cases cited by the learned counsel are in line with Cheshire v. Inhabitants of Schutesbury, 7 Metc. (Mass.) 566, 568, where, in speaking for the court of Massachusetts, Judge Wilde said:

"By the grant of a dwelling house the land under it passes as necessary to its use and enjoyment." Greenwood v. Murdock, 9 Gray (Mass.) 20, 22, 69 Am. Dec. 272.

I will not now discuss the question whether, under certain recent decisions of the federal courts, the above cases have any applicability in a court of bankruptcy. It is enough to say that in any court they cannot be decisive of the question now before me. In those cases the grantor of the building was the owner of the land upon which the building stood; and the court held that, in conveying the building he conveyed, not only the building, but the land on which it stands, unless it appears from the deed, or from the circumstances, that such was not his intention. But in the case before the court the land in question was owned by Holbrook and his co-tenant. Hicks was under an oral agreement with them respecting the purchase of that land from them, upon which he intended to erect a mill. The paper which is not claimed by Holbrook to be a real estate mortgage was a mortgage upon the building and machinery placed upon Holbrook's land. The cases in the Supreme Judicial Court of Maine have no applicability to such a state of facts. Clearly Holbrook cannot be heard in court to say that this mortgage in question is a mortgage of real estate, when he himself holds the title to the real estate. Under the legal aspect of the case, the mill, when erected, must have become a part of the realty.

In Milton v. Colby, 5 Metc. (Mass.) 78, it was held that:

"Where A., the owner of land, agrees to sell it to B., and to convey it to him by deed when B. shall erect a house thereon, and B. agrees to erect a house thereon, and that he will, on receiving a deed of the land, mortgage it to A. to secure the purchase money, B. does not, by erecting the house, acquire any property therein, but the same becomes a part of the realty; and a mort-

gage of the house by B. before he receives a deed of the land conveys nothing to the mortgagee."

In delivering the opinion of the court, Mr. Chief Justice Shaw said:

"The court are of opinion that the plaintiffs took no interest by the mortgage made to them by Diggles of the house in question. * * * The general rule is that the erection of a building on the land of another makes it part of the realty, and, of course, it becomes the property of the owner of the soil; and it is only in virtue of an express agreement between the owner and builder that one can have a separate property in a building, as a chattel, with a right to remove it. The agreement between these parties, so far from being such an agreement, was in legal effect an agreement that the building and soil should be united and held together as one tenement, and the security of the builders was in the personal agreement of the owner, by which they could require him, on complying with the terms of the agreement on their part, to convey the fee to them, by which they would obtain a legal title to the buildings with the soil." Hemenway v. Cutler, 51 Me. 407; Kingsley v. McFarland et al., 82 Me. 231, 19 Atl. 442, 17 Am. St. Rep. 473; Lapham v. Norton, 71 Me. 83; Westgate v. Wixon, 128 Mass. 304; Eastman v. Foster, 8 Metc. (Mass.) 19.

In the case last cited it was held that:

"A building erected on the land of one who has given a bond to the builder to convey the land to him, on his paying a certain sum within a certain time, is not the personal property of the builder, within the meaning of Rev. St. c. 74, § 5, so as to require a mortgage thereof, given by the builder to the owner of the land, to be recorded in the town clerk's office, in order to render it valid as against the creditors of the mortgagor, nor so as to cause a forfeiture of the building to the mortgagee, under Rev. St. c. 107, § 40, in 60 days after breach of the condition of the mortgage." King v. Johnson, 7 Gray (Mass.) 239; Butler v. Page, 7 Metc. (Mass.) 40, 39 Am. Dec. 757.

Under any fair consideration of the rights of the parties, it cannot be held that the mortgage was a mortgage of real estate. As to its being a mortgage of personal property, the language of Chief Justice Shaw in Eastman v. Foster, supra, seems to apply to this mortgage. It was not a pure mortgage of personal property "to be redeemed or forfeited as ordinary chattels mortgaged by the owner." In another branch of this opinion I have stated the attitude of the law in regard to unrecorded chattel mortgages. Without entering upon the question of the effect of the nonrecording of a mortgage of personal property, I do not find that there is sufficient in the case to impress the fund of $225, arising from the sale of the remnants of the mill, with an equitable lien for the benefit of the claimant Holbrook.

It should be further observed that the allowance of the claim of Holbrook to these funds has been most strenuously opposed by counsel for the other respondents, who contend that the statutes of Maine, which give a mortgagee of real estate a lien upon the insurance placed thereon by the mortgagor, have no application to the present cause, because there is no evidence that shows, or tends to show, that Holbrook ever adopted any measures to entitle him to the benefit of the statutes referred to.

It is likewise contended that Holbrook, having the fee to the real estate upon which the improvements were placed, and having taken a mortgage of such improvements, is thereby estopped from setting up that such mortgage is not a chattel mortgage, for the reason that such claim is inconsistent with the language of the mortgage and the rights

of the parties thereunder. With equal earnestness, they urge that this court should apply the rule, which is frequently adopted in the federal courts, that, when the language of a contract is ambiguous, the practical interpretation of it by the parties is entitled to great, and sometimes to controlling, influence. District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526; Constable v. National Steamship Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110.

In applying this rule to the case at bar, they urge that as both Hicks, the mortgagor, and Holbrook, the mortgagee, have dealt with the improvements as if they were personal property, the court should treat the mortgage as one of that class. Great stress is also laid upon the fact that the mortgage was originally recorded in the town clerk's office at Vanceboro, and after the institution of proceedings in bankruptcy it was recorded in the town clerk's office at Calais, and it is urged that this fact shows that the parties continued to regard the mortgage as one relating to personalty. There is force in these contentions. But, in view of the conclusions which the court has reached, it becomes unnecessary to consider or pass upon them.

(b) Did Holbrook have an equitable lien upon the insurance fund?

Of the $2,000 representing his claim, a large part was expended in the construction of the mill which was covered by the insurance. The case shows that, after the mortgage, there was an agreement that Hicks should insure the property for Holbrook's benefit. He was not made beneficiary in any insurance policy, as in the Young claim. There was no agreement with reference to any particular policies under which he should have the benefit, as in the claim of Blake & Co.; but there was an agreement that he should be protected by insurance. After the satisfaction of the claim of Mrs. Young in respect to one policy upon which she has an equitable lien, and after the satisfaction of the claim of Blake & Co. upon the two policies on which their claim is impressed, there still remains a balance of the insurance fund. The evidence tends to show that the agreement with Holbrook to protect him by insurance was made before the last policy was issued under which Blake & Co. claim. I allow Holbrook to have his claim upon the insurance money after the satisfaction of the claims of Mrs. Young and of Blake & Co.

My conclusion, then, is that the proceeds arising from the sale and disposition of the remnants of the mill property are not impressed with any equitable lien in favor of Mynia A. Young, W. L. Blake & Co., Arabella Hicks, or Edward A. Holbrook; but, for the reasons which I have given, they vest in the complainant as trustee in bankruptcy.

In accordance with the foregoing opinion, I hold that Mynia A. Young has an equitable lien upon the fund arising from the adjustment of the insurance under policy No. 6,603,308 in the Liverpool & London & Globe Insurance Company, for the amount of her claim and interest thereon, amounting in all to the sum of $763.20; that W. L. Blake & Co. has an equitable lien upon the fund arising from the adjustment of the insurance under policy No. 6,603,363 in the Liverpool & London & Globe Insurance Company, and under policy No. 13,971 in the Capital Insurance Company, for the amount of its

claim and interest thereon, amounting in all to the sum of $723.70; that Edward A. Holbrook has an equitable lien upon the balance of the fund arising from the adjustment of the insurance, after payment of the above sums to Mynia A. Young and W. L. Blake & Co.

Arabella Hicks is not entitled to any equitable lien or other rights in the fund, and, as to her, the bill will be dismissed.

The prevailing parties will recover the costs of the depositions taken in support of their respective claims; but no other costs will be allowed.

A decree may be drawn in accordance with this opinion.

THE SOUTHSIDE.

(District Court, S. D. New York. June 21, 1907.)

1. SHIPPING—LIMITATION OF LIABILITY—FERRY COMPANY.
   A New York corporation operating a ferry for the carriage of passengers across the East river between Manhattan and Brooklyn *held* entitled to a limitation of its liability for the death of a passenger to the value of the boat on which he was such passenger and its freight, under the provisions of Rev St. §§ 4283–4285 [U. S. Comp. St. 1901, pp. 2943, 2944].
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 644.
   Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]
2. SAME—DEATH OF PASSENGER BY FALLING FROM FERRYBOAT—LIABILITY OF VESSEL.
   Claimant's intestate, while a passenger on petitioner's ferryboat, crossing East river from Manhattan to Brooklyn, stood leaning against the gate across the front end of the boat, near the end where the gate was fastened by being let into a four-inch groove at the side rail, when through some movement of his or a lurching of the boat the end of the gate was pulled out from the groove and he fell overboard and was drowned. The evidence showed that the gate was in good repair and that similar gates had been used by petitioner on its boats for many years without accidents. There was also a conspicuous sign near by warning passengers to keep "hands off the gates." *Held*, that petitioner was not guilty of negligence which rendered it liable for the death, but that it was attributable to the negligence of the deceased.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 544, 551.]

In Admiralty. Proceeding for limitation of liability.

Wilcox & Green, for petitioner.
Kantrowitz & Esberg and Franklin Pierce, for claimant.

ADAMS, District Judge. This proceeding was brought by the Brooklyn Ferry Company of New York, the owner of the ferryboat Southside, under sections 4283, 4284, and 4285 of the U. S. Revised Statutes [U. S. Comp. St. 1901, pp. 2943, 2944] and the acts amendatory thereof and supplementary thereto, to have its liability, if any should be found to exist, limited to the value of its interest as said owner in said boat, her tackle, &c., and her freight. In due course a monition was issued and other proper proceedings taken to notify all who had any claims against the vessel to appear and protect their interests. Under this notice Bessie Rabinowitz appeared as adminis-

tratrix of her husband Edward Rabinowitz, deceased, and answered the petition, alleging, inter alia, as follows:

"VII. She denies that the petitioner here is entitled under the provisions of sections 4283, 4284 and 4285 of the Revised Statutes of the United States and the acts amendatory thereof and supplementary thereto. to have its liability as owner limited to the amount or value of its interest as owner of said ferry boat, her boilers, engines etc. and her said freight for the said trip or voyage; and alleges upon information and belief that this Court has not jurisdiction of the subject matter of this proceeding and that said sections 4283, 4284 and 4285 of the Revised Statutes of the United States have no application to the facts hereinafter set forth and that this court has no jurisdiction to limit the liability of the petitioner herein and that said sections confer no jurisdiction upon this court to hear and determine this proceeding, and this answer is filed without waiving any right to raise said question of jurisdiction at every point in this case and to contend that this court has no right to hear and determine this matter or to pass upon any questions involved herein.

VIII. She further says upon information and belief that the Brooklyn Ferry Company of New York is and at all times hereinafter mentioned was a domestic corporation duly organized and existing under the Laws of the State of New York and that on the 21st day of November, 1902, Edward Rabinowitz, the husband of this claimant duly purchased of the defendant, a common carrier of passengers between Tenth Street in the Borough of Manhattan, City of New York, and Greenpoint, Borough of Brooklyn, City of New York, at its ferry house at the foot of Tenth Street and East River in the City of New York, Borough of Manhattan, a ticket entitling him to passage from East Tenth Street in said City and Borough to Greenpoint in said City and Borough of Brooklyn across the East River in the City of New York upon its ferry boat designated as 'South Side.' That claimant's said intestate at or near eleven o'clock in the forenoon of said date boarded said boat at East Tenth Street aforesaid, as it had the right to do, and became a passenger of defendant across the said East River. That claimant's said intestate, while crossing said River and while a passenger of said defendant was, as he had the right to do, standing upon the bow or front part of said boat leaning against an upright or post attached to the gates admitting passengers to said boat and through which passengers passed in leaving said boat. That while so standing at said post, and because of the facts hereinafter stated and without any fault upon the part of the claimant's intestate, he fell or was precipitated through said gates into the East River and was drowned. That said boat known as 'South Side' belonging to the defendant was an antiquated boat, had through long years of use become unsafe, insecure and decayed, and the means of access to an exit from said boat and its gates and all parts thereof were defective and antiquated and out of repair, and the said boat was unseaworthy and the attachments of said gates to the post against which claimant's intestate was leaning at the time of said accident and to the other post were defective and insecure all through the negligence and carelessness of the defendant. That passengers to the knowledge of defendant were in the habit, prior to said date, of leaning against said post and against said gates, and said gates were negligently and carelessly attached to said posts and were otherwise defective and insecure, and that by reason of the motion of said boat the claimant's intestate was brought into contact, without any fault upon his part, with said gates, and with said defective and insecure attachment and because of said insecure attachment and gates and of the defective condition of said gates and because the same were old and insecure and antiquated in form and unfit for the purposes of gates, the same, without any fault on the part of claimant's intestate gave way and allowed claimant's intestate to be precipitated into the East River. That said post and said gates were negligently and carelessly placed by the defendant very near the bow or front part of said boat and so near the front part of said boat that while claimant's intestate was leaning against said post and an ordinary lurch occurred in said boat he was precipitated against said gates without any fault upon his part and the said gates, because of their insecure condition, gave way and because the space between said gates and the end of

said boat was so narrow, as aforesaid, he was precipitated into said River. That by reason of said defective and unsafe condition of said gates and of said boat and said narrow bow of said boat and the decayed and defective condition of said boat, all of which were the result of negligence and carelessness upon the part of the defendant and all of which were in violation of the defendant's duty to its passenger and to claimant's intestate to safely carry him in transit between said points aforesaid the claimant's intestate was thrown into said East River. That upon claimant's intestate being thrown into said River, as aforesaid, it became the duty of the defendant as a common carrier of passengers towards claimant's intestate. a passenger, to use a high degree of care to save the life of claimant's intestate, but in violation of said duty defendant negligently and carelessly failed to stop said boat and negligently and carelessly continued said boat and negligently and carelessly omitted to take proper means to secure the body of the claimant's intestate and as a result thereof claimant's intestate was either drowned or crushed in the wheel of said boat."

The effect of this answer was to traverse the allegations of the petition but apart from some general charges of unseaworthiness there was no proof to show that the boat was unfit to carry passengers on her route, aside from some charges respecting the defective condition of the lattice work iron gate which crossed her bow. Apart from this question, there is no real controversy as to the right of the petitioner to a limitation of liability, and if the petitioner is responsible for the loss of life of the claimant's husband, it is only to the extent of the appraised value of the boat and freight, which was $10,004. The original claim on the part of the widow and next of kin was for $100,000, but after certain of the proceedings to limit had been taken in this court, the claim was reduced to $10,000.

The facts appear to be that the deceased was a passenger on the Southside on a trip from her Manhattan slip to her Brooklyn slip in the morning of November 21, 1902. She left Manhattan at 10:45 o'clock, the tide being flood. When approaching and near her Brooklyn terminus, about 100 feet from the mouth of her slip, the deceased in some manner went through the forward gate on the port side and overboard and was drowned. It has been suggested on the part of petitioner, that this might have been a deliberate act on his part with a view to suicide, but he was only 28 years of age, apparently happily married, and the testimony is so clear that his circumstances were prosperous, with every prospect of, at least, an ordinarily satisfactory life, that such an idea must be rejected. The cause of his death was no doubt an accident and it is to be determined whether it was a result of the neglect of some duty which the petitioner owed, as a common carrier, to the deceased or resulted from his own negligence, for which the petitioner would not be liable.

The real controversy is about the sufficiency and condition of the gates crossing the bow, the claimant contending that they were old, in a dilapidated condition and generally unfit for the purpose for which they were intended, that was to protect passengers from getting overboard through any mischance which in the ordinary course of things might occur. The petitioner claims, on the other hand, that though put on the bow of the boat for the passengers' protection they were not in any way designed to save them from the results of their own negligence in handling the gates, which they were expressly warned against by a

notice to keep their "Hands off the gates." This gate was constructed in two sections, about 26 feet across from rail to rail, which ran in nearly a straight line from the rails to the center of the boat where the sections met and were fastened together. The rail ends ran into grooves, at least 4½ inches deep, on knees supporting the rails. When the gates were open they folded up and remained affixed to a post on each side between the horse gangway and the passenger gangway, one on each side. This accident happened in the passenger gangway on the port side of the boat. The deceased was standing there, leaning against the gate when the accident happened. Several witnesses upon the part of the claimant said that he was not leaning against the gate but the decided preponderance is in favor of the petitioner's contention that he was doing so. The claimant's statements early in the case tend to establish such fact. Her answer to the petition in this connection alleged:

"That claimant's said intestate, while crossing the said river and while a passenger of defendant was, as he had a right to do, standing upon the bow or front part of said boat, leaning against an upright or post attached to the gates admitting passengers to said boat and through which passengers passed on leaving said boat."

This upright or post was a part of the gate, extending somewhat above it, and formed the extreme port end, which went into the socket on the rail. One of the claimant's witnesses on the trial, Mrs. Annie Bolstein, who was examined at the Coroner's inquest, (then named Annie Danzinger) which almost immediately followed the accident, said that the deceased was "leaning on the post where the gate closes * * * against the post." Another witness, Bopp, who was a deck hand on the boat and testified on the petitioner's behalf at the inquest, said the deceased was leaning against the post of the gate which was properly closed and could not be opened even with the expenditure of considerable force except by taking the end of the gate out of the socket. Some witnesses for the petitioner on the trial, members of the crew of the boat, said that the deceased was leaning against the gate. I think the testimony shows that the deceased at the time of the accident was leaning, with his right arm around the upright, with his back against the gate and his left arm stretched across it. An ordinary lurch of the boat occurred or there was some movement of the passenger which caused the gate to open and permit him to go backward through it and overboard.

It appears that these gates were not required by any statute but had been adopted by the petitioner, and other ferry companies, to prevent passengers from sitting upon the bows of boats, with their legs dangling over, an obviously dangerous position, and to act as a barricade to prevent the passengers from leaving before the boats were fastened to the bridges and ready for their safe landing. These gates had been in use for many years but were kept in good order by such repairs as might be needed from time to time, being removed occasionally for such purpose, and other gates, kept on hand with that view, substituted during the repairs. The witness Bopp, who testified in court for the claimant said that the gates in question were in extremely bad order, entirely unfit for use but his statements, if they could have any weight,

were entirely overborne by the testimony of others in the employ of the petitioner. His testimony in court can not be believed in view of what he had previously said and the fact that he evinced on the trial an adverse disposition towards the petitioner. He remained in its employment until immediately prior to the trial and his testimony rather hurts than helps the claimant.

It has been urged that other people leaned against the gate but that seems to be immaterial. When the gates were erected notice was printed in a conspicuous place near them that they were not to be handled. When a passenger did handle them, notwithstanding the warning and came to grief, it seems to have been a case of negligence on his part fully accounting for the accident.

The fact that millions of passengers were carried on this boat and similar ones during a series of years without any accident happening from the use of the gates is strong proof that the petitioner could not anticipate any such trouble as ensued, and is therefore not liable for the result of this accident. Cleveland v. New Jersey Steamboat Co., 68 N. Y. 310; Loftus v. Union Ferry Co. of Brooklyn, 84 N. Y. 455, 38 Am. Rep. 533; Hubbell v. The City of Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; Race v. Union Ferry Co. of New York and Brooklyn, 138 N. Y. 644, 34 N. E. 280.

The petition is granted but the claim is disallowed. Decree accordingly.

THE HEATHDENE.

MILBURN v. FEDERAL SUGAR REFINING CO.

(District Court, S. D. New York. June 28, 1907.)

SHIPPING—DELAY IN DISCHARGE CAUSED BY INSUFFICIENT STEAM.

A vessel under contract requiring reasonable dispatch is liable to a consignee for demurrage paid by him to another vessel by reason of the occupation of a wharf by the first for an excessive time in discharging, where the delay was caused by the failure of such vessel to furnish sufficient steam for the winches to make the discharge with reasonable dispatch. Such vessel is also liable for an extra sum which the consignee was compelled to pay to the stevedores by reason of the delay so caused.

[Ed. Note.—Quick dispatch, see note to 14 C. C. A. 657; 21 C. C. A. 342.]

In Admiralty. Suit to recover balance of freight.

Convers & Kirlin, for libellant.
Ernest A. Bigelow, for respondent.

ADAMS, District Judge. The libellant here, W. J. Milburn, as master of the steamship Heathdene, brought an action against the Federal Sugar Refining Company to recover a balance of freight claimed to be due the libellant of $1,000, on a cargo of sugar brought to Yonkers, New York, on the said steamship. The whole freight from Java was £6591.12.7 all of which was paid excepting the sum here in dispute, payment of which is resisted on the ground that the steamer did not supply sufficient steam to discharge the cargo as fast as it should by

reason of which the respondent was damaged to the extent of $951.27 which it retains to cover its damages. The matter was referred by consent to a commissioner who reported that the steamer did not supply sufficient steam. The deficiency of steam caused damages in two respects, viz:

1. $846.27 demurrage claimed to have been paid to the steamship Yarborough because the respondent was unable to furnish her with a dock as soon as would have been possible if the Heathdene had been discharged sooner

2. $105. the amount of the bill of the boss stevedore for the time lost by his men in consequence of the slow delivery.

The commissioner reported that the libellant was entitled to recover $895. being $1000. unpaid freight less the stevedore's bill of $105. and both parties excepted.

I. With respect to the demurrage item the commissioner said, inter alia:

"There being no custom, the law implied an agreement to unload with reasonable diligence under all the circumstances. Empire Transp. Co. v. Phila. & R. Coal Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623. and cases there cited; Marshall v. McNear (D. C.) 121 Fed. 428; Williscroft v. Cargo, etc. (D. C.) 123 Fed. 169.

Cases in which questions of this character are presented are almost invariably suits for demurrage, brought on behalf of the vessel, and no instance has been brought to my attention where the claim was asserted against the vessel; but the obligation to use reasonable diligence must be mutual, and if there is an absence of such diligence through the fault of the vessel, she should respond in damages. I think that it would have been far from burdensome to require the Heathdene to discharge an average of 1,000 tons a day from three hatches, and that she could easily have done so if ample steam had been supplied. I consider that under the charter she was bound to furnish as much steam as was required to drive the winches effectively in discharging according to the customary method at the place of discharge. The captain's testimony, above referred to, shows that she had previously discharged over 1,900 tons of coal a day, and loaded over 2.100 tons, at three hatches, and it would seem to have been a comparatively easy matter to discharge 1,000 tons of sugar from the same number of hatches, especially when a speedier method was adopted. For some unexplained reason the donkey boiler could not supply the necessary steam, and the captain and engineer were unable or unwilling to make up the deficiency from the main boilers.

On the 18th of October, respondent wrote libellant that because of the Heathdene's failure to supply sufficient steam to discharge her cargo properly, respondent would hold libellant for demurrage on the Yarborough, 'now awaiting orders, resulting from the above mentioned lack of steam,' and adding, 'Under ordinary conditions, the Heathdene should be finished by to-morrow evening, and we shall hold you for any demurrage incurred on the Yarborough after this time.' The following day, libellant acknowledged the receipt of this letter, laid the blame on the stevedores, and stated that he declined all responsibility for demurrage on the Yarborough. That vessel, also, carried a cargo of sugar from Java, under a charter to Maclaine, Watson & Co. of London, dated prior to the Heathdene's charter, and the bills of lading, which by their terms were made subject to the conditions of the charter, had been endorsed to respondent. Respondent, therefore, became liable to the Yarborough for demurrage according to the terms of that vessel's charter, which provided that the cargo should be 'discharged with the despatch customary at the port of destination' (Carver on Carriage by Sea, [4th Ed.] § 637, p. 771). But irrespective of this agreement, respondent was liable for demurrage, since there was no custom that a vessel should await her turn at the dock, and the Yarborough was entitled to a berth within 24

hours after entry at the custom house. Respondent put in evidence a bill which it paid to her agents. This bill was originally made out for 7 days' demurrage from October 17 to October 23 (when she took the berth previously occupied by the Heathdene), at £49.14.0, or $1,692.54 in U. S. money, and was subsequently reduced to $1,571.64 by deducting demurrage for half a day. There was a clause in the Yarborough's charter that 20 days' demurrage should be allowed, 'if required,' at 6d. per net register ton, and the bill was based upon this provision. On the bill is a memorandum that the Yarborough arrived the 14th, entered the 16th, and demurrage commenced the 17th. This is sustained by the testimony, and it is shown that there was no berth for her except that occupied by the Heathdene. Respondent rendered libellant a bill for 3½ of the 6½ days' demurrage paid the Yarborough. This apportionment was made on the basis of 1,000 tons a day as a fair rate of discharge for the Heathdene, and the amount billed against libellant was described as 'demurrage on S. S. Yarborough incurred through lack of steam furnished by S. S. Heathdene.' The question is whether demurrage of the Yarborough, caused by her exclusion from the berth by reason of the Heathdene's failure to discharge with due diligence, and paid by respondent under the bills of lading adopting the demurrage clause in the Yarborough's charter, is either fairly and reasonably to be considered as arising, according to the usual course of things, from the Heathdene's breach of contract, or is to be regarded as such damage as may be reasonably supposed to have entered into the contemplation of both parties, when the Heathdene's charter was made, as the probable result of such breach. Primrose v. Western Union Co., 154 U. S. 1, 29, 14 Sup. Ct. 1098, 38 L. Ed. 883. The latter principle, under which special damages are sometimes recoverable, cannot be considered as applicable, since it does not appear that it was ever known to the owners, charterer or master of the Heathdene that the Yarborough had been chartered under conditions which might or would bring her to the same berth at about the same time. Her charter provided that when loaded she should proceed to Port Said for orders to discharge at a port in the United Kingdom, 'or at Bordeaux or Hamburgh, or at an intermediate port, but excluding Rouen, or at Marseilles or Genoa, or to proceed, at Charterer's option, to Delaware Breakwater for orders to discharge at New York, Boston, Philadelphia or Baltimore.' Even notice acquired after the Heathdene's charter and before breach would be insufficient. Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. But it is contended that the Yarborough's demurrage was such damage as ordinarily and naturally flowed from the breach. It is argued with much force that a shipowner must know, or at least reasonably anticipate, that his is not the only vessel which will discharge at the dock to which she is consigned, and that until she leaves, the next ship cannot discharge, and he must also know or expect that if the other vessel is delayed by an unduly slow discharge of the vessel at the berth, the consignee will have to pay demurrage for the delay. In support of this, Welch, Perrin & Co. v. Anderson, 61 L. J. Q. B. 167, 7 Asp. M. C. 177 (Court of Appeal), and The Nadia (C. C.) 18 Fed. 729, are cited. In the first of these cases the defendants had agreed with plaintiff to have their ship ready at a certain dock, on a specified date, to receive a cargo of tiles, but the ship not being ready on the agreed date, the tiles remained aboard the railway trucks on which they had been transported, and the plaintiffs were obliged to pay the railway company for the detention of the trucks. The court held that the shipper could recover the amount of this payment from the shipowners, Lord Esher observing:

'It seems to me that the demurrage payable for the detention of these trucks was the natural, ordinary and reasonable consequence of the defendants' breach. They must have known that the tiles would have to be brought in vehicles of some kind or other, whether barges, carts or trucks. If they had been brought in barges, and the ship had not been ready, demurrage would obviously have had to be paid for the detention. * * * It was therefore a natural result of the defendants' breach of the contract that the trucks were detained and that the plaintiffs had to pay for the detention.'

In the other case cited (Circuit Court, on Appeal, E. D. Texas), which was a suit for lighterage, Judge Pardee allowed demurrage of a ship as a set-off

where the ship had been detained by libellant's tardy performance of an agreement with a cargo owner to lighter the cargo to the ship.

But I consider that I am bound by Judge Brown's view of the law in Petrie v. Heller (D. C.) 35 Fed. 310. That was a suit for freight, in which the respondent sought to offset demurrage paid by him to a schooner while she was waiting at Perth Amboy to receive a cargo of tankage which libellant had agreed to carry from New Haven and deliver to the schooner, the respondent claiming that the cargo should have been delivered to the schooner by a certain date under the agreement between him and the libellant. Judge Brown found that there was no agreement to deliver by the date claimed, and no lack of reasonable diligence in the transportation of the tankage from New Haven, and he disallowed the offset; but he added: 'Such damages, moreover, would not be the mere ordinary damage for the detention of such a cargo of tankage, and could only be recovered upon a special contract made in reference to the schooner, with a liability for such special damage understood, or fairly within the contemplation of the parties.' This, to be sure, is obiter, but as it is a clear and definite expression of the law which this court regarded as applicable to a situation analogous to that presented in this case, I think that I should follow it until the court holds otherwise."

The respondent excepted to this finding as follows:

"The respondent hereby excepts to so much of the report of the Commissioner made herein, and filed in the office of the Clerk of this Court on the 24th day of April, 1907, as holds that the libellant is entitled to recover $895.00 with interest from November 1, 1905, basing its exception on the following grounds, that is to say:—

The demurrage paid by the respondent to the SS. 'Yarborough' was the natural and ordinary consequence of libellant's breach of the contract to give reasonable dispatch, or such as may be reasonably supposed to have been in the contemplation of the parties at the time of making the contract, and respondent should be allowed to set off the amount of said demurrage against libellant's claim for freight."

The question presented is whether under a contract requiring reasonable dispatch for a vessel, the consignee is precluded from recovering demurrage paid by it to another vessel by reason of the occupation of the first of a wharf for an excessive period.

The statement of the case by the commissioner, quoted above, seems to answer the question and it may be assumed that in the absence of the dictum by Judge Brown, he would have so decided. The court, however, is not bound by the judge's expression intended for the case then under consideration and I think that a consignee, for the reasons stated by the cases not followed by the commissioner, is entitled to recover the damages he has so paid. It does not seem just that money so paid out should not be recoverable from the cause thereof.

The exception is sustained.

II. The question of the stevedore's bill has I think been correctly decided and needs no more discussion than has been given to it by the commissioner. He said:

"As to the bill for the lost time of the stevedores. It is to be presumed the captain knew that a piling gang would have to be employed by the consignee, and that the probable consequences of the ship's failure to discharge with reasonable diligence would be to subject the consignee to the expense of the lost time of the men. The bill was concededly an estimate of the time, but the boss stevedore testified that he made the charge low, and I am satisfied it was fair. It was not paid, however, and still remained unpaid when the last hearing was had before me, April 5, 1905, nearly 18 months after it was incurred. According to respondent's testimony, it has a running account

with the stevedores, with periodical settlements, and since this claim was incurred there have been several of these settlements, from which the item was always reserved. All other debts arising out of the discharge of the Heathdene have been paid. Respondent's explanation of this situation is that the case was an unusual one, and the item was reserved until the liability for the disputed freight should be determined, to be then settled, along with the legal expenses. The testimony is positive that the item is to be paid, irrespective of the result of this litigation. Under these circumstances, there is no reason in my judgment why it should not be allowed. I think that the item is recoverable under the principle of The Giulio (D. C.) 34 Fed. 909."

The libellant excepted to this finding as follows:

"The libellant hereby excepts to so much of the Commissioner's Report as holds that the respondent is entitled to deduct from the freight due the libellant the sum of $105.00, the amount of the stevedore's bill.

The ground of the exception is that the stevedore's bill is not an item of damage sustained by the respondent in consequence of an act of neglect or default on the part of the libellant, and that the stevedore's charge is not a direct, proximate, natural, nor ordinary consequence of the failure of the vessel to supply steam in accordance with the standard adopted by commissioner."

The exception is overruled.

In re CULLMAN FRUIT & PRODUCE ASSN.

(District Court, N. D. Alabama, N. D. August 8, 1907.)

No. 1,242.

1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—DELIVERY UNDER SALE CONTRACT.

   Where machinery, sold and shipped to a corporation to be paid for in cash, was delivered without such payment, at its request and promise to send a check, which was not done, and afterward the seller's agent settled the claim by taking negotiable vouchers for the price secured by collateral, the title to the machinery passed to the purchaser, at least on such settlement, and on its subsequent bankruptcy to its trustee.

2. CORPORATIONS—CONTRACTS—POWERS OF PRESIDENT.

   A contract, signed by the president of a corporation, by which it purported to lease from the seller property which had previously been sold and delivered to it, and which provided that the title should remain in the seller, is ineffective to reconvey such title, where it was not authorized by the board of directors.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1612, 1621.]

In Bankruptcy. On petition to try title to personal property.

The Cullman Fruit & Produce Association having been adjudicated a bankrupt, the Sprague Canning Machinery Company files this petition, asking that this court direct the receiver to turn over to them certain personal property found in possession of the bankrupt at the time of the filing of the petition, alleging the same to be the property of the petitioners; the facts in relation to the issues being as follows: On or about the 14th day of May, 1906, certain machinery to be used in a canning factory was shipped by the Sprague Canning Machinery Company, a corporation of Illinois, to the Cullman Fruit & Produce Association, a corporation in Alabama. This shipment was made on an order received from the Cullman Association on the 14th day of May, and provided for the shipment on June 1, 1906; the sale being for cash. The shipment was made, with bill of lading and draft attached; but it was not

shown whether the bill of lading was in the name of the Sprague Canning Machinery Company or the Cullman Company. After the goods arrived at Cullman, Ala., the Cullman Association wired the Sprague Company to release the car and they would send check. Upon receipt of this telegram the Sprague Company, relying on this promise to send the check, wired the railroad to let the Cullman Company have the goods, and the goods were in fact so delivered; but no payment was ever made by the Cullman Association for the goods shipped to them. About the 1st of August, 1906, after the delivery of the goods, an agent of the Sprague Company went to Cullman, Ala., and saw the president and manager of the Cullman Association, and asserted claim to the property, and made demand for the machinery or the money which had been promised therefor. The president of the Cullman Association admitted the claim of the Sprague Company and then gave the said agent two vouchers, drawn by the president on the treasurer of the company and payable at Parker's Bank, one for $215 and one for $1,000, in payment for the purchase money for the property. Said vouchers were payable August 15th and September 1st, respectively. At the time of the delivery of these "vouchers" (as they were designated by the witnesses) to the agent of the Sprague Company, there was also delivered to him by the president of the Cullman Association $1,200 worth of bonds to secure the payment of the drafts or vouchers. These bonds were secured by a mortgage on all the assets of the Cullman Association, and the fact was made known to the agent of the Sprague Company at the time he accepted the bonds. At the time of the acceptance of these vouchers and bonds by the Sprague Company the property was in the possession of the Cullman Association at Cullman, Ala., and was in use as part of its canning factory, being attached to the building by pipes. About the 5th of September, 1906, another agent of the Sprague Company went to Cullman to secure some sort of a settlement of the account between that company and the Cullman Company, and, failing to secure a satisfactory adjustment, a certain contract was entered into, which was signed in duplicate by the Sprague Canning Machinery Company, by its treasurer, and by the Cullman Fruit & Produce Association, by its president, to one of which was attached the seal of the Cullman Company, and to the other there was no seal. That contract was in terms a contract of lease by the Cullman Company from the Sprague Company of the identical canning property now in issue; the terms of the lease being that the Cullman Company agreed to pay as rental the identical sums of money as embraced in three notes, which were executed at the same time with this lease. These notes were never paid. It was further stipulated in the said lease that the Sprague Company would make a complete bill of sale to the Cullman Company of the property involved in this proceeding as soon as said notes were paid. No action was taken by the board of directors of the Cullman Company authorizing this lease, or in any manner ratifying the act of the president and manager in executing same; but the president of the Cullman Association represented to the agent of the Sprague Company, at the time the lease was signed, that he had ample authority to sign same. The Sprague Company, which was a corporation under the laws of Illinois, had never complied with the laws of Alabama for entering into business in this state.

Milton Humes and Paul Speake, for petitioner.
Shelby Pleasants and O. D. Street, for receiver.

HUNDLEY, District Judge (after stating the facts). The first question which confronts us, and, indeed, the controlling and decisive question, is: Did the title to the property in fact and in law ever pass from the Sprague Canning Machinery Company into the Cullman Fruit & Produce Association? It is contended by counsel for petitioner that the whole transaction, from start to finish, shows an intention not to part with the title until the purchase price was paid, and it is insisted that this intention, as disclosed by the testimony in this case, is decisive of the question at issue in favor of the pe-

titioner. There may be cases in which the intention only of the parties should govern, but such is not the case where the contract can be ascertained from the terms thereof and acts of the parties thereto. The intention must be gathered from the terms of the contract and the circumstances of the case. 6 Am. & Eng. Encyc. of Law (2d Ed.) p. 438. There is no doubt about the proposition that, where personalty is sold for cash on delivery, the payment stipulated for is a condition precedent, and, unless complied with, the seller may reclaim the property. "But even in such case, if delivery is made to the purchaser without presently demanding the payment thereof required by the contract, the condition precedent is waived and the title passes." Neal, Morse & Co. v. Boggan, 97 Ala. 611, 11 South. 809. Says the Supreme Court of Alabama in that case:

"Thus, in Leedom v. Phillips, 1 Yeates (Pa.) 527, the seller of a lot of sugar for cash on delivery left it in front of the buyer's store in his absence. On the same day the buyer sold it, and, two hours later, failed. It was ruled, in replevin by the seller against the subpurchaser, that the condition had been waived and title had passed to the buyer. The court said: 'If one sells goods for cash, and the vendee takes them away, without payment of the money, the vendor should immediately reclaim them by pursuing the party.' So, in Bowen v. Burk, 13 Pa. 146, it is said: 'By an unqualified delivery, notwithstanding a cash sale, the seller relinquishes the advantage of possession and trusts to his action on the contract.' In Mackaness v. Long, 85 Pa. 158, it is said: 'Although the terms of a sale be cash, subsequent delivery without payment passes the property to the vendee, not only as to the rest of mankind, but against the vendor himself. If the vendee takes the goods away without payment, the vendor should immediately reclaim them by pursuing the party and retaking them; and this may be done, when necessary, even by force. The right of reclamation after delivery exists only in cases of fraud or deceit in the purchase, or in procuring the possession.'"

Now it must be noted that there is not the slightest testimony in this case tending to show any effort on the part of the petitioner to pursue the Cullman Company, immediately after delivery, for the purpose of reclaiming the goods. On the other hand, the telegram from the Cullman Company, requesting the release of the car and embracing promise to send check, bore date of June 26th, and not until August 1st following was any effort made by the Sprague Company to secure any adjustment of the matter with the Cullman Company, and even then no effort was made to reclaim the property, but to secure payment therefor. H. O. Crane, witness for the petitioner, testified that when he went to Cullman on the 1st day of August he "demanded the machinery, or the money which had been promised for it." Then and at that time what took place between the parties? The machinery was not delivered to the agent of the Sprague Company, but said agent accepted two vouchers of the Cullman Company, signed by its president and treasurer, and payable at the banking house of Parker & Co. (negotiable paper), and $1,200 in first mortgage bonds of the Cullman Company to secure these vouchers. The agent of the Sprague Company was advised, at the time he accepted this collateral, that the mortgage to secure these bonds covered all the real estate and machinery of the Cullman Company. Even granting, for the sake of argument, that, when the machinery was delivered on the promise of the Cullman Company to send check, on its failure to do so the

title at that time still remained in the Sprague Company, which we do not admit (see Blackshear v. Burke, 74 Ala. 239), can there be any doubt, as matter of law, under the facts and circumstances of this case, that the title passed from the Sprague Company to the Cullman Company, when the agent of the former company accepted in payment for the machinery negotiable vouchers; secured by the bonds, on or about August 1st? We think not, and we feel compelled to hold that, if the title did not pass when the property was delivered to the Cullman Company on its promise to send check, it did in fact pass at the time of the acceptance of the vouchers and bonds. A case directly in point with this view, and which is sustained by ample authority, is that of Tatnall et al. v. Rome F. & M. Works, 98 Ala. 532, 13 South. 271. In that case certain goods were ordered by mail and shipped as ordered, with invoice to the purchaser; but the bill of lading, with draft for price, was sent to the bank for collection and payment refused by the purchaser, who submitted an offer to pay in 30 days, which offer was accepted by mail, and the purchaser sent his note, which was never paid. It was held that the sale was completed by the vendor's acceptance of the buyer's offer. So, in the case at bar, the goods were ordered by mail, and shipment was made with 10-day draft and bill of lading attached. The vendee declined to accept the goods on these terms, and proposed instead to send check after delivery. This proposition was accepted by the vendors, and the goods delivered. The check not being sent as agreed, the vouchers and bonds were afterwards given and accepted.

The petitioner directs attention to the case of Montgomery Iron Works v. Smith, 98 Ala. 644, 13 South. 525, and insists with considerable vehemence that that case is decisive of the proposition, and shows conclusively that the agent Crane's act in taking the two vouchers, with bonds as collateral security, was not a waiver of the Sprague Company's retention of the title. A careful reading of that case will show conclusively that it differs from the case at bar in one very material element. In that case it was stipulated expressly, in a written contract made at the time of the purchase, that all payments made before default in the payment of the notes should be treated as payment for the use of the machinery. The contract also provided that, upon default in the payment of any of the notes, the vendor might take possession of the property or might sue on all of the notes, if it saw proper; but it was reiterated in the contract that the title should remain in the vendor, and should not become vested in the vendee, until all of the notes were paid. There were no such conditions as these made or contemplated in the original written contract of sale. As we have before said, this contract was made by ordinary correspondence through the mail. The goods were simply ordered by letter, and they were shipped, with bill of lading attached and accompanied with a 10-day draft. This contract of shipment, which was accepted by the Cullman Company, does not attempt in the slightest manner to set out on its face any reservation of title to the goods. Nor are we able to glean from the testimony in this case, at the time the telegram was sent to the Sprague Company requesting the release of the goods and the promise to send check, that there was any

reservation of title on the part of the Sprague Company, or a recognition of any reservation of title by the Cullam Company, in case the check should not be paid. There is no evidence before this court, either in the testimony or the correspondence passing between the parties, that at the time of the purchase it was expressed that the title should remain in the vendors. In fact, at the time of the acceptance of the vouchers and bonds the witness Crane testifies that President Fealy of the Cullman Company expressed a willingness to sign any necessary documents showing that the title to the machinery should remain in the vendors until paid for; but no such document was signed or demanded by the vendors, and the reason given by the witness Crane as to why such document was not signed was because "at that time it was only a few days until those checks were to be paid, and we left the machinery as it was, waiting the payment of those checks."

It being the opinion of the court, for the reasons stated and upon the authorities above cited, that the title to the machinery passed into the Cullman Company, the remaining questions, as to the right of the Sprague Company to engage in business in Alabama, and the validity of the mortgage given by the Cullman Company to secure its bonds, and the effect of what purports to be a lease executed by that Company to the Sprague Company, are questions only remotely connected with the controlling question in this case. The lease purporting to have been executed on the 7th day of September, 1906, if executed by authority, was admissible only in consideration of the question of the intention of the parties, in connection with the terms of the contract and the circumstances of this case. Then, if that lease could be construed as a valid lien upon the property of the bankrupt, it would not at this time be necessary for this court to pass upon the effect of that lien in its relation to the mortgage given to secure the payment of the bonds, for all such questions will necessarily be determined and settled, as provided under the bankruptcy law, in the final distribution and settlement of the bankrupt's estate.

It must not be forgotten that the burden of proof in this case is upon the petitioner to establish its title to the property in controversy. This we are compelled to hold it has failed to do. The title having vested absolutely in the Cullman Company, the lease bearing date of September 7th could have no force or effect for reinvesting the title in the Sprague Company—first, because it does not purport to be and is not in fact an instrument seeking to convey the title from the Cullman Company to the Sprague Company; and, second, if it were such instrument, it could not be effective for this purpose, because it was not executed by the authority of the corporation. "It is a generally recognized principle of the law that the president of a corporation or its general manager, without authority of its board of directors, cannot make a valid conveyance or assignment of the property of the corporation." Norton v. Alabama Nat. Bank, 102 Ala. 420, 14 South. 872. It is true that, where an instrument is under the seal of the corporation, it purports authority; but the proof in this case affirmatively shows that there was no resolution of the board of directors authorizing the execution of the paper. American Savings & Loan

Ass'n v. Smith, 122 Ala. 505, 27 South. 919; Sampson v. Fox, 109 Ala. 671, 19 South. 896, 55 Am. St. Rep. 950. The act of Fealy in signing the so-called lease was simply the act of an agent of the corporation, acting without the scope of his authority; his act having no force or effect in so far as it involves the issues now presented. Neither his act in signing this lease nor his declarations in relation thereto were evidence to bind his principal, the Cullman Company, because there was no independent proof of his authority to bind that corporation in the act performed. Postal Telegraph Co. v. Lenoir, 107 Ala. 640, 18 South. 266; Buist v. Guice, 96 Ala. 255, 11 South. 280; Talladega Ins. Co. v. Peacock, 67 Ala. 253; Galbreath v. Cole, 61 Ala. 139. The authorities are practically unanimous upon the proposition that one who deals with an agent does so at his peril. The law places him upon notice that he must ascertain for himself whether or not the agent is acting within the scope of his authority. Cummins v. Beaumont, 68 Ala. 204.

It follows, therefore, that the petition of the Sprague Canning Machinery Company cannot be sustained; and it is therefore ordered, adjudged, and decreed, that the same be, and is hereby, dismissed out of this court. It is further ordered, adjudged, and decreed that the costs of this proceeding be, and the same are hereby, taxed against the estate of the bankrupt.

UNITED STATES v. NOOJIN.

(District Court, S. D. Alabama, N. D. August 9, 1907.)

No. 1,251.

1. JUDGMENT—EFFECT OF CONDITIONAL ORDER SETTING ASIDE.

A final judgment was rendered on an appearance bond given by the defendant in a criminal case. Subsequently a motion was made to set aside such judgment, and an order was entered sustaining the motion on condition that the costs in the case should be paid within 60 days, which was not done. *Held*, that such order did not supersede the judgment, but merely suspended it for 60 days, and that an execution was properly based on such judgment, and not upon the subsequent one.

2. UNITED STATES—ENFORCEMENT OF JUDGMENT—DEFENSE OF LACHES.

The right of the United States to cause execution to be issued on a judgment in its favor in a purely governmental suit, such as an action on an appearance bond given by a defendant in a criminal case, is not barred by limitation, nor by the laches of its officers in failing to have such execution issued until more than 10 years after the judgment was entered.

On Motion to Quash Execution.

The facts in regard to this matter, which appear by the records of this court, are succinctly as follows: In the year 1891, one J. J. Burns being prosecuted criminally to answer an indictment against him in this court, made an appearance bond. J. H. Hughes and J. T. Noojin (movant here) were sureties on this bond in the sum of $300. At the fall term of this court in 1891 a judgment nisi was taken on this bond against the principal and these sureties, and notice was issued to each of them as required by law. At the spring term of this court in 1892 the defendant Burns was tried and acquitted. On March 10, 1892, the judgment nisi was made final for the full amount of the bond and costs. On October 5, 1892, on motion of the

defendant J. J. Burns, the judgment final was set aside on condition that the costs be paid in 60 days; otherwise, execution to be issued for the whole judgment rendered. It not appearing that these costs were paid, an execution on the original judgment was issued on May 14, 1892, and another execution was issued on January 28, 1893; but these executions do not appear, from the records, to have been acted upon in any manner. They became functus by nonaction. The principal on this bond and one of his sureties, to wit, J. A. Hughes, are now dead. No further action was had by the United States until July 16, 1906, which was 14 years and 4 months after the rendition of the original judgment, when an execution was issued from this court and was about to be levied on the property of the movant, Noojin. To that execution he filed a motion to quash, but that motion was never heard by the former judge of this court; and, no order being made in relation thereto, both execution and motion became defunct. Now another execution has been issued upon the original judgment rendered, and the movant, Noojin, moves to quash this execution, because it was issued upon a dormant judgment, and, further, because said execution was not predicated upon a valid judgment. It is further contended that the execution was issued upon the wrong judgment, being issued upon the judgment of March 10, 1892, instead of the judgment of October 5, 1892. The grounds of the motion were also stated in other ways, but these two were sufficient to present the issues here involved. Neither the judgment nor the costs are shown to have ever been paid.

Culli & Martin, for movant.
O. D. Street, U. S. Dist. Atty.

HUNDLEY, District Judge (after stating the facts). There can be no question about the execution being issued upon the right judgment. The conditional judgment, which had been previously rendered against the principal and his sureties, was, after due and legal notice to them, made final on the 10th day of March, 1892. On the 5th day of October, 1892, the following judgment was entered, to wit:

"This cause coming on to be heard upon the motion of the defendants to set aside the judgment final heretofore entered herein at a former term of this court, and after being argued by counsel and duly considered by the court, it is ordered that said motion be, and the same is, hereby granted, upon the condition that the defendants pay the costs of the sci. fa. herein within 60 days from the date hereof; otherwise, execution will issue for the whole amount of the judgment as heretofore rendered."

The effect of this last order or judgment was to bring into full force and effect the judgment of March 10, 1892, immediately on failure to pay the costs of the sci. fa., as conditioned in the order of October 5, 1892. This last order did not supersede the judgment of March 10th, but only suspended that judgment for 60 days, for the benefit of this movant and the other obligors on the bond. It cannot be seriously questioned that, if execution had been issued on the judgment of March 10th at the expiration of the 60 days provided in the judgment of October 5th and failure to pay the costs, such execution would have been to all intents and purposes a binding, valid, and enforceable execution. Of this proposition I have no doubt. This status of this matter being fully justified by the records of this court, we are then confronted by the really decisive question in the case, to wit:

Can this movant now be permitted, in the manner here attempted, to take advantage of the failure of the government's agents for more than 10 years to cause execution to be issued on the judgment of March 10th, and to enforce that execution? Does or does not the

maxim, "Nullum tempus occurrit regi," apply in the case at bar? The general proposition is well stated, in 19 Am. & Eng. Encyc. of Law (2d Ed.) p. 188, to be as follows:

"The prerogative of royalty in regard to the limitations of actions extends to republican governments, and the maxim, 'Nullum tempus occurrit regi,' applies in the United States, both as to the federal government and as to the several states, except where express statutory provisions to the contrary exist."

This general principle is amply sustained by the multitude of authorities, both state and federal, cited in the note to the text. It is true that in cases where the government or the state is the nominal party, and not in fact the real party in interest, this maxim and rule of the law does not apply. But such is not the case here. The effort is here made to prevent the United States from enforcing a judgment, secured in its own courts, for the sole benefit of the government. Every penny of the judgment, when collected, will become eo instanti the property of the United States. The negligence of the agencies of the government in failing to enforce the judgment and execution cannot be of avail to this movant here. The government is seeking the enforcement of its own rights, and is not, therefore, bound by any statute of limitations, nor barred by any laches of its officers, however gross. United States v. Southern Pac. R. R. Co. et al. (C. C.) 39 Fed. 132. "The United States is not subject to any act of limitation." United States v. Johnson, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389.

The purport of this motion is nothing more nor less than an effort on the part of this movant to stay the hand of the sovereign in its effort to enforce a public right and to assert a public interest. The general rule that laches is not imputable to the government is essential to the preservation of the interests and prosperity of the public. This rule is founded upon the highest grounds of public policy, and any other doctrine would be ruinous in the extreme. All the property of the United States is held in trust for the people, and it is now well settled, upon grounds of public policy, that the public interests shall not be prejudiced by the neglect of the officers or agents to whose care they are confided. The government can only transact its business by and through its officers and agents, and its fiscal operations are so various, and its agencies and officers so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches could be applied to its transactions. The Supreme Court of the United States has uniformly and repeatedly declared that in such cases as this laches cannot be set up against the government. United States v. Kirpatrick, 9 Wheat. 735, 6 L. Ed. 199; United States v. Van Zandt, 11 Wheat. 190, 6 L. Ed. 448; United States v. Nicholl, 12 Wheat. 509, 6 L. Ed. 709; Dox v. Postmaster General, 1 Pet. 318, 7 L. Ed. 160; Gibson v. Chouteau, 13 Wall. 99, 20 L. Ed. 534; Gaussen v. United States, 97 U. S. 584, 24 L. Ed. 1009; United States v. Thompson, 98 U. S. 489, 25 L. Ed. 194; Steele v. United States, 113 U. S. 129, 5 Sup. Ct. 396, 28 L. Ed. 952; United States v. Nashville, C. & St. L. Ry. Co., 118 U. S. 125, 6 Sup.

Ct. 1006, 30 L. Ed. 81; United States v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968.

It is contended by counsel for movant with much earnestness that by act of Congress the United States has adopted in its own courts the same rule to enforce judgments in favor of the United States as used in civil cases between its citizens. The statute cited to sustain this contention is section 916, Revised Statutes of the United States [U. S. Comp. St. 1901, p. 684]. Under and by virtue of that statute it is claimed that, when the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law and places itself upon an equality with other litigants. This, indeed, may be true; but the courts have universally held that such condition is always qualified by the rule that neither the statute of limitations nor laches will bar the government of the United States as to any claim for relief in a purely governmental matter. United States v. Adams (C. C.) 54 Fed. 114; United States v. Southern Colorado Coal & Town Co. (C. C.) 18 Fed. 273. In the case of Pond v. United States, 111 Fed. 989, 49 C. C. A. 582, it was held, with citation of numerous authorities, that, since laches are not imputable to the government, its right in a governmental matter, prescribed by its own statutes, cannot be affected by state enactments. Such, indeed, is the status of the case at bar.

It is therefore ordered, adjudged, and decreed that the petition of J. T. Noojin be, and the same is, hereby dismissed out of this court. It is further ordered, adjudged, and decreed that said J. T. Noojin pay the costs of this proceeding, for which let execution issue. It is further ordered that said Noojin have 20 days from the filing of this decree to perfect an appeal, if he so desires, by entering into bond, with good and sufficient surety, in the sum of $1,500, to be approved by the clerk of this court, conditioned to pay such judgment as the appellate court may direct, and also to pay the judgment, costs, and interest on the judgment rendered March 10, 1892, should the appellate court decide this motion adversely to him, the said Noojin. It is further ordered that, upon the execution and approval of said bond, the execution on said judgment of March 10, 1892, be stayed until the further orders of this court.

THE H. B. MOORE, JR.

(District Court, S. D. New York. July 22, 1907.)

TOWAGE—INJURY TO TOW—FAULT OF TOW IN FAILING TO MAKE HAWSER FAST.

A steamer taken in tow by a tug, to be moved out from her loading berth, is responsible for the proper fastening of the lines to her own bitts, and where, in such case, the tow was injured by coming in contact with a pier by reason of the insecure fastening of one of the lines which slipped on the bitt, the tug is not in fault for her injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, § 25.]

In Admiralty.

Butler, Notman & Mynderse, for libellants.

Wing, Putnam & Burlingham and Jonathan H. Holmes, for claimant.

ADAMS, District Judge. On the 22nd day of September, 1906, the steamship Freke, a vessel of 190 feet in length and 30 feet beam, was lying on the south-west side of pier 36 of the Atlantic Basin, Brooklyn, and being loaded and desirous of going to sea, employed the tug H. B. Moore, Jr., to tow her through the gap, which was formed by piers 33 and 38. There was an intervening pier, 37, between the pier where the steamship was lying (36) and two piers, 34 and 35, on the other side of the basin inside of 33. All the inside piers were somewhat shorter than the exterior ones, which were 300 feet apart. The tug started about 10:20 a. m. to tow the steamer stern first with two hawsers, made fast respectively from her own stern side bitts to the steamer's side bitts at her stern. The tug attempted to proceed through the gap but in doing so the steamer was brought in contact with the east side of pier 33 and somewhat damaged, at first claiming about $3,000, but subsequently increased it by amendment to the extent of $6,500.

An action was brought by the libellants to recover these damages, charging the tug with fault in several respects but principally for not keeping the steamer clear of the pier, and improperly directing the casting off of the hawser which was made fast to the steamer's starboard quarter, and that if two hawsers were necessary in taking the steamer out, the tug was in fault for failing to supply the second hawser.

The tug's answer denied any negligence on her part and alleged that the accident was solely due to the negligence of those in charge of the steamship in not making the towing line properly fast and in not going ahead with her engines before she did.

From the testimony, it appears that the steamer had her full power of steam available for use but did not resort to it until it appeared that she was in close proximity to pier 33 and likely to collide with the east side thereof, when the pilot, seeing that a collision was eminent between that pier and the stern of the steamer, ordered her engine slow ahead but the master, who was also on the bridge and passing the orders from the pilot, directed it to be put half speed ahead and almost immediately full speed but these orders were too late and did not prevent the collision.

The tug ran her own line from her port side to the steamer's starboard side; it had an eye on the steamer's end which was placed on the steamer's starboard quarter bitts. The other line ran from the tug's starboard side to the steamer's port side. This was the steamer's line and had no eye. The distance between the sterns of the vessels was about 30 feet. The lines were fastened on double bitts or bollards on the steamer and used exclusively in pulling her out. After the vessels had turned somewhat and proceeded a short distance, the tug's hawser became slackened from the turning of the vessels to the port of the tug and useless for that reason and to avoid the danger of getting it in the propeller of one of the vessels, the tug's master ordered it to be taken in and thereafter the pulling was done with the line running from the starboard side of the tug to the port side of the steamer. When approaching pier 33 this line slipped, or "rendered" as it was called, on the steamer's bitts to an extent variously estimated

at from 10 to 30 feet. The latter was the judgment of the master and deck hand of the tug and confirmed by the pilot of the steamer to a certain extent. The latter said at first it was 10 or 12 feet but on cross examination stated he would not swear "that it did not render thirty feet." I judge that 30 is a measurably correct estimate. The tug's witnesses were watching the hawser closely and were more likely in view of their interest to have reached a correct judgment in the matter than were the others on the bridge of the steamer.

There is no doubt that the hawser slipped and that the fault of the collision was in the slipping of that line. It does not seem that the casting off of the other line had any effect whatever on the accident nor do I see any fault on the part of the tug in using the steamer's hawser. There was no trouble with the hawser for the purpose to which it was adapted excepting that it slipped and that was due to insufficient fastening on the part of those attending to it on the steamer. It was said that they made a sufficient number of turns but that is disproved by the fact that it slipped. It is evident that it was in their power to make it secure as is shown by the fact that when those on the stern of the steamer noticed the slipping, they almost immediately made it fast. It is urged that the slipping was the result of an extraordinary strain put upon the hawser by the tug but if there was such a strain, which I doubt, it was the effect of the steamer's failing to use her engine to assist in an obviously necessary manœuvre. It is said on the part of the steamer that it was the duty of the tug to give orders concerning the use of the steamer's steam but if that were the case, and the evidence does not make it clear, the question only arises was it a fault in extremis. Here the slipping of the hawser was the proximate cause of the accident. Any question of negligence in extremis with respect to the use of the steamer's engines is subordinate to that of the slipping of the hawser and it has so recently been decided by the circuit court of appeals that the towed vessel is responsible for the lines on her being properly made fast that it does not seem necessary to discuss the question further. I refer to the case of The Lyndhurst (D. C.) 129 Fed. 843, where I held that the tug was liable for the results of a collision between the tow and a wharf through the sliping of a hawser on the tow. There was but one man on the tow and I followed the principle that the tug is responsible for the make up of a tow of that character, including the fastening of the towing hawser, but the circuit court of appeals took a different view and held that the tug was free from blame, "because the hawser was not carefully adjusted by her master over the designated cleat, and that for his carelessness in that respect the tug is not liable." Id., 147 Fed. 110, 113, 77 C. C. A. 336.

The libel is dismissed.

DEITSCH et al. v. GEORGE R. GIBSON CO.

(Circuit Court, S. D. New York. August 12, 1907.)

TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT — PRIORITY OF RIGHT.

A firm commenced the use of a name as a trade-mark for tooth brushes in 1883, and continued such use until its failure about 1890, and during the same time defendant used a similar name for brushes sold by him. On being sued for infringement, he promised to quit, but, the firm soon failing, he did not. After the failure complainant's assignor, who had become a partner shortly before, appropriated the trade-mark as his own, and had the same registered. *Held*, that he was not the legal successor of the firm, and obtained no right from defendant's promise, but his right dated only from the time of his own use, which, being later than defendant's, afforded no ground upon which complainant was entitled to enjoin defendant as an infringer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 36, 41, 42.]

In Equity. On motion for a preliminary injunction.

Joseph L. Levy, for the motion.
Griggs, Baldwin & Pierce, opposed.

HOUGH, District Judge. Undoubtedly the grant of a registered trade-mark to the complainants makes them prima facie owners thereof, which is but one way of saying that the burden is on any one, asserting the right to use the same collocation of words and figures, to prove that right. The greatest right possessed by complainants must be measured by the affidavit of their assignor, Martin, to the effect that the trade-mark had been "continuously used in (my) his business since about the 1st day of April, 1883." In other words, it is of the essence of complainant's contention that they are at least the prima facie owners of a trade-mark appropriated as long ago as 1883 by Martin, and continuously used by him in his business since that date.

In 1883 Martin was 16 years old, and a boy in the employ of the Wallach firm. Whatever his rights, when shortly before its failure he became a partner in the firm, the trade-mark statement signed by him is difficult to reconcile with the now admitted facts. The best way of putting it for complainants is to say that the firm of Wallach devised the trade-mark in 1883; Martin became a partner in that firm in 1889; and by virtue of some assignments or transfers from the other partners came out of the wreck of the Wallach business the owner of the firm's trade-marks. If he did that, he could perhaps use his own trade-mark on the goods of houses he was subsequently connected with, and leave them and their business taking his trade-mark with him. This seems to me the line of reasoning based on cases like Thomson v. Batcheller, 93 Fed. 660, 35 C. C. A. 532. As applied to this case, I do not think title to the trade-mark is successfully gotten out of the Wallach firm and into Martin, or, in other words, the trade-mark as Martin's property (not "Willy Wallach's") is no older than 1890, or some date subsequent to the Wallach failure, and it became Martin's property by the simple process of his continuing to use it after the

failure—when nobody objected to his so doing. But such use cannot make him legally the successor of "Willy Wallach." The failure opened the trade-mark to the public; Martin as one of the public appropriated it; and whatever rights he possesses date from such appropriation. Assignments or disclaimers by other members of the extinct "Willy Wallach" firm are of no avail. When that firm abandoned business, the trade-marks were abandoned, and when Wallach & Blackwell executed the papers now produced and dated in 1902 they owned nothing which could assist Martin in his use of the word "Marguerite." The interference proceeding does not help this present contention. Martin's use of the word from 1890 was enough to defeat Martin & Bowne Company.

It is quite true, as stated in briefs, that I have given unusual opportunity for the production of affidavits on both sides. This was done because the grant of a registered trade-mark in effect puts the burden of proof on a defendant—an inversion of the ordinary proceeding—and therefore I thought considerable care in preparation of defendant's case was required.

Every affidavit submitted suggests the need of cross-examination; but, taking them for what they are worth, I consider it shown affirmatively that "Marguerite" as Martin's trade-mark dates not from 1883, but about 1890.

It is also affirmatively shown that from a date earlier than 1890 Gibson has sold, and been known in the trade to sell, "Margherita" brushes made by Loonen of Paris—the very brush now sought to be enjoined. The action in common pleas in 1890 was probably brought and settled substantially as narrated by Martin. It evidently did not stop Gibson, and, even if he did promise to stop, it is difficult to see why he was not absolved from his promise by the swiftly following failure of "Willy Wallach." The nearest approach to truth I can get from these affidavits is this: For a number of years before 1890 Willy Wallach used "Marguerite" and Gibson "Margherita." Wallach thought more of his word than Gibson did of his, and, when the latter was sued, he promised to quit. Wallach almost immediately failed. Gibson continued "Margherita," Martin took up "Marguerite," and each (personally or through successors) has continued to use his own word ever since, though Martin has had to compromise with Martin & Bowne Company and let them have "Marguerite" until 1908, which is the reason for complainants not having a Marguerite toothbrush in stock when suit began.

Motion for preliminary injunction denied.

DERHAM v. DONOHUE.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1907.)

No. 2,447.

1. PLEADING—AMENDMENT PERMISSIBLE WHERE VARIANCE IMMATERIAL.
Where the variance between the pleading and the facts which the pleader seeks to prove is so slight that it is obvious that the opposing party could not have been misled by it in the preparation of his case for trial, it is the duty of the court to disregard it or to permit an amendment to conform the pleading to the proof offered.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1338.]

2. BILLS AND NOTES—NOTICE OF PROTEST—SUFFICIENCY.
A notice of protest is sufficient which by express terms or by necessary implication informs the indorser of the identity of the paper, of due demand, of its protest, and of its dishonor.
Mistakes and omissions in it which obviously could not have misled or prejudiced the indorser are not fatal.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1129–1136.]

3. SAME—FACTS—CONCLUSION.
A certificate of deposit dated January 25, 1904, due January 25, 1905, was duly presented for payment. Payment was demanded and refused on January 25, 1905. Thereupon a notice of the presentment, demand, and dishonor was sent to, and received by, the indorser, which was dated January 25, 1904, when it should have been dated January 25, 1905, which stated that the demand and dishonor were on the day of the date of the notice, that the certificate was dated January 25, 1905, when it was dated January 25, 1904, and it omitted to recite this clause which was in the certificate, "No interest after six months." *Held*, the notice sufficiently identified the certificate and notified the indorser of due presentment, demand, and dishonor, so that it is obvious that he could not have been misled or prejudiced by the mistakes in it.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1129–1136.]

(Syllabus by the Court.)

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

D. W. Lawler and D. F. Lyons, for plaintiff in error.
Thomas H. Quinn, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. M. F. Donohue recovered a judgment against John Derham, the indorser of a certificate of deposit issued by the First National Bank of Faribault, and the defendant sued out this writ of error to reverse it.

The first alleged error specified is that the court permitted the plaintiff to amend his amended complaint at the trial when the certificate and indorsement were offered in evidence by inserting in the copy of the certificate set forth in the pleading the words, "With interest at 3 per cent. per annum, no interest after 6 months," which had been omitted from the complaint, and received the certificate and indorsement in evidence. But the statutes of Minnesota provide that:

"No variance between the allegation in the pleading and the proof is material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and it shall be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just." General Statutes of Minnesota 1894, § 5262.

The Supreme Court of Minnesota has declared that:

"When the disagreement between the facts alleged and the facts proved or sought to be proved is so slight that it is perfectly obvious that the adverse party could not have been misled in his preparation for trial, the variance is deemed immaterial, and the court will either disregard it altogether or order an immediate amendment without costs." Wilcox Lumber Co. v. Ritteman, 88 Minn. 18, 92 N. W. 472.

The case in hand falls under this rule. The certificate of deposit was set forth correctly in the original complaint and its execution was admitted by the answer; but the words "with interest at 3 per cent. per annum, no interest after 6 months," were omitted from the amended complaint. It is obvious that the defendant could not have been misled by this omission in his preparation for the trial, and it was the duty of the court below to permit the amendment and to receive the certificate and indorsement in evidence under the United States statute of jeofails. Rev. St. § 954 [U. S. Comp. St. 1901, p. 696]; Gen. St. Minn. 1894, §§ 5262, 5266.

The second error specified is that the court rejected evidence that Stateler agreed with Derham to take the certificate of deposit as an absolute payment of its face value for a part of the purchase price of his farm. Stateler sold his farm to Derham about December 16, 1904. Donohue had a mortgage on the farm for $4,599. Derham signed this indorsement, "Pay to the order of M. F. Donohue," upon the certificate, and delivered it to Donohue, and the latter released his mortgage and paid over to Stateler $401, the difference between the principal of the debt evidenced by the certificate and the amount due on his mortgage. The agreement between Donohue and Stateler was made at the time of the sale of the farm before the certificate was indorsed and delivered to Donohue and was not communicated to the latter. Counsel argue that this agreement constituted a defense to this action under section 5157 of Statutes of Minnesota 1894, which reads:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before due."

They cite in support of their contention La Due v. First National Bank, 31 Minn. 33, 16 N. W. 426. In that case the payee of a draft indorsed it to one Edison, against whom the drawer, the defendant bank, had an offset. After the draft became due Edison indorsed it and it passed by subsequent indorsements to the plaintiff. The court held that the indorsers subsequent to Edison took it subject to the same offset to which it was subject in his hands. But the action in that case was

upon the draft, and that draft had passed by indorsement through Edison to assignees of the plaintiff. In the case in hand the action is not upon the certificate of deposit which Derham once owned, but upon Derham's indorsement of it. That indorsement was made directly to the plaintiff Donohue. Whatever the relations of Stateler and Derham may have been, there never was any contract of indorsement of this certificate between Derham and Stateler, and as Stateler was never a party to, or the owner of, such a contract, he was never the owner or assignor of the thing in action here in hand, the indorsement to Donohue, which is the subject of this action, and the statute invoked has no application to this case. The evidence of the agreement between Stateler and Derham was immaterial and inadmissible.

About the 16th day of December, 1904, in the negotiations for the indorsement of the certificate and the satisfaction of the mortgage Derham informed Donohue that if he would hold the certificate, which was dated January 25, 1904, and which by its terms drew interest for only six months, until January 25, 1905, the bank would pay a year's interest upon it. Thereupon they went together to the bank, and it promised to pay this year's interest if the certificate was held until January 25, 1905. Donohue agreed with Derham to hold it until that time, and that Derham should have the interest which the bank would then pay, and Derham indorsed the certificate. Counsel argue that the effect of this agreement was to substitute Donohue for Derham in the latter's relation to the bank, so that, if the bank failed to pay the certificate, the loss was Donohue's, and not Derham's. The position is untenable, because the transaction was concluded by the execution of the indorsement, the written contract by Derham to pay the certificate on due demand and notice, if the bank did not, and the delivery of this contract and the certificate to Donohue by Derham. That indorsement is utterly inconsistent with the theory that Donohue took the chance of the failure of the bank. It is in writing, its terms and legal effect are certain, and it must prevail.

Nor is the contention that since Donohue did not demand the payment of the certificate until January 25, 1905, Donohue assumed the risk of the insolvency of the bank meanwhile and thereby released Derham from his indorsement, more persuasive, because Donohue delayed his demand at the request of Derham and for his benefit, and Derham is thereby estopped from taking advantage, to the detriment of Donohue, of the delay which he caused.

Finally, counsel insist that the judgment should be reversed because in the notice of protest its date was January 25, 1904, when it should have been January 25, 1905, the date of the certificate was recited January 25, 1905, when it should have been recited January 25, 1904, and the notice failed to state that the certificate contained the words, "No interest after 6 months." They cite the following authorities in support of their argument that this notice did not inform Derham of the demand and refusal of payment of the certificate on January 25, 1905, when it fell due: Townsend v. Lorain Bank of Elyria, 2 Ohio St. 345, 353, 360, in which a note fell due on June 4, 1849, and a notice dated June 2, 1849, that it was presented and dishonored on that day, was held insufficient. Ransom v. Mack, 2 Hill (N. Y.)

587, 38 Am. Dec. 602, wherein a notice dated July 4th, that a note was presented and dishonored on that day when it was presented and dishonored on July 3d, was held bad; Etting v. Schuylkill Bank, 2 Pa. 355, 44 Am. Dec. 205, in which a notice dated on the second day of grace that payment of the note had been demanded and refused on that day, when it should have stated that the demand and dishonor were on the next day, was rejected; Wynn v. Alden, 4 Denio (N. Y.) 163, where a notice without date that the paper was presented and dishonored on "this day" was held bad; and Tevis v. Wood, 5 Cal. 393, in which a notice that the demand and dishonor were one day too late was held insufficient. It is conceded that these decisions strongly tend to sustain the contention of counsel. There are, however, decisions to the contrary. Ontario Bank v. Petrie, 3 Wend. 457; Crocker v. Getchell, 23 Me. 392; Journey v. Pierce, 2 Houst. (Del.) 176; 2 Daniel on Neg. Inst. § 984; Tiedemann on Commercial Paper, § 346. The rule upon this subject which prevails in the federal courts was stated by Story, J., in Mills v. United States Bank, 11 Wheat. 431, 436, 6 L. Ed. 512, in answer to a contention that a notice was fatally defective because it did not state who was the holder of the paper, because it misdescribed the date of the note and because it did not state that the demand had been made at the bank when the note was due. He said:

"No form of notice to an indorser has been prescribed by law. The whole object of it is to inform the party to whom it is sent that payment has been refused by the maker, that he is considered liable, and that payment is expected of him. It is of no consequence to the indorser, who is the holder, as he is equally bound by the notice, whomsoever he may be, and it is time enough for him to ascertain the true title of the holder when he is called upon for payment. The objection of misdescription may be disposed of in a few words. It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact, without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility. * * * The last objection to the notice is that it does not state that payment was demanded at the bank when the note became due. It is certainly not necessary that the notice should contain such a formal allegation. It is sufficient that it states the fact of nonpayment of the note, and that the holder looks to the indorser for indemnity. Whether the demand was duly and regularly made is matter of evidence, to be established at the trial. If it be not legally made, no averment, however accurate, will help the case; and a statement of nonpayment and notice is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser."

This decision has been generally followed, and these rules may be said to be established in the national courts and to prevail in many of the state courts. Any notice of protest is sufficient which by express terms or by necessary implication conveys information to the indorser of the identity of the paper and that upon presentment, when due, payment has been neglected or refused. Mistakes and omissions in a notice which obviously could not have misled or prejudiced an indorser are not fatal to it. Bank v. Swann, 9 Pet. 33, 46, 9 L. Ed. 40; Bank v. Watterson, 2 Fed. Cas. No. 941; Cooper v. Gibbs, 6 Fed. Cas. No. 3194; Hodges v. Shuler, 22 N. Y. 114; Gates v.

Beecher, 60 N. Y. 518, 527, 19 Am. Rep. 207; Youngs v. Lee, 12 N. Y. 551; Bank of Cooperstown v. Woods, 28 N. Y. 561, 566; Smith v. Whiting, 12 Mass. 6, 7 Am. Dec. 25; Housatonic Bank v. Laflin, 5 Cush. (Mass.) 546, 548; Cayuga County Bank v. Warden, 1 N. Y. 413, 417; Rochester Bank v. Gould, 9 Wend. 280.

In the cases cited for the plaintiff in error the dates of the notices and the dates therein named on which the demands and dishonors were averred were within a few days of the due dates of the respective pieces of paper, so that the indorsers might have inferred that the demands and presentments were made on the wrong days. But in the case before us the indorser knew that the certificate which he had indorsed was dated on January 25, 1904, that it was due on January 25, 1905, and that he received this notice a short time after the latter date. The notice was dated January 25, 1904, and stated that on that day the certificate was duly presented for payment and that payment was demanded and refused. Derham knew that this was a mistake, for he knew that the certificate was issued to him and that he himself had possession of it on that day. Thus he knew it could not have been presented on the day stated in the notice. He knew that it fell due on January 25, 1905, and that the purpose of this notice was to inform him of its presentment and dishonor. "A statement of nonpayment and notice," says Mr. Justice Story in Mills v. United States Bank, "is, by necessary implication, an assertion of right by the holder, founded upon his having complied with the requisitions of law against the indorser." It is plain that the mistake in the recital of the date of the certificate in the notice and its failure to contain the clause, "No interest after six months," could not have misled Derham as to the identity of the paper, and there is no rational escape from the conclusion that by the terms of the notice and the necessary implication therefrom it sufficiently informed him of the presentment, demand, and dishonor of the certificate on the day when it fell due.

The judgment below must accordingly be affirmed; and it is so ordered.

HOOK, Circuit Judge (specially concurring). I concur in the result in this case, and in what is said excepting as to the application of the Minnesota statute of amendments. Congress has prescribed a rule sufficient for the guidance of national courts in this particular.

COLLIN COUNTY NAT. BANK OF McKINNEY, TEX., v. HUGHES.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1907.)

No. 2,511.

1. APPEAL AND ERROR—DECISION—QUESTIONS PRESENTED BY RECORD.

Legal issues other than the one specifically presented for determination may properly be considered and determined by an appellate court, where they naturally arise and are pertinent to the question at issue and to further proceedings in the trial court.

2. COURTS—FEDERAL COURTS—JURSIDICTION TO ENFORCE JUDGMENTS.
The jurisdiction of a national court over a controversy once lawfully acquired includes the power to enforce its judgment or decree, and this power may not be destroyed or restrained by the legislation or lack of legislation of the states.

3. SAME—WRIT OF SCIRE FACIAS TO REVIVE A JUDGMENT.
A Circuit Court of the United States has power to issue its writ of scire facias to revive its judgment and to prescribe a reasonable method of service thereof without the district where the judgment defendant has departed therefrom. Such power is derived from the Constitution and Rev. St. § 716 [U. S. Comp. St. 1901, p. 580], and cannot be restrained, limited, or rendered less efficacious by the statutes of a state.

4. SAME—MODE OF SERVICE.
The conformity act (Rev. St. §§ 914, 915, 916 [U. S. Comp. St. 1901, p. 684]) empowers a Circuit Court to use a similar remedy to that provided by a state statute to enforce its judgments, but does not require it to follow the method prescribed by a state statute in serving a writ of scire facias to revive a judgment on a nonresident defendant if it deems such method insufficient.

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

On Petition for Rehearing.

For former opinion, see 152 Fed. 414.

Clayton C. Dorsey and William V. Hodges, for the motion.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. Counsel for Hughes have made a motion for a rehearing of this case upon four grounds: (1) That what is said in the opinion with reference to the practice upon a writ of scire facias to revive a judgment is obiter dictum, (2) that the use of the writ of scire facias to revive a judgment is abolished in Colorado, except in the manner prescribed by the statutes of that state; (3) that the method of service of the writ is prescribed exclusively by the statute of Colorado, and that it may not be otherwise served by the direction of the federal court to revive a judgment of that court in that state; and (4) that the service of the writ personally outside of the district of Colorado will not be due process of law under the decision in Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

1. What was said in the opinion upon the questions challenged was appropriate and logical in its relation to the decision of the actual issue presented, to wit, whether or not the order assailed in this case was a final order. While the specific legal issues other than the latter question were not expressly presented for adjudication, they naturally arose and were properly considered in view of the condition of the case and the necessity of proper action by the court below.

2. The jurisdiction of a national court over a controversy once lawfully acquired includes the power to enforce its judgment or decree, and this power may not be destroyed or restrained by the legislation or lack of legislation of the states, because it is granted by the Constitution and the acts of Congress, which are the supreme law of the land. Barber Asphalt Pav. Co. v. Morris, 66 C. C. A. 55, 59, 132 Fed. 945, 949. The writ of scire facias to revive a judgment

is founded upon the statute of 2 Westminster, c. 45, enacted in the thirteenth year of Edward I, or the year 1285. A scire facias to revive a judgment is a continuance of the original action, and is not a new action. The practice under the common law in case the writ of scire facias could not be served upon the defendant was to render judgment of fiat executio upon two returns of nihil. But Chief Justice Beasley in delivering the opinion of the Supreme Court of New Jersey in Elsasser v. Haines, 52 N. J. Law, 10, 18 Atl. 1095, 1098, said, and it is a rational statement, that there is no substantial difference between the judgment fiat executio and the judgment quod recuperet. So that it does not seem to be material to notice the form which the judgment in the case at bar may take under the scire facias issued. In the eighteenth volume of the Encyclopedia of Pleading and Practice, at page 1055, the statement is made that scire facias to revive a judgment is the usual method unless another is provided.

In 1789 the Congress granted to the Supreme Court and the Circuit and District Courts of the United States the power to issue writs of scire facias. Rev. St. § 716 [U. S. Comp. St. 1901, p. 580]. In 1822 in Delano v. Jopling, 1 Litt. (Ky.) 118, 120, the Court of Appeals of Kentucky held that a judgment rendered in the state of Virginia on a scire facias against special bail upon two returns of nihil was entitled to full faith and credit in the state of Kentucky, and sustained an action for judgment upon it. That court said:

"A scire facias is styled a judicial writ, viz., a writ for the purpose of effectuating what has already been decided, or, in case of bail, to compel the bail to perform that which he hath solemnly undertaken of record; and the reason why the bail is summoned at all is out of abundant caution and tender regard to his rights, for the purpose of allowing him to show some matter which may have arisen since his undertaking, and which may exonerate him. Hence he is summoned to answer matters of record, and the judgment rendered of record after his undertaking, against his principal, is conclusive against him. There is therefore no necessity of taking the same care to bring him into court, in order to subject him to his undertaking, as there is with regard to defendants in original actions, where the matters in controversy are entirely en pais, and have never been settled or ascertained by judicial determination."

In 1858, in Battey, Ex'r, v. Holbrook, 77 Mass. 212, the Supreme Judicial Court of that commonwealth decided that after judgment had been rendered against a defendant, and he had removed from the local jurisdiction of the court, the writ of scire facias might still issue, "for," said the court, "the suit is in fact still pending in court, its remedy yet incomplete, and to be enforced as and when new breaches occur"

In 1840 one Comstock recovered a judgment in the Circuit Court of the United States for the District of Rhode Island in an action of debt in which the defendant had been duly served with process. In 1859 a writ of scire facias was sued out upon that judgment in Rhode Island, and was served personally upon the defendant in the state of Massachusetts, to which state he had moved and in which he was then residing. In 1860 an action was brought upon this second judgment in one of the trial courts of Massachusetts, and the plaintiff re-

covered. Upon a writ of error the Supreme Judicial Court of Massachusetts affirmed the judgment. It said:

"The scire facias was not a new action, but a continuation of the old one. Wright v. Nutt, 1 T. R. 389. It was indeed necessary that notice thereof should be given to the defendant before judgment thereon could legally be rendered. But, as the law prescribed no form of notice to a defendant out of the district where the court was held, it was for the court to cause such notice to be given as should be reasonable and enable him to appear and defend his rights. The notice given to the defendant was actual, personal, and seasonable, and though it was not in any form which had been ordered by the court, and was not proved by a return of an officer of the court, as such officer, but by his affidavit, yet it was adopted by the court as sufficient; and the judgment thereafter rendered must be deemed valid, and this action thereon be sustained. The Circuit Court could not be ousted of its jurisdiction by the absence of the defendant from the district in which the action was pending." Comstock v. Holbrook, 82 Mass. 111, 113.

In this state of the law and the practice the territory of Colorado in the year 1861 enacted a statute to the effect that the common law of England and all acts and statutes of the British Parliament prior to the fourth year of James I, of a general nature and not local to that kingdom, should be the rule of decision and be considered in full force until repealed by legislative authority. 2 Mills' Ann. St. § 4184. There can be no doubt that, under the common law, the foregoing statutes and decisions, and the established practice, the Circuit Court of the United States had power to issue its writ of scire facias and to prescribe a reasonable method of service thereof without the district of the court where a defendant in a judgment had departed from its district. In 1877 the Legislature of Colorado provided that a judgment in a civil action might be revived by filing a petition, issuing an order to show cause and serving it on the defendant in the same manner as summonses were required to be served in civil actions. Mills' Ann. Code, §§ 241–244. The statutes of Colorado also provided that a summons in a civil action might be served by publication where the defendants were not residents. Mills' Ann. Code, § 41. At the time of the issue of this scire facias there was a rule of the court below in force in the district of Colorado, to the effect that:

"Writs of execution and other final process issued on judgments and decrees rendered in this court and the proceedings thereon had shall be the same, except their style, as are now or may be hereafter used in the highest court of original and general jurisdiction in this state."

But this rule is not controlling in the issue and service of writs of scire facias because they are not writs of execution or other final process, nor are they proceedings thereon had, and, even if the rule were applicable, it would still be within the power of the court below to vary its process and its manner of service by order so as to attain the ends of justice.

It will be perceived from the statutes and decisions which have been cited that the power to issue the writ of scire facias and to serve it in such manner as the court below deemed wise and reasonable was vested in that court prior to the Colorado act of 1877 and that no additional power was granted by that act.

In Elsasser v. Haines, 52 N. J. Law, 10, 18 Atl. 1095, Chief Justice

Beasley, in an exhaustive and learned opinion which he delivered in the year 1889 for the Supreme Court of New Jersey, expressed the opinion of that court that a judgment upon two returns of nihil upon a scire facias issued in the state of Pennsylvania upon a bail bond was according to the course of the common law and of the law of that state, and was conclusive in the state of New Jersey and the action upon it was sustained.

Counsel insist that this proceeding by scire facias cannot be sustained, and they cite in support of their view Humiston v. Smith, 21 Cal. 129, 135, Cameron v. Young, 6 How. Prac. (N. Y.) 372, Hughes v. Shreve, 60 Ky. 547, and De Baca v. Wilcox, 68 Pac. 922, 923, 11 N. M. 346, decisions which hold that the writ of scire facias to revive a judgment is abolished in these various jurisdictions by the provisions of their codes that there shall be one form of civil action. It is enough to say in answer to these opinions that they do not apply to suits or proceedings in the national courts, that this court has previously expressed a different opinion, and that its view has been sustained by the Supreme Court. U. S. v. Insley, 54 Fed. 221, 223, 4 C. C. A. 296, 298; Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158, 37 L. Ed. 1163. The same conclusion was earlier adopted in England. 2 Coke's Inst. 472. In Brown v. Wygant & Leeds, 163 U. S. 618, 16 Sup. Ct. 1159, 41 L. Ed. 284, the Supreme Court held that two returns of nihil constituted sufficient service upon a resident of a state.

There are decisions cited by counsel which determine other questions, but none have been brought to our attention which hold that a Circuit Court may not issue and direct the manner of service of a writ of scire facias upon its own judgment so as to warrant it in entering a judgment of revivor thereon. In Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837, however, the Supreme Court decided that a judgment upon two returns of nihil in the state of Pennsylvania upon a scire facias to revive a judgment of a court of that state would not sustain an action upon the revived judgment in the state of Louisiana when the original judgment had become barred by the statute of the latter state. The court held that, if the scire facias was a new action, there was no sufficient service because the defendant was a resident of Louisiana at the time of the returns and had received no notice, and that, if it was a continuance of the original action, the effect of the judgment of revivor was to keep in force the local lien in the state of Pennsylvania, and that it did not have the effect to remove the bar of the statute of limitations in the state of Louisiana. In Bickerdike v. Allen, 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, may be found a decision that the service of a writ of scire facias issued upon a judgment in another state upon a resident of the state of Illinois by publication in the other state would not sustain an action upon the judgment of revivor rendered thereon in the state of Illinois under the doctrine of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. And there is an opinion in Weaver v. Boggs, 38 Md. 255, that a judgment of revivor on two returns of nihil in the state of Pennsylvania will not sustain an action upon the judg-

ment of revivor in the state of Maryland after its statute of limitations has run.

A careful review and reconsideration of these authorities show that the common law, the practice under it, and the decisions of the courts that a judgment of revivor may be rendered in the jurisdiction in which the original judgment was recorded upon the issue of a writ of scire facias and its service in such manner as the court may direct upon the defendant who is without the territorial jurisdiction of the court in which the record remains, is undisputed. But there is a controversy among the authorities over the effect of such a judgment in the state of the residence of the defendant at the time the writ of scire facias is served upon him. That controversy is not presented, and will not be presented in this case, and hence it is unnecessary farther to consider it.

But counsel contend that the act of conformity compelled the Circuit Court to adhere to the method of service of the writ of scire facias prescribed by the statutes of Colorado. There are two answers to this contention. The first is that the power of the Circuit Court to issue and to serve its writ of scire facias was derived from the Constitution and the act of Congress, and that it cannot be restrained, limited, or made less efficacious by the statutes of the state. The second is that the act of conformity does not require the Circuit Court to follow the method of service of its writ prescribed by the act of Colorado of 1877. Three sections of the conformity act are discussed by counsel. Section 914, Rev. St. [U. S. Comp. St. 1901, p. 684] is mandatory. It declares that the practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty cases shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing in like causes in the state courts. It has no application to this case because it relates exclusively to proceedings before judgment. It may not be futile to notice the fact, however, that this is the most peremptory section of this act, and that nevertheless the Supreme Court and this court have held that strict conformity to the practice and proceedings in the state courts is impracticable, and that this section does not require the courts of the United States to adopt any rule of pleading, practice, or procedure enacted by state statute or announced by the decision of a state court which would restrict their jurisdiction or unwisely encumber the administration of justice in their tribunals. O'Connell v. Reed, 5 C. C. A. 586, 592, 56 Fed. 531, 536; Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602. Thus it has been held that a variance from the state practice in (1) the signature of the summons (Martin v. Criscuola, 10 Blatch. 211, Fed. Cas. No. 9,159; Dwight v. Merritt [C. C.] 4 Fed. 614); (2) its service by a private party (Schwabacker v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501); (3) the time and form and character of the charge to the jury (Railway Co. v. Horst, 93 U. S. 291, 300, 23 L. Ed. 898; Association v. Barry, 131 U. S. 100, 120, 9 Sup. Ct. 755, 33 L. Ed. 60); (4) the motions for new trials (Missouri Pac. Ry. Co. v. Chicago & A. Ry. Co., 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309); (5) the effect of

a special appearance (Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942); (6) the method of reviewing judgment; and (7) the time within which an answer should be made after service of the summons, and variances in many other respects, constitute no violation of this peremptory section.

Section 915 provides that in common-law cases in the Circuit and District Courts the plaintiff shall be entitled to similar provisional remedies as those provided by the laws of the state in which the courts are held, and that the Circuit and District Courts may by general rules adopt state laws with reference thereto. Section 916 provides that the party recovering a judgment in any common-law cause in the Circuit or District Court shall be entitled to similar remedies on the same by execution or otherwise to reach the property of the judgment debtor to those that are provided in like causes by the laws of the state in which such court is held, or by any such laws as are thereafter enacted which may be adopted by general rules of such Circuit or District Court, and that such courts may from time to time by general rules adopt such state laws as may thereafter be in force in such state. It will be noticed that these sections do not limit the power of the court to determine how its process shall be served after judgment, but only provide that the parties shall be entitled to similar remedies to those provided in like cases by the laws of the state. The Supreme Court has held that only those statutes in force at the time of the passage of this act, to wit, June 1, 1872, were adopted thereby, and that all subsequent statutes, must be adopted by general rules of the Circuit Courts or they are not in force. Lamaster v. Keeler, 123 U. S. 376, 391, 8 Sup. Ct. 197, 31 L. Ed. 238. This court has held, however, that, in the absence of the proof of any general rule, a general practice may become a rule, and that, when the general practice is to use the remedies provided by the state statutes, the appellate court will presume, in the absence of proof, that these have been adopted by a general practice or a general rule. Logan v. Goodwin, 109 Fed. 490, 495, 43 C. C. A. 658, 663; Citizens' Bank v. Farwell, 56 Fed. 570, 574, 6 C. C. A. 24, 28. It may therefore be assumed in the words of section 916 that a party recovering a judgment in the Circuit Court is "entitled to similar remedies upon the same by execution or otherwise" to those which have been provided by the statutes of Colorado. Now, the statutes of Colorado provide a remedy for the revivor of a judgment by scire facias and prescribe the method of the service of the writ of scire facias. The plaintiff, therefore, might have availed himself of this method of service if it was sufficient. If, however, it was, in the opinion of the Circuit Court, insufficient, that court had the power under the common law and under this statute to adopt and use similar remedies by directing the service to be made in such way as in its opinion would give to the defendant reasonable notice that the suit in which the judgment had been rendered would be continued, and that the judgment would be revived in accordance with the practice at common law under the decisions in Kentucky, Massachusetts, and New Jersey, which portray it. In other words, before, and in the absence of, the Colorado statute of 1877,

the United States courts had the power to issue the writ of scire facias and to cause it to be served according to the practice at common law by a personal service of the writ upon the defendant without the territorial jurisdiction of the court in which the record was found and upon such service it had the right to enter its judgment. When the Colorado statute was enacted, it had the option to adopt the specific method of service prescribed by that statute, or to refuse to adopt it. The greater includes the less, and hence it had the right to prescribe the method of service of its writ and to use a similar remedy by such service as it thought proper both under the common law and under the act of conformity. The latter act did not deprive the court below of the right or the power to cause the service of its writ upon two returns of nihil and by such personal service as it deemed necessary to give proper notice to the defendant.

3. Counsel argue that the service of the writ of scire facias upon the defendant personally without the jurisdiction will not sustain the revived judgment under the rule in Pennoyer v. Neff. No decision of any court has been called to our attention to the effect that such service will not sustain a revived judgment in the jurisdiction in which the record of the original judgment is found. The Massachusetts and New Jersey cases hold that it will sustain such judgments both in that and in other jurisdictions. There are decisions that the statute of limitations bars a proceeding of scire facias to revive a judgment within the same time that it bars an action for the same purpose (Lafayette County v. Wonderly, 92 Fed. 313, 34 C. C. A. 360; Wrightman v. Boone County, 88 Fed. 435, 31 C. C. A. 570), and that an exemption by state statute of a homestead from execution exempts it from execution under section 916, Rev. St. (Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196). In Kirk v. U. S. (C. C.) 124 Fed. 324, 335, Kirk v. U. S. (C. C.) 131 Fed. 331, Kirk v. U. S., 137 Fed. 753, 70 C. C. A. 187, there was a holding that an action could not be maintained in the state of New York upon a judgment upon a bail bond based upon a service of a writ of scire facias without the district of the record of the bail bond. But a scire facias upon a bail bond is the commencement of a new action, while a scire facias upon a judgment is a continuance of an old action. Moreover, in the Kirk Cases it is evident that the established practice to serve writs of scire facias beyond the jurisdiction of the record and to enter judgments thereon and the decisions in Kentucky, Massachusetts, and New Jersey which portray this practice were not called to the attention of the courts; for the Court of Appeals said that it was cited to no authority holding to the contrary of its conclusion where the proceeding was by scire facias to revive or continue a former proceeding in the nature of an original action. Kirk v. U. S., 137 Fed. 755, 70 C. C. A. 187.

The conclusion of the whole matter is:

(1) The common law and the statute of 2 Westminster were in force in Colorado from 1861, save as otherwise provided by statute.

(2) The Circuit Court of the United States had the power to issue the writ of scire facias to revive a judgment according to the course of the common law under Rev. St., § 716, in the absence of any special statute of the state of Colorado upon the subject.

(3) The statute of Colorado of 1877 granted to that court no new right or remedy, but was cumulative and simply gave to it an additional remedy to one which already existed.

(4) The conformity act (sections 914, 915, 916, Rev. St.) empowered the Circuit Court to use a similar remedy to that provided by the state statute. The Circuit Court of the United States under the common law and the practice thereunder and the statutes to which reference has been made had the jurisdiction to issue a writ of scire facias to revive the judgment in question and to cause it to be served personally without the district upon the defendant in the record within the district.

(5) The effect of the judgment rendered upon this service in the jurisdiction of the present residence of the defendant is left undetermined, and the motion for the rehearing is denied.

WESTINGHOUSE, CHURCH, KERR & CO. v. CALLAGHAN.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1907.)

No. 2,547.

1. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS.

One who enters the employment of another thereby assumes the risk of the negligence of his fellow servants in the performance of all acts which they do while they are not discharging a positive duty of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 567.]

2. SAME—DUTY OF CARE FOR SAFETY OF PLACE AND OF APPLIANCES WHERE CHARACTER NECESSARILY CHANGES WITH WORK, SERVANT'S NOT MASTER'S.

The duty of caring for the safety of a place or of appliances in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses is the duty of the servants to whom the work is intrusted, and it is not the duty of the master.

3. SAME—VICE PRINCIPAL—FELLOW SERVANTS.

All who enter the employment of a common master to accomplish a common undertaking are prima facie fellow servants, although their grades of service are different, and some direct and supervise the men subject to their command and their work, while others perform the labor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 451, 452.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippen v. Kimball, 31 C. C. A. 286.]

4. SAME—RISK OF SUPERVISION BY FELLOW SERVANT ASSUMED.

The servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567, 570.]

5. SAME—VICE PRINCIPAL—DEPARTMENTS OF BUSINESS.

The homogeneous business of a master cannot be divided into distinct and separate departments under the rule in Railroad Co. v. Baugh, 13 Sup. Ct. 914, 149 U. S. 368, 383, 37 L. Ed. 772, by the testimony to that

effect of his servants, and such testimony is incompetent for this purpose. The nature of the business alone can separate it into departments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 475–479.]

6. SAME—VICE PRINCIPAL—FACTS—CONCLUSION.

The plaintiff and D. were employed by the defendant in dismantling heavy machinery in the World's Fair buildings. D. was foreman under a superintendent who was under a manager there. The day before the accident a heavy wooden frame 25 feet high had been erected and temporarily fastened in place with guy ropes under the direction of D. to be used to lift and move the heavy parts of an engine. On the day of the accident the plaintiff and four other men were working under D. to permanently secure this frame in place. D. directed the plaintiff to go upon the frame, and, after he had climbed there for the purpose of moving one of the ropes which held this frame in place so that they could use it at another place as a permanent guy rope, D. untied it below, and the frame fell and injured the plaintiff.

Held. D. was not a vice principal, but he was a fellow servant of the plaintiff, and the defendant was not liable for his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 451, 452.]

(Syllabus by the Court.)

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

Percy Werner, for plaintiff in error.

James J. O'Donohoe, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. Westinghouse, Church, Kerr & Co., a corporation, was engaged in dismantling heavy machinery in the World's Fair buildings at St. Louis. Caldwell was its manager and Oldham its superintendent there. According to the most favorable evidence in the record for the plaintiff below, Callaghan, he had worked for this corporation during the Fair, had left his employment for some time, and about the 1st of December, 1904, he returned and applied to Caldwell for his old job. Caldwell referred him to Oldham, the superintendent who employed him. He then labored there three weeks with a gang of men in the power house taking down props, and Douglas worked in the machinery hall with another gang. Douglas was the foreman, and ordered the work to start promptly and gave the plaintiff his orders. On December 24, 1904, Oldham asked the plaintiff if he would work upon Christmas Day, and offered him time and a half. He accepted the offer, and reported to Oldham that he was ready to work. Douglas on the night before Christmas ordered him to work and to be out early. On Christmas Day Callaghan, Douglas, Stanley, Dorig, and two other men who had agreed to work on that day appeared and Douglas ordered them to put permanent guy ropes on a heavy wooden frame which had been erected the day before under his direction for the purpose of lifting and removing the heavy materials of which the engines were composed. This frame consisted of four upright pieces of timber 8 by 8, 25 feet long. Upon the east and west sides heavy timbers 14 feet long had been mortised into the up-

rights, and there were timbers lying across these from north to south. This frame was temporarily held in position by guy ropes. In order to substitute permanent guy lines for the temporary ones, Douglas, who was a rigger and the foreman of this gang, directed one of the men to get some ropes, and ordered the plaintiff to go upon the northwest corner of the frame. After he and Stanley had climbed upon this frame Douglas directed the latter to untie a certain temporary guy rope, so that it might be moved to the corner of the structure, and there used for a permanent line, but Stanley was unable to loosen it. Thereupon Douglas untied it below where he was at work, and the frame immediately fell and injured the plaintiff. One of the laborers testified that he worked in the boiler room department, and that this was 20 or 30 yards from the department in which the engines were being dismantled. Another testified that the power house and machinery hall were different departments, which were all run by the same foreman, and that he worked in the department for dismantling engines under Douglas. Douglas was paid higher wages than the other employés. He directed them what to do and where to work, and also engaged in manual labor with them.

At the close of the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor, on the ground that the negligence which caused the injury was that of the plaintiff's fellow servant, Douglas, and not that of the defendant; but the court denied the request, and this ruling is assigned as error. The testimony of the servants that the work of dismantling the machinery in which they were employed by the defendant was in different departments, that one of these was the dismantling of the machinery in the power house and another the dismantling of the machinery in machinery hall, was futile and immaterial. Its evident purpose was to endeavor to bring the case under the rule in Railroad Co. v. Baugh, 149 U. S. 368, 383, 13 Sup. Ct. 914, 920, 37 L. Ed. 772, to the effect that the superintendent of a separate department of a vast and diversified business may be a vice principal. "But," said the court in that case, "this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct." But the dismantling of the machinery in the buildings at the World's Fair was single and homogeneous, and the testimony of those employed in it was both incompetent and insufficient to divide it into distinct departments. The character of the business and that alone separates it into distinct departments and it cannot be so divided by the testimony of those who are employed to carry it on.

The frame which fell was constructed under the direction of Douglas. He directed Callaghan to station himself upon it and he untied the guy rope which permitted it to fall. Callaghan assumed the risk of the negligence of his fellow servants, and, if Douglas is conclusively shown by this evidence to have been the fellow servant of the plaintiff, the latter was not entitled to recover here, and the court should have instructed the jury to return a verdict for the defendant. "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 that of control must exist to de-

stroy the relation of fellow servants." Railroad Co. v. Baugh, 149 U. S. 368, 384, 13 Sup. Ct. 914, 920, 37 L. Ed. 772. The servant assumes the risk of the negligence of his superior fellow servant in the latter's direction of the men and of the work to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work. American Bridge Co. v. Seeds, 75 C. C. A. 407, 410, 144 Fed. 605, 608, and cases there cited.

The duty of the master to exercise ordinary care to make and keep reasonably safe the place in which, and the machinery and appliances with which, his servants are at work, does not extend to cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses. But the duty of care for the safety of the place and of the machinery and appliances in such cases devolves upon the servants to whom the work is intrusted. American Bridge Co. v. Seeds, 75 C. C. A. 407, 415, 144 Fed. 605, 613, and cases there cited. If the negligent act of the servant which causes the injury is done in the discharge of a positive duty of the master, then the negligence therein is the negligence of the master. If it is done in the discharge of any other duty of the employé, it is the negligence of the servant, the risk of which his fellows have assumed. Weeks v. Scharer, 111 Fed. 330, 335, 49 C. C. A. 372, 377.

In Coal Co. v. Johnson, 6 C. C. A. 148, 56 Fed. 810, a foreman of a gang of 10 or 12 men worked in a mine under a pit boss, who worked under a superintendent. While one of this foreman's gang was digging a hole in the floor of a room in the mine by his direction to set a drilling machine, the foreman struck the roof above him with a pick to make a hole there for the same machine, and thereby brought down upon the plaintiff a mass of stones and earth, which seriously injured him. The foreman had authority to direct the men in his gang when and where to work and what to do. It was his duty to prop the roofs of the rooms with timber, to sound and inspect them so that they would be reasonably safe, to drill holes in their faces, charge them with powder, and fire it at the proper times to bring down the coal. This court held that the foreman was not a vice principal, but a fellow servant of the workmen. In Minneapolis v. Lundin, 7 C. C. A. 344, 58 Fed. 525, the city engineer was the general superintendent of all the work of the city. He appointed a superintendent of sewer construction. The latter employed a foreman who superintended and directed the work of a crew of about 50 men. This foreman was empowered to hire and discharge men, and to direct them when, where, and how to work. He ordered one of his gang to reload a hole which had been drilled in a rock, and had been filled with dynamite which had failed to explode, but he did not inform the workman that dynamite remained in the hole. The workman, in ignorance of the presence of the dynamite, proceeded to drill out the hole, the dynamite exploded, and he was injured; but the foreman was held to be his fellow servant. To the same effect are Kansas & A. V. Ry. Co. v. Waters, 16 C. C. A. 609, 70 Fed. 28, and The Miami (D. C.) 87 Fed. 757.

The principles and authorities to which reference has been made leave no alternative in the case in hand. The plaintiff and Douglas were engaged in the same work, the work of dismantling heavy machinery, and at the moment of the accident in securing in place for this purpose, a frame which had just been erected and which was held in place by temporary guy ropes, a work which necessarily continually changed the character of the place where, and the appliances with which they were working, as to safety. It was the duty of these servants, of Douglas and Callaghan, and not the duty of the master, to care for the safety of this place in so far as that safety was conditioned by the frame which they were securing in place and their manipulation of it. Douglas was not a vice principal of the master, because he was neither a general manager nor a superintendent of the entire undertaking or of any distinct department of a vast and diversified business. He was not a vice principal because the performance of the specific act which caused the injury was not a part of the positive duty of the master, but one of the duties of the servant. In the performance of this act and of all his acts in relation to this frame the evidence is conclusive that he was discharging no positive duty of his master, but the ordinary duty of a servant. He was, therefore, in the performance of these acts a fellow servant of the plaintiff and the defendant was not liable.

The judgment below must accordingly be reversed, and the case must be remanded to the Circuit Court, with directions to grant a new trial; and it is so ordered.

VERA CRUZ & P. R. CO. v. WADDELL et al.

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

No. 708.

1. APPEAL AND ERROR—REVIEW—PRESUMPTIONS—TRIAL BY COURT.

It matters little whether a court trying a case without the intervention of a jury formally excludes evidence which it has necessarily had to hear in order to determine its relevancy at the time when offered, or at the end, when it considers the whole with a view of maturing its judgment, for the fact that it remains in the record does not necessarily imply that it was improperly considered in making the final decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3766.]

2. SAME—FINDINGS OF FACT.

Reversal of the lower court's judgment as to the facts will only be made when such judgment is shown to be against the clear preponderating weight of all the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3974.]

3. SAME—PRESUMPTION.

Where the whole testimony has not been incorporated in the record, it will be presumed that such testimony preponderates in favor of and sustains the judgment of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

4. SAME—FINDINGS OF FACT—SUFFICIENCY TO SUPPORT JUDGMENT.

Where findings of fact are specifically made and filed by the trial court sitting without the intervention of a jury, and no exceptions are taken to such findings, no other or additional findings are asked, and the testimony in full is not incorporated in the record, such findings will be taken as true, and the appellate court in passing upon the case will only reverse in case it finds the judgment rendered to be contrary to the facts so found and set forth by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3073.]

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

Carroll T. Bond and J. S. Lemmon (Marbury & Gosnell, on the briefs), for plaintiff in error.

Edward Duffy and William C. Scarritt (Bond, Robinson & Duffy and Scarritt, Scarritt & Jones, on the briefs), for defendants in error.

Before PRITCHARD, Circuit Judge, and WADDILL and DAYTON, District Judges.

DAYTON, District Judge. This case comes here upon a writ of error to a judgment rendered by the Circuit Court of the United States for the District of Maryland. The original action was one in assumpsit instituted by the defendants in error, who will hereinafter be called the "engineers," against the plaintiff in error, hereinafter to be called the "railroad company," in the superior court of Baltimore City, and removed by the defendant railroad company to said United States Circuit Court. Attachment in the original proceeding was sued out and served upon Allan McLane, receiver of the Maryland Trust Company, and he, in the course of the proceeding, confessed assets in his hands, as such garnishee, sufficient to pay plaintiff's demand. The defenses interposed were substantially the general issue of nonassumpsit, and the case came on for trial by the court under express stipulation waiving trial by jury, and judgment was rendered in favor of the plaintiff engineers against the defendant railroad company on February 24, 1906, for $10,632.10, principal, and $850.56, interest, after the court had filed in the record its findings of fact and conclusions of law, and a written opinion setting forth its reasons therefor.

The record is voluminous, but only a very brief statement of facts will be necessary. The railroad company, a West Virginia corporation, engaged in the construction of a line of railroad in Mexico, by contracts in the nature of accepted written propositions, employed the plaintiff engineers substantially to furnish plans and specifications for, and inspect and supervise the construction of, the bridges on said railroad line —some 208 in number. In addition to this, said engineers were called upon and furnished plans for an ocean pier at Vera Cruz, and supervised the construction of the company's shops at Tierra Blanco, and performed other services, and incurred expenses not necessary here to set forth in detail. The work involved a period of over three years, and, at the end these engineers rendered to the railroad company their account for these services, set forth in 72 specific items, showing a total of $123,215.03, which, after allowing payments of $108,591.45,

left, as they claimed, a balance of $14,623.58 due and unpaid to them. The sole controversy in the case turns upon the integrity of this account, and whether proper and sufficient evidence has been adduced to sustain it.

Many exceptions to the testimony were taken, motions were made to strike out and exclude testimony, prayers were made for "instructions or declarations by the court as to the law of the case" in the course of the hearing, and numerous assignments of error are now based upon the trial court's action in overruling these exceptions and motions and denying these prayers. We have carefully considered all these, and, for reasons following, we believe them to be without merit.

It matters little whether a court, trying by agreement a case in lieu of a jury, shall formally exclude evidence which it has necessarily had to hear in order to determine its relevancy, at the time when offered, or at the end, when it considers the whole with a view of maturing its judgment, for, as said in Miller v. Houston City St. Ry. Co., 55 Fed. 366, at page 372, 5 C. C. A. 134, 139:

"The admission of evidence in a case being tried by a court without the intervention of a jury does not require the nice distinction of ruling that it does when it is to go to a jury. And the fact that testimony is given in an answer, or read in a deposition, does not necessarily imply that it is improperly considered in the final examination and conclusion of the case. The same judicial mind that would exclude it from a jury can as readily set it aside upon a final consideration; and, where there appears sufficient evidence to justify the conclusions reached, the presumption is that the irrelevant testimony, although heard and not positively excluded by order, was set aside eventually, and not considered to the injury of the plaintiff in error."

And in this connection the words of Mr. Justice Shiras in Holmes v. Goldsmith, 147 U. S. 150, at page 164, 13 Sup. Ct. 288, 292, 37 L. Ed. 118, are deemed pertinent:

"The modern tendency, both of legislation and of the decisions of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused."

The court below has set forth in six separate paragraphs the facts involved, and the record nowhere discloses any exceptions taken to these findings, and no requests made for other or additional findings, and, although very voluminous by reason of the extended bills of exceptions, prayers for instructions, and assignments of error, it does not set forth the testimony upon which these findings are based, save and except to the extent that the bills of exceptions afford summaries of certain portions thereof.

We are convinced that the brief statement and application of a few principles governing appellate courts in passing upon cases like this, involving only questions of fact, will render wholly unnecessary a detailed consideration of this multitude of exceptions and assignments of error. And these principles are so fundamental and universal as to require no citation to the vast number of decisions establishing them.

First. Reversal of the lower court's judgment as to the facts will only be made when such judgment is shown to be against the clear preponderating weight of all the testimony.

Second. Where the whole testimony has not been incorporated in the record, it will be presumed that such testimony preponderates in favor of, and sustains, the judgment of the trial court.

Third. Where findings of fact are specifically filed by the trial court, sitting without intervention of a jury, and no exceptions are taken to such findings, no other or additional findings are asked, and the testimony in full is not incorporated in the record, such findings will be taken as true, and the appellate court, in passing upon the case, will only reverse it in case it finds the judgment rendered to be contrary to the facts so found and set forth by the trial court.

Under these principles, it is clearly apparent that the judgment of the lower court in this case must be in all respects sustained. And in justice to that court we feel constrained to state that, by what we have said herein, we do not intend to imply that improper and irrelevant testimony under the peculiar circumstances involved was admitted and considered. In the course of the trial the learned judge presiding, in passing upon the motions to strike out the testimony excepted to, said:

"I think that those motions should not prevail because the testimony that you move to strike out is all in one shape or another material and pertinent. It all has some force. How much weight or probative force is to be given to it is another matter, because this motion does not go to that. This motion is based on the theory that it is altogether inadmissible for any purpose for which it is offered. Now, it seems to me that it is admissible for some purpose or another. Some of your criticism goes to the exactness of the testimony. On the whole consideration of the matter, I admit the testimony for some weight, for some probative force as to each item. Of course, as to how much is a question for after consideration, but I will refuse the motions to strike out."

A careful consideration of the 14 bills of exceptions setting forth summaries of the evidence excepted to has convinced us that he was entirely right in this ruling, and such consideration further convinces us that he was entirely right in the final conclusions reached by him, for from this record as it is before us comes the abiding conviction that this railroad company, after securing the efficient services of these engineers—men standing in the forefront of their profession, and of approved character for probity—has sought by technicalities to escape its liability for the just and contract compensation due from it for such services. The appeal bond in this case was in the penalty of $1,000, conditioned to pay damages and costs. The formal order of judgment is not set forth in the record, and we are wholly unable to determine whether provision was made in it for the payment of interest upon the principal of the debt from the date of the judgment until its payment. To such interest plaintiff engineers are clearly entitled. More than a year has already elapsed since this judgment was rendered.

Out of abundance of caution, therefore, we will remand this cause to the court below, with direction, if such order of judgment does not already so provide, it be corrected so as to make full provision for the payment of such interest. And, affirming, as we do, the court below in its adjudication of the principles involved, it follows that defendants in error must recover of the plaintiff in error their costs in this court expended.

THE BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1907.)

No. 686.

COLLISION—STEAMER AND SCHOONER—FAILURE TO SHOW PROPER LIGHTS.

A schooner *held* in fault for a collision with a steamer in Chesapeake Bay in the night, on the ground that, while becalmed, she had been drifted around by the tide so that the steamer was an overtaking vessel, and could not see her side lights, and she failed to exhibit any white light or flare-up astern as required by the rules, although the steamer was seen approaching for a considerable time before the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 105–116.

Overtaking vessels, see note to The Rebecca, 60 C. C. A. 254.]

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

The following is the opinion of the District Court by Morris, District Judge, delivered orally:

This collision occurred in the Chesapeake Bay about 11 o'clock at night, December 19, 1905, some four miles to the north of Point-No-Point. The night was dark, but the atmosphere was clear, except for a slight haziness on the surface of the water. The schooner was a small and very old vessel of about 55 tons, loaded with lumber. The deck load extended three or four feet outside her hull and up to the foremast, and was about four feet in height above the deck. She was on her way up the bay, having come out of the Rappahannock river the day before. The steamer Baltimore, a large passenger steamer of the Chesapeake Steamship Company, had left Baltimore at 5 p. m. on her regular trip to West Point on the York river. She was proceeding south by E. ¼ E. down the bay in the usual track of steamers of her class. The case stated for the schooner in her libel is that the schooner was on her port tack with the wind very light from N. N. W. with hardly sufficient headway for steerage, making a course N. N. E., that the lookout reported the steamer's headlight an hour before the collision, and that the schooner held her course and watched the lights of the steamer until in a short time, without change of course, the steamer ran into the schooner, striking her on her port side forward of the fore rigging, cutting off the fore part of the schooner and carrying away her foremast, fore rigging, foresail and fore topmast, and so injuring her that she filled at once, carrying down one of her crew who was in the forecastle, and who was drowned.

The case for the steamer, as stated in her answer and cross-libel, is that she was proceeding at her usual speed of 12 miles an hour with her second officer on duty in the pilot house, a quartermaster at the wheel, and a lookout forward near the stem; that the first they saw was the bow light of the steamer reflected on the sails of the schooner directly in front of the steamer, less than 100 feet distant, and heading southeast in such a direction that her side lights could not be seen from the steamer and that no white light or flare-up was exhibited to the steamer over her stern; that the reflection was reported by the lookout and seen by the second officer at the same moment; that the second officer at once rang for full speed astern, but before the steamer's headway was checked her stem struck the schooner on the port side, forward of the foremast, and cut away the schooner's bow, without disturbing the deck load. The fault charged against the schooner is not having displayed a white light or flare-up on the schooner's stern, in compliance with article 10 of the act of Congress of June 7, 1897 (30 Stat. 96, c. 4 [U. S. Comp. St. 1901, p. 2879]), she being the overtaken vessel. The course of the steamer I take to be established as south by E. ¼ E.; that was the proper and usual course for her, and there is no reason to doubt the steamer's witnesses that it was the course

of the steamer that night. The schooner's witnesses gave her heading as N. N. E., and the pinch of the case is the correctness of the schooner's contention as to her heading.

In the first place, it may be well to consider the relative possibility of want of vigilance on the part of those on watch on the respective vessels. The crew of the schooner consisted of the master (who was also the owner) and three colored men. The master for some time before the collision was below in the cabin and the colored mate had the wheel. There was a young colored man as lookout standing on the deck load at the port forerigging. The lookout was also cook during the day, and the mate had been on duty nearly all Monday and Monday night, and had but short intervals of rest on Tuesday. The steamer had left Baltimore only five hours before; the lookout had been on watch only one hour and the second officer since 6 o'clock. The mate and lookout on the schooner testify that they saw the steamer's light a very long distance off, and that she continued to approach directly toward the schooner, but the mate did not call the master, who was just below him in the cabin, and the lookout did not call up the man who was asleep in the forecastle just under him. That the mate did not call the master is certainly significant and leads to the inference that, after the two men on the schooner first saw the steamer, they were too drowsy to watch her, and too stupid with weariness to do anything.

The important question is the heading of the schooner. In the schooner's libel and in the testimony of the two men on her deck and of her master it is said that the wind was N. N. W. and the schooner's heading N. N. E., but it is also stated that the wind was so light that the schooner did not have steerageway. If the wind had been as they state, N. N. W., and sufficient for steerageway, the schooner could not have made a course N. N. E. It would be impossible for a schooner of this class with a heavy deck load piled four feet, in a very light wind hardly sufficient for steerage, to keep a course four points off the wind. That may have been her heading when those on the schooner first saw the steamer's light, but there was no reason why she should keep that heading. The fact was that the schooner was becalmed and was keeping no course at all, but was drifting. The tide since 8 o'clock had been flooding and setting her up the bay, and that current acting with most force on her stern, which was deepest in the water, would carry her stern to the northward and set her bow more and more to the eastward and southward. As to the wind, if there was at that time any wind, I am satisfied that the preponderance of proof is that it was not from the N. N. W., but to the east of north, what there was of it. I am satisfied that, whatever may possibly have been the heading of the schooner when those on her deck say they first saw the steamer to the northwest off their port bow, that before the steamer had approached near enough to see the schooner's port light, the schooner's head, under the influence of the tide, had come around until she pointed at least southeast. In that relative situation, the schooner's port light could not be seen from the steamer. The schooner was then the overtaken vessel, and was under obligation to exhibit a bright light or flare-up from her stern.

The second officer and lookout of the steamer appear to have been vigilant, and there does not appear to me to be any way of accounting for their not seeing the schooner's port light, except that the schooner had drifted around so as to bring her port light abaft her beam to the steamer. It is urged in behalf of the schooner that the character of the wound is not consistent with a blow from the stern. The effect of a blow given by one vessel to another in collision cases is often surprising, and is not an altogether safe premise to argue from. Both vessels are moving and both yield to the impact. In this case the blow was just forward of the deck load. The bow of the schooner was cut off and the deck load but slightly moved. If the blow had come from forward, more in the direction toward the schooner's stern, it seems probable, as the steamer was going full speed, that the steamer would have brought up against the deck load and carried the schooner with her and have forced her open, rather than have sliced off the bow and headgear as she did. I see nothing sustaining the theory urged in behalf of the schooner which is deducible from the wound to the schooner produced by the blow.

It is urged that because at the moment of the collision the second officer of

the steamer says he did discern the red light the steamer must have been approaching the schooner from forward of the schooner's beam. I do not think it necessarily so follows. The steamer was running forward on the schooner, and may have opened the light to the second officer by running past the screen. The bow of the steamer may have already struck the forward rigging and disturbed the screen, or the second officer, being high up above the schooner's deck, may have looked down on the light from above. I must further say that there is some doubt cast upon the schooner's case by the discrepancies between the testimony of the master and owner at the investigation before the steamboat inspectors and his statements in court.

Upon the whole case, I find that the schooner was in fault, in that she was heading in such a direction that the steamer was coming up more than two points abaft her beam and unable to see her side lights, and that the schooner did not make known her presence by exhibiting a white light or flare-up light from her stern.

I find the schooner solely in fault.

J. Kemp Bartlett and Robert H. Smith, for appellants.

Arthur D. Foster and Reuben C. Foster, for appellee.

Before PRITCHARD, Circuit Judge, and BRAWLEY and BOYD, District Judges.

PER CURIAM. The decree of the court below dismissing the libel of George H. White, master and owner of the schooner Amelia M. Price, is affirmed.

In so far as said decree awards damages to the steamship Baltimore for the injuries sustained by said steamship in the collision, and orders execution against George H. White, the owner of the schooner, said decree is reversed, the costs in this court to be divided.

PHILADELPHIA & R. R. CO. v. BAKER.

(Circuit Court of Appeals, Third Circuit. May 13, 1907.)

No. 27.

1. RAILROADS—ACTION FOR INJURY IN COLLISION—PENNSYLVANIA STATUTE.

Act Pa. April 4, 1868 (P. L. 58), which provides that, when any person shall sustain personal injury or loss of life while lawfully engaged or employed "on or about the road, work, depots and premises of a railroad company" of which company such person is not an employé or passenger, the right of action and recovery shall be the same as would exist if such person were an employé, does not prevent a recovery from a railroad company for the death of an engineer in the employ of another company, who, while running a train of such company over a track of defendant, under an agreement which gave it the right of way, was killed in a collision with a train of defendant negligently being run upon the same track, since the track was not at the time the premises of defendant, whose train was there without right, but of the lessee.

2. SAME—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The charge of the court, in an action to recover for the death of a railroad engineer, killed in a collision between his train and a train of defendant company, *held* to have fairly submitted to the jury the question of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 951.]

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

For opinon below, see 149 Fed. 882.

Gavin W. Hart, for plaintiff in error.
Charles H. Edmunds, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Sarah Jane Baker, a citizen of New Jersey, brought suit against the Philadelphia & Reading Railroad Company, a citizen of Pennsylvania, to recover damages for the death of her son, Henry K. Baker, which she alleged resulted from the negligence of that company. There was a verdict and judgment in her favor. Thereupon defendant sued out this writ of error.

Henry K. Baker was a locomotive engineer, employed by the Central Railroad Company of New Jersey. At the time of his death his engine was hauling a train of freight cars for that company from Jersey City to Philadelphia. The latter portion of the run was made under a trackage arrangement between the two companies over the tracks of the defendant. After Baker's train approached Tabor Junction, he was signaled by the defendant company's tower man to take the south-bound track of the defendant company. While running thereon, at a point south of the signal tower, Baker's engine struck the engine of a local freight train of the defendant company which was passing from the south to the north bound track. This Reading train had not only no right on the south-bound track at the time, but it violated the rules of that road in having no flagman out to warn approaching trains.

It is thus clear that Baker's death was caused by the negligence of the Reading Road's employés, and that company was justly held responsible for damages unless, by virtue of the Pennsylvania statute of April 4, 1868 (P. L. 58), Henry K. Baker is held to be an employé of the Reading Road, and the negligence of its employés treated as that of his co-employés. This statute provides:

"That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the road, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company shall be such a one as would exist if such person were an employé; provided that this section shall not apply to passengers."

It was lately before us in Delaware & Hudson Company v. Yarrington, 152 Fed. 396. We there said:

"Seeing then that the defendant company had at the time and place of this accident no right whatever to occupy this tract, and that it was guilty of negligence in obstructing the passage of the train on which plaintiff rode, we hold the act had no application."

That case controls the present, for here, as there, the track where the accident occurred, while the property of the Reading Company, was, when the accident occurred, the property for the time being of the Central Railroad of New Jersey. The court below therefore rightly held the act of 1868 did not apply.

Objection is made that the court excluded from the jury considera-

tion of Baker's alleged contributory negligence in exceeding a proper speed limit, in saying in reference to him: "There is no evidence that he did not proceed carefully; but, at any rate, he proceeded." Standing alone, this sentence might be open to such charge; but, when this statement is considered in the light of the whole charge, it did not have the effect complained of. The jury were instructed, if the signal gave Baker the right to go ahead, and assured him he had a clear track, still "he was required to use the ordinary and usual care, even under those circumstances." Attention was called to the fact that, while there was no evidence of Baker's negligence in running the train (by which we understand the court referred to his handling the engine, keeping lookout, etc.), "there is evidence that he was going at the rate of 15 miles an hour." After reciting the conflicting testimony on that point, the court then left to the jury what inference was to be drawn by the inquiry:

"Is there any evidence from which the inference could be drawn that Henry K. Baker was negligent in the way and at the speed he ran his train?"

And following this the jury was told:

"If you find from the evidence he was not negligent, but that there was negligence on the part of either the man in the tower or the crew running the shifting engine, and if there was negligence of either or both together, then this company would be responsible for the death of Henry K. Baker under the law."

Under this charge we think the questions involved were fairly submitted, and the judgment should be affirmed.

AJAX METAL CO. v. BRADY BRASS CO.

(Circuit Court, D. New Jersey. July 31, 1907.)

1. PATENTS—INVENTION—SUBSTITUTION OF MATERIALS.

While the substitution of one material for another is not as a rule patentable, there are exceptions to such rule, and, under some circumstances, the adaptation of certain materials either singly or in combination to the production of certain desired results may amount to invention, even though it involves no more than the taking advantage of certain inherent qualities developed or discovered experimentally. This is particularly the case with respect to composite mixtures or alloys of metals.

2. SAME—VALIDITY AND INFRINGEMENT—ALLOY FOR JOURNAL BEARINGS.

The Hendrickson and Clamer patent, No. 655,402, for an alloy for antifriction bearings, which consists of a copper tin-lead alloy, having "less than seven per cent. of tin and more than twenty per cent. of lead and the balance of copper," covers a superior alloy for journal bearings, having a higher percentage of lead, which is the lubricant, than it was previously thought possible to make successfully. It discloses invention, and is not void for anticipation nor lack of novelty, nor because of prior knowledge and use of the invention. Nor is it invalid for indefiniteness, in that it specifies only the maximum limit of tin and the minimum limit of lead in the alloy, it having been discovered by the patentees by experiment that within such limits, a critical relation exists between the metals, whereby, on being fused together, the copper-tin matrix, which holds the lead in suspension, solidifies quickly at a high temperature, and retains properly distributed through it, before it has time to run off or settle, a

greater quantity of the lead (which solidifies at a still lower temperature) than when other proportions are used, and the description, therefore, gives a practical working formula to those skilled in the art, and is as definite as it can be made and protect the invention. Neither is the advance made in the art one of degree merely; the alloy made within the proportional limits given being sharply and critically different from those not so made. The patent also *held* infringed.

3. SAME—NOVELTY—PRIOR USE.

In order that a single prior knowledge and use of an invention may be enough to negative novelty in a subsequent patent therefor, it must be something more than an accidental or casual use, and it must be shown that such use was so far appreciated at the time and adopted or followed as to create a well-understood, if not an established, practice capable at any time of being resorted to, and not something incidental and fugitive which is hunted up and brought forward simply to defeat the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 66.]

4. SAME—PROOF TO ESTABLISH PRIOR USE.

The temptation in patent cases to resort to the defense of prior use to defeat the patent is always great, and parties are held in consequence to the most convincing and stringent proof, not only to the fact of such use, but to its character as well.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 78.]

In Equity. Bill to restrain infringement of letters patent No. 655,402, issued to Joseph G. Hendrickson and Guilliam H. Clamer, for an alloy for anti-friction bearings. On final hearing.

Augustus B. Stoughton, for complainant.
Hillary C. Messimer, for defendant.

ARCHBALD, District Judge.[1] The mere substitution of one material for another is not, as a rule, patentable. Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683. Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. Ed. 863. But to this there are exceptions. And, while it may not be possible to define just when it is so, it must be recognized that, under some circumstances, the adaptation of certain materials, singly or in combination, to the production of certain desired results, may amount to invention; and that too, even though it involves no more than the taking advantage of certain inherent qualities, developed or discovered experimentally. Smith v. Goodyear Dental Co., 93 U. S. 486, 23 L. Ed. 952; Goodyear Dental Vulcanite Co. v. Davis, 102 U. S. 222, 26 L. Ed. 149; Magowan v. New York Belting Co., 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 781; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. This is particularly the case with regard to composite mixtures or alloys of metals, such as is the character of the device in suit, the object of which, as declared by the inventors, was to provide an anti-friction alloy for journal bearings, which should hold up within itself more lead than was theretofore considered possible.

The value of alloys, composed of tin, lead, and copper, for the bearings of railroad cars and engines, had long been recognized, but up to 1892 there had been no attempt at any definite mixture; old brass and copper scrap and shells, of heterogeneous character, being somewhat indiscriminately made use of. About that time, however, as the out-

[1] Specially assigned.

come of an extended line of experiments, it was determined by Dr. C. B. Dudley, the eminent head of the chemical department of the Pennsylvania Railroad (whom it gives me pleasure to say I have known for nearly 40 years), that the best results were to be obtained from an alloy, consisting approximately of 8 per cent. of tin, 15 per cent. of lead, and the rest of copper. The lead in such a mixture is the lubricant, the tin gives hardness, and the copper strength. Too much tin, however, increases the wear, producing a hard, cutting, action, besides adding to the expense, while with lead it is just the opposite, so that upon both grounds it is desirable, within certain limits, to keep down the tin and increase the lead as much as possible. But lead does not unite with the others chemically, and hence a certain amount of tin is necessary, the copper and tin forming a skeleton frame or matrix of a honeycomb structure, in which the lead is held mechanically, and the problem is to determine just the right proportions. The practical difficulty experienced with a copper-tin-lead mixture is that, in the process of melting, a so-called eutectic or readily fusing alloy between the copper and tin is formed, as a subsidiary compound, which solidifies at a comparatively low temperature, allowing the lead with a still lower melting point to segregate and fall to the bottom, when present in quantity, producing what is known as a "lead sweat." To obviate this, a high solidifying point for the mass is requisite, at which the copper-tin matrix shall set quickly and hold the lead properly distributed through it, before it has time to run off or settle; and with this secured an indefinite increase of lead is possible.

The received idea, however, at the date of the patent, as the result of the Dudley experiments, was that the limit in the diminution of tin and increase of lead had been reached in the relative amounts there determined; the proportion of tin so fixed being supposedly required to hold up the lead, and tin and lead having to be increased together beyond that. But it was discovered by the present inventors that this was not the case, and that, on the contrary, the subject was regulated by a critical relation between the metals involved, by which, with tin at less than 7 per cent. by weight, lead at more than 20 per cent. and the balance, or some 73 per cent., of copper, there was a quick solidification of the mass without the forming of any appreciable eutectic alloy, the large percentage of lead present being held and retained without difficulty, a small percentage of other metals, such as antimony, zinc, iron, etc., to be found in ordinary brass scrap as impurities, being also permitted. The proportions so given, it is to be observed, conform to a critical point in the constitution of copper-tin alloys, on one side of which, according to the relative percentages employed, they solidify or set quickly at a high temperature; and, on the other, by reason of different percentages, they combine differently, forming among other subsidiary compounds certain eutectic mixtures, which remain liquid for a much longer period, cooling slowly. This critical point is a well demonstrated scientific fact, which is generally, if not universally, accepted; and is shown to exist close to where there are 9 parts of tin to 91 of copper, or relatively something over 9 per cent. of the former. Having regard to this, and the consequences which flow from it when lead is additionally intro-

duced, all tin-copper-lead alloys divide sharply into those which contain this relative proportion of tin and copper, which, by reason of their high melting point and the absence of eutectic alloys, permit of a large content of lead, and those which fall outside of these limits, where this is not possible. The adaptation of this principle in the production of anti-friction alloys for railroad bearings constitutes the merit of the present invention and the contribution made by it to the journal-bearing art. Its utility has been most signally recognized; the Pennsylvania Railroad having adopted and made large and increasing use of the alloy for a number of years, at first with the addition of a little nickel, which was supposed to produce a more homogeneous mixture, but latterly without it. And, upon certain bearings sent out from the Pittsburg shops for use on the lines west of there having been found to infringe, the company on notice desisted. It is also in use on the extensive system of the Norfolk & Western Railroad. And, upon being submitted to Mr. Robert J. Fisher, counsel for the Eastern Railway Association, the companies composing that association were advised to respect the patent, the practical significance of which will be appreciated. The proportions specified in the single claim of the patent are "less than 7 per cent. of tin, and more than 20 per cent. of lead, and the balance of copper." But these amounts are to a certain extent suggestive only, and are not strictly adhered to in practice; the most satisfactory results for high grade bearings being secured with an alloy of 5 per cent. of tin, 30 per cent. of lead, and 65 per cent. of copper, a variation which the patent permits and was intended to cover. This, with a small fraction of sulphur, which is of no materiality, is the combination made use of by the defendants, who thus admittedly infringe, if the patent is valid.

The validity of the patent, however, is contested upon several grounds. And the first criticism of it is its indefiniteness. The limitation of tin, as it is said, is given but one way, "less than 7 per cent.," and of lead, the other, "more than 20 per cent."; the copper being dependent upon both and varying accordingly. There is nothing certain about this, as it is claimed, admitting of almost endless variety, as it does, and affording no real guide. But that it presents a practical working formula, according to the evidence, there can be no doubt. To one skilled in the art, as is there shown, it teaches that, with tin not exceeding the limit named, lead to the extent of 20 per cent. and upwards can be incorporated—a desirable feature if it could be accomplished as is well known—the proportion of copper being regulated to correspond. By observing these limits, the mixture is kept within the critical point necessary for the avoidance of eutectic alloys and the formation of a homogeneous mass, so that, practically as well as scientifically considered, the directions are sufficiently precise and instructive. Anything more so would admit of evasion and give away the invention, which consists not in the establishment of exact and rigid proportions, but in the discovery and disclosure of the critical relation between tin and copper, required to make possible a high percentage of lead, the terms of the patent being so framed as to appropriate and cover the whole field, copper-tin-lead alloys, as pointed out above, being divided into those where this is possible and those where it is not. Within

the limits so fixed, it is left to the particular person practicing the invention to determine the proportions which he deems best, the patent simply but explicitly instructing him to keep down his tin below 7 per cent., whereby lead to exceed 20 per cent. may be successfully introduced. It is not to be assumed that, in doing so, ordinary skill and judgment will not be exercised, this being presupposed; or that the extreme and manifestly useless combinations, suggested in argument as possible, will be pursued.

It is said, however, that by the nickel patents to the same inventors, issued within three weeks after the application for the patent in suit and there referred to, they are on record as declaring that, not only was tin as low as 6 per cent. possible, but that, by the use of a small amount of nickel not exceeding 1 per cent., the tin could be reduced to three per cent. or even be entirely dispensed with, the lead at the same time being increased, as a desirable feature, as high as 22 per cent., thus in both respects realizing the terms of the patent. But that the desirability of a high per cent. of lead is so suggested is of no significance. This was well known, the difficulty being to accomplish it. Nor does the low per cent. of tin, which is shown in the same connection, bring the case within the patent; this being brought about by the use of the nickel, the declared purpose of the patent in suit being to produce the same result of high lead and low tin without that constituent, the inventors having apparently discovered the ability to do so, while the applications for the nickel patents were pending.

Much stress is laid, however, on the fact that Dr. Dudley, in his Franklin Institute address in 1892, not only disclosed the desirability of increasing the lead and decreasing the tin, but, as productive of the best results attained by his experiments, gave definite percentages, not far removed from those of the patent, namely, 8 per cent. of tin, 15 per cent. of lead, and 77 per cent. of copper, at the same time suggesting that a further diminution of tin and increase of lead with still better results might be practicable. The advance made upon this, if any, by the present inventors, was thus, according to the argument, not only plainly marked out for them, but was at the best one of degree merely, which is not patentable, the alloy which they have devised having no different characteristics, physically or chemically, from that produced and described by Dr. Dudley. But, however close the proportions of the two may seem to be, those given by Dr. Dudley are in fact outside of the patent, and beyond the critical relation which is there disclosed and declared for. And while it is true that Dr. Dudley did suggest possibilities tending to a still further approach to it, intimating that the question had not perhaps been finally disposed of, his own experiments in that direction were not successful, leading him to the conclusion that the limit in all probability had been reached, and that, as one function of the tin was to hold up the lead, upon the lead being increased the tin had to be also, a mistake, shared by others, which impeded rather than promoted a discovery. Dr. Dudley also concedes that the successful production by these inventors of an alloy for railroad bearings, containing so little tin and so high lead, not theretofore deemed practicable, involved invention, although at an earlier stage, when less

fully informed, he was inclined to question it. And while this is by no means conclusive, and it is not, of course, to be expected that, with becoming modesty, he would bespeak more for his own contribution to the art, however conspicuous, than it was entitled to, to the disparagement of others, he would certainly be the first to detect their shortcomings, and to appreciate whether the advance claimed was all that was said of it. Nor is it true that this advance was one of degree merely. The fact is, as stated by Dr. Sauveur, confirmed by Dr. Chandler, and already alluded to—which Prof. Langley and Prof. Richards, the defendants' experts, men of the highest professional standing, by the way, do not seem to deny—that alloys manufactured in accordance with the patent are sharply and critically different from those not so manufactured, the difference being one of kind, all tin-copper-lead alloys dividing into those which contain the relative proportions named in the patent, which, by reason of their high setting point and the absence of eutectic compounds, permit the introduction of a large quantum of lead, and those which fall outside of these limits, where it is not practicable. This does not present simply the case of a copper-tin-lead alloy, low in tin and high in lead, nor yet of a specially composed journal-bearing material. But it consists in the establishment of a precise rule or formula, by which within certain limits, to the extent desired, and without other than the ordinary foundry methods, a homogeneous mixture of this general character, known to be of the highest utility for the purpose, is capable of being successfully produced. Standing for this, as the patent clearly does, there is nothing in what is so sought to be urged against it which detracts from the merit or the validity of the invention.

Neither is there in the various anticipations charged. It is said, for instance, that a bronze coin of the Atilia family of the date of 45 B. C., an analysis of which was given in a work on mixed metals and metallic alloys, published by A. H. Hiorns in 1890, was made of a composition within the terms of the patent; there being 4.77 per cent. of tin, 25.43 per cent. of lead and 68.72 per cent. of copper. But an ancient coin is no guide for a modern railroad journal, and a disclosure with respect to the one teaches nothing of value as to the other. Conceding, therefore, that the analysis so published shows that an alloy of the character given could be successfully coined, it was not to be assumed that it could be made use of under the very different conditions which obtain in the case of a journal bearing.

It is further said that the Hahn (1873) British patent is for a copper-tin-lead alloy, which is suggested as suitable, among other things, for anti-friction bearings, the copper being stated at from 70 to 73 per cent., the tin from 9 to 11 per cent., and the lead from 15 to 20 per cent., with zinc from ½ to 1 per cent. But on this there is no occasion to dwell. Not only is it outside of the proportions named in the patent and the critical relation upon which these are based, but it does not approach by a considerable so near as Dr. Dudley did, and, if his experiments did not anticipate, neither by so much the more does this.

The Vaughan (1874) British patent stands no differently. It too

is for an anti-friction bearing metal, in which tin, copper, and lead are the principal constituents, with a certain amount of phosphorus and zinc. It is of interest as advancing the theory, of which use is made in the patent in suit, as well as in all such mixtures, that, in the process of melting, alloys of the metals named are formed having different degrees of fusibility and solidifying at different temperatures, whereby a porous cellular mass of the harder and less fusible metals is produced, in which the softer and more easily melted are held, the interstices or cells of the one being filled with the others, presenting a soft-bearing surface for contact with the friction producing parts. But, outside of this, the disclosures of the patent are of little consequence. The proportion of tin suggested runs all the way from 4 to 15 per cent., and lead the same, varied by phosphorus and zinc, the latter being given at from 8 to 20 per cent., with enough copper added to it all to make up 100 parts, between which extremes the inventor does not seem to discriminate. All this to too wide of the mark to require discussion.

So, also, is the Hewitt (1901), besides which it is later in date than the patent in suit, from which time alone it takes effect as a publication. Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68; Diamond Drill Co. v. Kelley (C. C.) 120 Fed. 282. And, even assuming that the date of the application, which is earlier, could be considered, it amounts to no more than the other patents referred to, if so much, it being doubtful, also, whether it states anything practicable.

This brings us to the real issue in the case, which is more serious—the alleged prior knowledge and use of the invention by the Brady Metal Company, with which Mr. Brady, the president of the defendant company, was formerly associated. The contention is that in April, 1896, some four years before the application for the present patent, the Brady Metal Company, which was an extensive manufacturer of railroad bearings, made a successful casting of substantially the same proportions of tin, lead, and copper, as are now practiced by the defendants within the terms of the patent, and continued to make use of the same from that time on, as have the Brady Brass Company succeeding them. This, if established, is, of course, the end of the patent, the novelty of which it effectively negatives. There can be no question, under the evidence, that at the date stated the Brady Metal Company did make a journal composed of copper, tin, and lead in the proportions suggested. This is proved by documentary evidence which cannot be controverted, the original letters from the metallurgical chemists who made the analysis having been produced, where the copper is given at 65.29 per cent., the tin at 7.54 per cent., and the lead at 26.56 per cent., with traces of zinc and iron which are not material, the percentage of tin being subsequently corrected and reduced to 5.93, by taking out the antimony which had been inadvertently included. But while a single previous knowledge or use, such as this, may be enough to negative novelty (Coffin v. Ogden, 18 Wall. 120, 21 L. Ed. 821; Daniel v. Restein [C. C.] 131 Fed. 469), the use must be something more than an accidental or casual one (Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279). It must, indeed, be so far understood and practiced or persisted in as to become an established

fact, accessible to the public and contributing definitely to the sum of human knowledge. Gayler v. Wilder, 10 How. 477, 497, 13 L. Ed. 504; Acme Flexible Clasp Co. v. Cary Mfg. Co. (C. C.) 96 Fed. 344. It is incumbent on the defendants, therefore, to show that the prior use which is set up was so far appreciated at the time, and adopted or followed, as to create a well-understood, if not an established, practice, capable at any time of being resorted to, and not something incidental, indefinite, and fugitive, which is now hunted up and brought forward simply for the purpose of defeating the patent. It is just here that the use by the Brady Metal Company, which is relied upon, is challenged, and is open to question. It is true that the requirements in this respect have apparently been met, if the statements of Mr. Brady, the president of the company, as well as of Mr. Reubens, his assistant, and Mr. Adams, the assistant superintendent, are taken broadly, as they are made, without discrimination. Mr. Brady, for instance, says, in substance, that for some time prior to April, 1896, they had been experimenting to get a cheap low-grade mixture that would be high in lead and low in tin, and that, upon the occasion in question, the particular bearing journal appearing to be so good, they thought it an excellent sample, and sent it to their chemists to be analyzed accordingly, and that, when it came back, "Eureka" would best express his feelings with regard to it; that he at once sent to Mr. Onslow, the superintendent of the works (now dead), for another piece; and that from then on bearings were produced and sold by them of substantially the proportions of tin, lead, and copper so shown, not exclusively, indeed, there being bearings made by them of different composition and character, and some under specific orders, but definitely, extensively, and continuously, so long as he was connected with the Brady Metal Company where this occurred, and afterwards with the Brady Brass Company, upon its organization.

But, comprehensive as this testimony may seem to be, upon examining it critically, it does not stand the test; its deficiencies not being disclosed in this résumé of it. The principal difficulty with it is that it deals in generalities, without much knowledge. Mr. Brady, as he has to admit, only knew in a broad way what was going on at the works, for which he had to rely on Mr. Onslow, the superintendent, his own office being elsewhere. That which they were striving for, as he says, was a cheap, low-grade bearing, such evidently as would satisfy the trade, and allow them to compete successfully with others, rather than one of any particular excellence. The piece sent to the chemists for analysis was not selected upon any such account as is stated by Mr. Brady, but, as is shown by the letter [2] to Mr. Onslow of April 13, 1896, ordering it, was produced for the express purpose of having a test, being made up, as directed, of 50 per cent. clean copper and 50 per cent. of copper shells, with whatever tin was deemed necessary. The object of the test is not disclosed, nor the considerations which controlled the mixture, but it was evidently to see how far copper shells would

[2] This letter was not put in evidence at the hearing before the examiner, but was produced by the defendants upon call by the court, and is treated as though it were regularly offered.

economically answer; the result which followed being regarded solely to that end. That this result was altogether haphazard and unexpected is shown, not only by the way it was brought about, but by the fact that, in his estimate of the contents of the copper shells, Mr. Onslow took them for 50 per cent. lead and 50 per cent. copper, when, by the analysis made at the same time with that of the journal, they were found to be 79.66 per cent. lead, as against 9.72 per cent. copper, the rest being tin and antimony, and it was because of this mistake that the relative percentages of tin and lead turned out as they did in the casting. This, of course, would not matter, provided the effect of these percentages was appreciated, and the proportions shown were adopted and followed. But clearly that was not the case. The journal analyzed was a single test piece of 19 pounds, of which Mr. Onslow, upon being applied to, could not furnish any more, not having saved any, and there was apparently no call upon him to reproduce it. That there was any change at the works in the mixture of these metals as a result of the showing made is not pretended. On the contrary, Mr. Brady says that they had been putting them together in about the same shape for a number of years, and simply continued on as they had been doing; the time assigned for this previous practice being anywhere from 10 to 15 years, carrying it back of even the Dudley experiments. It is difficult to understand, if this was the case, why he was particularly elated or moved to cry out "Eureka" as to a matter with which they had been so long acquainted. For the prior, as well as the subsequent, course at the works, however we have only the say-so of Mr. Brady and his assistants, no record being produced, nor any working practice shown; the men who weighed out and mixed the metals, as we shall presently see, who ought to be acquainted with it, if any one, knowing nothing about it. Mr. Brady also admits that no regard was paid to impurities in the shape of iron, zinc, etc., which were permitted as high on an average as 3 or 4 per cent., with a maximum at times of 8 or 10, which not only carries the practice outside of the patent, where only incidental or inappreciable impurities are allowed, but, as is shown by the evidence, with impurities in such quantity, commercial castings could not be made. It is thus evident that the chance proportions of tin and lead, shown by the analysis relied on, have simply been seized upon, because they happen to fall within the terms of the patent, in the hope that they may do duty as an instance of prior knowledge and use, without their having any such real character. In this respect Dr. Dudley's advice, in his letter of September, 1903, to look up their records, and see whether they would not show bearings containing over 20 per cent. lead and less than 7 per cent. tin, seems to have been effectively followed, and may have inspired this whole defense; suggesting a lack of independent knowledge on the subject outside of it. But, however that may be, no particular virtue was recognized in the mixture at the time, except as it might help to produce a cheap or low-grade bearing, and even now is stoutly denied; success, as it is claimed, residing in the manner of mixing and melting, which the defendants' workmen have achieved by experience and skill without regard to proportions. There was thus, as the outcome of the disclosure made by the analysis,

no modification of the practice previously pursued, no rule deduced for future guidance, no excellence of quality perceived, except as it made for cheapness. While, then, taking Mr. Brady's testimony at the best, and allowing all that can be fairly claimed for it, it may show that, upon the one occasion, by chance experiment, the terms of the patent were realized, and that to this extent and in this sense a prior use may have been established, there must be something more in order to satisfy the statute than that which was so purely accidental, unappreciated, ineffective, and impermanent.

Nor is this materially improved by the testimony of Mr. Reubens or Mr. Adams, which is not, of course, to be lost sight of. The knowledge of the former beyond that of Mr. Brady may be doubted. As assistant to the president, and his stenographer, he was no more likely to be acquainted with what was going on at the works than his superior. And while, as chemist, which he also seems to have been, he may have been in shape to make analyses, as well as to interpret them, there is nothing to prove that he ever did anything for the company in this line. He does say that he talked over with Mr. Onslow, from time to time, the percentages of tin and lead which were being used, and he is satisfied from this, as he says, and the one particular analysis which was made, that the directions for more lead and less tin were being followed. The statements of Mr. Onslow, as to what he was doing, are mere hearsay, and, of course, not evidence. But, accepting what passed between them in this way as indicative of what was desired and was being aimed at, it amounts to no more than that they were striving for as little tin and as much lead as was practicable, which may be conceded; that being the wish of every one. It is no proof, however, of the actual percentages successfully realized, and by the analyses made in July, 1896, of some of the products of these works by the same parties who made the earlier one in April, lead and tin are shown by no means within the proportions now claimed, to say nothing of the large per cent. of zinc present, thus proving that, notwithstanding the disclosure made by the first analysis, it had up to that time resulted in no confirmed knowledge or practice such as is set up, which naturally throws doubt as to any that followed.

It is true that in the testimony of Mr. Adams we apparently have something more specific. He was assistant superintendent under Mr. Onslow, and thus presumably acquainted with what was being done. And he states, positively and definitely, that at both the Brady Metal Company and the Brady Brass Company, where he was also employed as superintendent, as high as 30 per cent. of lead, and as low as 5 per cent. of tin, were successfully employed in making bearing alloys. But neither does this bear the requisite scrutiny. The only way that he can swear to it, as he says, is that upon one occasion he weighed out 30 pounds of lead himself and put it into the crucible. But, without holding him down to any such particularity, he admits that, as a matter of general practice, they were making use of composition scrap, consisting of copper shells, turnings, old oil cups, castings, "and such stuff," as much lead being put in as they could hold up. But this is just the indiscriminate way that every one else was

doing prior to the time of the invention, with correspondingly uncertain and unsatisfactory results, and nothing more definite or nearer to the patent could be looked for, from it, there than eleswhere. Adams is discredited also by his statements to James Heavey, who was sent to him by the complainants, upon learning that he was formerly connected with the Brady Metal Company. To Heavey he said, as the latter testifies, that he knew of no low mix of tin, and that the company never put in as high as 20 per cent. of lead, nor, indeed, more than 16 or 17 pounds to the pot (180 pounds), which is not half that. He also said that he had forgotten about it since he was out of the business. This was reported back to the complainants, who took steps to have him attend as a witness. But upon Heavey's going to him a second time, he said he was not an errand boy for the Ajax people, intimating that, if they wanted him, they ought to communicate with him directly. This they did by letter suggesting a specific date for his testimony, but got no answer. And on a third visit by Heavey he was even less cordial, and more offish, making a half promise to testify, but not keeping it. Heavey is charged with bias, having worked for the Brady Brass Company and been discharged after a few weeks' service. And it is no doubt true that, when Hopkins went to Adams, he told him substantially the same as he says now, that they got over 35 or 40 per cent. of lead in their mixtures. But, outside of this, his statements, as Hopkins says, were vague and rambling, and the impression left was that Adams wanted money, and was not to be relied upon. Without crediting that, however, all things considered, his testimony is not left in such a shape as to be unhesitatingly accepted.

Nor is this all that there is to be said upon this subject. When Brady and Reubens were on the witness stand, they were asked who there was who would confirm their statements with regard to the practice at the works, and the percentages of tin and lead which were made use of, and they both declared, without naming any one, that they would be known to some of the workmen. But in flat contradiction of this those of the workmen who would be likely to be informed, if any, upon being called by the complainants, professed that they knew nothing of any such practice as had been testified to. Mr. Wilmerding, for instance, went to work in the defendants' foundry in June, 1901, in order to familiarize himself with the various products of the company, so as to qualify as a salesman; and became acquainted, through foundry slips, with the component parts of the different mixtures, one of which slips he produced, together with a memorandum book in which the various formulas made use of at the time by the Brady Brass Company were entered, and, so far as his acquaintance went, the company, as he says, never made or sold a metal having more than 20 per cent. lead and less than 7 per cent. tin and the balance copper. Defendants say that he was only four weeks in the foundry, and but four or five months with the company all told. But, considering the object he had in view in going into the foundry, it is hardly credible that he would not have become informed of a bearing mixture of such superior quality.

John Stehr was also employed by the Brady Metal Company for five or six years, up to 1898; his duties being to receive the metals as they came from the dealers, and weigh the mixtures of copper, tin, and lead for supplying the furnaces, under the directions of the superintendent, there being but two such weighers, himself and another. There were definite proportions to these mixtures, as he says, some of which he gives, one, of the so-called Magnus metal, being composed of 15 pounds of lead, 15 pounds of tin, and 100 pounds of copper; and he says that he has no knowledge of any in which there was more than 20 per cent. lead, and less than 7 per cent. tin, the proportions of the patent. There was also a shell mixture composed of 60 to 70 pounds of copper and 35 to 40 pounds of shells, from which, as a rule, the castings were bad, the lead sweating out and more copper having to be added, besides which there were other compositions of scrap and brasses, which it would take too long to go into. The position which this man was in, and the necessary familiarity which he had to have because of it, make it altogether improbable that there could have been any mixture, low in tin and high in lead, without his knowledge, and his denial that there was is convincing. There certainly could be no steady run in daily practice of the character claimed, which would escape his notice while he was there, and this continued for two years after April, 1896, when it is said to have started.

Hermann Bunje also worked for the Brady Metal Company from 1892 to 1899, tending to the fires, and putting the metal into the pots to be melted down. The general specifications, as he says, called for 100 lbs. of copper, 15 of tin, and 15 of lead, which represented the common practice. There was also another mixture of 77 of copper, 13 of lead, and 10 of tin; but never anything of over 20 pounds of lead, with less than 7 pounds of tin, in a 100-pound mixture. There were besides this other make-ups, of turnings and old bearings or brasses, with the latter of which 15 or 20 pounds of shells—a bundle to a pot—were used, and sometimes sheet copper and shells. But this was in the old shop (which they left in the fall of 1896), and did not turn out well and was not continued steadily, the sheet and copper shells doing the best. James Heavey, an experienced molder, already spoken of, now working for the complainants, was also employed in the fall of 1899 by the Brady Brass Company, and he confirms the others that they did not while he was there use more than 15 per cent. of lead in their copper-tin-lead alloys, and did make use of the other mixtures which have been given. But he only worked there about four weeks, and his means of knowledge were correspondingly limited; the value of his testimony being thus in its corroboration of the others.

Summing up, therefore, the conclusions reached upon this branch of the case, both on account of the unsatisfactory character of the evidence produced by the defendants, as well as because of this direct contradiction of it, the alleged prior knowledge and use which is set up cannot be sustained. The temptation to resort to a defense of this kind in patent cases is always great, and parties are held in consequence to the most convincing and stringent proof. Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

This extends not only to the fact of such use which in the present instance has no doubt been met, but to the character of it as well, which must have been sufficiently positive and pronounced to leave some abiding effect which cannot be said of it here. No old bearings, as it is to be noted, showing the proportions of the mixture, have been put in evidence, and, while the failure to produce physical exhibits such as these, which is sometimes insisted upon, may have been satisfactorily explained, the case lacks the confirmation which this would give. But, more than this, although bearings low in tin and high in lead are said to have been extensively sold, not a single customer is found to testify to their use, it being altogether incredible that, considering the decidedly superior wearing qualities which such bearings would possess, they should not have been thoroughly advertised and known. A single isolated instance realizing the invention has been proved. But that is all, and, under the circumstances, is not enough. Not only was it brought about by the merest chance, but it produced no permanent result, no mixture corresponding with the percentages obtained being adopted, nor the prevailing foundry practice changed. The contrary, of course, is asserted, but without avail. And the validity of the patent is not to be affected by anything of so little established account.

Let a decree be drawn in favor of the complainants, sustaining the patent, and directing an account, with costs.

CONROY v. PENN ELECTRICAL & MFG. CO.

(Circuit Court, W. D. Pennsylvania, District Court. February 5, 1907.)

No. 21.

1. PATENTS—SUBJECT OF PATENTS—FUNCTION OF MACHINE.
   The Conroy patent, No. 723,139, for a method of ornamenting glass, which consists in chipping and scalloping the edges of plate glass for small mirrors by the use of a machine, is void as merely being for the function of the machine in the manufacture of an old product; the same work having previously been done by hand and by practically the same mechanical process.

2. SAME—PUBLIC USE—MACHINE FOR SHAPING EDGES OF GLASS.
   The Conroy patent, No. 735,949, for a machine for shaping or chipping the edges of glass articles, discloses invention, and is not invalid for public use because the machine was in fact used for more than two years prior to the application; it being shown that, while the machine was fairly successful, and its product was sold, the purpose of its use was experimental, and it was during such time being perfected by the inventor and was kept under lock and key and as far as possible from the knowledge even of the factory workmen who were not engaged in its operation. Also, *held* infringed.

In Equity. On final hearing.

Christy & Christy, for complainant.
J. M. Nesbit, for respondent.

BUFFINGTON, Circuit Judge. This bill charges infringement of both claims of method patent No. 723,139 for ornamenting glass,

granted to John M. Conroy March 17, 1903. This patent was applied for October 22, 1902. It also charges infringement of claims 1, 4, 5, 6, and 7 of patent No. 735,949, for ornamenting glass, granted John M. Conroy August 11, 1903. It was applied for December 31, 1902. The application for the earlier patent originally included both method and machine claims. On suggestion of the office, the machine claims were withdrawn and made the subject of a later application on which the second patent issued. Validity of the former is challenged on the ground that it is an attempt to patent the mere function of a machine. If such be the case, the patent, under well-recognized principles (Risden v. Medart, 158 U. S. 81, 15 Sup. Ct. 745, 39 L. Ed. 899), must be held void.

The patents refer to the chipping and scalloping the edges of plate glass for small mirrors. Previous to these patents this was done by hand. A piece of plate glass of the desired size, diamond scored on the upper side about an eighth of an inch from the edge, was firmly held by an operator with one hand to overlap the edge of a table. In the other hand the operator held a chipping tool. This consisted of a handle provided with a bifurcated prong somewhat wider than the glass plate. The longer arm of the prong was on the lower side of the plate. A sharp, quick downward stroke of the tool forced the inner end of the lower prong against the lower side of the plate, and the upper prong against the upper edge of the plate. This chipped or cut out scallops back to the scored line. The tool was then moved along the plate, and the operation rapidly repeated. It resulted in a uniform succession of scallops along the plate. The advance in hand chipping now dispenses with scoring. The invention in this case consisted in supplanting hand chipping by machine chipping. The process was: The edge of a plate of glass, supported on a firm rest or table, was presented at an inclined angle to engage a row of projecting pins equally spaced diagonally across the outer surface of a revolving band wheel. The impact of the successive pins made a corresponding successive series of chipped uniform scallops along the edge of the plate. The origin of the device is thus described by complainant's witness Horst: He was asked:

"Do you see the Rieseck drum here before you? A. Yes, sir. It is marked 'Defendant's Exhibit, Rieseck Drum.' Q. You have said that this first machine was built in February, 1899. Do you recall the circumstances under which this matter of the chipping machine first came to your attention? A. As I remember it, I was teaching a boy to chip glass by hand, when Mr. Conroy, he stopped to see what we were doing, when I asked him if he couldn't make a machine to chip glass by. He studied awhile on it, examined the hand tool, and then said he thought it could be done with a drum-pulley. I asked him how, and he said he would let me know later. In about an hour I was called to the office by Mr. Conroy, and he there explained to me that he was going to Peter Rieseck and see if he could get an iron pulley that would answer the purpose. He explained that he would have holes drilled in it, and then we could try it. In a day or two the pulley, and a pair of pillow-blocks came to the factory. Then he had our carpenter at that time, Mr. David Chambers, build a frame. After the frame was built I mounted the drum. Mr. Conroy went to the Labelle Steel Works and got two rods of steel. I think they were five-sixteenths steel rods. I then cut the pins into lengths of about two inches, filed them, and fit them in the holes."

The plan devised by Mr. Conroy was at once embodied in a machine. Of this Mr. Conroy says:

"Q. Were you able to successfully chip glass while the drum purchased February 23, 1899, was in use? A. We succeeded in chipping some—making some good work—but numerous difficulties arose that we had to meet at different times. One of these was in the drum itself. The metal in it was too light. The pins couldn't be held in position exactly. I didn't know what was the matter with it for awhile. Some pieces would come out all right, and others would not: but I found finally that the metal was too light in that drum, and that was one cause of trouble. But these difficulties that I am speaking of were mechanical difficulties. They didn't alter the invention at all. The invention as it is to-day is as it presented itself to me at the start. These mechanical difficulties had to be overcome in its use."

From this it will be seen that the method and the machine were simultaneously evolved, and that what was devised was a machine by which a well-recognized article, theretofore hand made, could now be machine made. The process substituted a machine made for a hand made article, made it cheaper, quicker, and somewhat more uniform. The method then is simply the novel function of the machine, and not the novelty of its product; nor, indeed, do we find any difference in the mechanical process employed in the hand and machine operation other than that incidental to change from hand to machine work. Indeed, complainant's expert, in discussing the question whether there is a blow in machine operation and simply a tortional pressure in the hand process, virtually concedes there is no functional difference, saying: "It is not, however, in my judgment, a matter of any material consequence." In Rubber Company v. Goodyear, 76 U. S. 796 (19 L. Ed. 566), it was held:

"A machine may be new, and the product or manufacture proceeding from it may be old, in that case the former would be patentable, and the latter not. The machine may be substantially old, and the product new. In that event, the latter, and not the former, would be patentable. Both may be new, or both may be old. In the former case, both would be patentable. In the latter, neither. The same remark applies to processes and their results. Patentability may exist as to either, neither, or both, according to the fact of novelty, or the opposite. The patentability or the issuing a patent as to one in no wise affects the rights of the inventor or discoverer in respect to the other. They are wholly disconnected and independent facts. Such is the sound and necessary construction of the statute."

Now applying this general principle to the case in hand, it is very clear that, in view of the prior existence of chipped glass, and that the advance Conroy made was to devise a machine to make it, it is clear that, while such machine is patentable, the function of that machine, namely, making machine chipped glass, is not. To do so would thwart the object of the patent law, which is to promote, not retard, inventions. To use a homely illustration: Beef was chipped by hand. But no one would contend that when the first machine for chipping beef was made the inventor thereof could secure a patent for the process embodied in the machine. To do this would be to bar the way to every inventor who might devise some other machine for producing the common article of chipped beef. Such a construction of the patent laws would make them retard progress.

Upon consideration we are clear that patent No. 723,139 is void as simply being for the function of a machine devised to manufacture an old product.

Two alternative forms of machine illustrate the invention of machine patent No. 735,949; one the band wheel type referred to above, and the other a vertical reciprocating head mounted in guides and provided with a diagonal row of spaced pins on its face. These pins strike the glass as in the case of the preceding structure. The first claim is:

"In a machine for shaping the edges of glass articles, the combination of a carrier having a series of two or more pins secured to the carrier and spaced in the direction and transversely of the path of movement of the carrier so as to operate successively and at different points on the article, means for moving the carrier and a rest or bearing arranged to support the article adjacent to the edge to be operated on, substantially as set forth."

The respondent's alleged infringing structure No. 1 is a reorganized shear. A number of projecting pins are spaced and staggered on a pivoted arm in the direction and transversely of the arms' path of movement. The result of this arrangement is that the pins operate successively on the edge of the plate of glass which rests on a support and is inclined at an angle to receive the impact of the pin. The oscillating pin-carrying arm is a carrier, and differs from the reciprocating carrier of complainant's second structure only in the fact that it turns on a pivot, instead of sliding in guides. So far as functional and mechanical means go, it is an obvious mechanical alternative for complainant's reciprocating head. We are therefore of the opinion it infringes.

It is contended, however, that the patent is void because not taken out within two years after the machine was put in public use. The question is not without difficulty, but upon consideration we are of opinion the use of the machine down to February, 1901, was experimental. Chipping glass by hand was a comparatively new art, and we find the device of the patentee was the first successful application of machinery to that art. A number of serious obstacles were encountered in the operation of the machine, and, while it was in a measure successful, and its product was sold, yet the testimony also shows that during this entire period the patentee encountered difficulties and was persistently laboring to perfect the machine. These troubles could only be discovered by the use of the machine, and attempts to remedy them when discovered necessitated still further use. During this whole period the machine was kept under lock and key in a factory to which the public had no access, and efforts were made to prevent the other factory workmen, not engaged in its operation, from seeing it. True, during this time the product of the machine was sold, but the sale was the incident, and experiment and improvement the main object of such use. It will also be noted that in two particulars at least the patent was based on matters developed by these experiments, viz., adjustment of the rest block laterally to enable the chipping of different thicknesses of glass and its adjustment horizontally so as to allow the pins to strike the edge of the glass below the axis of revolution and as the pin was moving away from the bar.

In view of the period up to February, 1901, being wholly experimental, we are of opinion application for the patent was made in due time.

CONROY v. PENN ELECTRICAL & MFG. CO.

(Circuit Court, W. D. Pennsylvania. February 5, 1907.)

No. 37.

PATENTS—INFRINGEMENT—MACHINE FOR SHAPING EDGES OF GLASS.

The Conroy patent, No. 731,667, for a machine for ornamenting glass, by chipping the edges of plate glass, which is a modification of the machine of patent No. 735,949, to the same inventor, designed to be used in chipping circular or oval plates, makes a table, carrying the plate and having a step by step machine movement to present successive portions of the plate to the action of the single cutting pin and essential element of each claim, and is not infringed by a machine having no such movable table, nor its mechanical equivalent.

In Equity. On final hearing.

Christy & Christy, for complainant.
J. M. Nesbit, for respondent.

BUFFINGTON, Circuit Judge. This bill charges infringement of both claims of patent No. 731,667, applied for April 2, 1903, and granted June 23, 1903, to John M. Conroy for a machine for ornamenting glass. Scalloping the edges of plate glass by a machine in which a projecting series of pins struck successive blows on the edge of an inclined plate supported on a rest was shown in the patent to Conroy, No. 735,949, applied for December 31, 1902. That machine had a series of pins projecting on the carriers. The patent now before us involves the same general principle, save that it uses a single pin upon a reciprocating head. This enables it to chip circular or oval plates. This is shown by the patentee, who says:

"Will you describe the operation of chipping circular or oval plates on the machine shown in Figs. 1 and 2 in patent 735,949? A. All that is necessary, in order to chip either an oval or a circular plate, with the machine marked Fig. 1, is to drive some of the pins in, preferably near the edge of the drum, leaving but one out, projecting out far enough to do the chipping. Either the first or the second one is generally the one that we leave stand, and drive the others in so that they will not interfere with the work. Then you have the same kind of machine, the action of which is then practically the same, as in the chipping machine described in Figs. 5 and 6; the difference being that, instead of being held between disks, the plate is held in the hand and rotated as the chipping progresses. This can be done very successfully and neatly, but not with the same degree of certainty as if the plates are put between the disks and in the special machine made for that purpose. * * * Q. Can you not state about how long it is since you thought of chipping with a single pin, holding the glass by hand, and when chipping with a number of pins? A. I thought of that way back near the start, I saw the possibility of chipping ovals and circles, as well as straight lines, on the drum; and it was that thought that was carried out in making this circular chipper, instead of driving the pins in on the drum. Instead of using it that way, I thought it would be more convenient the other way. It was from the drum that I got the idea of building the circular machine. The circular machine is only a special application of this idea which is contained in the first patent."

It will thus be seen that this device differs from the structures of the prior patent in that its table is movable, whereby the plate edge is brought in alignment with the successive strokes of the pin. The movable feature of this table is noted in the specifications:

"This table is shifted step by step to bring successive portions of the article into the plane of movement of the pin, 2."

"By this construction the table carrying the article will be moved forward a predetermined distance on each revolution of the drum and pin; such distance being proportionately to the desired width of the scallop."

"The invention described herein relates to * * * and has for its object a construction and combination of mechanical devices whereby portions of the edges may be taken away in such manner as to produce an inclined scallop or indentation on the edge; a series of such scallops being produced by a regulated feed of the glass transversely of the line of the movement of the pin operating to produce the scallop."

The element of a table with movable capacity is found in both the claims, viz., "a table * * * and means for shifting the table step by step across the path of movement of pin." Now, in view of Conroy's earlier device and the restricted field open for the grant of this patent, the movable table will be regarded as one of its essential features. It is evident, if the patent depends for novelty simply on the use of a single pin on a carrier, instead of the multiple pins of the other device, a grave question of patentability would arise. The other feature of a shifting feed table is required to confer patentability on the combination. That feature being carried into the claims, we cannot reconstruct them by striking it out, which we here in effect do, if we hold that defendant's machine No. 2 infringes. It has no movable table. The function of the machine-moved, step by step table of the claim is wholly performed by hand. Nor is a movable table found in respondent's No. 3 structure. It is said, however, that in it there is a mere transposition of parts; the table being fixed and the pin made movable, instead of the table being movable and the pin fixed, as in the device of the patent. But it is evident there is here not a mere transposition of parts, but two wholly different structures mechanically. The frame of the machine is a large horseshoe shaped casting firmly bolted to a rigid support. A circular plate of glass (in No. 4, an oval) is clamped between two stationary horizontal plates in the open end of the shoe. The glass projects slightly beyond the plates. An arm is pivoted above the plates and concentrically with them. This arm has pivoted on its lower side another arm, sector-shaped, which carries on it a chipping pin. The sector-arm is held to its lowest range of movement by a spring. The revolution of the arm not only puts the chipping pin in alignment with the successive places to be chipped on the circular plate, but by means of a trigger contact between a detent carried on the arm and a ratchet on the upper surface of the stationary clamping plate the sector-arm is intermittently drawn up and released. The successive, evenly spaced blows of the pin, thereby actuated, chip the plate. Manifestly this is a wholly different mechanical structure from that of the patent. Not only is the table stationary, but its fixed position co-operates through its ratcheted plate to cause the pin to reciprocate. A new element is

found in the pin-carrying sector, and its reciprocating movement results from the movement of an arm in a horizontal orbit concentric with the stationary, circular, clamping plate.

It is clear that the respondent has in this device devised another method of chipping glass, and that it employs different mechanical means from complainant's and uses other and additional elements.

We accordingly hold that infringement is not shown.

AMERICAN GRAPHOPHONE CO. v. INTERNATIONAL RECORD CO.

(Circuit Court, S. D. New York. June 11, 1907.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The presumption in favor of the validity of a patent created by a decision of the Circuit Court of Appeals sustaining it cannot be overcome on a motion for a preliminary injunction in a subsequent case by ex parte affidavits relating to matters occurring several years previously.

In Equity. Suit for infringement of letters patent No. 688,739, for a process for making sound records, granted to Joseph W. Jones December 10, 1901. On motion for preliminary injunction.

C. A. L. Massie, for the motion.

Waldo G. Morse, opposed.

LACOMBE, Circuit Judge. This patent was sustained and construed by the Court of Appeals upon voluminous records and after a long hearing on exhaustive briefs. Am. Graph. Co. v. Universal Talking M. M. Co. and Same v. American Record Co. (C. C. A. Second Circuit, Jan. 14, 1907), 151 Fed. 595. This creates a presumption in favor of the patent, which defendant must rebut by satisfactory proof. It relies mainly upon affidavits and an abandoned application. Whether the statements of the affiants are of such a character as would induce the Court of Appeals, if it believed them, to modify its former opinion, is at least doubtful; but certainly in their present condition, untested by cross-examination and dealing with the events of ten years and more ago, this court cannot accept them as sufficient ground for overruling the Court of Appeals as to either validity or construction.

Under the rules as to additional processes adopted by the Court of Appeals in the American Record Case, infringement seems to be quite satisfactorily made out, although the evidence is mainly circumstantial.

Complainant may take order for preliminary injunction.

AMERICAN GRAPHOPHONE CO. v. LEEDS & CATLIN CO.

(Circuit Court, S. D. New York. June 11, 1907.)

1. PATENTS—INFRINGEMENT—TALKING MACHINE RECORDS.

The mere making of duplicate copies of fully finished, commercial, foreign-made records for talking machines does not constitute infringement of the Jones patent, No. 688,739, for a process of producing sound records.

2. SAME—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.
Preparations or threats to infringe a patent shown by ex parte affidavits only are not sufficient to warrant the granting of a preliminary injunction.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 479.]

In Equity. Second motion for preliminary injunction.
See 140 Fed. 981.

Philip Mauro, for the motion.
Louis Hicks, opposed.

LACOMBE, Circuit Judge. The court is not satisfied, upon the proof, that prior to the commencement of the suit defendant accomplished anything (in the way of infringement) otherwise than the making duplicate copies of fully finished commercial foreign-made records. And it is thought that the making of such duplicates did not constitute infringement. The case is readily differentiated from Victor T. M. Co. v. Leeds & Catlin Co. (C. C.) 150 Fed. 147, and (C. C. A.) 154 Fed. 58, where by stipulation it was conceded that the particular discs complained of were made expressly for insertion in an infringing combination, not for general commercial purposes.

Whether a sufficiently strong case can be made out of preparations and threats to infringe to warrant injunction is a question which should be left till final hearing. It cannot well be decided on affidavits.

The motion is denied, without leave to renew. Complainant has now moved twice for preliminary relief, and the time of the court should not be again claimed for the consideration of such a voluminous record until at interlocutory hearing on pleadings and proofs it may be able to dispose of all the issues.

INTERNATIONAL MERCANTILE MARINE CO. v. STRANAHAN.

OCEANIC STEAM NAVIGATION CO. v. SAME.

(Circuit Court, S. D. New York. August 24, 1907.)

1. CONSTITUTIONAL LAW—VALIDITY OF STATUTES—JUDICIAL AUTHORITY AND DUTY.
For a court of first instance to declare unconstitutional an act of Congress is an exercise of judicial power which, in cases where no great and immediate financial loss is threatening, is warranted only when the unconstitutionality exists beyond rational doubt.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 42.]

2. SAME—DUE PROCESS OF LAW.
Section 9 of the immigration act of March 3, 1903 (32 Stat. 1215, c. 1012 [U. S. Comp. St. Supp. 1905, p. 279]), which makes it unlawful to bring into the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and provides that "if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought * * * was afflicted with such disease at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time such * * * transportation company * * * shall pay to the collector of customs * * * $100, for each and every violation of the pro-

visions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid," does not create a crime so as to render it unconstitutional because it does not provide for a jury trial, the "fine" provided for being, in fact, a penalty, and, if suable at all, recoverable in debt, and not through criminal proceedings. Nor are proceedings for its enforcement unconstitutional as depriving a transportation company of its property without due process of law under a practice by which the Secretary makes his determination that the penalty has been incurred ex parte and without notice, and requires its payment before a clearance is granted, or under a modified practice by which the company is given notice to deposit the amount of the penalty as a condition to the granting of a clearance to the vessel, and is given 14 days in which to show cause why the penalty should not be imposed. The section is a necessary sanitary measure, and as such belongs to that class of summary executive proceedings which Congress may lawfully authorize under its power to regulate immigration.

3. SAME.

Under its constitutional power to regulate commerce, Congress may lawfully impose conditions upon the granting of clearance to vessels as a means of enforcing immigration regulations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 72.]

At Law.

The plaintiffs in these suits are steamship owners in the North Atlantic trade; the International Mercantile Marine Company operating the American and Red Star lines, and the Oceanic Steam Navigation Company the White Star line. Defendant is the collector of customs at this port. The actions are brought to recover, as illegally exacted, various sums of $100 each, paid defendant as a condition of procuring clearance for certain of plaintiffs' ships. Defendant's justification for such exaction is section 9 of the immigration act of March 3, 1903 (32 Stat. 1215, c. 1012 [U. S. Comp. St. Supp. 1905, p. 279]), declaring it "unlawful for any person including any transportation company * * * to bring into the United States any alien afflicted with a loathsome or with a dangerous contagious disease," and further prescribing that "if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought * * * was afflicted with such disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such * * * transportation company * * * shall pay to the collector of customs * * * $100 for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid." Plaintiff transportation companies did bring to this country aliens afflicted with the proscribed diseases. It did appear to the satisfaction of the Secretary that the aliens were so afflicted when plaintiffs embarked them, and that their condition might have been detected by competent medical examination. Neither here, nor before any departmental officer, have plaintiffs disputed these facts; it being the essence of their demand that the existence of disease and the absence of proper inspection therefor are alike immaterial, inasmuch as either the statute under which defendant acted, or the procedure under it, or both, are unconstitutional and therefore ineffectual to prevent recovery of moneys exacted by defendant under the obvious compulsion of stopping the voyage of a ship worth millions until a paltry hundred was forthcoming.

The practice under section 9 has not at all times been the same. Before January 25, 1905, the procedure (in New York at all events) was to examine the immigrants and decide whether any were obnoxious to the section, after which a notice was sent the shipowner, informing him, in substance, that he would pay a fine of $100 per diseased immigrant before his ship could clear, and this writing was the first communication of any sort given by the Department to the carrier on the subject. After the date mentioned, written notice was first given the shipowner that diseased aliens had been discovered on a

given ship, and that the Secretary was satisfied that their condition could and should have been ascertained at the time and by the examination mentioned in section 9, wherefore 14 days were given wherein the persons notified might show cause why their ship should not be fined, and in the meantime clearance was granted only on deposit of $100 as security for the payment of each fine that might be ultimately imposed. This change in practice was wrought by circular 58, and some of the money now sued for was exacted before the circular, and some after.

So far as the evidence herein discloses, circular 58 made no difference at all to these plaintiffs. Before the circular date, they unofficially knew, as soon as inspection of immigrants completed, how many fines they would be required to pay for any given ship, getting such information from their own representatives whose business took them regularly to Ellis Island, and after the circular they had the same means of knowledge, plus a notice which told them nothing new, if their Ellis Island men were alert. But whether information of trouble came in one way or another, plaintiffs' course was the same—i. e., to do nothing—so far as denying the Department's allegations was concerned. These are, I believe, the facts shown by the evidence, all objections to which have been overruled, in order that everything on which counsel have based argument may be before the appellate court, and not because I deem all the evidence material or relevant. On the contrary, I do not think that the information gleaned by plaintiffs through their own men, whether before or after circular 58, bound them at all. For legal purposes the first knowledge they had of official purpose or decision, at any time, was the official notice. Further, I consider 14 days an unreasonably short time within which to show cause, if the shipowners were unprepared with any information regarding the physical condition of their passengers on embarkation, which was the state of the case, and which plaintiffs' counsel assume as a reasonable and lawful position on their clients' part. The fact is that the carriers brought in the aliens on the chance that they would not be deported, and they now assert in effect that the "rules of the game" have not been observed in punishing them for taking the chance.

The cases have been tried without a jury. Formal findings will be signed in accordance with this statement and the following opinion.

William G. Choate and Lucius H. Beers, for plaintiffs.

Henry L. Stimson, U. S. Atty., W. T. Denison, and F. Frankfurter, for defendant.

HOUGH, District Judge (after stating the facts as above). To declare unconstitutional, especially in a court of first instance, an act of Congress, is an exercise of judicial power warranted (in cases where no great and immediate financial loss is threatening) only when the unconstitutionality exists beyond a rational doubt. The practice of which the statute under consideration is an instance—i. e., using a refusal of clearance as a means of extorting settlement of governmental claims—is nearly as old as the Union (Rev. St. § 4206 [U. S. Comp. St. 1901, p. 2843]), and has for 20 years past been a part of our immigration system (Act Feb. 23, 1887, c. 220, § 8, 24 Stat. 415 [U. S. Comp. St. 1901, p. 1293]; Act March 3, 1891, c. 551, § 10, 26 Stat. 1086 [U. S. Comp. St. 1901, p. 1299]). I am not advised of any previous attack upon the practice. It is not asserted that the exact form of words contained in section 9 of the act of March 3, 1903 (32 Stat. 1215, c. 1012 [U. S. Comp. St. Supp. 1905, p. 279]), is any older than that statute, but I believe that most of the battery of argument directed against it might with equal force have been used against other acts of Congress for many years back; and that fact alone would strongly incline me to leave the constitutional question for the higher courts, pursuing the

course illustrated by Spreckels Co. v. McClain, 113 Fed. 244, 51 C. C. A. 201.

I do not, however, incline to think the act unconstitutional. For some years I have regarded it as harshly opposed to the spirit of the Constitution, and perhaps capable of use in derogation of earlier treaty rights of citizens of friendly nations, yet entirely within the congressional power of regulating foreign commerce. This predisposition has rendered the more necessary, careful study of the brief of distinguished counsel for plaintiffs, after which I am still unable to assent to their conclusions.

The proposition first advanced, going to the root of the whole matter, is that section 9 creates a crime, viz., the bringing into the country a diseased alien whose condition might in official opinion have been discovered at the port of embarkation, and for that crime provides a sanction, viz., a fine of $100. From this premise flows the conclusion that by constitutional guarantee a jury trial is secured to those alleged to have committed the crime and incurred the fine. The premise asserted rests wholly on the use of the word "fine" in the section considered. A crime is a wrong which the government "punishes in what is called a criminal proceeding, in its own name" (U. S. v. Lee Huen [D. C.] 118 Fed. 455), and, since the punishment meted out is a "fine," and a "fine" can be collected only in a "criminal proceeding," therefore that which the statute calls unlawful must be a crime, because it entails a fine. This is putting on one word more than it can bear. "Fine" and "penalty" are frequently used interchangeably as in Cunard Co. v. Stranahan (C. C.) 134 Fed. 318, and the mere use of the word "fine" is not conclusive as to the nature of the action at law leading up to it. 1 Bish. Crim. Law (7th Ed.) 17, note. The ingredients of a statutory crime are as well the sanction as the prohibition. An act may be malum in se, and yet no crime even at common law. It may be malum prohibitum, but, if the machinery of the criminal law, the method of enforcement called in the Lee Huen Case the "criminal proceeding," be denied, there is no crime. There being no common-law offenses against the United States, a federal statute adding to the list of offenses must at once define it, denounce it, and afford the appropriate remedy. It has been somewhat loosely said that a crime is an offense punishable through indictment, yet clearly it is a vital element of a crime, legally speaking, that its punishment be reachable through indictment or information. It would I think puzzle the astutest attorney to draw and press to conviction an indictment on this section of the act. It would be necessary to accuse a person, yet the "fine" is imposed on a ship, while on conviction the court would be obliged to direct the payment of $100 to the collector, a method of collection hitherto unheard of on the criminal side. Evidently Congress did not intend by this statute to add to the Criminal Code, and it certainly denied to any crime it inadvertently seemed to create the only proper method of enforcement. To construe the act reasonably, therefore, the $100 "fine" must be considered a penalty, and, if suable at all, recoverable in debt. U. S. v. Banister (C. C.) 70 Fed. 44.

Irrespective, however, of the argument just considered, plaintiffs urge that all proceedings under section 9 are void, as depriving them of

their property without due process of law; the exactions prior to circular 58 having been made without notice or opportunity to defend, and those after the circular in accordance with a procedure not warranted by the act itself. The sum of this contention is that, whether the statute be hopelessly vicious or not, no constitutional method of enforcing its provisions has as yet been put in practice. If this be possibly true, the preliminary inquiry is vital—of what right or property have the plaintiffs been deprived? This question their counsel have answered thus:

"The right which the plaintiffs are here asserting is the right of ownership of their own funds. That is a constitutional right, and plaintiffs are here claiming that that constitutional right has been infringed by the taking of their property."

This statement, I am compelled to think, confounds effect and cause —it really begs the question. Truly the plaintiffs paid money under compulsion; but they did so to get clearance, and the real grievance, the causa causans of the train of events, was the refusal of clearance. If that was lawful and constitutional, everything else was right enough, so that the logical questions are: (1) Had Congress a constitutional right to refuse clearance under the circumstances and in the manner set forth in section 9? And (if such right exists) (2) was clearance refused in accordance with the terms of the statute?

As to the second query, it is enough to say that no substantial defect has been pointed out. The procedure before circular 58 was in literal compliance with the statute, which provides for no notice, and that, since the circular, while more merciful in form, is at least no more drastic in effect, than that of earlier date.

The first question requires consideration of the nature of clearance. The word means to satisfy the customs, harbor dues, and the like, and obtain from the governmental authority of the port leave to depart, and in that sense was known to the language before the establishment of our federal government. Oxford Dict. Murray, tit. "clear" and "clearance." In the absence of statute, clearance is but the gracious permission of the sovereign to depart from a port into which, without like permission implied from an "entry," there was no right to come. In the United States this sovereign power is, by the commerce clause of the Constitution, lodged in the federal government, and the privilege of clearance is granted, regulated, or withheld by statute. It may be wholly suspended by embargo, of which domestic vessel owners cannot complain; and, though it afford to foreign owners a casus belli, they are entitled to no judicial relief. It is only if and when the same power that can altogether withhold clearance transforms the favor thereof into a statutory right that vessel owners can complain at law. Hendricks v. Gonzalez, 67 Fed. 351, 14 C. C. A. 659. In the present instance the very statute of which plaintiffs complain gives them the right of clearance on payment of the sum they seek to recover. It was within congressional power to refuse them clearance altogether. I do not think they can complain of getting it at a price. The foregoing considerations, if well founded, dispose of the cases at bar, but another line of argument has been presented, deserving statement.

As was said in Murray v. Hoboken, etc., Co., 18 How. 284, 15 L. Ed. 372:

"There are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

That the regulation of immigration is one of these matters, and that congressional action in withdrawing it almost wholly from the judicial domain is constitutional, has been decided in a line of cases too recent and familiar to need citation. Incidental to the regulation of immigrants, and absolutely necessary to efficiency of administration, is regulation of those who make immigrants possible. The importance of such regulation cannot be exaggerated, and in a city which is at once the immigrant's gateway and dumping ground need not be dilated upon. Section 9 of the act of 1903 is in my judgment a sanitary measure, necessary both for healthy immigrants and uninfected Americans, and as such belongs eminently to that class of summary executive proceedings, transfer of which to the judicial branch would "swamp the courts" (Sing Tuck, 194 U. S. 170, 24 Sup. Ct. 621, 48 L. Ed. 917), and "defeat the object sought to be attained" (Sing Lee [D. C.] 54 Fed. 334).

Every consideration leading to the judgments in Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, and Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, makes to uphold the present statute. The destruction of inferior tea and unlawful fishnets, by summary process and without hearing, is certainly no less an infraction of private right than is here complained of. Undoubtedly the power is great, and may be unjustly used, but if under this, as under other sections of the immigration law, executive officers act under peril of suit or legal review for abuse of discretion or malicious conduct, those who bring diseased aliens into the country have as large judicial protection as have the aliens they bring—in each instance as much as the nature of the case will (in congressional opinion) permit.

Let judgment for defendant be entered in each case.

LANCER v. ANCHOR LINE (HENDERSON BROS.), Limited.

(District Court, S. D. New York. July 15, 1907.)

COMMERCE—CARRIERS—FEDERAL EMPLOYER'S LIABILITY ACT.

The federal employer's liability act of June 11, 1906 (34 Stat. 232, c. 3073), relating to the liability of common carriers engaged in commerce between the states, and between the states and foreign nations, to their employés, is within the constitutional power of Congress to regulate interstate and foreign commerce, and applies to carriers engaged in foreign commerce by sea, making such a carrier liable for an injury to an employé resulting from the negligence of his fellow servants.

In Admiralty.

Wilford H. Smith, for libellant.

E. Sidney Berry, for respondent.

Percy S. Dudley, for Hamburg-American Line by permission of court.

ADAMS, District Judge. This action was brought by Patrick Lancer, employed by the respondent on the 29th of October, 1906, to assist in the discharge at New York of its steamship Columbia and who received personal injuries while so engaged. There is no dispute about the fact of the injury having been received as alleged. It appears that the libellant had been at work with others in taking out a cargo of canned fish for a short time from No. 5 hatch, which was about 12 feet square. He was necessarily working in the square of the hatch in slinging up the cargo, when a draft fell back and struck him. This was caused by the draft coming into contact with a skid about 10 feet in length, which was placed between the upper and main decks to prevent the drafts from swinging beyond the square of the hatch. It was placed inside of the hatch and as the draft ascended it struck the lower edge of the skid just below the main deck and caused the draft to become loosened and fall into the hold striking the libellant a severe blow, resulting in the injury complained of. The cause of the trouble was the placing of the skid by fellow workmen inside instead of outside of the hatch, where it would have been as effective in serving its purpose of confining the uplifted load to the inside of the hatch. The accident was therefore attributable to the negligence of fellow servants. The libellant recognizes this situation but claims a right to recover under the provisions of the Act of Congress, approved June 11, 1906 (34 Stat. 232, c. 3073), known as the "Employer's Liability Act," which provides, inter alia:

"Be it enacted * * * that every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, or between any territory and another, or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employés, * * * for all damage which may result from the negligence of any of its officers, agents or employés."

The answer amounts to a general denial and at the conclusion of the trial upon the merits, the libellant reserved the right to adduce proof to show the facts alleged in the first three paragraphs of the libel, but since the trial the parties have stipulated that these may be taken as true. The principal matter covered so far as the present discussion is concerned, is that referring to the respondent being engaged in trade and commerce between the United States and foreign countries, which relates to the constitutionality of the act above referred to. This was disputed in the pleadings but the plaintiff's allegations in that respect were subsequently stipulated to be true.

The respondent contends:

1. That the injury was the result of a simple accident, the cause of which was not explained and that therefore there could be no recov-

ery. The theory urged is that the position of the skid was not the efficient cause of the accident, which has not been shown.

I think it is quite clear that the skid being on the inside instead of the outside of the hatch was the proximate cause of the accident. If it had been placed outside of the hatch, in all probability, the draft would have gone safely to the deck.

2. That the libellant can not recover under the Federal Employer's Liability Act because he has not by his pleading or proof brought his action within the terms of the Act.

With respect to the pleading, while it is true that no specific allusion is made to the act, yet it is fully set forth that the injury was caused by negligence and that he notified the defendant that he would claim the benefit of the act. The proof is ample to show that the respondent was negligent through the libellant's fellow servants, for whose acts the respondent was made liable by the provisions of the said act. If it was a constitutional exercise of Congressional power, there can be no doubt of the libellant's right to recover.

The question of the constitutionality of the Act has been discussed in several authorities and different conclusions reached. For example, in Brooks v. Southern Pac. Co. (C. C.) 148 Fed. 986, decided by Evans, J., December 31, 1906, the act was declared invalid and the representative of a fireman who was killed through the negligence of his fellow servants in a railroad accident was held not entitled to recover. On the other hand, in the case of Spain v. St. Louis & S. F. R. Co. (C. C.) 151 Fed. 522, decided March 13, 1907, it was held by Trieber, J., that the presumption of validity will be indulged in until the contrary is shown and that Congress has power under the commerce clause of the constitution to legislate for the safety and protection of employés engaged in interstate commerce, whether the transportation be on water or on land.

Both of the opinions are well reasoned out. In the latter it is said if there ever were any doubt as to the power of Congress to enact such legislation it was removed by what was decided in Patterson v. Bark Eudora, 190 U. S. 169, 175, 23 Sup. Ct. 821, 47 L. Ed. 1002. It was there contended that even if the contract were under the police power, that power is vested in the state and not in the general government, but Mr. Justice Brewer said in holding the Act constitutional:

"Neither do we think there is any trespass on the rights of the states. No question is before us as to the applicability of the statute to contracts of sailors for services wholly within the state."

Judge Trieber said (page 527 of 151 Fed.) that:

"The expression of the court that contracts with sailors for their services are exceptional in their character and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water must be understood to refer solely to the propriety of the legislation and not the power, for no one will contend now that the commerce clause of the constitution grants greater power to Congress over the commerce carried on by water than over that transported by land."

I quite agree with Judge Trieber in his various arguments and it should be further noted that other expressions in the opinion of the

Supreme Court are applicable to this case. It was said (on page 174 of 190 U. S., page 822 of 23 Sup. Ct. [47 L. Ed. 1002]):

"That there is generally speaking, a liberty of contract which is protected by the Fourteenth Amendment, may be conceded, yet such liberty does not extend to all contracts. As said in Frisbie v. United States, 157 U. S. 160, 165, 15 Sup. Ct. 586, 39 L. Ed. 657:

'While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing him from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.'"

I conclude that the act was constitutional and the libellant is entitled to recover. There will, therefore, be a decree for him, with an order of reference.

THE WAVERLEY.

(District Court, S. D. New York. June 26, 1907.)

1. COLLISION—STEAMSHIP AIDING GROUNDED TOW IN CHANNEL—ATTEMPT OF ANOTHER VESSEL TO PASS.

   While the steamship Ligonier and a tug were working to get the Ligonier's tow off the ground at the southern end of the canal leading from Port Arthur into Sabine Pass, the steamship Waverley, coming down the canal, attempted to pass through the narrow space between the Ligonier and the west bank, resulting in a collision. The Ligonier did not consent to such passing; but, on the contrary, both she and her tow sounded a number of blasts of their whistles intended to warn the Waverley of the danger. The Ligonier stopped her engines, but could not move further to the eastward because of the shallow water. *Held*, that the Waverley was solely in fault for the collision in attempting to force a dangerous passage, in the absence of an agreement by the Ligonier to co-operate.

2. NAVIGABLE WATERS—OBSTRUCTION OF CHANNEL BY VESSELS—CONSTRUCTION OF STATUTE.

   Section 15 of Act March 3, 1899, c. 425, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], which makes it unlawful to anchor or tie up any vessel in a navigable channel in such manner as to prevent or obstruct the passage of other vessels, was not intended to prevent the aiding of a vessel grounded or in difficulty, even if it involves the temporary obstruction of a channel.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libelant.
Butler, Notman & Mynderse, for claimant.

ADAMS, District Judge. This action was brought by the J. M. Guffey Petroleum Company, the owner of the steamship Ligonier, against the steamship Waverley, to recover the damages sustained through a collision between those vessels on the 28th day of January,

1905, about 9 o'clock a. m. at the mouth of the Port Arthur Canal. This was an artificial channel several miles long running from Port Arthur to the Sabine Pass. The tide therein was greatly affected by the wind but on this occasion it was nearly normal, with a flood current of about 1½ miles per hour.

The Ligonier alleged that she left Port Arthur on the 27th of January with the loaded barge Conemaugh in tow on hawsers of about 200 fathoms, bound for sea, and had proceeded nearly through the canal and was about to emerge into the Pass, when the barge took the ground on the east side of the canal. The Ligonier, with the tug Della assisting her, kept pulling on the barge for several hours but did not succeed in moving her; that while thus engaged the steamer Waverley, outward bound, at about 9 o'clock a. m. the 28th, approached through the canal and notwithstanding warning signals given by the Ligonier and the Conemaugh continued to approach with the evident intention of forcing her way through the canal to the westward of the Conemaugh and the Ligonier; that the latter observing this persistence on the part of the Waverley, stopped her engines and eased the strain on the hawsers but when the Waverley came abreast of the after part of the Ligonier she apparently smelled the ground, keeled over and struck the Ligonier heavily on her starboard quarter, driving her over on the east bank of the canal and doing considerable damage, estimated at $8,000.

The Waverley alleged that she left the basin at 6:40 a. m. and when she had approached within about 2 miles of the junction of the canal and Sabine Pass, the Conemaugh was discovered apparently aground on the north-easterly side of the junction; that she was being assisted by the tug Della on her starboard quarter and the Ligonier which was towing ahead on 2 hawsers of about 75 or 100 fathoms in length; that the Ligonier was occupying a position nearly in the centre of the channel in the Sabine Pass to the south of the said point of junction; that while the Waverley was still at a considerable distance the Ligonier sounded a whistle of 7 blasts, which was answered by the Conemaugh with a similar signal and said exchange of signals was afterwards repeated between said vessels; that the said signals were, as the Waverley is informed, the private code of signals adopted by the libellant for use between their steamers and barges; that when the Waverley had approached to within about a mile, she gave a signal of one whistle to indicate that she would pass the Ligonier on the westerly side of the channel; that this signal was not answered nor were two repetitions of it given at intervals of 1 or 2 minutes; that upon approaching near enough for accurate observation, it was seen that the Ligonier had encroached upon the westerly half of the channel and that her engines were working apparently at full speed; that the distance between the Ligonier and the westerly bank of the Pass was sufficient for the Waverley to pass, although requiring careful steering, and it was within the power of the Ligonier to enlarge this space by proceeding to the eastward of mid-channel or by stopping her engines and slacking her towing hawser; that the Waverely therefore kept on, her engines running slow and navigating with all possible care and caution; that she made the turn at the junction of the canal and Pass

aforesaid and entered upon the avenue of water between the Ligonier and the westerly bank with precision; that just as the bow of the Waverley lapped the stern of the Ligonier, the latter which had negligently omitted to stop her engines or to sheer off to the eastward, carried a port wheel and kept her engines full speed ahead, thus deflecting a stream of water from her propeller to the westward and causing the bow of the Waverley to sheer against the westerly bank of the Sabine Pass; that the bow of the Waverley thereupon rebounding from the west bank, took a strong sheer to eastward and although all possible efforts were made to check her sheer by dropping her anchor and otherwise, the bluff of the port bow of the Waverley came gently in contact with the starboard side of the Ligonier.

Considerable testimony has been adduced in support of the respective contentions. After duly considering it, I have come to the conclusion that the Waverley was solely in fault for the collision. The signals which she urges were between the Ligonier and the Conemaugh, were actually designed to warn the Waverley that it would be dangerous for her to attempt to make the passage. It is true that she passed the Conemaugh without striking but by a very narrow margin, about 25 feet, and I am inclined to believe that in doing so, she took a sheer towards the western bank which she could not overcome and therefore struck it with such force as to cause her to rebound towards the east and come in contact with the Ligonier. I am satisfied that the latter did all she could to avoid the collision. She had not enough of water to the eastward to make any appreciable change in that direction, as is shown by the fact that the contact drove her at once into the bank on that side, and she did stop her engines before the Waverley was actually alongside and in time to prevent any stream of water being forced against her bow. It is possible that the Ligonier might have acted more promptly in stopping but there was evident hazard in doing so because of the flood tide and the danger of being drifted astern. I think she stopped her engines as soon as it was prudent.

The Waverley urges that the Ligonier was blocking the channel and thus violating Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543], but I do not think her actions in this case placed her in fault. The Act referred to in my judgment was not intended to prevent some necessary and perhaps unavoidable obstruction of a navigable channel in aiding a vessel in difficulties and I do not consider that the Ligonier violated its provisions here.

The evident fault of the Waverley in attempting to force her way through under the circumstances obviates the necessity of making too close a scrutiny of the Ligonier's proceedings. There were doubtless several things she could have done, for example, abandon her work on the barge, if she had known the Waverley would insist upon proceeding notwithstanding the situation, but I do not deem it necessary to go into such discussions, as the attempt of the Waverley to pass without the consent or co-operation of the Ligonier, is sufficient to account for the collision.

The libellant will have a decree, with an order of reference.

THE BÉRENGÉRE.

(District Court, D. Oregon. August 12, 1907.)

No. 4,726.

SHIPPING—DAMAGE TO CARGO—MEASURE OF VESSEL'S LIABILITY.

The measure of damages recoverable from a vessel for damage to a cargo of steel through its fault is the difference between the market value of the cargo at the port of delivery in its damaged condition and its value if it had been delivered in good condition, with interest from the time of delivery and other items of expenditure made necessary by reason of the damage. In such a case the shipper or owner cannot recover for loss of a profit he would have made by delivery of the steel on a prior contract of sale, which delivery was refused by the purchaser on account of its damaged condition; the vessel having no relation to such contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 485.]

In Admiralty. Suit for damage to cargo.

Certain steel was shipped on the barque Bérengére from Antwerp, in Belgium, to be carried to Portland, Or. The shippers, having received their bills of lading, indorsed them to Henry Lund & Co., the libelants, who were to deliver the steel to Robertson-Manning Company, on its arrival at destination, at the alleged invoice price of $3,656.20. The steel was damaged on the voyage by rust, from contact with salt water, concededly through the fault of the ship. Robertson-Manning Company, becoming aware of its condition, refused to receive the same, and negotiations were entered upon between libelants, the agents of the ship, and the underwriters of the cargo, looking to a settlement of differences arising on account of the damages sustained, resulting in the agreement as to the steel that it should be sold for what it would bring in the market, leaving other matters to abide further arrangement or the determination of the court. W. B. Honeyman became the purchaser at $2,750. Prior to the sale Honeyman had, at the instance of the underwriters, made a survey of the damages incident to the corrosion, and fixed them at the sum of $240. In his purchase he allowed the market value in Portland, less the amount of his appraisement, thus making the steel worth, in good condition, $2,990. The sale was not consummated until December 22, 1903, although the ship arrived in port some time in October previous; delay in the meanwhile being occasioned more or less by the negotiations pending for settlement of damages. Steel declined in the Portland market, between the day of shipment from Antwerp and the time of the ship's arrival in Portland, from $5 to $6 per ton.

W. C. Bristol, for libelant.

Williams, Wood & Linthicum, for respondent.

WOLVERTON, District Judge (after stating the facts). What measure of damages should be applied for the ascertainment of the amount of libelants' recovery? This is the principal question for determination. Proctor for libelants insists that the measure should be the difference between the invoice price libelants were to receive for the steel from Robertson-Manning Company and the amount paid therefor, in its damaged condition, by Honeyman. It is reasoned that the ship is liable in that measure because it is responsible for the damaged condition of the steel, and it was that condition that prompted Robertson-Manning Company to refuse to receive it. Upon the other hand, it is urged that the true measure is the difference between the market value of the merchandise in Portland at the time of the ship's arrival and the value thereof in its damaged condition.

It is a general rule, recognized both in this country and in England, subject to certain well-established qualifications, that anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach. The application of the rule, however, is not always the same in different jurisdictions. The grounds that go in support of it are ordinarily the dependency and contingency of that character of profits upon uncertain, variable, and changing conditions, their remoteness, and the omission of any engagement, either express or implied through contractual relations, to answer therefor. But where such anticipated profits are not contingent, uncertain, or remote, or where, from the express or implied terms of the contract or the special circumstances under which it was entered into, it may reasonably be presumed that they were within the intent and mutual understanding of the parties thereto, they constitute, by the consensus of judicial opinion, a proper measure for recovery in the way of damages for breach of the contract. Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Western Union Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479; Hockersmith v. Hanley, 29 Or. 27, 44 Pac. 497. This latter principle has been applied, as between carrier and shipper, where an unreasonable delay has been suffered by the carrier, and the contract of affreightment, through intendment, contemplated that the goods should be delivered for immediate sale in the market at destination. In such case the carrier is liable to the shipper for the decrease in the market value of the goods from the time they should have been delivered in due course. The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644, affirming the decision of the Circuit Court to the same effect in 43 Fed. 681. "The liability of the vessel," says Brown, District Judge, in The Giulio (C. C.) 34 Fed. 909, "for the loss of a market during the period of negligent delay after the goods have been taken on board, has been often decided in the courts of this country." See, also, The Sammie (D. C.) 36 Fed. 568; The City of Para (D. C.) 44 Fed. 689. The rule, however, is otherwise where there has been no delay, and the cargo is damaged through fault of the carrier. In such case the measure of damages is the difference between the value of the goods in their damaged state and their value at the port of destination, had they been delivered in good order. Henderson & Gaines v. Ship Maid of Orleans, 12 La. Ann. 352; Western Manuf'g Co. v. The Guiding Star (C. C.) 37 Fed. 641.

In this jurisdiction interest has been allowed on the measure from the time of delivery. The Nith (D. C.) 36 Fed. 86. This as between the shipper and the carrier. But the ship's liability is not to be affected by private contracts between the shipper and strangers for the purchase and sale of the goods. The Compta, 6 Fed. Cas p. 233, No. 3,070. The reasoning of Judge Hoffman in that relation is cogent and pertinent. He says:

"The shipowner by the bill of lading does not enter into any engagement with the owner of goods that may be damaged to go into a joint speculative operation founded upon the anticipated state of the market at some indefinite future time, to be judged of by the shipper, who retains in his own hands the whole conduct of the adventure. Such a rule would impose on the shipowner obligations and liabilities little suspected by persons engaged in that

business, and of which his contract by bill of lading contains no hint. The only safe, rational, and equal rule is to hold, as before stated, the vessel liable for the difference between market value of the goods, if sound, and their value in their damaged condition at the time and place of delivery."

These authorities leave nothing for me to add in the determination of this cause. The damages sought to be recovered were occasioned, not by delay, but by the failure to carry in good condition, and the rule applicable in determining the measure thereof is plainly the one last stated. The amount recoverable, therefore, is $240, with interest thereon at the rate of 6 per cent. per annum from October 1, 1903, the date of the arrival of the ship in port. To this should be added other items of expenditure occasioned by the damage, namely: Moving steel on Columbia dock, $3.50; wharfage, $22.25; storage, $22.60; (The Giulio, supra); and also, I think, commission on sale of the steel, $68.75—making a total added of $117.10.

I disallow the item for telegrams and that for counsel fees, as being for the individual benefit of the libelants; also the items for premium occasioned by giving bond in court, $5.00, and court costs advanced, $18.20, because I assume they will be taxed, of course, following the decree in favor of the libelants.

THE PRINTER.

(District Court, W. D. Washington, W. D. August 17, 1907.)

No. 438.

TOWAGE—LOSS OF TOW—INSUFFICIENT ANCHORAGE.

A tug which had engaged to tow two schooners out of Gray's Harbor to sea started with them, but, the tide not being favorable for crossing the bar, anchored the two vessels inside the bay to await the proper condition of the tide on the next day, and left them. The wind was high at the time from the east, and increased later and the tide was ebb. At once one of the vessels commenced to drift; it appearing from a preponderance of the evidence that the anchor chain parted. Another anchor was dropped, but its chain also parted, and the vessel drifted on the bar and was wrecked. Both anchor chains were worn and rusted. The other vessel remained safe at her anchorage. *Held*, that the tug was not in fault for not at once taking the vessels over the bar, although it could possibly have been done with safety, that being a matter as to which the master was required to exercise his judgment, but that she was in fault for anchoring the vessels so near together that the one which was wrecked could not use a proper length of anchor chain and for leaving them without seeing that both were securely anchored; that the wrecked vessel was also in fault because of her defective and insufficient anchor chains, and entitled to recover only half damages from the tug.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Towage, §§ 23, 25.]

In Admiralty. Suit in rem, to recover damages for the loss of the three-masted schooner Alcalde, alleged to have been caused by negligence in the performance of a towage contract. On the evidence, the court decides that the loss of the Alcalde was caused by concurring negligence of the owners and masters of both vessels, and that the damages and costs be divided equally.

H. W. Hutton and W. L. Sachse, for libelants.
Austin E. Griffiths, for claimant.

HANFORD, District Judge. In the month of February, 1904, the steam tug Printer undertook to tow the three-masted schooner Alcalde, together with the schooner W. J. Patterson, both loaded with full cargoes of lumber, from Aberdeen on Gray's Harbor, in the state of Washington, outward to sea. The weather on that day was cloudy and wet, and there was an east wind prevailing, the velocity of which, according to the record of the weather station at North Head, 40 or 50 miles from Aberdeen, until 1 o'clock p. m., was from 16 to 21 miles per hour, and increased in force during the afternoon to 28 miles per hour, and continued to increase to 39 miles per hour at midnight; the highest velocity during the day being 44 miles. This record indicates the proximate force of the wind affecting the case with greater accuracy than any other evidence submitted. The vessels started from Aberdeen about 11 o'clock a. m. on a flood tide, and about one hour before the time of high tide. There is a bar at the entrance of Gray's Harbor, and it is not deemed by navigators to be prudent to attempt to take a vessel over the bar on an ebb tide, and for that reason the tug took the two vessels to an anchorage near the north shore of Gray's Harbor, about seven or eight miles below Aberdeen, arriving there about 1 o'clock p. m., where she first let go of the Alcalde, and then placed the W. J. Patterson, which was a larger vessel, about three-quarters of a mile distant downstream, where she was safely anchored and remained during the prevailing storm, holding by one anchor with 70 fathoms of chain. The captain of the tug deemed the position of the Alcalde to be unsafe, being too near the mud flats at low tide. He therefore returned and took that vessel in tow, and moved her to what he deemed to be a better position, about the same distance from the Patterson as her first position, where her port anchor was dropped and 30 or 40 fathoms of chain paid out, and, as soon as the towline was released, the tug steamed away to Hoquiam, to wait until the next day, when, at the proper stage of the tide, she was to return to complete her contract by towing both vessels to sea.

The time of the second anchorage of the Alcalde was between 1:30 and 2 o'clock p. m., which was but a short time after the beginning of the ebb tide. The force of the wind was then in the same direction as the tide—that is, outward, towards the bar—and by the combined force of the wind and tide the Alcalde drifted by the W. J. Patterson, and continued drifting until she struck on the bar, and became a complete wreck. The Alcalde carried a port anchor, weighing about 1,400 pounds, and a starboard anchor, weighing 1,600 pounds, and a small kedge. There is no important contradiction or discrepancy in the testimony upon which the facts thus far recited have been established. As to other facts the evidence is conflicting, and my conclusions are based upon what I deem to be the preponderance of the evidence.

The place where the vessels were left by the tug is customary anchorage ground, and as good for the purpose as any part of Gray's

Harbor. The Alcalde's anchor chains were old, worn, and crystallized, and unfit for service as ground tackle for a vessel of her size. The testimony on the part of the libelants is to the effect that the Alcalde began to drift immediately after releasing the tug the second time; that she dragged her port anchor with 35 fathoms of chain until after she passed the Patterson; that it was unsafe to pay out more chain when she began to drift because of the danger of running afoul of that vessel; that, after passing the Patterson, she dropped her starboard anchor, and paid out 35 fathoms of chain, which broke as soon as that anchor took hold upon the bottom; that she then paid out more chain on the port anchor until about 55 fathoms in all had been paid out, when that chain also broke. I discredit all the testimony to the effect that the port anchor was dragged, and I am convinced that the vessel went adrift for the sole reason that each of her chains successively broke immediately upon being subjected to the strain of the vessel. My reasons for this conclusion are as follows:

(1) The chains were weak and incapable of standing a severe strain. Under the same conditions, one chain held a larger vessel near the place where the Alcalde started to drift, and it is a self-evident proposition that a good anchor with a sufficient length of good chain would have held the Alcalde also.

(2) The testimony of some of the libelants' witnesses is to the effect that the vessel was not held by her port anchor at all, but commenced to travel downstream as soon as she was released from the tug and continued going unchecked by her port anchor, until she had drifted two miles or more, when she came up on the chain with a jerk, and it then immediately parted, and that, while she was still dragging her port anchor, the starboard anchor was dropped; that the vessel pulled up on it with a jerk, and that chain immediately "snapped"; that she continued dragging the port anchor for an additional mile; that after breaking away from the starboard anchor she swung around, so that her stern came up into the wind, until she was athwart the current and had the wind abeam, and drifted broadside to both the current and the wind, and that she persisted in refusing to head up to the wind after the spanker had been set for the purpose of forcing her stern forward, so that her keel would be in line with the anchor and chain attached to her bow. This testimony is simply absurd, for, unless natural laws were suspended, if the vessel drifted broadside to both current and wind, there was no 1,400 pound anchor with 40 or more fathoms of chain pulling against her bow.

(3) The testimony given in behalf of the libelants by the mate of the Alcalde, although corroborating some of the absurdities sworn to by his associates, contradicts them in one important particular. He says that there was no jerk nor sudden strain upon either chain, but that each in succession parted under a steady strain. The most reasonable inference to be drawn from the circumstances is that the port anchor remained where it was dropped, as the starboard anchor did.

The unsuitableness of the anchor chains was a contributing, and the principal, cause of the loss of the vessel, and it is immaterial whether other faults on her part charged in respondent's answer are sustained or not sustained by the evidence.

On the other hand, the evidence convicts the steam tug of neglect of duty on her part, and the law requires the loss to be divided. After having undertaken to tow the Alcalde to sea, it was her duty to exercise ordinary care and vigilance for the safety of her tow until her contract had been completely performed. The Margaret, 94 U. S. 494, 24 L. Ed. 146.

There was negligence in her management and breach of duty on her part in two particulars: In the first place, the two schooners were not spaced with sufficient distance between them. In view of the warning of danger given by the increasing velocity of the wind on that day, ample room should have been allowed for paying out sufficient chain to afford the greatest security, but, on account of her position to the windward and upstream and the lack of sufficient distance between them, if the Alcalde had paid out as much chain as the W. J. Patterson did, a collision would have been almost inevitable. In the second place, the facts that the Alcalde's port anchor chain broke as soon as she began to pull on it, and that the tug did not render assistance when she commenced to drift, proves that she was left to her own resources with undue haste. In the condition of the weather then prevailing, the tug had no right to go away until after her tow had been securely anchored. Connolly v. Ross (D. C.) 11 Fed. 342; Hastorf v. Governor (D. C.) 77 Fed. 1000; Hughes v. Railroad Co. (D. C.) 93 Fed. 510; The Thomas Purcell, Jr., 92 Fed. 406, 34 C. C. A. 419; The American Eagle (D. C.) 54 Fed. 1010; The Snap (D. C.) 24 Fed. 510; The Battler (D. C.) 55 Fed. 1006.

The libelants contend that the tug was in fault for not proceeding to take the Alcalde directly to sea on the day of starting, notwithstanding the condition of the tide and the threatening weather. The most that can be said with regard to the argument on this point is that there was a possibility of success in such an undertaking. The captain of the tug, however, had a pilot's responsibility. He was required to act with discretion, and would have been responsible if a disaster had resulted from any lack of prudence in attempting to cross the bar under the conditions stated. Humbolt Lumber M'fg Ass'n v. Christopherson, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264. His conduct must be judged by circumstances which necessarily had to be considered at the time, rather than by theories based upon after-acquired knowledge. I therefore acquit the respondent of all blame and responsibility in this particular, and I hold that it is liable for half the damages only, for the reasons above stated. I grant the respondent's request for leave to amend the answer by denying that the value of the Alcalde at the time of the loss was greater than $3,000, in order to have the benefit of that issue if desired in an appellate court. Notwithstanding the amendment, however, I find the value of the vessel with her equipment and stores to have been $10,000, and the value of the personal effects of Capt. Harris to have been $700, making the total loss $10,700 to be divided.

Accordingly, I direct that a decree be entered in favor of the libelants for $5,350, and that the total amount of taxable costs be divided equally.

PERKINS et al. v. NORTHERN PAC. RY. CO. et al. KENNEDY et al. v. GREAT NORTHERN RY. CO. et al. WOODWARD et al. v. CHICAGO, M. & ST. P. RY. CO. et al. LIVINGSTON et al. v. CHICAGO & N. W. RY. CO. et al. BREWSTER et al. v. CHICAGO, ST. P., M. & O. RY. CO. et al. SHILLABER v. MINNEAPOLIS & ST. L. RY. CO. et al. HUMBIRD v. CHICAGO GREAT WESTERN RY. CO. et al. BARROWS v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO. et al. CARLE v. CHICAGO, R. I. & P. RY. CO. et al. JAMES v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, D. Minnesota, Third Division. September 23, 1907.)

Nos. 857-865, 870.

1. COURTS—JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE.

A suit to enjoin state officers or a state commission from enforcing a state statute or regulation fixing maximum railroad rates is not one against the state, of which a federal court is prohibited from entertaining jurisdiction by the eleventh constitutional amendment; no property or revenues of the state being affected by such suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 844½.

Federal jurisdiction of suits against state, see note to Tindall v. Wesley, 13 C. C. A. 165.]

2. EQUITY—PLEADING—MULTIFARIOUSNESS OF BILL.

A bill which seeks to enjoin the Attorney General of a state from taking steps to enforce state statutes fixing railroad rates is not multifarious because it also joins the members of the State Railroad and Warehouse Commission as defendants, and asks an injunction restraining them from enforcing an order made by them under legislative authority also affecting rates.

3. CORPORATIONS—SUITS BY STOCKHOLDERS—CONDITIONS PRECEDENT.

Stockholders in corporations, who made demand either upon the directors or the managing officers of their corporations to refuse to comply with a state statute alleged to be unconstitutional, and whose demands were in each case refused on the ground of the severe penalties imposed by the statute upon such officers and directors for their failure to obey its requirements, *held* to have sufficiently complied with equity rule 94 to entitle them to maintain a suit in a federal court to enjoin the corporation from complying with such statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 793.]

4. CARRIERS—STATE REGULATION OF RATES—DETERMINATION OF VALIDITY.

Where a state enacted successive regulations of rates to be charged by railroads on intrastate business, each of which necessarily affected the earnings of the railroad companies, the validity of such regulations as to whether they are unconstitutional as confiscatory is to be considered separately; the first without reference to the subsequent ones, and the latter with reference to the effect of those previously enacted.

5. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to enjoin the enforcement of state enactments regulating railroad rates, on the ground that the same are confiscatory and would deprive the railroad companies of their property without due process of law and deny them the equal protection of the laws, in violation of the fourteenth constitutional amendment, is one arising under the Constitution of the United States, of which a federal court has jurisdiction on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 820, 822.

Jurisdiction in cases involving federal question, see notes to Bailey v. Mosher, 11 C. C. A. 308; City of Helena v. Mills, 5 C. C. A. 11.]

6. INJUNCTION—PRELIMINARY INJUNCTION—GROUNDS FOR DENIAL.

Where rates of charge by railroad companies for the intrastate carriage of commodities and passengers have been fixed by the state, and such rates have been accepted and put into operation by the railroad companies, a preliminary injunction will not be granted at suit of stockholders of such companies to restrain further enforcement of such rates by the state or obedience thereto by the companies; the legitimate purpose of such an injunction, except in cases of fraud, being to preserve the status quo pending a final hearing on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 302–306.]

7. CARRIERS—STATE REGULATION OF RAILROAD RATES—CONSTITUTIONALITY OF STATUTE.

A preliminary injunction granted restraining the putting into effect of Act Minn. April 18, 1907 (Laws 1907, p. 313, c. 232), fixing rates for the carrying of commodities by railroads within the state on the ground that such rates, if enforced, in connection with reductions in both commodity and passenger rates made by prior acts, would on the showing made be confiscatory, and would deprive the companies of fair compensation for the services performed and a fair return on the property invested.

In Equity. On motions for preliminary injunctions and demurrers to bills.

How, Butler & Mitchell, Robert Thorne, and Robert A. & Henry W. D. Forest, for C. E. Perkins, J. S. Kennedy, J. T. Woodward, C. Livingston, G. S. Brewster, W. Shillaber, J. J. Carle, and H. A. James.

Stiles W. Burr, for J. A. Humbird.

Lancaster & McGee, for F. C. Barrows.

C. W. Bunn, for Northern Pac. Ry. Co.

E. T. Young, Thomas D. O'Brien, Royal A. Stone, C. S. Jelley, and George T. Thompson, for Atty. Gen. E. T. Young and Railroad and Warehouse Commission.

William C. Bicknell, for J. R. Reeve.

T. F. White and George H. Tyler, for O. J. Whiteman.

Wm. R. Begg, for Great Northern Ry. Co.

E. P. Peterson, for John Palm and L. Larson.

F. W. Root, for Chicago & St. P. Ry. Co.

Samuel A. Lynde, for Chicago & N. W. Ry. Co.

Thomas Wilson, for Chicago, St. P., M. & O. Ry. Co.

George W. Seevers, for Minneapolis & St. L. Ry. Co.

A. G. Briggs and J. L. Erdall, for Chicago G. W. Ry. Co. and others.

Alfred E. Boyeson, for Northwestern Fuel Co.

C. Louis Weeks, for C. H. Tripp and E. B. Swygart.

Alfred H. Bright, for Minneapolis, St. P. & S. S. M. Ry. Co.

R. J. Stromme, for E. Sauby.

Stringer & Seymour and R. A. Jackson, for Chicago, R. I. & P. Ry. Co.

LOCHREN, District Judge (orally). Gentlemen, I feel that it is a subject of congratulation that through this long-continued contest there has been such uniform courtesy displayed by counsel on both sides, not only towards the court, but towards each other. The cases have been fully and ably presented to the court, upon both sides. If circumstances permitted, I should be glad to give the cases further consideration

than I feel myself able to. In view of the necessity of attending to other business, and especially in view of the fact that the October term in Minneapolis is coming on, I think it better that I dispose of the cases according to my first impressions than to detain them for further examination, which would hinder the ultimate settlement of the issues.

These suits have been brought by one or more stockholders of each of nine railroad companies doing business within the state of Minnesota, and each of them also engaged in interstate business, claiming that the rates fixed by the Railroad and Warehouse Commission, and which have been termed by counsel the "Merchandise Rates," as well as the rates fixed by the Legislature of the state by the act of April 4th of the present year (called the "Passenger Rate Law"), and the rates also fixed by the Legislature by the act of April 18th of the present year (chapter 232 of the statutes of this year [Laws 1907, p. 313]) are so low as to not afford adequate compensation to the railroad companies for the services that they are required to perform and a reasonable return upon the property which is invested by these railroad companies, and used in the business, and therefore are confiscatory under the provisions of the Constitution of the United States that no state shall deprive any person of life, liberty, or property without due process of law, or deny equality under the laws; that the requiring of the railroad companies to do business at these rates would not afford adequate compensation, and are equivalent to taking their property without due process of law. These bills of complaint are met by demurrers upon various grounds, one of which is that, being brought against the Attorney General and other state officers, but especially the Attorney General, they, in fact, amount to actions brought against the state, which are prohibited, so far as the federal courts are concerned, by the eleventh amendment to the Constitution of the United States. This matter I disposed of at a preliminary hearing, contrary to that contention, holding that, although the state is interested in this matter, these suits are not, in terms nor in necessary effect, actions against the state. No property of the state is affected, no revenues of the state are affected, by the result of the litigation, and although the eleventh amendment to the Constitution prohibits suits, or actions, against the state, by citizens of another state or of a foreign country, the fourteenth amendment provides that the state shall not deprive any person of life, liberty, or property without due process of law. There must be some way to enforce that provision of the Constitution. It is a provision which requires no action of Congress to make it effective. It is a prohibition against the state, and, if the state by any act attempts to deprive any one of life, liberty, or property, without due process of law, the courts must provide some adequate remedy for the protection of such person. It would be a reproach to the courts did they fail to provide an adequate remedy in a case of that sort. And it is unnecessary in these cases to hold that the eleventh amendment would be ineffective as against the later provision, in the fourteenth amendment, if the remedy can be reached in another way; and it seems to me that it can—by tying the hands of the officers of the state, if necessary, in a proper action, and restraining them from attempting to enforce or put in effect a provision of the law

of the state which is unconstitutional under the terms of the fourteenth amendment. This has been done in so many cases that it seems to me it does not now require argument to sustain that position, and I therefore hold that that ground of the demurrer is not well taken.

Another ground is that the bills are multifarious, in joining the Warehouse and Railroad Commission and the Attorney General, because the acts complained of are separate and distinct acts and the acts of different bodies. The order of the Railroad and Warehouse Commission, of September 6th of last year, was promulgated by that commission under the authority of a legislative act, and, as has been decided in many cases, such an order has the same effect as a legislative act; that is, that the Legislature has a right to empower administrative bodies to act in respect to this matter of rates and other matters of regulation concerning public corporations engaged in the business of transportation, so that its order has the same effect as a legislative act. And the other two acts complained of are acts passed by the Legislature. They all amount to legislation that has been put forth by the state, and it seems to me that complaints against all these acts may properly be joined in one action, and that the Railroad and Warehouse Commission have such charge in respect to the enforcement of these rates that they can properly be made defendants in an action of this kind, as well as the Attorney General.

Another objection is that the bills do not show compliance with the ninety-fourth equity rule; such compliance being necessary to permit actions of this sort to be brought by stockholders. Whereas, matters in which a corporation is concerned are properly under the management only of the officers and directors of the corporation, who should ordinarily be parties to an action to enforce corporate rights, and providing that such suit will not be allowed to be maintained by a stockholder unless it appears that he has first applied to the officers and directors of the corporation, demanding that they should enforce the rights which he complains are being infringed, and secure the safety of his property; the property being, of course, ultimately the property of the stockholders, and only upon their refusal to do so will he be allowed to bring an action to protect himself. It seems to me that that has been done sufficiently in these cases. In every one of them an application has been made, either to the directors or to the controlling officers of the corporation whose duty it would be, in a proper case, if it was necessary, to call a meeting of the directors to act upon the matter, and either where the directors have met together, or where the matter has been disposed of by the officers, the stockholders have been met with a direct refusal to take any action to protect the property against these alleged illegal attacks upon it. The reason alleged by the officers of the company and by the directors for not taking such action was, not that they doubted or denied the claim of the stockholders that this order and these acts were confiscatory, and null and void under the Constitution, but that by the provisions of the acts themselves such severe penalties were denounced for any attempted violation of the acts that they ought not to be called upon to incur the danger of those penalties, and would not assume that danger, and, for that reason, would not act in the mat-

ter. And it seems to me, in view of the severe penalties denounced by these acts of the Legislature, that the officers of the corporations could not have done otherwise than to have refused to act under those circumstances, where their action would have laid them liable to severe penalties; and every subordinate, who under their direction should attempt to violate these provisions, being also liable to like penalties, would also refuse. There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any Legislature which could enact provisions of that kind. In case of the refusal to issue a ticket at a certain rate which is fixed by the Legislature as proper, but which the railroad companies hold to be void and unconstitutional (and which would be an act of itself not immoral nor malum in se, but would ordinarily afford the person who was refused the privilege of a ticket a right of action against the railroad company), in case he was in the right and the refusal was wrong, there would be no question but that in a civil action any such person would receive an adequate remedy; there would be no danger that any court or jury would refuse to give ample damages. Beyond question, the result of actions of that kind would be that the damages would almost certainly border on the excessive, instead of failing to remunerate the party for any wrong he would suffer on account of such a refusal. But under the provisions of these laws, acts not immoral or wrong in themselves, but which are only unlawful because prohibited, would entail upon the person refusing to comply with such laws the position of being convicted of a felony. They make the refusal a felony, and impose a punishment very unusual —a fine that might be to the amount of $5,000, or imprisonment in the state prison to the extent of five years, or both, in the discretion of the court; punishments which are applied only to the very highest crimes short of homicide of which men are ever guilty; punishments which would be deemed adequate in cases of burglary, highway robbery, or crimes of the highest character, short, as I say, of homicide. There is no doubt that the directors and officers of railroad companies were entirely justified in refusing to take the hazard that would fall upon them (and their employés, if they acted under their advice) by taking any steps to save the stockholders from the consequences of these laws.

I agree with counsel for the defendants that these matters must be considered separately. For instance, the order of the Commissioners of September 6, 1906, which went into effect on November 15th of the same year, must be considered by itself upon the charge that it did not afford adequate compensation to the railroad companies and had the effect of confiscating their property. If it did not have that effect, it would not have that effect if the subsequent acts added to it had that effect. And so with the act of April 4th—the passenger act. If that did not reduce the revenues of the companies to a degree which would leave them without sufficient compensation, even after the reducing effect of the order of the commissioners, then that would not be unconstitutional; it would be constitutional and proper. And the same remarks would apply to the act of April 18th, which affected the rates chargeable upon commodities. It would have to be considered, of

course, with reference to the reductions theretofore made by the two previous acts; but if that still left enough to compensate the railway companies for their services rendered in the transportation, and left an adequate return upon the value of the property which was used in the transportation within the state, the complainants would have no cause for complaint. But, of course, the latter act must be considered with reference to the reductions made in the earlier order and the earlier act. Now, I will not attempt—it would be impossibe that I should do so—to go through with the different estimates that have been made in respect to the expenses of the railroads in the transportation of freight and passengers, state and interstate, and what is applicable to the state properly.

It is argued that this court has not jurisdiction of the case because it does not raise any federal question, for the reason that there is no controversy as to the effect of the constitutional provision in the fourteenth amendment, that I have referred to, because it is admitted on the part of the defense that the construction claimed for that provision by the complainants is the true construction, and that there is no controversy in relation to it, and that the only controversy arising upon this hearing is in relation to matters of fact alone. With respect to that, I might say that there is not really any controversy in respect to matters of fact, until we come to the ultimate facts in the case. There is no controversy as to what the order of the Railroad and Warehouse Commission actually was. There is no controversy as to the terms of that order or its effect upon the different articles of merchandise in respect to which it fixes the rates. There is no controversy in relation to the purport of the two different acts of the Legislature to which I have referred. There is no controversy with respect to the showing which has been made by the railroad companies as to the cost of transportation, their operating expenses in the past, and the anticipated increase in those expenses in the present year. Nor is there any controversy with respect to the amount invested in these railroad properties, in the first place. There has been no attempt to show that they are different from what they are claimed to be in the showing made by the railroad companies themselves, nor with respect to the fixed charges, which are incumbrances upon these different properties, nor with respect to the amount of stock outstanding in these different companies. In relation to some of them (the Chicago Great Western in particular), I believe that the evidence is that there are no outstanding bonds, anything which is usually reckoned by railroad companies as among their fixed charges; but it does appear that there are outstanding debentures, and that there are classes of preferred stock, several of them, each class in its order being allowed a certain amount of dividend before the next class in order would be entitled to any, and so on, until we come to the common stock. And I am inclined to think that debentures of that kind, and preferred stock, which is entitled to dividends before anything goes to the common stock, are very much of the same nature as bonds or securities, which would be entitled to the payment of interest upon them before there would be any dividends on the preferred or common stock.

That they are very much of the same character as these others which are reckoned under the head of fixed charges.

Now, the showings by the different railroad companies amount to this: That in the years past, including the year 1906, there was not enough revenue from the business carried on within the state, including business that was entirely local to the state and the share of the interstate business which would properly be chargeable to or applied upon the property of the railroad companies within the state, to entirely pay the fixed charges outstanding and afford any adequate dividend or compensation to the owners of the stock itself, which represents the property, after paying all the operating expenses; and the showing was, in some cases, that there were no charges made, in the keeping of the accounts, under the head of or for or on account of depreciation in the road or rolling stock, the property of the company. It is evident that there ought to be a proper account under that head; that a railroad, like everything else, will wear out in time, and they have been used so long in this country that there can be a reasonable estimate of the percentage of loss each year from depreciation of the roadbed, culverts, bridges, rolling stock; that it would be proper to lay aside a reasonable amount to furnish replacements, renewals, and repairs when needed; and that if that was not done the railroad company might soon be in a position in which it could not keep up, with the receipts that it was getting, and maintain its property in an efficient state to render such service as the public is entitled to receive from it. Now this is a matter in which the public has an interest, as well as the railroad companies and the stockholders of the railroad companies. Some of us older men can remember, in the early days, about the time when the state was admitted, the great anxiety that the people of the state had at that time that railroads should be brought into the state; that persons having capital should be induced to bring railroads into the state; that it was necessary for the prosperity and the upbuilding of the state that it should have railroad connections with the rest of the world; that great and successful efforts were made to get large subsidies, in the way of land grants, from Congress; and that almost every community in the state, every village that had hopes of getting a railroad to it, counties, and all the municipalities were ready to vote, and did vote, bonds as subsidies, for the purpose of inducing men with capital to come into the state and build railroads. They could foresee that it was necessary for the advancement and prosperity of the state to bring emigrants and others into the state, and change what at that time was a large waste into the sites of prosperous cities, thriving towns, and villages and farms, and therefore to have railroads built, giving them connection with the rest of the world; that there should be a way to take farm products, grain, cattle, hogs, everything that was produced by the farmer, in the quickest manner to the best market, and to bring into the state commodities that were needed by its people. And that was done. Railroads were built. We have them. We see the effect of the railroads; and I think every one will admit that no institutions that we have had in the state have done so much to bring about the present state of prosperity, upbuild cities, and cover the state with prosperous farms and with a large population, as the railroads; and it

would certainly be a very great calamity if these railroads were dealt with in such a way as to destroy their efficiency and usefulness to the inhabitants of the state. But, notwithstanding this, there is, of course, a danger that the mass of the people, looking upon these large aggregations of wealth, seeing occasionally a person who is reputed to be or who has become wealthy on account of his connection with these railroads, and that they are getting considerable amounts of money from the people of the state as compensation for the services that they are performing, will manifest a disposition to reduce this compensation; to save to the people a certain amount of what they have to pay when they patronize the railroads as passengers, or have commodities of any kind to ship upon the railroads. It is quite natural that they should want to have those charges reduced to the lowest point, at any rate, which would be consistent with keeping up the efficiency of the railroads and the advantages which they are receiving from them. There is a danger that this feeling of selfishness may lead them too far, and reduce this compensation so much that it will not enable the railroads to serve them with efficiency—to keep up their roadbed, culverts, bridges, and everything so that they will be entirely safe for the transportation of passengers and freight, and to keep the rolling stock in the best state of efficiency, and enable them to provide the best service attainable. And that is exactly what those corporations are required to do. They are required to exercise the highest degree of care in relation to the transportation of passengers, and a high degree of care in relation to the transportation of freight, and it is certainly for the interests of the people that they should be enabled to do this; and it would be a very short-sighted policy which would reduce the compensation of these railroads to a degree that would disable them from performing these services fully and fairly for the benefit of the people.

A question has been raised in the case that these rates fixed by the Railroad and Warehouse Commission and by the Legislature trench upon the authority of Congress under the commerce clause of the Constitution, which gives to Congress the entire control and regulation of commerce among the states and with foreign nations and the Indian tribes. There is no question made that this is an exclusive power, and that no state has any right to trench upon it in the least, and the decisions of the Supreme Court have been quite frequently to the same effect. In the Eubank Case (Louisville & N. R. Co. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416), and in the case of the transportation from St. Louis to Texas (I do not remember the title), where the Legislature provided that the shipper could not recover any greater amount than was stated upon the bill of lading, and where, after the bill of lading had been issued, the Interstate Commerce Commission, or some persons acting through its authority, raised the rate, and the railroad company collected the rate, which was above the amount named in the bill of lading, the Supreme Court held that an act of that kind by the Legislature was matter affecting interstate commerce and not within the power of the Legislature to enact. There were several of those decisions referred to on this hearing.

It is claimed on the part of the complainants that these regulations of rates in this state, passenger and freight, do interfere with interstate

commerce, and instances have been cited as to their effect upon transportation between, we will say, the Twin Cities, and points on the border line of North Dakota; a comparison between the rates which the state has fixed, which would govern as between these cities and Moorhead, and rates which would govern transportation across the river to Fargo. And it has certainly been very persuasively argued that these rates, fixed by the Minnesota Legislature in relation to transportation in Minnesota alone, do of themselves necessarily interfere with interstate commerce, and, under the provisions of the Hepburn law, prohibiting discrimination in respect to localities similarly situated, it is claimed that if the railroad companies themselves, without authority of the state, should fix the present rates between these cities and Moorhead and the interstate rates now existing between these cities and Fargo (and the same with Grand Forks and other places) that they would be liable to prosecution for discrimination. And it would seem to be very difficult to avoid that conclusion, and the conclusion that these rates fixed in respect to Minnesota do necessarily and directly affect interstate commerce. But, on the other hand, we have decisions of the Supreme Court, going back at least as far as the case of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and the Granger Cases (Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik v. Chicago & N. Ry. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. P. R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99), and repeated by very many decisions since and up to the present time (the last one being what may perhaps be termed the dictum of Mr. Justice White in the case which was decided only on the 19th of April last), to the effect that the state has the right to fix rates in respect to local business within the state; that each state has that right. That has been, as I say, decided over and over again by the Supreme Court, and as it is a fact that, if these rates fixed by the Minnesota Legislature do interfere with interstate commerce, it is not simply the rates between here and Moorhead which interfere with it, but it would be as well the rates fixed to any point near the borders of the state, the rates in the state to Willmar, or Detroit, or Crookston, would, in the same way, to a lesser degree, interfere with the interstate rates that existed prior to that time between these cities and points in North Dakota. A holding that they did so interfere, and for that reason are unconstitutional, if held at all, would apply, it would seem to me, to these rates entirely throughout the state. The state is bordered on all sides by other states, and I do not think it can be held that the rates simply to Moorhead might be unconstitutional, and the rest of them constitutional; but, in view of the decisions of the Supreme Court, to which I have referred, and which have been so continually adhered to down to the present time, it seems to me it would be very improper that I should attempt, on this preliminary hearing in this case, to make a holding entirely contrary to those holdings of the Supreme Court. I should hesitate very much before doing so. Although I do not think I ordinarily hesitate in any case to rule as I deem to be correct according to law, I certainly do pause before holding that these rates are not within the power of the Legislature, if they are fairly compensatory.

I have no doubt that Congress might very properly, under the constitutional provision giving it the entire power of control over interstate commerce, assume control of the avenues of interstate commerce, of the railroads which are engaged in interstate commerce, and of all rates which are collected by those railroads, whether within the states or without the states, because the matter of those rates would affect these avenues of interstate commerce, and might affect their ability to continue as avenues of interstate commerce. The rates, if they were fixed by the states, might be fixed so low in one state, and another, and all of them, that the railroads could not exist and could not perform their functions as carriers of interstate commerce, and for the purpose of securing these railroads as carriers of interstate commerce, Congress would have the power, under that provision, to take the entire control of the regulation and the rates which the carriers of interstate commerce, upon the avenues of interstate commerce, would have the right to charge, the same as Congress has assumed the right, under the very same clause, to control the navigation of the coastwise waters, bays, and lakes, and the rivers running through the country, even if the rivers are entirely within a particular state. They have as much control of the Mississippi river above the Falls of St. Anthony as they have between St. Louis and New Orleans; the same control of the Minnesota river, which is entirely within the state—both of which streams have been used for the purpose of navigation within my recollection. On the upper Mississippi, above the falls, there were two lines of steamboats, before the war, for some years, and upon the Minnesota river there were several lines of steamboats, running as far up as Ft. Ridgeley, I think, and after Congress assumed the control of navigation entirely, it applied this control to those rivers just as much as to rivers that run between states and through several states, and applied it to the bays and inlets on the coasts of the ocean, where there was navigation running from one state to another. The same with the coasts upon the Great Lakes. I think there is no doubt but that matter would be within the control of Congress. But, as has been held by the Supreme Court in many cases, where Congress has the power to exercise control, as long as it fails to exercise it, the states may exercise control in all matters that are proper—police regulations at any rate. And until Congress does exercise that control, and certainly while the Supreme Court continues to hold, as it has, that the states may regulate the local commerce that is entirely within the state, I do not think it would be proper that I should attempt to hold that these acts are void as invasions of the right of Congress to control exclusively the avenues of interstate commerce, although I must confess that the arguments to the effect that these particular acts of the Minnesota Legislature do interfere, necessarily and directly, with interstate commerce, are extremely cogent.

Now, with respect to the order of the Railroad and Warehouse Commission which went into effect on the 15th of November last, and which was accepted by the railroad companies, and which they acted under from that time to the commencement of this action, and in respect to the passenger rates, which were fixed by the act of April 4th of the present

year, and were accepted by the railroad companies, it is claimed that no preliminary injunction should issue having the effect to stop the operation of that order and that act, and that the office of a preliminary injunction is simply to keep matters in statu quo until the final decision of the case. That is, ordinarily, the effect of a preliminary injunction, and ordinarily it ought not to be extended beyond that. It is true that there may be cases—for instance, where a trustee of property is attempting to put that property in the hands of a third person and to defraud the cestui que trust of the property or of its use or benefit, and where that is made clear, and where it has not gone fully into effect, but has partly gone into effect, and that is made clear, a preliminary injunction may be made so far mandatory as to require—where the property has been partly taken away from the hands of a trustee, perhaps by his own fraudulent consent, and the cestui que trust is likely to be deprived of it—that even a preliminary injunction may be made mandatory so far as to require that that property be restored to the hands of the trustee, or into such hands as the court may place it, to preserve it for the benefit of the cestui que trust. But that exercise of authority ought not to extend beyond cases where there is actual fraud; where the person receiving the property has no fair claim of right, no fair color of right to the property. If he can show that he has a fair color of right which may be litigated, he ought not to be deprived of an opportunity to preserve the status quo until the matter should be properly determined. Now, in this case, in respect to the rates fixed by the Railroad and Warehouse Commission, it is claimed on behalf of the state (and claimed, no doubt, honestly) that these rates are not confiscatory, that they do afford an adequate compensation for the services rendered, in view of the property which is used in the business, and that they are entirely valid; and the same way with the passenger rates. The state insists (and, no doubt, entirely in good faith) that these rates are compensatory, that these acts are not confiscatory, and that they are not in violation of the constitutional provision in any manner. And it seems to me, under those circumstances, that the preliminary injunction cannot go against the enforcement of the rates fixed by the Commission, nor the passenger rates which have been accepted by the railroads and are in operation. I say this without any reference to the fact that the court would have no right to fix rates if it should be determined to enjoin either of these rates. And this will obviate the necessity, upon this hearing, of determining whether the rates fixed by the Commission, or the passenger rates, together or singly, are confiscatory, and do not afford reasonable compensation for the services rendered and a proper allowance with respect to the property employed. These, I think, need not be considered.

But the act of April 18th, fixing the commodity rates, has not yet gone into effect. It has been restrained by the preliminary order of this court. And if it appears on this hearing that the rates fixed by that commodity act, in view of the lessening of the rates by the Railroad and Warehouse Commission and the lessening of the rates by the act of April 4th, are not sufficient to be compensatory, and are in fact confiscatory, the preliminary injunction ought to go against the putting

of those rates into effect. As has been said, the showing in the case is that, under the rates that were in effect prior to any of these mentioned going into effect, the amount of compensation received by the railroad companies for the services done within this state, in respect to transportation within the state, of property and persons, was not compensatory; that in the case of the stronger roads, although it came very nearly being compensatory, in relation to the others they were far from compensatory. And it was virtually admitted that the effect of the order made by the Railroad and Warehouse Commission was to reduce the amount of compensation which the railroad companies would receive upon the articles that were covered by that order, on merchandise within the state of Minnesota, some 20 per cent. to 25 per cent. (I think that appeared in the report made by the Railroad and Warehouse Commission to the Legislature), and that the effect of the act of April 4th, with respect to passenger rates, cutting the rate from three cents to two cents per mile, which, upon the face of it, would be a cut of 33⅓ per cent., was in fact, in view of all conditions, actually a cut of about 22 per cent. or 23 per cent. of the amount which was paid before for like services. It seems to me, upon this evidence of the conditions before either of those new rates were put into effect, and the reductions made by those rates, that, if there is added the reduction which is attempted to be made by the commodity act, it will reduce the compensation received by the companies below what would be a fair compensation for the services performed, including an adequate return upon the property invested. And I think, on the whole, that a preliminary injunction should issue, in respect to the rates fixed by chapter 232, talked of as the commodity rates, and that there should be no preliminary injunction as to the other rates, although the matter as to whether they are compensatory or not is a matter which may be determined in the final determination of the action.

An order will be entered overruling the demurrers in each case.

In re TINDAL.

(District Court, E. D. South Carolina. June 27, 1907.)

BANKRUPTCY—PREFERENCES—KNOWLEDGE OF CREDITORS—EVIDENCE—FINDINGS.

Evidence *held* to sustain a referee's finding that certain mortgagees, who took their mortgages within four months before the filing of a bankruptcy petition, had no knowledge that at the time the mortgages were given the bankrupt was insolvent, and that a preference was intended, but that another mortgagee, whose mortgage was executed only eight days before the bankruptcy petition was filed, had sufficient knowledge of the bankrupt's actual condition to put him on inquiry, and his mortgage was therefore void as a preference.

Lee & Moise, for Harby.
Haynsworth & Haynsworth, for Norris.
Smythe, Lee & Frost, for creditor unsecured.
C. Du Rant, for bankrupt.

The following is the opinion of I. C. Strauss, Referee:

"On the 18th day of March, 1907, at a meeting of creditors in the above-styled matter, A. D. Harby, as executor of and trustee under the will of Horace Harby, deceased, for and in behalf of his coexecutors and trustees and himself, offered for allowance as a secured claim proof in the form prescribed by law of an indebtedness due to the estate of Horace Harby by the bankrupt, evidenced by a bond executed by the bankrupt on the 1st day of November, 1906, conditioned for the payment of $2,442.43, on the 1st day of February, 1907, with interest from date at the rate of 8 per cent. per annum, payable annually, unpaid interest to bear interest at the same rate; the security therefor consisting of a mortgage executed on the same day by the said bankrupt, covering all of the right, title, and interest of the bankrupt, being an undivided sixth interest and share in and to the property and estate of James E. Tindal, deceased, real and personal. Objections were entered by the trustee to the allowance of this claim as a secured claim, on the ground that the execution of the mortgage in question constituted a preference, under section 60a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], in favor of Harby & Co., and, under section 60b of the bankruptcy act, was voidable at the suit of the trustee. No charge was made by the trustee that the said mortgage was executed by the bankrupt with intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, and that this transaction did not fall within the inhibition of section 67e of the act. Testimony was taken. The bond and mortgage in question are in evidence, and were in fact filed with the proof. The bond was executd by A. J. Tindal unto 'H. J. Harby in his own right, and H. J. Harby, A. J. Harby, J. M. Harby, and Horace Harby, as executors and trustees under the will of Horace Harby, deceased, doing business as Harby & Co.' The condition of the bond was stated in the following language: 'That if the above bound A. J. Tindal, his heirs, executors, and administrators, shall and do well and truly pay or cause to be paid unto the above-named H. J. Harby, in his own right, and H. J. Harby, A. D. Harby, J. M. Harby, and Horace Harby as executors and trustees under the will of Horace Harby, deceased, doing business as Harby & Co., their certain attorneys, etc., the full sum of twenty-four hundred and forty-two and $^{43}/_{100}$ dollars,' etc. The mortgage recited the bond as having been executed unto the executors and trustees under the will of Horace Harby, deceased, and in no way referred to the copartnership existing under the firm name of Harby & Co. H. J. Harby, in testifying, and his counsel, took the position that the estate of Horace Harby was the owner of the bond and mortgage in question, and had loaned the money secured thereby to the bankrupt on the date of the papers, and was an innocent purchaser for a present bona fide consideration. The trustee took the position that the bond and mortgage were executed primarily to secure Harby & Co. The testimony shows, and it was conceded by counsel on both sides, that the bond and mortgage were executed (1) for an advance in money made at the time of $500; and (2) for the purpose of paying Harby & Co. $1,900 for fertilizers advanced in the spring of 1906. Harby & Co. is a mercantile copartnership, consisting of H. J. Harby in his own right and of the estate of Horace Harby. Henry J. Harby managed the business of Harby & Co., and was the leading spirit and practically the sole manager of the affairs of the estate of Horace Harby; he being one of the executors and trustees under the will of the said Horace Harby.

"The bond and mortgage in question are indorsed as follows: 'For value received, the within security and the debt thereby secured are assigned unto the estate of Horace Harby. [Signed] Harby & Co. [L. S.].' The bond and mortgage are dated 1st November, 1906. The check of Harby & Co. on the Sumter Savings Bank for the sum of $500, dated November 14, 1906, was introduced in evidence to show the cash payment of $500 said to have been made at the time of the execution of the papers. The mortgage was recorded in the office of the clerk of the circuit court for Clarendon county, both as a mortgage of real estate and as a mortgage of personal property. The estate of Horace Harby is the claimant. I find, as a matter of fact, that the said bond and mortgage were in the first instance intended to be executed and

delivered to Harby & Co., and were in fact so executed and delivered. I find that subsequently the said bond and mortgage were on January 21, 1907, assigned, transferred, and delivered by Harby & Co. unto the estate of Horace Harby, and the estate of Horace Harby is now the owner and holder thereof.

"Having ascertained these facts, it is evident that the trustee, under ordinary circumstances, would be relegated to his action at law against Harby & Co. to recover any preference which may have been made by the bankrupt to the said Harby & Co., but under the peculiar circumstances of this case, H. J. Harby having acted in a dual capacity, first as the managing partner in the firm of Harby & Co., and, second, as the leading spirit and practically the sole manager of the affairs of the estate of Horace Harby, the estate of Horace Harby would be charged with notice of all facts known to the said H. J. Harby, and, if the execution of said bond and mortgage to Harby & Co. constitutes a preference voidable under section 60b as against Harby & Co., the estate of Horace Harby, as assignee of the said bond and mortgage, could claim no higher rights than Harby & Co., and in the hands of the estate of Horace Harby the said bond and mortgage would likewise be voidable as a preference. 'A creditor will not be permitted to obtain a preference indirectly by transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor, or other colorable device or transaction intended to evade the provisions of the bankruptcy act.' Hackney v. Raymond Bros. & Clarke Co., 10 Am. Bankr. Rep. 218, 94 N. W. 822; In re Beerman, 7 Am. Bankr. Rep. 431, 112 Fed. 662.

"The voluntary petition of the bankrupt was filed herein on the 13th day of February, 1907, and on the 14th day of February, 1907, adjudication of bankruptcy was made. The bond and mortgage in question were executed on November 1st, and were filed for record on the 14th day of November, 1906, so that it is clear that the said bond and mortgage were executed within four months before the filing of the petition herein.

"Section 60a provides:

"'A person shall be deemed to have given a preference if, being insolvent, he has within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procurred or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property; and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.'

"By section 1 (25) 'transfer' is defined as follows:

"'Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the disposition of property absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.'

"From the testimony herein, and all of the facts and circumstances in this matter, including the sworn appraisal of the bankrupt's estate, and including his accounting for the disposition of his property and funds, I must conclude, and I find as matter of fact, that Andrew J. Tindal was insolvent on the 1st day of November, 1906, the date of the execution of the bond and mortgage in question, and therefore the mortgage to Harby & Co., if enforced, would enable Harby & Co. to obtain a greater percentage of their debt than other creditors of the same class at the time of the execution of the mortgage. Consequently, under the authority of section 60a, the said bankrupt, by the execution and delivery of the said bond and mortgage, gave to Harby & Co. a preference.

"Section 60b, provides as follows:

"'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.'

"Therefore, the only question remaining to be considered is whether Harby & Co. had reasonable cause to believe that the said mortgage was intended as a preference. This is a question of fact, and must be determined from all of the facts and circumstances of the case. The bankrupt testified with ref-

erence to this bond and mortgage (page 1 of the testimony) as follows: 'Q. Here is a mortgage that you gave Harby & Company upon your interest as an heir at law and distributee of J. E. Tindal, $1,900. May 1st, 1906. Has that mortgage been proven, Mr. Referee? A. No, sir. Q. Is that for a present consideration? A. It was not. Q. I see the amount is $2,431.40. When was that debt contracted? A. $1,900 was for fertilizers obtained in May, 1906, $500 was some funds, and interest added for the funds. Q. You got the money? Did you get that money, $2,431.40, at the time you executed the mortgage? A. No, sir; I got $500, less the interest. Q. When did you get the balance? A. The balance was for fertilizers, nineteen hundred and some odd dollars. Q. When were those fertilizers furnished you? A. In May. Q. The date of the mortgage is May? A. No, sir; November or December. I have forgotten exactly.' On page 49 of the testimony the bankrupt stated, in reply to the examination of the trustee, as follows: 'Q. When did you see this bankruptcy coming on you? A. About the 13th of February. Q. The 13th day of February; why that is the day you filed your petition? A. That is the time I decided to go into bankruptcy. Q. Well, then, when did you find out you could not pay your debts? A. About the same time. Q. In the fall of 1906, were you not pressed for money? Didn't you see then that you could not pay your debts? A. I didn't know, but thought I could make arrangements. Q. That was in the fall? A. In January or December, 1906, I tried to make arrangements.' The only other testimony with reference to the mortgage in question was given by H. J. Harby and Abe Levi, and a copy of this testimony is hereto attached. The testimony of H. J. Harby was substantially as follows: That the bankrupt had been doing business with him for two or three years, and had always paid promptly. That in the spring of 1906 Harby & Co. sold the bankrupt on open account fertilizers amounting to $1,900. That Mr. Tindal had always paid his accounts promptly, and in fact had anticipated payments. That crops were exceedingly short, and that at the maturity of this debt he went to the home of the bankrupt, and asked him for payment. The bankrupt told him he could not pay, and Mr. Harby then asked him for a mortgage of his individual property, and the bankrupt told him that it was already mortgaged, but that he owned an interest in the estate of his father, James E. Tindal, and would give him a mortgage on that interest. Mr. Harby agreed to take the same, and with the bankrupt went to Manning for the purpose of having the papers prepared. Mr. Harby testified that he had no notice of any kind that Mr. Tindal was insolvent, and on the contrary made especial inquiry regarding the loan, and found that it would be a first class loan for him to take. He states that Mr. Tindal told him that 'that' (referring to the Harby debt) and one other matter was about the only matter he had to get straightened up. That when they arrived in Manning, the bankrupt asked him for an additional loan of $500, and he told him, as the security was good, he was willing to let him have it. Mr. Harby stated that Mr. Tindal told him that he had had a disastrous year; what he had been making and what he had made. That he usually made 200 bales of cotton, and had gotten something like 25 or 30 bales. Mr. Harby was asked why he went on the very day the account became due to see Mr. Tindal, and he said: 'It was a pretty hard year, and I knew very well that Mr. Tindal was like a great many other people in Clarendon county, unable to meet their obligations. I figured in my mind, I will go down and take a paper, and will transfer that paper to the estate of Horace Harby, and get my money. Q. You thought he was hard up? A. Yes; everybody was who farmed. Q. Did you know what other concerns Mr. Tindal was dealing with last season? A. I only know by hearsay, from what I heard from Mr. Tindal at that time. I know since, because I have seen. From what Tindal told me, the only debt of any consequence pushing him was the debt due to the Sumter Banking & Mercantile Company. Q. Did he tell you how much that was? A. He said they claimed that he owed them $2,300 or $2,400, but that it was a mistake; he said that he owed them about $1,800.' Mr. Harby further stated that Mr. Tindal mentioned no creditors to him but the Sumter Banking & Mercantile Company, other than the secured creditors for the purchase of lands bought in his own name outside the estate. Mr. Harby further stated as follows: 'Q. You

thought that you were about the only creditor outside of the Sumter Banking & Mercantile Company? A. Except the secured creditors for the purchase of lands that he bought in his own name, outside of the estate, I thought that the banking company and I were the only creditors, and to go further, his business relations were so obscured as to other parties that it has not been thirty days since the attorney for the estate of James E. Tindal requested to know where that mortgage was, as he wanted the estate of Tindal to take it up, not knowing of these other debts. Q. When was that? A. About thirty days ago—possibly forty-five. Q. Can't you recollect about the time? A. I say about thirty or forty-five days ago. I said "No" that mortgage is in the estate of Horace Harby, and we made it for an investment, and we want it.' It was stated in open court by Mr. Cuttino, one of the attorneys engaged in the matter, that he was the attorney representing the estate of Tindal, who had made the offer to Mr. Harby to purchase the bond and mortgage for the estate, and as late as that time the estate of Tindal had no idea that A. J. Tindal was insolvent. Mr. Harby stated that he never knew that Tindal was in financial trouble until he saw his mules advertised, or his attention was called to the mules being sold in front of the courthouse at Sumpter by O'Donnell & Co. The time was shown to be in January, 1907. He stated that the bond and mortgage were drawn at short time because Mr. Tindal expected to be able to pay when due, and he had partially agreed to extend the time. Mr. Levi testified merely in substance that before Mr. Harby took the mortgage he asked his opinion as to the value of the security. It is evident that the only fact known to Mr. Harby was that crops were generally short in that county, and that Mr. Tindal likewise had short crops; that Mr. Tindal's individual property was mortgaged; that is to say, his real estate and some of his live stock. This was in November, when the crops were being gathered, and before the business of the season was wound up and the result of the year's business could be ascertained. While Mr. Tindal must have known of his financial condition, he could not have known whether he would be able to obtain extensions of time and go on with his business or not.

"The burden of proof is on the trustee to show that Mr. Harby had reasonable cause to believe that a preference was intended. By section 1 (15) of the bankruptcy act, insolvency is defined: 'A person shall be deemed insolvent, within the provisions of this act, when, if the aggregate of his property, exclusive of any property which he may have conveyed, transferred, sold, or removed, or permitted to be sold or removed, with intent to hinder and delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.' And in Re Eggert, 4 Am. Bankr. Rep. 458, 102 Fed. 738, the court say: 'In this respect the act is widely different from the act of 1867. There the term "insolvency" was construed to mean an inability to meet one's obligations as they mature in the ordinary course of business. The term "insolvency" in the present act is equivalent to the term "bankruptcy" in the former act. While, therefore, rulings under the former act are inapplicable in a certain sense, because of this difference in the meaning of the term insolvency, they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time property sufficient, at a fair valuation, to pay all of his debts.' And in Re Eggert, 3 Am. Bankr. Rep. 541, 98 Fed. 843, it was held: 'To constitute a voidable preference, as defined in section 60a and section 60b, the creditor must have reasonable cause to believe the debtor to be insolvent in fact, as the foundation for a reasonable cause to believe that an unlawful preference is intended.' In Brandenberg on Bankruptcy (page 341) the author says: 'A knowledge of facts and circumstances, or the existence of a condition of facts with a knowledge of which he is chargeable, which would put a prudent man upon inquiry, is a reasonable cause to believe a debtor insolvent; and, if a creditor had reasonable cause when taking a preference to believe the debtor insolvent, it makes no difference of what he thought or knew of the debtor's intention in giving the preference. The intention of the creditor is not to be considered.' In Peck v. Connell, 8 Am. Bankr. Rep. 504, the court say: 'The right of a trustee to avoid a preference and recover the property is made to depend, not only upon the act and state of mind of the giving debtor, but the state of

mind of the receiving creditor must also be considered. It is not enough that an advantage in fact be given, but to make it voidable 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. The debtor must have intended to prefer, and the creditor must have had reasonable cause to believe that such intention existed. * * * The bankruptcy act does not take from the creditor all incentive to vigilance; he may still collect his claim from an insolvent debtor by legal process. Such process does not fall within the band of the bankruptcy act, unless the creditor shall have had reasonable cause to believe that it was intended thereby to give a preference. The intention of the creditor to obtain a preference is not condemned. * * * Knowledge or reasonable cause to believe that a preference is intended involves knowledge of a reasonable cause to believe that insolvency exists as a matter of fact.' Savings Bank v. Jewelry Co., 12 Am. Bankr. Rep. 781, 99 N. W. 121; Barbour v. Priest, 103 U. S. 293, 26 L. Ed. 478. In the case of Grant v. Bank, 97 U. S. 80, 24 L. Ed. 971, the court say: 'It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a secured payment for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law. Receiving payment is put in the same category in the section referred to as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside, and yet this could be done in a large proportion of cases if mere grounds of suspicion of their insolvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassment, either participate in the same feeling, or at least are willing to think, that there is a possibility of his succeeding. To offer to hold and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankruptcy law an engine of oppression and injustice. It would in fact have the effect of producing bankruptcy in many cases where it might otherwise be avoided.' This doctrine was reaffirmed in Stuckey v. Bank, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. In Hackney v. Raymond Bros. & Clarke, 10 Am. Bankr. Rep. 216, 94 N. W. 823, it was held: 'That notice that a debtor has not paid a claim at maturity is not necessarily a conclusive notice of insolvency under the present law.' In the case of Eggert, 4 Am. Bankr. Rep. 450, 102 Fed. 742, the court say: 'The only fact brought home to the creditor, and which it is claimed should have aroused inquiry, is that he was somewhat behind in the prompt payment of his obligations. We cannot say, as a conclusion of law, that knowledge of that fact, standing alone, was sufficient to put the creditor on inquiry. Indeed it may be said that a majority of merchants, absolutely solvent in the sense in which the term is employed in the bankruptcy act, are not at all times able to promptly meet their obligations as they mature. To hold that a creditor receiving payment of or security for a past-due debt is by the mere fact of knowledge that the debt is past maturity put on inquiry of his debtor's inability to pay all of his debts, and that under such circumstances is receiving payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive.' In Dutcher v. Wright, 94 U. S. 553, 24 L. Ed. 130, the court say: 'If it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor seeking the preference as clearly to have put a prudent man upon inquiry, it

must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained that fact by reasonable inquiry.'

"There is no showing here that Tindal himself was conscious of his insolvency on November 1, 1906; there is no statement of his assets and liabilities; there is no showing that Mr. Harby could have known who Mr. Tindal's creditors were other than those named to him by Mr. Tindal, and those of whom he is to be held to have had constructive notice by reason of the public records; there is no proof as to the extent of Mr. Tindal's means; there is no showing that there was even a suspicion of his insolvency in the minds of the public at that time. The public records disclose the fact that Mr. Tindal's interest in his father's estate, which was supposed to be of considerable value, was unincumbered and that his crops were unincumbered. Mr. Harby was a diligent creditor. In the case of Sirrine v. Stover, Marshal & Co., 64 S. C. 457, 42 S. E. 432, the court say: 'The rule established by the decisions of the United States Supreme Court as to the meaning of the words reasonable cause to believe, etc., under the act of 1867, is applicable in determining the meaning of the words reasonable cause to believe it was intended as a preference under the act of 1898; since a reasonable cause to believe a preference was intended by the debtor involves a reasonable cause to believe the debtor insolvent, as a preference depends on insolvency.' The courts say further: 'In determining whether the taking of a security by a creditor constitutes an illegal preference under the bankruptcy act of 1898 (section 60b), the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debts, or from circumstances which give rise to mere suspicions in his mind of possible insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.'

"It was conceded by the counsel in the case that to the extent of the $500 advanced by Mr. Harby at the time of the taking of the mortgage referred to there was no question, and that to that extent the estate of Harby must be considered a secured creditor. Under the facts and circumstances incident to the execution of the bond and mortgage referred to, I must conclude that the trustee has failed to show that Mr. Harby had reasonable cause to believe that the bankrupt intended to give a preference, and the claim of the estate of Harby must be allowed as a secured claim.

"In the course of these proceedings, on April 10, 1907, an order was made that the property of the bankrupt be sold by the trustee, and in and by said order it was provided that the property sold and disposed of be held to be valued as follows, to wit: 'The interest of the bankrupt in the real estate of the estate of J. E. Tindal, $4,000, the personal property of the bankrupt, $1,000, and the interest of the bankrupt in the personal estate of James E. Tindal of no value, by reason of the claims and off-sets held by and due to the estate of J. E. Tindal.' And in and by said order it was further provided: 'That the funds derived from the sale of the property of the bankrupt be kept in separate accounts by the trustee; that is to say, that separate accounts be kept of the funds derived from the sale of the real estate and of the funds derived from the sale of the personal property.' And the said order further provided: 'That the funds derived from the sale of the said property shall be held by the trustee to answer in the place and stead of the specific property sold to such creditor as may hold claims or incumbrances upon the said property, and which may hereafter be allowed as secured claims; and that the rights of all creditors claiming securities as against specific property be preserved as against the funds in the hands of the trustee.'

"It was conceded that the mortgage held by the estate of Harby, and above referred to, was a first lien in order of priority upon the interest and share of the bankrupt in the estate of James E. Tindal; hence it is ordered that the claim of the estate of Horace Harby be, and the same is hereby, allowed as a secured claim for the sum of $2,442.43, with interest thereon from the 1st day

of November, 1906, at the rate of 8 per cent. per annum, payable annually, and the further sum of 10 per cent. upon the amount so due to cover attorneys' commissions, the same being provided for and secured by the terms of the said bond and mortgage, and that the amount so allowed shall be first paid out of the fund of $4,000 derived from the sale of the interest of the bankrupt in the estate of James E. Tindal.

"On the 11th day of March, 1907, G. Manly Norris offered proof of indebtedness due him by the bankrupt, and demanded that the said account be filed and allowed as a secured claim; the security being a mortgage executed by the bankrupt to the claimant on the 5th day of February, 1907, covering the interest of the bankrupt in and to the estate of J. E. Tindal, both real and personal property. This mortgage was only recorded as a mortgage of real estate. At the same time Mrs. H. H. Norris offered for allowance as a secured claim proof of her account against the bankrupt; the security consisting of a mortgage executed by the bankrupt to the claimant on the 2d day of January, 1907, covering the interest and share of the bankrupt in and to the real estate of the estate of J. E. Tindal.

"In view of the fact that the interests of the bankrupt in the personal estate of J. E. Tindal has been held to be of no value, it is needless to consider the question involved as to the failure to record the mortgage of G. M. Norris as a mortgage of personal property.

"The trustee objected to the allowance of these claims as secured claims, on the ground that the same constituted preferences, under section 60a, and section 60b of the bankruptcy act, and that they were voidable by him for that reason, and on the further ground that the same were void under section 67e of the said act. Inasmuch as the facts are somewhat different, it will be necessary to consider these mortgages separately: In the case of the mortgage of G. Manly Norris, the testimony of the bankrupt is that the mortgage was given to secure an antecedent debt, contracted in May, 1906, and maturing October 1, 1906; that in the latter part of December, 1906, or 1st of January, 1907, the bankrupt had prepared and signed a mortgage covering his interest in the estate of J. E. Tindal in favor of the claimant for the sum of $7,000, and that he went to the claimant, and asked him to make a further advance of $6,000, and take the mortgage as security for such advance and for the sum then due him. At that time the creditor had made no effort to collect his debt, and had required no security. Mr. Norris testified that he refused to make the further advance for the reason that he suspected that the amount wanted would not pay the indebtedness then due by the bankrupt. In answer to the question, 'Q. Were you willing to make him the loan for $7,000?' he says, 'I was willing to make him the loan until I found out exactly how the matter stood, and then I declined to make the loan.' He was asked why he did not make further advances under the mortgage, and he stated that he suspected that it would not pay all of the accounts, and he therefore declined to go further with it. He was then asked: 'Upon making that determination, what did you do? A. Then I asked him to give me a mortgage for the $1,000 that he owed me in lieu of this $7,000 that he had already given. Q. At the time of taking that mortgage for $1,000, did you know of his financial condition better than when you took the mortgage for the $7,000? A. No; I didn't know it. I suspected that it would not pay his accounts.' Mr. Norris was the father-in-law of the bankrupt. The mortgage for $7,000 was not offered in evidence. When this mortgage was presented to him, Mr. Norris evidently undertook to make some investigation, and found such a state of facts as caused him to refuse to make further advances, and to demand security for the indebtedness then due him.

"The principle is well established that courts will scrutinize transactions between relatives with exceeding particularity. I held above that Mr. Tindal was insolvent on November 1, 1906. No showing was made that there was any improvement in his condition subsequent to that time, and I am forced to hold that he was likewise insolvent at the time of the execution of the mortgage to G. M. Norris, and that the enforcement of this security would enable Norris to obtain a greater per centage on his debt than other creditors of the same class. This was within four months of the adjudication in bankruptcy.

"The only question to be determined is, did G. M. Norris have reasonable

cause to believe that the said mortgage was intended as a preference? I conclude that the claimant had knowledge of such facts as would put a reasonable man upon inquiry, and consequently, under the decisions above cited, the claimant is chargeable with knowledge of facts which such inquiry would reasonably be expected to disclose. These facts would have been the insolvency of Tindal and his intention to prefer the claimant.

"It is therefore ordered that the claim of G. Manly Norris be disallowed as a secured claim, but that the same be allowed as an unsecured claim.

"The facts and circumstances attending the execution of the mortgage to Mrs. Norris are somewhat dissimilar from those attendant upon the execution of the bond and mortgage to Mr. Norris. It is true that Mrs. Norris was the mother-in-law of the bankrupt. She dealt with him on her own account. Mr. Tindal owed her $3,000, advanced to him in the spring of 1906, and due November 1, 1906. Mrs. Norris knew that crops were short. She did not desire to press her son-in-law, and made no demand upon him. On January 2, 1907, the bankrupt came to her, and offered to her a mortgage to secure her if she would agree to extend the time for payment. To this she assented. She had no knowledge of his financial condition, and the only facts known to her were that crops were short, and that Mr. Tindal stated he could not then pay the money, and that he volunteered the security. Were these such facts as would put a reasonable person on inquiry? Did she have reasonable cause to believe that Tindal intended a preference? I think not, and it is therefore ordered that the claim of Mrs. H. H. Norris be, and the same is hereby, allowed as a secured claim for the sum of $3,000, with interest thereon at 7 per cent. per annum from the 2d day of January, 1907, and that the same be paid out of the fund of $4,000 derived from the sale of the real estate of the bankrupt next after the payment of the debt allowed in favor of the estate of Harby, or so much thereof as said fund shall pay, and as to any deficiency, that the said claimant Mrs. H. H. Norris be entitled to share as an unsecured creditor in any other funds of the bankrupt estate.

"Under the views which I have taken of the mortgages of Mr. and Mrs. Norris, it is needless to consider the objection of the trustee that the same were executed in contravention of section 67e of the bankruptcy act."

BRAWLEY, District Judge. This case comes up on a review of the report and order of I. C. Strauss, Esq., referee, dated May 29, 1907, allowing as valid a mortgage executed by the bankrupt November 1, 1906, to A. D. Harby, executor and trustee, for $2,442.43, and a mortgage dated January 2, 1907, to Mrs. H. H. Norris for $3,000, and disallowing a mortgage dated February 5, 1907, for $1,000 to G. Manley Norris. The bankrupt filed his voluntary petition, and was adjudicated bankrupt February 13, 1907. All of these mortgages would have been void under the bankrupt act prior to the amendment of February 5, 1903, in that they were executed within four months before the filing of the petition, when the bankrupt was insolvent, and by them the creditors named obtained a greater percentage of their debts than any other creditors of the same class. The main object of the bankrupt act, and one of its most beneficial results, was an equal distribution among his creditors of the estate of the bankrupt. The effect of the amendment referred to is in most cases to practically defeat this beneficial intent, for it becomes necessary now to prove that the party receiving the preference had reasonable cause to believe that it was intended thereby to give the preference. The referee in this case had opportunity, which this court has not, of seeing in person the parties to this transaction, of observing their demeanor, and determining their credibility. The circumstances were suspicious, the mortgages were executed when the bankrupt was gravely embarrassed,

and within less than four months of the date of filing the petition, when it appeared that he was hopelessly insolvent. It appears that the bankrupt had in the year 1905 planted and raised a large crop of cotton, had paid off large sums of money advanced in the raising of the crop, and was in excellent credit; that he was a young man of unusual energy and skill and of buoyant disposition, and that, encouraged by his success in 1905, he planted very largely in 1906, securing large advances, whereby he was enabled to advance to tenants and others, having under his control about 79 ploughs. The year 1906, owing to weather conditions, was a disastrous one in the county where he lived, and the crop of that year was wholly insufficient to realize an amount sufficient to pay his indebtedness, but his father, who was a man supposed to be of large means, having died that year, it was thought that he would share a considerable inheritance, and it appears that his credit, therefore, was not greatly impaired. Being of sanguine disposition and energy, he expected to secure advances and to go on planting upon a large scale in the year 1907. He had among his assets claims against the tenants and others to whom he had made advances in 1906 amounting to about $20,000, and it was his hope and expectation that, if he succeeded in raising the money necessary to continue his planting operations in 1907, he would secure payment of this indebtedness, and, so far as appears from the testimony and from the finding of the referee, it was not until within a few days prior to the filing of the petition in bankruptcy that, being unable to procure the necessary advances, he realized his true condition, and filed his petition in bankruptcy. Harby, a merchant in Sumter, had sold him goods during the year 1906, taking no note or security; thus showing entire faith in the good credit of the bankrupt. It was understood between them that the money was to be paid about November 1st, and, not receiving payment, he went to the plantation of the bankrupt about November 1st, obtained a mortgage, and transferred it to the estate of his father, of whom he was one of the executors, thus obtaining the money needed in his business. Harby has testified that at that time he did not believe that the bankrupt was insolvent, and had no ground for believing that this mortgage was intended as a preference. The referee has found as a fact that the creditor had no reasonable cause to believe that the mortgage was intended as a preference, and that he had no knowledge of the real pecuniary condition of the bankrupt. Mr. Frost, the largest creditor, whose claim amounts to about ————, lived in Charleston. There is no testimony showing that the amount of this indebtedness was known to Harby or in that neighborhood. In the usual course of business, such fact was not likely to be made public, and, although it was well known that the crops were very short that year, it did not necessarily follow that all the planters in that region were insolvent. I do not find in the testimony sufficient ground to reverse the referee's conclusion as to the Harby mortgage, and it is therefore affirmed.

The next mortgage is that to Mrs. H. H. Norris for $3,000, dated January 2d. It appears that Mrs. Norris was the mother of the bankrupt's wife, and naturally any transactions between the bankrupt and members of his family required close scrutiny. The common instincts

of human nature incline one in failing circumstances to provide for those of his own household, and the nearest of kin are likely to be preferred. It appears from the testimony that the bankrupt had borrowed this money from his mother-in-law early in the year 1906, to be repaid in the autumn, when his crop was sold; that in the autumn, finding his crop short, he proposed to his mother-in-law to extend the loan, and executed this mortgage January 2, 1907, in order to secure it. There is no testimony that Mrs. Norris was acquainted with the bankrupt's actual condition. She lived in another county, separated by a river, and it appears that her son-in-law and his wife, according to the testimony, were in the habit of paying a yearly visit. The same considerations which led the referee to the conclusion that Harby had no reason to believe in accepting the mortgage that a preference was intended has led him to a like conclusion with respect to the mortgage to Mrs. Norris, and his order respecting it is affirmed.

Next is the mortgage to G. Manley Norris for $1,000, executed February 5, 1907. This was only eight days before the petition in bankruptcy was filed, when all hope of weathering the storm must have been abandoned, and there is testimony tending to show sufficient knowledge on the part of the mortgagee of the bankrupt's actual condition as to put him upon inquiry, and, as that inquiry would have demonstrated a hopeless condition of insolvency, the referee's conclusion that this mortgage is void, because the creditor had reasonable cause to believe that a preference was intended, will not be disturbed.

The able and well-considered report of the referee, stating all the facts and the law applicable thereto, renders further review unnecessary.

The orders made by the referee in accordance with the said report are affirmed.

RIVER SPINNING CO. v. ATLANTIC MILLS.

(Circuit Court, D. Rhode Island. March 25, 1907.)

No. 2,741.

1. SALES—BREACH OF CONTRACT BY PURCHASER—REMEDY OF SELLER.

The price of goods contracted to be sold and delivered, but which have not been delivered nor accepted so as to pass title to the buyer, cannot be recovered under a count in assumpsit for goods bargained and sold, the only remedy of the seller being an action for damages for breach of the contract, and the rule is the same whether the contract is one to sell merely or to manufacture and sell, in the absence in the latter case of the assent of the buyer to an appropriation on the contract of goods manufactured by the seller, or unless they are of such peculiar character as not to be marketable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 958, 960.]

2. SAME—CONSTRUCTION OF CONTRACT.

A written contract to sell a specified quantity of yarn of a stated quality, at a stated price, to be delivered in smaller quantities at intervals, is not one to manufacture and sell, but an executory contract to sell only, although the seller owned and operated a mill for making yarn, and it was contemplated by the parties that the yarn should be spun at such mill, since it was not bound to so make it.

[Ed. Note.—Contracts for sale of things to be produced or manufactured, see note to Star Brewing Co. v. Horst, 58 C. C. A. 363.]

3. SAME—MEASURE OF DAMAGES FOR BREACH.

Where a purchaser refuses to take goods bought which the seller has not on hand, but is to manufacture or purchase, the measure of his damages recoverable for breach of the contract is not the difference between the contract price and the market price of the goods at the time of the breach, but the actual profit he would have made on the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1106.]

4. SAME.

A company operating mills for making yarn which contracted to furnish to a buyer a quantity of yarn to be delivered as required in the future, after the completion of a contract then existing between the parties, on the refusal of the buyer to order or accept any further deliveries under the contract, *held* not entitled to recover as damages for its breach a loss resulting from a resale of wool which it bought some two years before it was required and reserved for use in filling the contract, although it was suitable for use on other contracts; such an element of damages apparently not being within the contemplation of the parties when the contract was made.

At Law.

Walter F. Angell, Frank H. Swan, and Edwards & Angell, for plaintiff.

Rathbone Gardner, Wm. H. Thornley, Gardner, Pirce & Thornley, John W. Boothby, and Boothby & Baldwin, for defendant.

BROWN, District Judge. This is an action of assumpsit by the River Spinning Company, a Rhode Island corporation, against the Atlantic Mills, a corporation organized under the laws of Maine, and was begun by attachment of real property by writ issued by the state court. Upon removal a jury trial was waived, and the case heard by the court on oral testimony and documentary proofs.

The declaration contains two special counts, also a count for goods bargained and sold, and other common counts.

Findings of Fact.

I find the facts as follows:

The following letters passed between the plaintiff and the defendant:

"Providence, R. I., March 20th, 1900.

"Mr. Andrew Adie, Agent,
"River Spinning Co., Woonsocket, R. I.

"Dear Sir: I beg to confirm the conversation over the 'phone to-day, and understand that you have sold us 250.000 pounds of what we call the regular 6½ run woolen yarn, at 81½¢ a pound. Also 250,000 pounds of special 6½ run, at 83½¢. This yarn to follow along after the present contracts with you are filled.

"It was not mentioned to-day, as a part of the conversation, but as nearly as I can remember the conversation, previous to your illness and mine, we were to have at the beginning of this contract (if you increased the capacity of your machinery at that time) deliveries of some 6,000/7,000 lbs. per week more, than we are now receiving. In other words, after your new machinery was in, and installed.

"It is also understood to be a part of this contract, that the Atlantic Mills deliver to you 250.000 lbs. of Noils, either 'X.X.' or 'X.X.X.' Z or P Noils, as they may be making from time to time, at 2¢ per pound less, than the contract price for this year, made with Mess. Asa Peck & Co. Will you, at your early convenience, please confirm the above.

"Yours very truly, Atlantic Mills,
"Chas. D. Owen, Agent."

"Woonsocket, R. I., U. S. A., March 30th, 1900.

"Atlantic Mills,
"C. D. Owen Esq., Agt.,
"Providence, R. I.

"Dear Sir: We beg to confirm your esteemed favor of the 20th inst. accepting our offer of 250,000 lbs. 6½-Run Filling Regular, at 81½¢., also 250,000 lbs. 6½-Run Special at 83½¢.

"The above to follow present Contracts. It is also understood to be a part of this Contract that you deliver to us 250,000 lbs. of Noils, XX or XXX Z & P at 33¢. and 45¢. respectively.

"We cannot yet determine what additional deliveries we can make with our increased capacity, but we fully expect to be able to give you 6,000 lbs. per week more, in other words, ¾ of our whole product.

"We trust this will be satisfactory, and esteeming your favors,

"Yours very truly, River Spinning Co.,
"Andrew Adie, Agent."

March 22, 1900, the plaintiff bought 221,036 pounds of wool at the cost of $82,869.53. This was bought at a fair price at that date, and was suitable material for the manufacture of the yarn. The price, by mutual agreement, was subsequently reduced to 76½ cents per pound for regular yarn, and 78½ cents per pound for special yarn, and the price of noils was also reduced. The plaintiff delivered, and the defendant accepted and paid for, all the special yarn; and the defendant delivered, and plaintiff paid for, the noils. The present controversy relates to the lot of yarn which we may designate as 250,000 pounds of regular 6½ run woolen yarn. It was understood by both plaintiff and defendant that the yarn had not been manufactured, but was to be manufactured by the plaintiff, and that spinning instructions were to be given by defendant to plaintiff. Referring to the provisions, "this yarn to follow along after the present contracts with you are filled," and "the above to follow present contracts," I find that, though deliveries of special yarn were begun prior to the completion of contracts existing March 30, 1900, deliveries on previous contracts were not completed before September 24, 1902, and that the defendant was not in default up to this date.

I find that from and after September 24, 1902, and until the date of the plaintiff's writ, March 29, 1904, the plaintiff was willing and ready and able in all respects to make deliveries at the rate of 24,000 pounds per week if the defendant had given spinning directions, or had so requested, and that the plaintiff repeatedly urged that spinning instructions be sent. On October 21, 1902, the plaintiff by letter informed the defendant that the plaintiff had been obliged to carry wool for the completion of the contract for a long period of time, and on November 24, 1902, the plaintiff sent the defendant samples of such wool.

I find that the rate of deliveries of yarn was not expressly agreed upon, but that the defendant, from and after September 24, 1902, was bound to take deliveries at reasonable rates. In considering what was a reasonable rate, I find that at the time of the contract the parties had in contemplation rates of delivery exceeding 18,000 pounds of yarn per week. The rate of deliveries upon the previous contract of November 18, 1899, I find not a proper or reasonable rate for deliveries under this contract. While there is doubt whether, by the terms of the contract of November 18, 1899, the defendant was to have an option

merely as to the kind of yarn, or an option as to the dates and quantities of deliveries, the parties apparently treated said contract as if the latter were the true construction. This, however, is insufficient to import such an option into the present contract. I find that the defendant did not, by the terms of the present contract, have an unlimited option as to the time of deliveries, but was bound to take at reasonable rates, and that the plaintiff was ready and willing to make such reasonable deliveries that, if the defendant had called for or accepted them, the contract would have been fully performed long before September 12, 1903, the date claimed in the plaintiff's bill of particulars.

At the date of the plaintiff's writ, March 29, 1904, the defendant had received and paid for 23,352 pounds of regular yarn, leaving undelivered at this date 226,648 pounds of yarn. Of this the plaintiff had manufactured 43,885 pounds in anticipation of spinning instructions from the defendant. I find that the plaintiff, in proceeding to manufacture said yarn, acted in reasonable reliance upon the defendant's original agreement to accept and pay for the same. About the early part of July, 1903, defendant's agent, Mr. Owen, was informed that the plaintiff's agent was anxious to get delivery directions for yarn that was manufacturing at plaintiff's mill, and which plaintiff's agent said plaintiff was "compelled to put into our stock awaiting his orders." Mr. Owen said that plaintiff was manufacturing yarn for him now against said contract (of March, 1900) at great risk. I find no evidence as to the plaintiff's disposition of the yarn that it manufactured, save that it put the same into stock awaiting orders. I find no evidence of any act of appropriation of any specific yarn by the plaintiff to the defendant, and I find no evidence that the title to the yarn manufactured by the plaintiff ever became vested in the defendant prior to the date of the writ. I find no evidence that the defendant at any time assented in any way to taking title to yarn save upon specific orders for specific deliveries, and I find that no specific order was given for any of the yarn in plaintiff's hands at the date of the writ. After the beginning of the present suit the defendant received and paid for 10,687 pounds of yarn, leaving in the plaintiff's hands 33,198 pounds of yarn for which it claims the contract price.

The continuous failure of the defendant to give spinning instructions, or to accept and receive reasonable amounts of yarn, was without justification, and excused the plaintiff from manufacturing more yarn than it did manufacture, and constituted a complete breach of the contract by the defendant prior to the date of the plaintiff's writ. The question whether the defendant, in explicit terms, made a refusal to accept more goods, I regard as immaterial, since the plaintiff's right to recover rests upon a breach of the contract already past at the date of the writ, and not upon an anticipatory breach, or upon an express declaration by the defendant that it would not complete its contract.

I find that 221,036 pounds of wool in plaintiff's hands at the date of the writ was more wool than was required to manufacture the 182,176 pounds of undelivered yarn not manufactured. I find that 100 pounds of wool will manufacture 110 pounds of yarn, and that the yarn in question was to contain 12 per cent. of material other than this wool, to wit, 12 per cent. of noils. The sale of wool by the plain-

tiff on April 6, 1904, was fairly conducted, but more wool was sold than was carried for the completion of the contract. The plaintiff has offered no evidence as to the market value of yarn or of wool at the time of the defendant's breach or at the date of plaintiff's writ. I am, therefore, unable to determine the market value of yarn at any time, or the market value of the wool at any time other than at the date of the original purchase, March 22, 1900, and at or about the date of sale, April 6, 1904. At this date, which was after the date of the writ, the plaintiff sold 219,830 pounds of wool for the price of $58,740.13.

I find that the wool purchased March 22, 1900, was not special material, but material suitable for use in plaintiff's general business; that the plaintiff, in manufacturing 250,000 pounds of special yarn, might have used 83,333 pounds of said wool, and in the manufacture of 67,236 pounds of regular yarn might have used a considerable amount in addition, had it so chosen. The plaintiff used none of this lot of wool upon this contract, and in using other wool did not consult the defendant. I do not find that the defendant in any way assented to the purchase, appropriation, or holding of any of this wool by the plaintiff for the performance of this contract. I find that, had the contract been performed by the defendant, the plaintiff would have made a profit of 7½ cents per pound on yarn. I find also all such facts not above included as may be referred to or made the basis of the following conclusions of law.

The defendant has appended to its brief certain requests for findings. These seem to involve mixed law and facts; but, as it may facilitate a final disposition of the case, I will pass upon said requests as framed. The first six requests are each and all denied. The seventh request is in part granted, and the eighth and ninth requests are granted, as will be seen from the following conclusions of law.

In the view that I take of the case, more specific findings of fact seem unnecessary; but, in case either party shall desire a more specific finding of facts, a request therefor may be filed within 30 days from the date of these findings.

Conclusions of Law.

The conclusions of law may best be stated in connection with the plaintiff's specific claims for damages.

The plaintiff claims:

(1) The contract price of 33,198 pounds of yarn manufactured and still in plaintiff's hands.

To support this item, plaintiff relies upon the count for goods bargained and sold. This count cannot support the pliantiff's claim for the contract price, for the reason that the title to the yarn did not pass to the defendant. Under such circumstances, the plaintiff's remedy is only damages for nonperformance of the contract. The rule is stated in 1 Chitty on Pldg. (11th Am. Ed.) *347, *348:

"If there have been no delivery of the goods, even the count for goods bargained and sold (not showing a delivery) cannot be maintained, unless it appear that there has been a complete sale and the property in the goods had become vested in the defendant by virtue of such sale, and an actual accep-

ance of the commodity by the defendant. * * * Nor is the property in goods vested in the defendant so as to render the common count for goods bargained and sold sufficient, unless the article has been finished, and specifically appropriated and set apart for the purchaser, and he has assented thereto."

In Benjamin on Sales (5th Eng. Ed.) 816, 817, it is said:

"It may be stated generally that the seller may recover the price of goods sold either where the goods have been sold and delivered to the buyer, or where they have been only bargained and sold to him. [The latter form of action is applicable where the property has passed, and the contract has been completed in all respects except delivery, and delivery is not part of the consideration for the payment of the price, or a condition precedent to its payment, as where payment is by agreement to be made irrespective of delivery, or where the condition of delivery has been waived by the buyer's refusal to take or receive delivery, or has been excused by the perishing of the goods which are at the risk of the buyer. * * *] Where the property has not passed, the seller's claim must [as a general rule] be special for damages for nonacceptance."

See, also, Benjamin on Sales, pp. 805, 812.

The plaintiff requests a ruling upon the following question: Was the contract between the parties one of manufacture and sale?

I am of the opinion that the contract was an executory contract for the sale of a specified quantity of yarn. Though I find that it was fully understood and contemplated by both parties that the yarn was to be spun at the plaintiff's mill, the terms of the written contract did not impose upon the plaintiff the obligation to spin this yarn, and its obligation would have been fully performed by the tender of yarn of like quality spun at other mills.

It does not seem practically important, however, whether this contract be regarded as an agreement to manufacture and sell, or as an agreement which did not bind the plaintiff to manufacture, but only to sell.

"When the seller is to manufacture the goods for the buyer, the rule is that prima facie the property will not pass till the goods are completely made and are appropriated with mutual assent." Benjamin on Sales (5th Eng. Ed.) 358.

According to what seems the better authority, the action for the contract price cannot be maintained even where the goods are manufactured according to the contract, in the absence of the defendant's assent to an appropriation of the goods. Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172; Atkinson v. Bell, 8 B. & C. 277; Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640; Tufts v. Grewer, 83 Me. 407, 22 Atl. 382; Sutherland on Damages, §§ 647–649, p. 1875; Harvard Law Review, March, 1907, p. 363; Kingman & Co. v. Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; 24 Am. & Eng. Enc. Law, pp. 1063, 1118.

Bookwalter v. Clark (C. C.) 10 Fed. 793, on which the plaintiff relies, is of the class of cases which relate to goods manufactured according to a certain measure, pattern, or style, and of such peculiar character that there is presumably no market for them. There is authority for the proposition that in this class of cases an action lies for the contract price despite the defendant's refusal to take the

goods, and notwithstanding that he has given no assent to receiving title other than that implied in his ordering goods; but even these cases do not support the broad proposition that, because goods are ordered to be manufactured, the maker may recover the contract price upon a refusal to receive them.

There is no general presumption that, because goods are to be manufactured, they are not of a marketable character. The fact that the 6½ run regular yarn was to be made to order would be entirely insufficient to raise a presumption that it was not marketable. Such evidence as there is in this case on the subject indicates that, as a matter of fact, yarn of the character in question is a staple for which there is a regular market.

The reasoning in Bookwalter v. Clark (C. C.) 10 Fed. 793, is inapplicable to goods of a marketable character, and it is specially inapplicable where the seller might have fulfilled his obligation by tendering goods made by other manufacturers.

If there are exceptions to the general rule that title does not pass without the buyer's assent to the appropriation of the goods, this case, upon the facts as I find them, is not within such exceptions. The measure of damages as to the lot of yarn manufactured and still in the plaintiff's hands should be the difference between the contract price and the value of the yarn in plaintiff's hands. As there is no evidence tending to show the latter item, it is impossible to estimate plaintiff's damages in respect to this item, or even to know whether it has suffered damage. At best, only nominal damages can be given for this item.

(2) Damages for failure to take 182,176 pounds of yarn which plaintiff did not manufacture.

I find the plaintiff entitled to recover as damages: (A) The profit which it would have made by the completion of the contract, to be figured by deducting from the contract price the amount which it would have cost the plaintiff to produce the same at its mills.

The proper rule of damages in this case I find to be that stated in United States v. Behan, 110 U. S. 338, 344, 345, 346, 4 Sup. Ct. 81, 83 (28 L. Ed. 168):

"The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely, first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract.

"It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of the materials on hand. At least, it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract."

See, also, Kingman v. Western Mfg. Co., 92 Fed. 486, 34 C. C. A. 489; Horst v. Roehm (C. C.) 84 Fed. 565; Roehm v. Horst, 91

Fed. 345, 33 C. C. A. 550; Kohn v. Dravis, 94 Fed. 288, 290, 36 C. C. A. 253.

The defendant contends that this rule of damages is inapplicable to the present case, for the reason that the contract was an executory agreement for the sale and future delivery of a staple article of commerce, and that the measure of damages for such an agreement is the difference between the contract price and the market price at the time of the breach.

While this is a just rule to determine a loss of profit on goods ready for delivery at the time of the breach, as was pointed out in Kingman v. Western Mfg. Co., 92 Fed. 486, 490, 34 C. C. A. 489, it is not the true rule as to goods not then made and ready for delivery. It is a just rule for the buyer in a suit by him, because on the breach, having the money in hand, he may procure the goods on the market, and charge the seller with the difference. But to measure the damages of a seller who has not the goods on hand by the difference between the contract price and the market price is often impractical, and would often be unjust. It would be equally unjust in a case where the seller was to make the goods himself, and in a case where he was to procure the goods from other manufacturers or jobbers. If the vendor can make his goods for less than the market price, he is entitled to his actual profit. If his goods are to be bought, or to be made for him by other contractors above the market price, then his profit would be smaller than the difference between the contract price and the market price. Only if the cost of production and the market price at the breach were the same would the rule be just, and this is practically to say that the rule would seldom be a just mode of determining the loss of profits.

That there is in a suit by the seller no proper basis for a distinction between goods which he is to manufacture (whether bound to manufacture or not), and goods which he is to buy, instead of to manufacture, is apparent from the reasoning of the Supreme Court in Roehm v. Horst, 178 U. S. 1, 21, 20 Sup. Ct. 780, 788 (44 L. Ed. 953), where it is said:

"If the vendor has to buy instead of to manufacture, the same principle prevails," etc.

In figuring what profit the seller has lost, he should be charged with all expenditures which he would have been to for getting the goods in hand for delivery to the buyer, whether he was to make them himself (voluntarily, or under obligation to do so), have them made by other manufacturers, or was to buy them ready made. It is enough to show what would have been the seller's cost of acquiring the goods. The mode of acquisition is irrelevant to the rule that, in order to compensate the seller, the buyer who has chosen to break a contract should pay the seller the profit he would otherwise have made. From the decisions of the Supreme Court above cited, it appears that the principles of compensation are not peculiar to cases where the seller agrees to manufacture, as well as to sell. Furthermore, the seller relies upon obtaining the contract price because it includes his reimbursement as well as his profit. If he has the goods, he can reimburse himself by sell-

ing them. He cannot reimburse himself by selling what has never come into existence or into his hands; and the fact that he is justly excused from making or getting the goods leaves him with no recourse but the buyer for reimbursement for expense and for compensation for loss of profit. The rule for which the defendant contends not only fails to give compensation to the seller for his actual loss of profit, but fails absolutely to recognize the duty of the buyer to reimburse the seller for expenditures.

I am of the opinion that the plaintiff is entitled to recover as its loss of profit the sum of $13,717.19, being 7½ cents per pound upon 182,768½ pounds of yarn not manufactured.

(B) Plaintiff's loss on wool.

The plaintiff claims as damages its loss on a resale of wool which it claims was left on its hands as a consequence of the defendant's breach of contract. The facts, however, do not present the simple case of a purchase of materials which the plaintiff could use only for the unperformed part of the contract.

The wool was purchased in advance of the need for it. The plaintiff could have procured the wool at any time it saw fit, and in buying consulted its own views as to the market. The wool was of a kind suitable for use on other contracts, and could have been used on other contracts had the plaintiff so chosen. It was held by the plaintiff for two years and a half before it was, in fact, needed for manufacture. This reservation of wool for so long a time does not appear to have been contemplated by either party in March, 1900, the time of the contract.

It also appears that during this period the plaintiff had the opportunity, had it so chosen, to have used 83,333 pounds in the manufacture of the special yarn. It elected not to do so, and used other wool for this purpose. It also chose to use in manufacturing for the deliveries of regular yarn other wool than that on hand. If, when manufacturing 67,236 pounds of the regular yarn, it chose to purchase or to use other wool, it exercised its own judgment at a time more than two years after the original contract. If it preferred to reserve this wool for the later and final deliveries rather than to use it for the earlier deliveries, such a choice could hardly have been made without regard to the plaintiff's speculations or opinions as to the wool market. The appropriation of this wool (if it was appropriated) to the final and more remote deliveries was an act of independent judgment. To do this increased carrying charges, and any act of the deferring of the use of this wool for the contract, was an expense not chargeable to the defendant.

That the plaintiff had on hand so large a quantity of wool at the time of the breach, or at the date of its writ, seems to have been due to several reasons—to its purchase of wool in advance of the need for immediate use to fill defendant's orders; to its judgment that, in view of the condition of the market, it was advisable to do so; to its election not to use any part of the wool for the special yarn or on other orders; to its election not to use any part of the wool for its deliveries of regular yarn, or for the yarn manufactured for delivery; to its reservation of the wool for the later and more remote deliveries.

In all these acts of independent judgment, opinions as to the market

were doubtless a factor. It is true that the plaintiff had incurred a fixed charge for a certain quantity of wool; but, when it did so, it had the option of using the wool either for this or other orders for yarn. There was no specific act appropriating the wool to this contract. It is hardly probable that material suitable for use in its regular business would have been reserved during a period of more than two years, unless during that time the condition of the wool market enabled the plaintiff to get wool at a price cheaper than the price it had paid for the wool on hand. So far as the plaintiff went in this contract, it used other wool; and, so far as can be known, had the plaintiff manufactured the remaining 182,176 pounds of yarn, other wool might still have been used, and the present lot still have remained in plaintiff's hands.

The plaintiff contends that this wool was bought to cover this contract, but this means little more than that the plaintiff, in view of what wool it had on hand and of this contract, and doubtless of other contracts, thought it advisable on March 22, 1900, to buy additional wool in anticipation of or as a precaution against a higher market. Can it be said that this defendant is in any proper sense responsible for the fact that the plaintiff not only bought at a high market, but that it reserved the wool for four years and unloaded it on a low market? It must not be overlooked that this material was not special material adapted for use only on this contract. It was such material as was ordinarily used, and as was usable in the plaintiff's ordinary business.

It is probable that the contract was a factor in the plaintiff's judgment that it should buy wool on March 22, 1900; but how important a factor it was in view of other considerations, of other contracts with this defendant and with third persons, or prognostications as to the wool market and as to other orders, it is impossible to say. That it was the sole factor, or even a principal factor, is not apparent. The amount of wool bought does not correspond to the amount required for this contract; and the amount of wool reserved does not correspond with the amount required to complete the contract. There seems to be little more warrant for saying that this lot of wool was appropriated for this contract than for saying that the lot of 349,000 pounds of California wool in the grease at 11½ cents a pound (which apparently was figured by Mr. Adie in estimating the profit) was appropriated for this contract.

So far as the plaintiff bought wool merely to cover its obligations to deliver yarn, as a protection against a change of price of wool as distinguished from the provision of material necessary for the contract, his dealings in wool must probably be regarded merely as a collateral enterprise, for the results of which the defendant is not responsible. But, at all events, the postponement of deliveries of the regular yarn for more than two years and six months seems to break all connection between what was in the contemplation of the parties at the date of the contract and the final outcome. There was also the intervention of independent acts of judgment in reserving the wool when an opportunity arose to use it.

It is well settled that one who breaks his contract is answerable only for such consequences as may reasonably be supposed to be in the contemplation of the parties at the time of making the contract. Globe

Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. After a careful consideration of this item of loss, I am of the opinion that it was neither a necessary nor a contemplated consequence of defendant's acts, and is too remote for allowance.

The plaintiff may take judgment for $13,717.19 damages, with interest from September 12, 1903.

THE SHAWMUT.

THE MYRTLE TUNNEL.

(District Court, D. South Carolina. July 9, 1907.)

1. SALVAGE—BASIS OF COMPENSATION—QUASI DERELICT.

Prima facie a vessel found at sea in a situation of peril, with no one on board, is a derelict; but, where the master and crew have left temporarily for the purpose of obtaining assistance, and with intent to return and resume possession, she is not technically a derelict, although another vessel finding her in such condition and rescuing her is entitled to salvage compensation as in case of a derelict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 7, 8.]

2. SAME—SCHOONER TEMPORARILY ABANDONED AT SEA—SALVAGE AWARD.

The schooner Myrtle Tunnel, laden with cross-ties, was disabled by a hurricane off the Florida coast, and, a passing steamer being unable to tow her, the master and crew took passage on such steamer to Charleston to procure assistance. The master proceeded to Savannah, where her owners resided, who hired two ocean-going tugs to go in search of the schooner. Three days later the steamer Shawmut, on a voyage from Jacksonville to Philadelphia, finding the schooner abandoned and waterlogged, took her in tow and proceeded with her to Jacksonville, which was the nearest port, and some 60 to 75 miles distant. Owing to her being so deep in the water, she could not be taken over the St. John's Bar, and the master of the Shawmut, after a delay of a day and a half, by direction of his owners, took her to Charleston. One of the tugs sent out to search for her came up with the Shawmut and her tow before they reached the bar, and demanded that the schooner be surrendered to her, and also that she be taken to Charleston, advising the master of the Shawmut that she could not cross the St. John's Bar. The other tug joined them at the bar, and both accompanied the Shawmut and tow to Charleston. The value of the schooner and cargo was $38,500. *Held* that, under the rule that a salvor is bound to the exercise of ordinary care only, the Shawmut was not chargeable with fault which deprived her of the right to salvage or lessened the amount to which she was entitled, because she proceeded to the bar and stayed there until the master could communicate with her owner's agent at Jacksonville, or because of his refusal of the assistance of the tugs, or the use of an alleged defective hawser on the towage to Charleston, which proved sufficient, but that she would not be allowed for the hire of two tugs engaged to take the schooner into the harbor at Charleston, the two tugs under hire from the owners being present, and having tendered their services; that under the circumstances, and in view of the efforts being made by the owners to regain the schooner, which would probably have been successful, the Shawmut was entitled to an award equal to one-third the value of the vessel and cargo.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 69.

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.
See 146 Fed. 324.

Miller & Whaley, for libelants.
Bryan & Bryan, for respondents.

BRAWLEY, District Judge. The four-masted schooner Myrtle Tunnel, of which the Paulsen Company of Savannah, Ga., is managing owner, sailed from Brunswick laden with cross-ties, bound for New York, March 31, 1907, and one day out was struck by a hurricane, her sails torn away, her forward house amidships stove in, waterways on port side and her deck load carried away, and was badly leaking. On April 3d her master requested towage by the steamship Mae to the port of Charleston; but said steamship, because of her own damaged condition and lack of coal, was unable to tow the schooner, and at 1:30 p. m. April 3d took off the master and crew, who arrived at the port of Charleston on the night of April 4th. The master forthwith communicated by telegraph with her owners at Savannah, and took the next train to that place. The owners hired the ocean-going steam tugs Jacob Paulsen and the Cynthia to go in search of her; the former leaving on the same day, as soon as she could coal, and the latter on the second day thereafter, when she was free from prior engagements, and the master of the Myrtle Tunnel going on the Cynthia, of which Capt. Avery, a skillful and experienced navigator, was master. The Myrtle Tunnel had been abandoned at a point about 53 miles E. by S. from St. Augustine, Fla., in longitude 80° 16′; latitude 29° 40′. On the night of April 7th, the steamship Shawmut, owned by the libelants, of the value of $100,000, with a cargo valued at $20,000, while on her regular route as a freight-carrying steamship, from Jacksonville, Fla., to Philadelphia, sighted the Myrtle Tunnel, and lying by her until the next morning, and finding that she was abandoned and water-logged, took the schooner in tow, and started to return to Jacksonville. There was a slight discrepancy in the testimony as to the point at which the schooner was picked up; the libel stating it as being about 60 miles from St. John's Bar, and there is testimony that the master of the Shawmut told Capt. Brown that she was picked up at a point about 75 miles from the St. John's Bar and about 90 miles from Charleston. The schooner was carried to the St. John's Bar, arriving on the afternoon of April 8th, where she remained until Wednesday morning, April 10th, on account of her inability, by reason of her depth of draft, to enter the St. John's river. She was carried to Charleston and anchored inside of the harbor on the afternoon of April 11th. The steam tug Paulsen, which had been cruising in search of the Myrtle Tunnel, came up with the Shawmut having her in tow on Monday afternoon. Brown, the master of the Paulsen, states the time at 12:30, and Hansen, the master of the Shawmut, states the time at 2:15; Brown testifying that she was 26 to 30 miles from St. John's Bar, and Hansen testifying that she was about 18 miles. Brown testifies that he informed the master of the Shawmut that the tugs Paulsen and Cynthia had been sent by the owners in search of the Myrtle Tunnel, that her draft was such that she could not enter the St. John's river, and that he had papers aboard which would satisfy the master of the Shawmut of these

facts, and demanded that the schooner be taken to Charleston, and the answer states that he required the steamship Shawmut to turn over the schooner to said tugs to tow her forthwith to Charleston. The tug Cynthia, Avery, master, arrived at the St. John's Bar Monday afternoon, shortly after the arrival there of the Shawmut, with her tow. Avery has described in detail his cruise in search of the Myrtle Tunnel and his plan of operation. He is an uncommonly skillful navigator, and there is little doubt that, according to the plan mapped out and followed by him, he would have discovered the Myrtle Tunnel within a relatively short time after she was actually found by the Shawmut.

This court has recently been called upon to consider many of the questions involved here (The Myrtle Tunnel, 146 Fed. 324; The Flora Rodgers and The J. W. Belano, 152 Fed. 286), and has reviewed most of the cases involving salvage awards. It is unnecessary therefore to state the law with much elaboration.

The first question that arises is whether the Myrtle Tunnel is a derelict. Prima facie a vessel found at sea in a situation of peril, with no one aboard of her, is a derelict; but where the master and crew leave such vessel temporarily, without any intention of final abandonment, for the purpose of obtaining assistance, and with the intent to return and resume possession, she is not technically a derelict. It is not of substantial importance to decide that question. She was what may be called a quasi derelict; abandoned, helpless, her sails gone, entirely without power in herself to save herself from a situation not of imminent, but of considerable, peril; lying about midway between the Gulf Stream and the shore, and about 30 miles from either. An east wind would have driven her upon one, and a west wind into the other, where she would have become a total loss. Lying in the pathway of commerce, with nothing aboard to indicate an intention to return and resume possession, it was a highly meritorious act upon the part of the Shawmut to take possession of her, and the award must be governed by the rules which govern in case of derelicts; the amount of it to be modified in some degree in the interest of the owners in consideration of their prompt, intelligent, and praiseworthy efforts to resume possession of her, wherein they incurred considerable expense. The contention of the claimants in the main is that this award has been forfeited or greatly diminished by the negligence and misconduct of the libelants.

Stripped of the vituperative epithets in which it has been articulated, the charge is:

First. That the Myrtle Tunnel should have been taken immediately to Charleston, that being the only safe port, owing to her draft; that in taking her to Jacksonville, where the depth of water is only 23 feet, she drawing over 28 feet, the schooner was exposed to unnecessary peril. It cannot be disputed that it is the duty of salvors to take the salved vessel to the nearest safe port, and that, of course, means a port into which she can be safely carried. There was no outward or visible indication on the Myrtle Tunnel of her depth of draft. There was a sounding well, from which it could have been approximated by allowance for the skin of the ship and her depth of keel, which were, of course, unknown and unknowable quantities, and a very high de-

gree of intelligence and skill would have suggested some effort to find out her draft; but she was water-logged, the waves washing over her at midships, and when it is considered that lumber-carrying vessels as a rule do not draw as much water as was proved to be the case here, that the master of the Shawmut was acquainted with the port of Jacksonville, and his owners had an agent there, and that he had no personal acquaintance with the port of Charleston, although the Atlantic Coast Pilot, a copy of which he had in his possession, would have given him the necessary information as to the depth of water on the bar at Charleston, it cannot be imputed to him as a culpable fault that he endeavored to make that port, which was nearer in distance. The first officer, who was aboard the Myrtle Tunnel, estimated her draft at 25 feet. If such had been the case, she could by pumping out have been enabled to cross the St. John's Bar. After the tug Paulsen, however, came up with him early in the afternoon and gave him positive information as to the schooner's depth of draft, it was obvious that she could not cross St. John's Bar, and futile to attempt to take her to Jacksonville. It then became his duty to take her to Charleston, where alone she could find safe anchorage, and he would not have been absolved from responsibility for any damage had any accrued by delay or otherwise. The information communicated to him by the master of the Paulsen was accompanied by a demand that the schooner be turned over to him and to his consort the Cynthia, and as the master of the Shawmut was presumably not well informed as to his legal rights, it was not unnatural that he should desire to communicate with his owners, and, as he testifies that he was then only 18 miles from the St. John's Bar, the court does not acquiesce in the contention of the claimant that there was gross and culpable misconduct in proceeding on his way. A high degree of care and prudence would have suggested that he proceed to Charleston, where eventually he was compelled to go; but the rule of diligence obligatory upon salvors is that of ordinary care. The law does not and should not scrutinize too narrowly a service begun with meritorious motive to save property exposed to destruction, and so long as the salvor acts in good faith and exercises that skill and care which a man of ordinary prudence and capacity would be expected to use in the preservation of his own property, his claim for remuneration ought not to be defeated by showing that a greater degree of skill might have avoided any possible peril. Every hour's delay in removing a disabled vessel from the perils of the open sea to a safe anchorage should be avoided; but the salvor in this case had an interest in the salved vessel jointly with the owner, and his conduct, measured by that standard, which requires the same skill as is demanded for the preservation of one's own property, while it may not be free from criticism, seems to be free from that degree of censurable fault which should deprive him of the remuneration to which he is otherwise entitled. The imputation of improper motive in desiring thereby to enhance his reward does not seem to be sustained.

The second fault imputed is in remaining at the St. John's Bar from Monday evening until Wednesday morning, when he started for Charleston. It is some distance from the mouth of the bar to Jacksonville, where the master could communicate with the agent, and it

was not until Tuesday evening that the agent, who had to communicate with the owners in Philadelphia, gave him his instructions. While the court does not approve of such tardiness, it cannot characterize it as grossly culpable.

The third charge is in rejecting offers of assistance from the tugs Cynthia and Paulsen, in not employing them to pump out the Myrtle Tunnel, and in the Shawmut proceeding to tow the schooner with an imperfect hawser. The master of the Shawmut had sent his engineer and others aboard the schooner while at the St. John's Bar to pump her out; but it was found that the pumps were not in working order, and after he determined to go to Charleston it does not seem to have been necessary to have pumped her out or to have called upon the tugs for that purpose, and nothing was done. Early on Tuesday morning, in a sudden squall, the hawser parted near the bits, and the schooner was carried out to sea, where the Shawmut proceeded to retake her. Every effort seems to have been made in Jacksonville to procure a new hawser, but none was obtainable. The agent of the steamship tried to buy a hawser from Capt. Avery of the Cynthia, who refused to sell it, saying that he would not furnish him tools to work with, but that he was willing to aid in every way possible, and to assist in towing, and so forth. The steamship's agent has testified that, in a conversation with Capt. Avery, the latter proffered assistance as a co-salvor, and there seems to have been at different times during the period covered by the service a misconception on both sides of the respective rights and obligations of salvor and owner; but the exigencies of the case do not seem to render it necessary to state the law on that point with any fullness. That the owner has the right to offer assistance in salving his property could scarcely be disputed; nor can it be questioned that it is the duty of the salvor to accept such assistance if he needs it. The only disputed point is whether the salvor needed the assistance of the two tugs. That the Shawmut ought not to have undertaken to tow the schooner with a damaged hawser, if he would thereby endanger her safety, if he could procure a sound one, is not open to doubt. There is no direct testimony as to the condition of the hawser, except that it parted on the night of the squall. If it parted by reason of the chafing, and it remained sufficiently long and sufficiently strong to answer the purpose of towing the vessel to Charleston, there does not seem to be any ground to impute culpable negligence in so using it, and the event proved that this was the case. The testimony of Capt. Avery was that he did not at that time consider it an act of grave imprudence on the part of the Shawmut to make the attempt, especially in view of the fact that the two tugs accompanied the Shawmut and the schooner as a convoy, and were at hand to render assistance if any was needed, and so avowed their intention, and, as already stated, the hawser turned out to be amply sufficient for the purpose, and the vessel was brought safely to Charleston.

Fourth. The next ground of complaint is that on arrival at the bar of Charleston the agent of the steamship hired two tugs, at a cost of $500, to bring the schooner into the harbor. The tugs Paulsen and Cynthia had been hired by the owners at the expense of $150 a day each to search for their vessel. They were at the St. John's Bar, and

offered to assist, if needed. The Shawmut did not need their service in towing, as she had sufficient power for that purpose, and, as it turned out, did not absolutely need the hawser; but on arrival at the bar of Charleston tugs were needed to bring the schooner into port. The tugs Cynthia and Paulsen were there. They had left St. John's Bar in company with the Shawmut, and had been in sight of her all the way. The master of the Shawmut and the agent of the steamship, who came to Charleston, well knew that the tugs were there, willing and able to do the service desired. They rejected this service and subjected the owners to the wholly unnecessary expense of hiring other tugs. This was inexcusable, and was done under the mistaken assumption that the Cynthia and Paulsen might claim to be co-salvors, and the award to the Shawmut thereby diminished. Even if such claim on the part of the tugs had been well founded, the amount to be allowed them would have been passed upon by the courts, and it is not to be lightly presumed that any court would give its sanction to any extravagant pretentions for such a service. This specification of fault in the salvor is sustained. The extent of it is easily measured. It amounts to $500, the sum paid for the tugs, which will not be allowed as costs.

As the court has no doubt that this is a meritorious case of salvage successfully accomplished, it only remains to fix the amount of the award. The Supreme Court, in Post v. Jones, 19 How. 150, 15 L. Ed. 618, says that the true principle is adequate reward according to the circumstances of the case. This court has hitherto in cases of derelicts adhered to the ancient rule of awarding a moiety, with great confidence in its wisdom, as affording some guide to and limit upon judicial discretion. This rule has never been regarded as inflexible, and it must bend to circumstances. Two opposing considerations are always operative upon the conscience and judgment in this class of cases. The one is the consideration of public policy, which leads to the giving of a bounty sufficiently liberal to induce vessels to undertake the labor and to incur the hazards of towing floating wrecks and removing them out of the pathway of commerce, where they are a menace to life and property, lying like hidden and uncharted rocks. It is within the experience of the court that the regular lines of passenger steamships plying up and down this coast are reluctant to undertake this service, and some substantial reward is required to stimulate it. The other consideration is that for the owner, who has been led by providential calamity to abandon his property for the time being. The value of the property salved, the danger to it, the risk of life, the skill, labor, and the duration of service are all elements which have to be considered. The court has fixed the value of the schooner in this case at $33,000, and the value of the cargo at $5,500. There was no risk of life, no especial skill, or extraordinary labor. The danger to the schooner as she lay when taken by the libelant was not so great as is usual in derelict cases, for the owners at considerable expense, and with great promptitude, had employed ocean-going tugs, under the command of skillful men, to cruise in search of her, and there was reasonable probability that they would have found her soon after she was taken in tow by the Shawmut.

It seems, therefore, that an award of one-third would be proper in the circumstances detailed, and a decree for such amount will be entered, which will carry all the costs incurred, except for the hiring of the tugs at Charleston, referred to above.

TELLER v. TONOPAH & G. R. R.

(Circuit Court, E. D. Pennsylvania. August 30, 1907.)

No. 17, April Sess. 1906.

1. CORPORATIONS—DIRECTORS—CONTRACT WITH COMPANY.

That directors of a corporation are personally interested in a contract made with the company and are to a certain extent to profit by it does not necessarily condemn the transaction. It merely calls upon them to justify it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1401-1415.]

2. SAME—STOCKHOLDER'S SUIT—INJUNCTION AGAINST CARRYING OUT CONTRACT.

Defendant railroad company entered into a contract with a syndicate, some members of which were its directors, and which had built a connecting line of road, by which defendant was to become guarantor of bonds of a company organized to own such road to the amount of $1,250,000, and was to receive 51 per cent. of the stock of such company, the syndicate to receive the remainder and the bonds in payment for the road. The control of such line was of great advantage to defendant, and the agreement was approved and ratified by a large majority of the stockholders. There was no proof of any fraud or attempt on the part of the members of the syndicate who were also directors of defendant to use their official position to benefit themselves at the expense of defendant, and they did not in fact control the syndicate. *Held*, that a single minority stockholder had no standing in equity to enjoin the carrying out of such contract upon allegations that it ought to be more favorable to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1438.]

In Equity. On final hearing.
See 151 Fed. 607.

W. Y. C. Anderson, for complainant.
John G. Johnson and J. W. Bayard, for defendant.

ARCHBALD, District Judge (specially assigned). This is a bill to prevent the consummation by the defendant company, of which the complainant is a stockholder, of a projected agreement, by which it is proposed to guarantee the bonds of the Goldfield & Bullfrog Railroad to the amount of $1,250,000, in exchange for 51 per cent. of the capital stock of that company, of the face value of $637,500. The charge is that the bargain is an unfair one, having been brought about by the directors of the defendant company with a syndicate of which they are members, formed to promote the construction of the railroad, the imputation being that they have taken advantage of their official position to favor themselves and their associates personally. The defendant company's railroad runs from a point on the Southern Pacific

Railroad, about 100 miles, through Tonopah to Goldfield, both in the state of Nevada, the part to the one place having first been built, and then the part to the other as an independent matter, and the two amalgamated; and the road about which there is this controversy is an extension of 79 miles beyond the end of the existing line to the newly developed mining region, bearing the euphonious name of Bullfrog, which has recently come into prominence. The complainant holds 22⅖ shares of stock (7 preferred and 15⅖ common, together of the par value of $2,240) out of a total of 21,500 shares, and stands alone in his opposition to the agreement, which was ratified by the rest of the stockholders at a meeting of the company, although it is said that one or two others while not joining in the suit are in sympathy with it. But, notwithstanding this disparity, he is entitled to maintain the bill on his own account, if he is right with regard to the subject of it. Neither does it matter that he was offered an interest in the first syndicate proposed, which he declined, and subsequently wanted to get into the present one, after which he began these proceedings; although it cannot be said to inspire confidence in the good faith of them. Nor is it to prejudice him that there was a previous bill by which, upon much the same grounds, he opposed and undertook to prevent the consolidation of the original railroad to Tonopah with the extension to Goldfield, which he now acknowledges was imperative, and has proved immensely profitable; the exchange of stock for bonds which he forced —the one paying 17 per cent. and upwards, and the other 6—discrediting his efforts if not suggesting an undue inclination to litigate.

The position of the complainant is that the Bullfrog extension was so manifestly a paying proposition from the start, and so absolutely necessary to the business of the company, that the directors should either have seen to it that the company built the road itself, instead of lending its credit to others to do so, or if that was not practicable, and it was to be built by a syndicate in which the directors were interested, that the company should get all the stock instead of merely a half of it, the enterprise being financed upon the company's guaranty. The facts are not exactly so, to say nothing of the use made of them. But that is not material. The ability of the company to build on its own account is asserted on the strength of the large returns received from the operation of its road, and the $350,000 of bonds in its treasury expressly reserved for the acquisition of new and additional property out of the issue authorized to take up those of the underlying companies. The credit of the company also, it is claimed, if effective for the benefit of others, was equally available in its own behalf; in which connection it is pointed out that the members of the syndicate have only been called on to pay 25 per cent. of their subscriptions, the rest of the money to build—some $600,000—having been obtained on the syndicate agreement without more. The complainant is even inclined to think that, if for any reason it could not raise the money on its own obligations, the directors who are men of large means should have got it for the company on their personal credit. These are somewhat novel ideas—some of them—but they are not necessarily to be rejected upon that ground. Upon examination, however, they will be found to be altogether untenable, both legally and financially.

It is not necessary to take much time over the suggestion that there was any duty on the part of the directors to raise money for the company personally. There might be exigencies, when they would see fit to do so, but they were not bound to. And as to the financing of the project, in the interest of the company, outside of this, the fact is, as appears from the evidence, that a number of financial institutions were approached in New York, Philadelphia, and elsewhere, in the effort to do so, but without success. No one indeed could be expected to advance money on the mere project to build, particularly in a new and undeveloped mining region of uncertain stability, such as Bullfrog then was. It is possible that the $350,000 of treasury bonds were available and could have been marketed. But the road cost nearly a million dollars, and called for cash, and the balance could hardly have been made up out of income. Nor was a second mortgage to be thought of, the company being already heavily bonded. Besides that, the stockholders were opposed to using the money of the company to build the extension, if they did not actually vote against it. The only thing left was a friendly syndicate, such as was formed, and the case is thus brought down to the fairness of the arrangement proposed to be made with it.

The exact proposition to the company was that the syndicate would build and equip at their own cost and expense the extension from Goldfield to Bullfrog, a distance of 79 miles, according to the location and survey which had been adopted, making it equal in all respects to the road operated by the defendant company; and when so completed, equipped, and paid for, without any liens or incumbrances, excepting a first mortgage for $1,250,000 to secure 6 per cent. 15-year bonds, and capital stock of the same amount, all of which stock and bonds were to be acquired by the syndicate, thereupon, upon the company undertaking to guarantee the bonds, the syndicate agreed to turn over 51 per cent. of the stock, reserving to themselves the benefit of the balance. Or, in other words, without any risk except the contingent liability which it assumed by its guaranty—the road being all built and paid for—for the mere loan of its name the company was to get stock of the face value of $637,500, putting it in control, the guaranty simply enabling the syndicate to float the bonds and get back the money which they had put into the enterprise, with whatever profits there might be above that. Looking at it practically, the fairness of this seems hardly open to question.

The complainant does not object, if a syndicate is the only alternative, to the general arrangement which is so outlined. He recognizes that it would be disastrous if the extension to Bullfrog is not secured and incorporated into the company's railroad system, and that a guaranty of the bonds may be necessary to get this. But he wants all the stock in exchange, and not simply a part of it. He seems to think that not only the directors, but their associates, can be made to take all the risk and forego any of the benefits, and that he and his fellow stockholders, who have advanced nothing, and assumed no responsibility, are entitled to all of them, and this, upon the principle that a trustee can take no advantage to himself out of his position. There is no question of the principle, but it is not ap-

plicable. Upon the same basis, not only the other half of the stock, but all the bonds not needed to reimburse the syndicate for its outlays, would be equally demandable as a part of the profits, which seems to have been overlooked by the complainant or he possibly would have claimed them.

There are several things, however, which stand in the way of adopting his contentions. In the first place it is to be noted that there are 32 members of the syndicate, only 10 of whom, holding considerably less than a controlling interest, are directors in the defendant company. And it can hardly be expected that those who are not will give up what is coming to them out of the enterprise, or that they can be constrained to do so by those who are. The bill is not to compel the directors as trustees to account for and surrender the profits which they will make, assuming that this could have been done upon the present showing. It aims to prevent the carrying out of the arrangement both as to the company and the syndicate, because of the complicity of the directors, who are charged with having used their position to favor it. Its purpose thus is negative, and except as it may possibly force better terms outside of these proceedings, it can effect a negative only. The complainant by these means may hold up the proposition in hope of a better one, but he is not in a position to compel it, nor can the court, if it had the power, be expected to bargain for it in his behalf. The bill is to be sustained, in other words, because the proposed arrangement is tainted or against conscience, and so to be prohibited, and not in order to have the parties come forward with something possibly more favorable.

The alternative, in case the arrangement should not go through, has therefore to be carefully looked to. The members of the syndicate, outside of the directors, who have put their money into the road, and taken the chance of success (which the complainant to the contrary notwithstanding, and by no grace of his, was not so assured in the beginning as it seems now), cannot be expected or required to get nothing out of it. The enterprise was a perfectly legitimate one, as to which they are not in the least beholden to the company, and upon every consideration they are entitled to the full benefit of it. If, then, they cannot secure the terms which they offer, and it must be everything or nothing in dealing with the company as the complainant would have it, they are likely, if indeed they will not be compelled, to go elsewhere with the property. And if, as the result, the road gets into the hands of a rival, as it may, it would be a blow to the company in comparison to which the half of the stock which is haggled for would be trifling. The complainant thinks that self-interest can be relied on to prevent this; enough of the syndicate, outside of the directors, being stockholders in the company. But this is taking large risks. And what right has the complainant to force the issue, or to impose any such extreme and obstructive policy upon the other stockholders? He comes into court as the champion of the company, but as all, except possibly a hesitating contingent, have declared against him, it is simply a question of his own interests. He admits, however, that there will be no direct injury to these, and that his stock will be worth just as much if the arrangement is put through as if it is not. His

only complaint is that it would be worth more with a better bargain, which seems to be his idea of irreparable damage. But, looking to the possibilities, his own bill is the real menace to his holdings, not to say those of others. And while he may be willing to take the chances upon it for himself, he cannot ask that others shall be put at any such hazard.

The complainant's case is thus clearly destitute of equity. It may be that the directors are on both sides of the proposed arrangement, and to a certain extent are to profit by it. But that does not necessarily condemn it. It merely calls upon them to justify it. Jesup v. Railroad (C. C.) 43 Fed. 483. And this they have abundantly done. The proposition made to the company is not an unfair one. The directors have not used their position to unduly favor it. It is to the decided interest of the company that it should be accepted. It would be disastrous, if as a result of these proceedings or for any cause it should be diverted and go elsewhere. The syndicate was made up with considerable difficulty, parties who were approached being reluctant to go into it, for which the pendency of the complainant's previous bill was not a little responsible. It was organized as the only alternative to promote the interests of the company and put through the road for its benefit, giving it control and heading off other roads which were talked of. A better bargain, giving up less stock, could admittedly be made with Senator Clark, who has large interests in the direction of Bullfrog and is seeking a similar entry into it. The guaranty of the company is of course of value, and, enabling the syndicate to float the bonds, as it will, they can afford to pay for it. But the liability assumed is not large, being indirect and contingent and the property good for it, the road having been completed and equipped while these proceedings were pending and being now successfully operated. The price to be paid is substantial, the stock offered to be turned over having a par value of $637,500, which is likely to be, if it has not already been, realized. And it gives control of the property, which is all important. To demand more than this, upon an all or nothing policy, makes the bill little better than an attempted financial hold-up. By every consideration, therefore, being opposed to the best interests of the company instead of conserving them, it must be dismissed, and the arrangement complained of be allowed to be proceeded with.

Let a decree be drawn in favor of the defendants, with costs.

CRUCHET v. RED ROVER MIN. CO.

(Circuit Court, D. Massachusetts. July 10, 1906.)

No. 358.

BANKRUPTCY—EFFECT OF PETITION—EXCLUSIVENESS OF JURISDICTION.

A federal court was without jurisdiction to entertain a creditors' suit against a foreign corporation, and to appoint a receiver therein, where at the time such suit was commenced a petition in bankruptcy was pending against the defendant in the district of its domicile, which was after-

ward followed by an adjudication; and, on the facts being made known to the court, such suit will be dismissed.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

In Equity. On plea to the jurisdiction and motion to dismiss.

H. H. Armington, for plaintiff.
James A. Tirrell, for defendant.
Franklin & Tedrow, for trustee in bankruptcy.

COLT, Circuit Judge. On March 18, 1905, a petition in involuntary bankruptcy was filed against the defendant in the United States District Court for the District of Colorado, and on May 22, 1905, the defendant was adjudged a bankrupt. The defendant is a mining corporation organized under the laws of Colorado, and its property is located within that state.

On April 21, 1905, this creditors' bill was filed in the United States Circuit Court for the District of Massachusetts, and a receiver appointed; the counsel for the defendant appearing and consenting to the entry of the decree.

The bill did not allege the pendency of bankruptcy proceedings in Colorado, nor was this fact in any way brought to the attention of the court. If it had been, the court would have refused to take jurisdiction of this bill, since it would be manifestly destructive of the fundamental purpose of the bankrupt act, and lead to endless confusion, for the Circuit Courts to entertain creditors' bills like the present one, after the commencement of proceedings in bankruptcy against the insolvent. Nor are we aware that any Circuit Court has ever entertained such a bill, and appointed a receiver, where it had notice that bankruptcy proceedings had already been commenced against the defendant.

The jurisdiction of this court under this bill, and of its receiver, is limited to the district of Massachusetts; and, since no property of the defendant has come into the possession of the receiver, the rights of creditors and of all parties having any interest in the bankrupt's estate have been up to the present time in no way affected by the entry of this decree appointing a receiver. Under these circumstances, it is clearly the duty of the court to dismiss the bill and discharge the receiver. The authorities upon this point are numerous and conclusive.

The jurisdiction of the bankruptcy court "is absolute, paramount, and exclusive to adjudicate the question of bankruptcy, to settle and liquidate the estate of the bankrupt, and as to all matters and questions arising in bankruptcy proceedings touching the persons and property of the bankrupts, their relations to their creditors, and the rights of creditors in and to the bankrupt's estate, from the commencement of the proceedings to their close." Brandenburg on Bankruptcy (3d Ed.) § 36, and authorities cited; Loveland on Bankruptcy (2d Ed.) § 18, p. 75; In re Watts & Sachs, 190 U. S. 1, 27, 35, 23 Sup. Ct. 718, 47 L. Ed. 933.

In Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866, the Supreme Court said:

"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 debt-

or 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."

In the case of In re Benedict (D. C.) 140 Fed. 55, the court said:

"It must be remembered, however, that this is strictly a proceeding in rem, contemplating only temporary control of certain property. A proceeding in bankruptcy is sui generis. The filing of an involuntary petition is not the commencement of a suit against the failing debtor to recover debts due. It contemplates rather the collection and distribution of an estate. Such proceedings do not abate by the death of the alleged bankrupt occurring after the petition and before the adjudication. In re Hicks (D. C.) 107 Fed. 910; In re Spalding (D. C.) 134 Fed. 507. Another fact must be kept in mind. The very property sought to be reached has been by virtue of the act of Congress brought sub modo under federal influence and control by the filing of the involuntary petition, which has, so to speak, imposed a status upon all the property of the alleged bankrupt everywhere. Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866; Mueller v. Nugent, 184 U. S. 1–16, 22 Sup. Ct. 269, 46 L. Ed. 405. Such petition, when filed, is held to be 'a caveat to all the world,' and to operate upon such assets like an attachment or injunction. Such legal result is not expressly provided for in the text of the law, but is predicated by the court upon the general scope of the act and the purpose of Congress."

See, also, State Bank of Chicago v. Cox (United States Circuit Court of Appeals for the Seventh Circuit, October, 1905) 143 Fed. 91, 74 C. C. A. 285, published in the Central Law Journal of April 6, 1906, with an exhaustive note reviewing the authorities by William Ritchie.

A decree may be entered dismissing the bill.

A. OVERHOLT & CO. v. GERMAN-AMERICAN INS. CO. (and nine other cases).

(Circuit Court, W. D. Pennsylvania. August 7, 1907.)

Nos. 64–66, 94–100.

REMOVAL OF CAUSES—TIME FOR FILING PETITION—PENNSYLVANIA PRACTICE.

Under the removal statute as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], which permits a petition for removal to be filed on or before the time when the defendant is required by the laws of the state or rules of the state court to answer or plead to the declaration or complaint, a petition must be filed by the time an affidavit of defense is required by the Pennsylvania practice, which, under the rules of the court, is an answer to plaintiff's claim and frames the issues to be tried.

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

On Motions to Remand to State Court.

Gordon & Smith, for plaintiff.

Jennings & Jennings, for defendant.

EWING, District Judge. These cases are before the court on motions to remand to the common pleas of Fayette county, Pa., from which they were removed by the several defendants without leave or authority of that court.

It seems that, when application was made to the court in which the suits were originally brought, it embraced, not only a petition to remove, but also a petition to consolidate various cases against the same company, which process of consolidation the defendants of their own volition made in transferring the causes to this court, although the applications aforesaid had been denied by the court of original jurisdiction.

Several reasons are assigned in support of the motions to remand but the only one thought necessary to refer to is that the application for the removal of the causes from the state court was made too late. The act of Congress in such cases provides that the petition for removal may be filed "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which said suit is brought to answer or plead to the declaration or complaint of the plaintiff." The rules of the court of common pleas of Fayette county aforesaid provide that:

"In all actions on policies of insurance, etc., if the plaintiff shall file on or before the return day of the writ, a statement showing the amount he believes to be due from the defendant, together with a copy of the book entries or instrument upon which the suit is brought, etc., he shall be entitled to judgment for want of an affidavit of defense, as follows, viz.: If the writ shall have been duly served and the said statement shall have been duly filed and a copy thereof served on the defendant prior to the return day, judgment by default may be entered any day after fifteen days subsequent to the service of said statement, etc., unless the defendant files an affidavit of defense."

The provisions of this rule were complied with by the plaintiff in these cases, so far as the service of the writ and the filing and serving of a copy of the statement on the defendant is concerned, and the defendants also complied with its provisions by filing, on the return day, affidavits of defense. The writs in all these cases, except in those cases embraced in No. 94 of November term, and one of the cases embraced in No. 95 of November term, were served on March 14, 15, and 16, 1906, and those in No. 94 and one in No. 95 of November term, on March 20, 1906, and the return day of all was April 2, 1906. By the above cited court rules the defendants were required to file affidavits of defense on April 2d in all the said cases, except those served on March 20th, where they were required to file them on April 4th. But the defendants filed all their affidavits of defense on April 2d, and the petition for removal was not presented to the court until April 13th.

It is now contended by the plaintiffs that, the petitions for removal having been presented after the defendants were required by the rules of the state court to file affidavits of defense and did so file such affidavits, it was then too late to remove said causes; while the several defendants insist that the requirements of the act of Congress that the application for removal shall be made before they are required to answer or plead to the declaration or complaint of the plaintiff

does not embrace affidavits of defense, but merely technical answers and pleadings. These claims of the respective parties present the questions before us for determination. The procedure act of May 25, 1887 (Laws Pa. 1887, p. 271, No. 158), in its third section directs that "the statement * * * in the action of assumpsit shall be replied to by affidavit," and the above cited rule of the state court in section 4 declares that:

"In all cases where an affidavit of defense is required, it shall set forth specifically and at length the nature and character of the same and shall state whether the defense is to the whole or a part of the claim, and if only to a part it shall state to what part, and all items of the plaintiff's claim not traversed or denied shall be taken as confessed."

Conceding that an affidavit of defense in Pennsylvania practice is no part of the pleadings, as declared by the Supreme Court in Muir v. Insurance Company, 203 Pa. 338, 53 Atl. 158, yet it is an answer to the plaintiff's claim, and under the said rules of court determines what the issue between the parties is, for only those matters alleged on the one side and denied on the other are by those rules put in issue, and, indeed, the answer of the defendant under the rules of court of Allegheny county makes the answer an affidavit of defense, for in section 1 of rule 8 it is directed that the defendant shall "file an answer verified by affidavit and such items of the claim and material averments of fact as are not directly and specifically traversed and denied by the answer shall be taken as admitted," and by section 2 it is further provided:

"If the specification and statement be filed with the præcipe, they shall be taken as an affidavit of claim, and defendant shall, without further notice, file his answer thereto within the time required for filing affidavits of defense, which answer shall be taken as an affidavit of defense."

Thus in every view of the case an affidavit of defense is an answer to the plaintiff's claim, and so important in this respect that it frames the issue to be tried between the parties.

In Martin v. B. & O. R. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311, Mr. Justice Gray, in delivering the opinion, says that this provision regarding the time for the presentation of a petition for removal "allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas." And again:

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the Circuit Court of the United States."

To the same effect, also, is Wabash Western Railway v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. It was upon the authority of these two cases that it was determined in Muir v. Insurance Company, supra, that the petition for the removal of the case from the

state court to the federal court should be filed before the defendant is required to file an affidavit of defense. The same principle is again declared in Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, where it is stated that "undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts." According to the plain interpretation of these decisions, the application for the removal of these causes was made too late, and the petition to remand must be granted. It may be stated that these cases have all been tried in the state court and passed upon by the Supreme Court on appeal and the judgments of the lower court affirmed.

The cases are therefore remanded.

HARTON v. HOWLEY et al.

(Circuit Court, W. D. Pennsylvania. August 3, 1907.)

No. 20.

1. ABATEMENT AND REVIVAL—PENDENCY OF ANOTHER SUIT—FEDERAL AND STATE COURTS.

The pendency of another action between the same parties for the same cause in a state court is not a bar to an action in a federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 87.

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 47 C. C. A. 205; Barnsdall v. Waltemeyer, 73 C. C. A. 521.]

2. COURTS—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTY.

Plaintiff had for many years been a resident of a city in Pennsylvania. Some two years before the commencement of suit he became superintendent of a company engaged in drilling oil wells, which required his presence the greater part of the time at the place where the company was at work. A year later, the most of the wells on which it was then engaged being in the vicinity of a town across the river in Ohio, 16 miles from his residence, he established his headquarters there, hiring a room in a hotel, where he stayed through the week. His family, consisting of a wife and son, remained in Pennsylvania, where his wife built a residence, and he usually spent Sundays there. He was in the directory there as a resident, paid taxes there, and voted there when he last voted. *Held* that, notwithstanding his testimony that he was a resident of Ohio and although he may have intended to remove to the Ohio town, he was in fact still a resident and citizen of Pennsylvania, and could not maintain a suit in a federal court against another citizen of that state.

On Plea to the Jurisdiction.

George C. Bradshaw, for plaintiff.

R. B. Petty and Thomas B. Alcorn, for defendants.

EWING, District Judge. In the bill filed in this case the plaintiff claims to be a citizen of the state of Ohio, and alleges the defendants are citizens of the state of Pennsylvania; and to that bill Frank P. Howley has filed a plea to the jurisdiction, stating therein that the

plaintiff, as well as the defendants, is a citizen and resident of the state of Pennsylvania, and also that another action between the same parties for the same subject-matter had previously been instituted and is still pending, undetermined, in the state courts of Pennsylvania.

This second ground of objection to the jurisdiction of this court may be disposed of first. It has been repeatedly determined that the pendency of another action between the same parties for the same cause or causes in the state courts is no bar to a similar action in the courts of the United States, as they are regarded as foreign courts for that purpose.

Upon the question of citizenship considerable testimony has been taken, which may be briefly summarized as follows: The plaintiff was born and raised in Beaver county, Pa., and while for a time prior to his marriage he resided in another state, from his marriage in 1889 up to March, 1905, it is admitted his residence was in Beaver, Beaver county, Pa. Up to about the latter date he was engaged in the building and contracting business, but then became interested in the Old Colony Oil Company and the Shawnee Oil Corporation; the former now conducting a contracting business in the line of drilling wells and the latter an oil producing company. Of both these companies the plaintiff is superintendent and manager, and the prosecution of his work for the former company naturally requires him to spend most of his time where their work lies, and for the latter company he has charge of their leases, which embrace territory in western Pennsylvania, eastern Ohio, and West Virginia. Plaintiff's family consists of himself, wife, and one son, now grown and in employment. In March, 1905, he claims to have left Beaver, and resided until the spring of 1906 in the western part of that county, back of East Liverpool, in the neighborhood of Smith's Ferry, and since March, 1906, he alleges that his residence has been East Liverpool, Ohio. He says his work during that period and for some time to come has been and will be in the neighborhood of East Liverpool, within a distance of some six miles, and that that is the most convenient point for him to his business. In East Liverpool he has quarters in a lodging house known as the "Hotel Hollenden," occupying there a room on the third floor, which he uses both for his bedroom and his office. He takes his meals wherever he happens to be. That hotel furnishes no meals. During the time he has been at East Liverpool and in the neighborhood of Smith's Ferry his family has continued to reside in the town of Beaver, where his mother also resides. In the fall of 1905, through negotiations conducted in part by himself, his wife purchased a lot in Beaver and subsequently erected thereon a dwelling house, completing it in the late summer or early fall of 1906, which she and her son have since occupied as their home. There is no disagreement or lack of harmony in the family and no separation of husband and wife. The plaintiff states that he hopes before long to be able to have his family with him in East Liverpool, and that so long ago as last fall he spoke to a real estate dealer in Beaver about trying to sell his wife's property there. He accounts for his wife and son remaining there by stating that his son is in employment there, or in that neighborhood, and that his wife stays there in order that he may live at home with her, as well as because of their ownership of that property.

The plaintiff's name appears in the local directory of Beaver as a resident of that place, and he is also registered as a voter and assessed for taxation there, both for the years 1906 and 1907, and he admits he voted there in the fall of 1905, the time he was staying near Smith's Ferry. He spends practically all of the week, except Sunday, in and about East Liverpool, and his room there is rented by the month. Sundays he generally spends with his family in Beaver. He has never exercised any of the rights nor borne any of the burdens of citizenship in East Liverpool, admitting that he has not paid any taxes there, and claiming that he has not voted there because the laws of Ohio require two years' residence. He states it is his intention to remain in East Liverpool so long as his business pays him as well as it does now, but admits his position would require him to go any place where the work of the corporations by which he is employed would demand. These corporations have their offices in Beaver, and both the plaintiff and his wife have some interest in one or both of them. The character of the work in which the plaintiff is engaged is such as to make it very uncertain as to where he will be at any particular time in the future, and the probability is that, like all others following similar vocations, he will be going about from place to place, remaining not very long and for no definite time in any one locality. East Liverpool is about 17 miles distant from Beaver, with rail communication, and the plaintiff pays $16 per month for his room at the former place.

The question for determination, then, is whether the plaintiff is a resident of Ohio or Pennsylvania, and under the pleadings in the case the burden of showing that he is not a resident of the former state rests upon the defendant. "To effect a change of citizenship from one state to another there must be an actual removal, an actual change of domicile, with a bona fide intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose." Kemna v. Brockhaus et al. (C. C.) 5 Fed. 762. "Domicile of origin must be presumed to continue until another sole domicile has been acquired by actual residence, coupled with the intention of abandoning the domicile of origin." Price v. Price, 156 Pa. 617, 27 Atl. 291. Applying these principles to the case in hand, and having regard to the employment of the plaintiff, the situation of his family, and all the facts and circumstances surrounding his and their acts during the past two years, I am impressed with the conviction that his real residence and citizenship are in Pennsylvania, and that his situation is rather that of one who purposes eventually, if family circumstances will permit and his employment so dictates, to change his place of residence permanently, rather than that of one who has already done so.

The conclusion, therefore, is that the plaintiff is a citizen of Pennsylvania, of which state both the defendants are citizens, and that therefore the plea of the defendant Howley must be sustained, and the case dismissed for lack of jurisdiction.

BENJAMIN v. MALONEY.

(Circuit Court, W. D. Pennsylvania. August 3, 1907.)

No. 19.

1. SALES—BREACH OF CONTRACT BY PURCHASER—MEASURE OF DAMAGES.
The measure of the damages recoverable by a seller for the breach by the purchaser of a contract for the sale of a quantity of scrap steel, which on the failure of the purchaser to take it was sold by the seller at the market price, is the difference between such price and the contract price.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1098.]

2. DAMAGES—PLEADING—AFFIDAVIT OF DEFENSE.
An affidavit of defense, attempting to plead a claim for damages for breach of contract, must allege facts showing, not only the right to such damages, but from which the amount can be ascertained.

At Law. On rule for judgment for want of sufficient affidavit of defense.

O. S. Richardson and W. D. N. Rogers, for plaintiff.
Watterson & Reid, for defendant.

EWING, District Judge. On December 4, 1905, the defendant entered into a contract with the plaintiff for the sale of 500 tons of heavy melting steel scrap, to be delivered f. o. b. cars Pittsburg at $17.05 per ton, or 350 tons thereof to be delivered in Allegheny at $17.35 per ton, or 350 tons or more for Pittsburg delivery and the balance to Sharon, Pa., at $18 per ton, deliveries to be made in December and January, and plaintiff to give two 60-day acceptances for $2,000 each on account; the balance to be settled for on basis of 30-day draft from date of invoice for each car. Pursuant to this contract one car of scrap was delivered, of the value of $414.29. No other scrap was delivered to the plaintiff, and he alleges that the time of delivery was by agreement postponed from time to time, and that finally, without his knowledge or consent, or previous notice, the defendant sold the scrap to other parties, and has refused to refund to him the amount of his payments on account, viz., the two drafts, aggregating $4,000, less the $414.29 for the one car delivered; and it is for that amount, to wit, $3,585.71, with interest from February 2, 1906, that this action is brought. The defendant filed an affidavit of defense and this matter is now before the court on a rule for judgment for want of a sufficient affidavit of defense.

The payment of the $4,000 by the plaintiff and the delivery of the one car of scrap, of the value of $414.29, are admitted; but the defendant denies that he ever consented to an extension of the time of delivery, and avers it is not true that plaintiff had no notice of defendant's intention to resell said scrap, and alleges that the facts are as set forth in extracts from letters which passed between the parties, recited in the affidavit of defense, and claims to be indebted to the plaintiff only in the sum of $2,461.69, for which check was sent to the plaintiff and refused. The correspondence set out shows that the defendant was anxious to have the scrap delivered and that the plaintiff was not ready to receive it; but at no point in the correspondence quot-

ed is definite notice given to the plaintiff that, unless he gives shipping directions within or by a certain date, the same will be sold in the open market or otherwise disposed of at his risk. The last correspondence set out is a portion of the letter of April 20, 1906, from the defendant to the plaintiff, in which he states:

"Your favor of the 16th inst. received, stating that you hope that I would not press you on the shipment of the steel, as you say you would lose considerable money on the deal. Would say I have certainly gave you all the time any reasonable person could, so I certainly have to straighten it out by the first of the month. So I hope to be able to see you before that time."

And the reply of the plaintiff thereto, the date of which is not stated, to the following effect:

"We are in receipt of your letter of the 20th inst. in regard to the steel scrap which you owe us, and note all you have to say. In reply we beg to state that Mr. Benjamin will be unable to run down to Pittsburg next week, as he has some very important business in the East which will take all of his time next week. He, however, expects to run down to Pittsburg the following week, when he will call on you, and hope that he will be able to straighten this matter out."

Following this correspondence the defendant states that he sold the heavy melting steel scrap at the market price then ruling, and thereafter sent the plaintiff a statement, dated May 3 (31), 1906, a copy of which is attached to the affidavit of defense and made part thereof, marked "Exhibit A," showing the items of the transaction, and that he sent to the plaintiff his check for the $2,461.69, being the balance shown by said statement, which plaintiff refused to accept, and beyond that sum he claims not to be indebted to the plaintiff. The statement referred to as "Exhibit A" is as follows:

Pittsburgh, Pa., May 31st, 1906.

Benjamin Iron & Steel Co., Buffalo, N. Y., in Account with T. J. Maloney, Twenty-ninth Street and A. V. R. R.

Date		Car No.	
2	1	Proceeds $1,000.00	$ 988 33
2	12	Dic't $1,000.00 renewal	11 67
3	1	Part Proceeds $2,000. Renew	975 00
3	5	Part Proceeds $2,000. Renew	1,000 00
3	12	Dic't $2,000. Renewal	25 00
5	31	Profit on 500 ton steel as per itemized bill herewith	1,119 97
			$4,119 97
		Credit.	
1	31	By Balance	$6,581 66
		Itemized account above	4,119 97
		Check to balance	$2,461 69

An affidavit of defense is required to set forth specifically the nature and character of such defense, and it will be noted that in the defense here set up neither the date nor place nor market price of the steel scrap sold is given, but that the manner in which the defendant arrives at the balance which he admits to be due is simply by deducting from the amount claimed by the plaintiff an item of profit on 500 tons steel "as per itemized bill herewith, $1,119.97." Naturally the construction to be placed upon that is that such profit is the difference between the

cost of the steel scrap to the defendant and the price at which it was contracted to be delivered to the plaintiff; for it cannot be the profit which the defendant made on the resale thereof to some third party or parties, else he would sustain no loss and be entitled to no set-off against the plaintiff's claim.

Admitting the defendant's contention that this was an executory contract, and that upon the plaintiff's declination to receive the goods according to contract he had a right to dispose of them elsewhere, his claim against the plaintiff for his abrogation of the contract would be damages measured by the difference between the market price at the place of delivery at the time plaintiff refused to receive and the contract price. But this, however, is not what the defendant claims, as shown by his affidavit of defense. Consequently, the defense he makes to a portion of the plaintiff's claim is founded upon an erroneous basis, and cannot be supported. For all that appears in the affidavit of defense, the defendant may have disposed of his scrap at a price in advance of his contract with plaintiff; for, while he says he disposed of it at the market price then ruling, he does not give that market price, nor, as above stated, when and where he made the sale.

The affidavit of defense is therefore adjudged insufficient, and the rule to show cause made absolute.

SOUTHERN RY. CO. v. BLUNT & WARD.

(Circuit Court, S. D. Alabama. July 30, 1907.)

No. 1,282.

1. RAILROADS—CONTRACT GRANTING RIGHT TO BUILD SHIPPING PLATFORM—VALIDITY.

   A contract by a railroad company, granting the right to another to build a platform on its right of way from which to load cotton for shipment over its lines on condition that the builder shall indemnify it against any loss or damage it may sustain by reason of such structure, is not contrary to the public policy of the state of Alabama.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 182.]

2. CONTRACTS—PRESUMPTION OF CONSIDERATION—ALABAMA STATUTE.

   Under Code Ala. 1896, § 1800, every written contract made the basis of a suit is presumed to have been made on a sufficient consideration, and the burden of impeaching such consideration rests upon the defendant.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 404.]

At Law. On demurrers to complaint.

Pettus, Jeffries & Pettus, for plaintiff.

De Graffenried & Evins and Thomas E. Knight, for defendants.

TOULMIN, District Judge. The questions raised by the demurrers, which go to the substance and maintenance of the action, are: First. Is the contract on which this suit is based in contravention of public policy, and therefore void? Second. Is it without consideration?

The contention of counsel for defendants is that the contract is against the public policy of this state, and public policy generally. Contracts against public policy are divided into several classes—among

others, contracts to offend against the laws and public duty. Kellogg v. Larkin, 3 Pin. (Wis.) 123, 56 Am. Dec. 164. If the contract in question is objectionable at all, it must be as a "contract to offend against the laws and public duty." The public policy of the nation or state must be determined by its Constitution, laws, and judicial decisions. U. S. v. Trans-Mis. Freight Ass'n, 58 Fed. 69, 7 C. C. A. 15, 24 L. R. A. 73; Swann v. Swann (C. C.) 21 Fed. 299; Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; same case 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84. What is there in the Constitution, laws, and judicial decisions of this state establishing or recognizing a public policy hostile to the enforcement of this contract? My attention has not been called to any provision of the Constitution against which this contract offends, or to any provision prescribing any public duty, the performance of which is abandoned or sought to be avoided by the contract, and I know of none.

But the contention of counsel is that the statute of the state provides that "a railroad company is liable for all damages done to persons, * * * or for any negligence on the part of such company or its agents," and cites section 3443 of the Code of Alabama of 1896; and their contention, further, is that, the Supreme Court of Alabama having decided that it was negligent for a railroad company to allow dry grass or other inflammable material on its track or roadway, it is plain that, when the plaintiff contracted with the defendants for the construction of a platform on its right of way, it contracted to do something which the statute had expressly forbidden under penalty. The substance of the argument in support of this contention is that, inasmuch as the platform was to be used for shipping cotton over the lines of the plaintiff's railroad, and inasmuch as cotton is known to be a highly inflammable material, the contract in question was clearly an offense against the statute referred to, and the public policy of the state, as evinced by the decision in the case of L. & N. R. R. v. Miller, 109 Ala. 500, 19 South. 989.

I know that section 3443, Code Ala. 1896, provides that a railroad company is liable for all damages done to persons or property, resulting from failure to comply with the requirements of certain sections of the Code, or for any negligence on the part of such company or its agents. The sections referred to in section 3443 are regulations affecting public safety, but have no application to the burdening or use of the right of way of railroads with structures or otherwise, and no penalty is prescribed in section 3443 or the other sections mentioned. I am not aware of any statute of the state which forbids, under penalty, a railroad company from building, or granting the right to another to build, a platform on its right of way from which to ship cotton over its lines. I am aware that the Supreme Court of Alabama, in the case cited (109 Ala. 500, 19 South. 989) has held that, as fire will escape from locomotive engines in sufficient quantities to ignite combustible material along the track or roadway of a railroad company, if dry grass or other combustible material was on such roadway in consequence of the railroad company's negligence, any person suffering damage therefrom would be entitled to recover if he proved his case in

other particulars. In that case it was found as a fact that the railroad was in that instance guilty of negligence in allowing the combustible material to be on the roadway.

If I understand these propositions of counsel I am inclined to think they are mistaken in the contention that there is a statute in this state which forbids under penalty the making of such a contract as the one under consideration. Moreover, there is nothing in this contract which attempts to relieve the plaintiff from liability in a case like that cited from 109 Ala. 500, 19 South. 989. The contract here in question, as I construe it, does not disable the plaintiff from the performance of the functions pertaining to the exercise of its powers granted by its franchise. The plaintiff does not by the contract abandon or attempt to abandon the discharge of any of its duties or liabilities to the public; nor did it assume by the contract to relieve itself of any liability or essential duty, as a common carrier, under the statute of the state or at common law.

In answer to the argument of counsel that "anything, the tendency of which would be to cause a relaxation of the highest degree of care and diligence in a common carrier, is therefore * * *. in contravention of the general policy of the law," I cite the case of S. C. & G. R. Co. v. Carolina, C. G. & C. Ry. Co., 93 Fed. 560, 35 C. C. A. 441, where the court said:

"It is not enough to avoid a carrier's contract, as in contravention of public policy, to show that because he is protected from loss he may be tempted to violate his duty to the public." Phœnix Ins. Co. v. Erie Trans. Co., 117 U. S. 324, 6 Sup. Ct. 750, 29 L. Ed. 873; Carolina Ins. Co. v. Union Com. Co., 133 U. S. 415, 10 Sup. Ct. 365, 33 L. Ed. 730.

"Before the court should determine a contract to be void as contravening public policy, where the contract is made in good faith and stipulates for nothing that is malum in se or malum prohibitum, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical." Kellogg v. Larkin, 3 Pin. (Wis.) 123, 56 Am. Dec. 164.

"The true rule of construction is that illegality is not to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other." U. S. v. Trans-Mis. Freight Ass'n, 58 Fed. 78, 7 C. C. A. 15, 24 L. R. A. 73.

"The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against the public policy of the state or nation." U. S. v. Trans-Mis. Freight Ass'n, supra; Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; same case 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

"The contract ought not to be declared void on the ground of adverse public policy, unless it clearly appears that there is a recognized or established public policy touching the subject-matter, which will be violated if the contract is enforced." Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., supra.

The contract here stipulates for nothing malum in se or malum prohibitum; and it does not appear clear to me that there is in this state a recognized or established public policy touching the case presented on the record now before the court. No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. Authorities cited supra.

Second. Is the contract without consideration? "A valuable con-

sideration, however small or nominal if given or stipulated for in good faith, is, in the absence of fraud, sufficient to support an action on any contract. This is equally true as to contracts of guaranty as to others." Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326; Davis v. Wells, 14 Otto, 168, 26 L. Ed. 686. The sufficiency of a consideration to support a contract rests in the judgment of the parties; and if in contemplation of law it is of any value, in the absence of fraud or duress, the contract will be enforced. Bolling v. Munchus, 65 Ala. 558; Lawrence v. McCalmont, supra.

I think it may be concluded from the complaint that the platform was built for the convenience and benefit of the defendants to be used in the shipment of their cotton, and other cotton placed with them for shipment, over the plaintiff's lines of railroad. The right was given by plaintiff to defendants to build the platform on its premises or right of way in consideration of defendants' agreeing to indemnify, or in effect to insure, the plaintiff against any loss or damage it might sustain by reason of the platform being built at that place. However this may be, the Alabama statute declares that every contract in writing. the foundation of a suit, is evidence that the party undertook to perform the duty for which it was given, and that it was made on sufficient consideration. It may be impeached by plea, and, when so impeached, the burden of proof is on the defendant. Code Ala. of 1896, § 1800; Bolling v. Munchus, supra.

I am of opinion that, on reason and authority, the demurrers to the complaint on the grounds hereinabove discussed are not well taken, and that they should be overruled, and that the demurrers as to matters of form are also untenable, and should be overruled.

It is so ordered.

BLUNT et al. v. SOUTHERN RY. CO.

(Circuit Court, S. D. Alabama. August 6, 1907.)

No. 1,285.

1. COURTS—JURISDICTION OF FEDERAL COURTS—PLURALITY OF PLAINTIFFS OR DEFENDANTS.

   If there are several coplaintiffs, each must be competent to sue, or if there are several defendants, each must be liable to be sued, in a federal court, to give that court jurisdiction.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

2. REMOVAL OF CAUSES—TEST OF REMOVABILITY.

   To be removable, a cause must be one over which the Circuit Court might have exercised original jurisdiction.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 29-34.]

3. SAME—JOINT ACTION—SEPARABLE CONTROVERSY.

   An action of tort, which may be brought against one or more persons, and which has been brought against two of them jointly, presents no separable controversy which will authorize its removal by one of them.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 95.

   Removal of causes, separable controversy, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.]

4. SAME.

Whether an action is one involving a separate controversy as to one of the defendants must be determined by what is alleged in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 115.]

On Motion to Remand to State Court.

De Graffenried & Evins and Thomas E. Knight, for plaintiffs.

L. E. Jeffries, for defendant.

TOULMIN, District Judge. If there are several coplaintiffs, the intention of the law is that each must be competent to sue, or if there be several defendants, each defendant must be liable to be sued, in the federal court, or the jurisdiction cannot be entertained. The controversy is not between citizens of different states, unless all the persons on one side of it are citizens of different states from all the persons on the other side. See note to Act March 3, 1875, c. 137, § 1, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], in 4 Fed. St. Ann. p. 294, and authorities cited therein.

The test of the right of removal is that the case must be one over which the Circuit Court might have exercised original jurisdiction under section 1, Act March 3, 1875, as amended. Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co., 188 U. S. 640, 23 Sup. Ct. 434, 47 L. Ed. 626. See note to section 2 of said act in 4 Fed. St. Ann. pp. 315, 316, and authorities therein cited.

An action of tort, which may be brought against one or more persons, and which is brought against two of them jointly, contains no separate controversy which will authorize its removal by one of them into the Circuit Court of the United States. Powers v. C. & O. R. Co., 169 U. S. 96, 18 Sup. Ct. 264, 42 L. Ed. 673; C. & O. R. Co. v. Dixon, 179 U. S. 135, 21 Sup. Ct. 67, 45 L. Ed. 121; Weaver v. Northern Pac. R. Co. (C. C.) 125 Fed. 155; Fox v. Mackay (C. C.) 60 Fed. 4.

Whether an action is one involving a separate controversy as to one of the defendants must be determined by what is alleged in the complaint. Ward v. Franklin (C. C.) 110 Fed. 795; Harley v. Home Ins. Co. (C. C.) 125 Fed. 792; Fogarty v. South. Pac. Co. (C. C.) 123 Fed. 973.

By the allegations of the complaint, and on the authorities cited supra, it appears to me that this cause has been improperly removed into this court; and it is therefore ordered that the same be, and it is hereby, remanded to the state circuit court.

In re LEWIN.

(District Court, S. D. New York. January, 1907.)

BANKRUPTCY—DISCHARGE—CONCEALMENT OF BOOKS.

A bankrupt *held*, on the evidence, not entitled to a discharge, on the ground that he caused his books of account to be removed from his safe and concealed, with intent to conceal his financial condition.

In Bankruptcy. On motion to confirm referee's report recommending the granting of discharge.

Lawrence L. Goldberg, for the motion.

James N. Rosenberg and Robert P. Levis, opposed.

HOUGH, District Judge. I do not think that the evidence can be said to definitely show a concealment of goods. There was a very extraordinary absence of goods at Lewin's place a short time before his illness; but that is just as consistent with extravagance as with concealment. It has, however, induced me to scan narrowly the testimony in respect to Lewin's books of account. I am convinced, from the evidence, that when Lewin left his store on the afternoon of the day on which he was hurt the books were in the safe. I am convinced that the safe remained intact until it came into the hands of the receiver. Lewin testified specifically that his insurance policy was in the safe, and the evidence is uncontradicted that the insurance policy was in the safe when it passed into the hands of the receiver. It is not suggested that the safe has been tampered with, in the sense that any one broke into it. Being a combination safe, it could not have been broken open without the lock showing the result of violence. No one had any interest to remove the books from the safe, but Lewin or somebody in his interest; and the inference is irresistible that, since the things of no value were found intact when the safe was opened, and the safe itself in good conditon, that the articles of value, to wit, the books, had been removed by some one knowing the combination, and no one knew the combination except Lewin.

Putting together his ability to get the books out and an apparent motive to secrete the books, there results, I think, a strong burden of proof upon Lewin to rebut the presumption that he took them. In other words, the proof is such as to shift the burden, which in the first instance lies on the objecting creditors. Lewin has not borne it. His cross-examination in respect of the information or misinformation that he gave when his schedules were prepared is most destructive, and the testimony of his attorney singularly unconvincing. I put my decision on the ground, as above indicated, that the creditors have offered enough testimony to shift the burden of proof to the bankrupt, and he has not borne it; but my belief regarding the transaction shown by the evidence is that, whatever may have been the shortcomings of Lewin before, his illness induced the removal of the books from the safe and their concealment.

The report of the special master is disapproved, and discharge denied.

F. W. MYERS & CO. v. UNITED STATES.

(Circuit Court, D. Vermont. July 23, 1907.)

No. 1,810.

1. CUSTOMS DUTIES—CLASSIFICATION—CORUNDUM—EMERY—SIMILITUDE.
Pulverized corundum, which, though a distinct article from emery, is identical with it in use and nearly identical in material, is dutiable by similitude to ground emery, under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 419, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674].

2. SAME—SAND—"CRUDE"—"MANUFACTURED."
Held, that under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 671, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], relating to "sand, crude or manufactured," "crude," sand is such as is found in nature, and "manufactured" sand is, though manufactured, substantially the same as crude sand; and pulverized corundum, which is not produced from crude sand, is therefore not sand of either kind within the meaning of the act.

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

For decision below, see G. A. 6,277 (T. D. 27,059), affirming the assessment of duty by the collector of customs at the port of Burlington. The article in controversy consisted of pulverized corundum, which the collector classified as ground emery under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 419, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]. The board held that, if the material in controversy were not actually emery, it was properly assessed at the same rate, by virtue of the similitude clause in section 7 of said act (30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]).

Walden & Webster (Henry J. Webster, of counsel), for importers.
Alexander Dunnett, U. S. Atty.

HOLT, District Judge. This is an appeal from a decision of the Board of General Appraisers assessing certain merchandise as emery. The article in question is corundum. The appellant claims that it is free of duty under the provision admitting "sand, crude or manufactured," free of duty, in paragraph 671 of the tariff act (Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]).

Corundum is a kind of stone or rock, consisting almost entirely of oxide of aluminum. It is substantially free from any impurities. Emery ore is corundum ore containing a mixture of impurities, principally oxide of iron. Both ores, when used in the arts, are ground into fine particles and used for grinding. Corundum and emery are commercially distinct articles, but the object for which they are used is identical; and they appear to be in fact identical, except that corundum is substantially pure and emery contains some impurities. There is no specific provision in the tariff act imposing a duty on corundum; and, unless corundum is manufactured sand, within the meaning of section 671 of the tariff act, I think there is no doubt that corundum is subject to the tax imposed upon emery, under the similitude clause in the tariff act. The actual question in this case, therefore, is whether corundum is included in the term "sand, crude or manufactured," as

used in section 671. Crude sand is obviously common sand, as found in nature. It consists almost entirely of silica. I think the term "sand, manufactured," as used in the act, means a kind of sand which, although manufactured, is substantially the same as crude sand. I do not think, therefore, that pulverized corundum ore, or corundum, can be called "manufactured" sand in the sense in which that word is used in the act. The fact that it is technically covered by some of the definitions of sand in the dictionaries is in my opinion immaterial.

My conclusion is that the decision of the General Appraisers, appealed from, should be affirmed.

WHITTMORE et al. v. MALCOMSON.*

(Circuit Court, S. D. New York. September, 1885.)

GAMING—SPECULATIVE TRANSACTIONS—SHORT STOCK SALE—BROKER'S RIGHTS.

Where defendant directed plaintiffs, who were stockbrokers, to sell certain stocks short for him, and afterward directed them to purchase the same stocks to fill the sale contracts, which they did, plaintiffs were entitled to recover the amounts so paid out or the balance remaining due thereon, even though the original short sales were intended as merely a wagering transaction, and no deliveries were contemplated; the indebtedness having arisen out of the subsequent purchases, to cover which it was clearly defendant's right to make at his election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 73–75.]

At Law. On motion for new trial on the minutes.

Richard B. Whittmore and Thomas O. Hill, stockholders in the city of New York, in partnership as Whittmore & Co., sued A. Bell Malcomson, Jr., for a balance claimed to be due on account of certain transactions in stocks. At the trial the plaintiff had a verdict, and defendant made this motion on the minutes of the trial justice for a new trial. Further material facts appear in the opinion.

John H. Parsons, for the motion.

B. F. Dos Passos, opposed.

WHEELER, District Judge. The plaintiffs are stockbrokers. The defendant speculated in stock through them. In the latter part of the transactions he directed them to sell certain stocks short for him, but put up no margins. Their testimony tended to show that they kept memoranda of the sales and of the persons to whom sold, but not of the persons for whom sold, in making the sales; that by the defendant's direction they purchased and paid for some stock, and paid another firm for some bought, and reported to them to be paid for by his direction, to cover his sales. The defendant's testimony tended to show that in entering upon these transactions it was understood that the differences were to be adjusted and paid between them according to the market price of the stocks, without any actual sales or purchases. This

*This case has been heretofore reported in 16 Abb. N. C. 303, and is now published in this series, so as to include therein all Circuit and District Court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

action is brought to recover the balance of amounts paid and commissions.

The defendant requested the court to charge the jury that, if the parties did not intend and agree that the stocks were to be delivered, but the real intent was to speculate in the rise and fall of prices and pay differences, the contract was void. The court charged the jury that, if the defendant procured the plaintiffs to sell stocks for him for future delivery, and, recognizing his obligation to furnish the stocks, he directed the plaintiffs to purchase the stocks for him, or directed the other firm to purchase the stocks and report the purchase to plaintiffs for payment, and the plaintiffs did pay for the stock for him pursuant to his directions, they would be entitled to recover the amount so paid, but that, if there were not such transactions, and the plaintiffs did not actually pay out the money for him, they would not be entitled to recover, and the judge did not otherwise comply with the defendant's request. The defendant moves for a new trial because of these rulings, and because, as he alleges, the verdict is against the effect of the evidence.

It is not doubted that the defendant's request embodies a correct proposition of law. Still it is not understood to be the duty of the court to lay down every such proposition that may be requested pertaining to the subject of the trial, but only to properly submit the issue raised to the jury for determination. The plaintiffs claimed to recover for money paid for the defendant at his request, and for commissions upon the transactions. No question is specially made about the commissions. Even if the sale of the stocks short by the plaintiffs for the defendant, without selling them to any particular person for him, was as between him and the plaintiffs so far a wager upon the prices which the stocks would bear as to be illegal and not binding upon him to furnish the stocks, still he would have the right and might feel morally bound to furnish the stocks; and, if so, there would be nothing unlawful in his purchasing stocks to furnish, either himself or by others. If he should buy them on credit, he could not defend an action for the price on account of the purpose for which he wanted them; neither could he defend an action for the money paid if he procured others to buy and pay for them. The question raised in this case was whether the plaintiffs did actually pay the money for the defendant by his direction. This question was submitted to the jury with express instructions to return a verdict for the defendant if they did not so pay the money. The payment of the money was not connected with any adjustment of differences on a wagering contract, or other illegality, to taint it. And the verdict appears to rest upon warrantable evidence. The plaintiffs testified that they actually paid the money at defendant's direction. The defendant, while he testified that they were merely to adjust differences in the beginning, did not positively deny giving an order by telephone for the purchase of some of the stock. One of the plaintiffs on cross-examination did say that they were to adjust differences; but whether the differences were between amounts paid and received, or between present and future prices, was not explained. When called to the question as to whether there was or not any arrangement to merely adjust

the differences between present and future prices of stock treated as if sold, he distinctly denies that there was.

Upon this review of the trial it appears that the proper issue was submitted to the jury upon evidence sufficient to sustain the verdict found upon the responsibility of the jury.

Motion for new trial denied, and stay of proceedings vacated.

In re WINCHESTER.

(District Court, W. D. Pennsylvania. August 7, 1907.)

No. 1,909.

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

A bankrupt cannot be refused a discharge on the ground of fraudulent concealment of assets because of his failure to state in his schedules, or to advise his trustee of the fact, that he had expended money in the improvement of property owned by his wife, where in a plenary suit by the trustee against the wife it was determined that the creditors had no lien upon or interest in the property because of such expenditure.

In Bankruptcy. On application for discharge.

T. S. Woodruff and C. L. Baker, for bankrupt.
D. A. Sawdey, for objecting creditors.

EWING, District Judge. On July 12, 1902, Winchester filed a voluntary petition in bankruptcy, and in that same fall presented his petition for discharge, to which objections were filed by one C. Smalley, a creditor. The matter was referred to Joseph M. Force, referee, as special master, and on June 10, 1903, he filed his report, finding that the bankrupt was guilty of a fraudulent concealment of assets within the meaning of the act of Congress, and recommending that his application for discharge be refused. To this report exceptions were filed by the bankrupt, and the matter only came before the court for hearing the middle of last month during the session in Erie.

The act of fraudulent concealment which the special master finds the bankrupt to have been guilty of was his failure to enumerate in his schedules of assets and to advise the trustee of the fact that he had during the year preceding his petition in bankruptcy expended some $2,000, funds received by him from his father's estate, in the improvement of property of his wife. It seems that the bankrupt's father in the fall of 1900 conveyed to the bankrupt's wife a lot of ground on which was an old house, and died shortly thereafter. By his death the bankrupt inherited some $3,000 from his father's estate, and it was a portion of this fund which he expended in the spring and summer of 1901 in the improvement of his wife's property, pursuant, in fact, to a desire expressed by his father that he should thus make the house habitable and a comfortable home for his family. Under these circumstances, and the expenditure having been made so long prior to the proceeding in bankruptcy, it is a very serious question whether there really was any intent, fraudulent in fact or in law, on the part

of the bankrupt to conceal assets from his creditors when he made no statement of this expenditure to the trustee or in his schedule of assets. Subsequent, however, to the report of the master, and by leave of this court, the trustee filed a bill in equity in the court of common pleas of Erie county against the bankrupt and his wife for the purpose of charging her property, for the benefit of the creditors of the bankrupt, with the amount of money he had expended in these improvements. That case was concluded by decree entered December 31, 1906, dismissing the bill, from which decree it does not appear that any appeal was taken.

In his finding and opinion the judge sitting in that case found that at the time these improvements were begun and up until July of that year (1901), when they were completed, the bankrupt's credit was good, although he was insolvent when they were finished; but all of the claims for work and materials used in said improvements have been paid, a portion thereof out of money borrowed by the bankrupt for that purpose, for some of which at least he gave satisfactory security. Among the security thus given was a judgment for $300, which constituted the first lien on the real estate inherited from his father and an additional piece purchased by the bankrupt himself, and a mortgage for $600, which constituted a second lien upon said real estate. And he further finds that, when said improvements were begun, said Winchester did not know what they would cost, that he contracted for the labor and materials and it was very improvident to spend so much on the old house, but that his wife, Mrs. Winchester, supposed him to be perfectly solvent and never conspired with him to defraud his creditors, had no thought that his improving her property would result in his insolvency, and that there is nothing to show bad faith on her part at any time, and concluded as matter of law that the bankrupt's general creditors have no lien upon the real estate of Mrs. Winchester by reason of his expenditures and improvement of her real estate, as there was no connivance on her part, and she had no knowledge of his failing circumstances when such improvements were made and consented to. In view of this plenary action before a court of competent jurisdiction, the record of which was introduced into this case upon the argument on the exceptions to the report of the special master, there seems to be no reason now for the conclusion arrived at by him upon the less complete and partial hearing had before him, but that the decree in the equity proceedings should control. That decree virtually determines that the bankrupt had no interest in the real estate of his wife subject to the claim of his creditors, and consequently in failing to disclose the expenditures he had made in making these improvements he cannot be guilty of a concealment of assets. This was the only objection urged against him found valid by the report of the master.

The exceptions to the report of the master are therefore sustained, the exceptions to the discharge overruled and dismissed, and the discharge granted.

SEESE'S ADM'X v. MONONGAHELA RIVER CONSOL. COAL & COKE CO.

(Circuit Court, W. D. Pennsylvania. August 3, 1907.)

No. 26.

SHIPPING—PROCEEDING FOR LIMITATION OF LIABILITY—EXCLUSIVE JURISDICTION OVER CLAIMS.

A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and an order made therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 659.]

At Law. On petition to dismiss for want of jurisdiction.

P. M. Smith, for plaintiff.

McIlvain, Murphy & Jones, for defendant.

EWING, District Judge. This action is instituted for the purpose of recovering damages for the death of James A. Seese, alleged to have been occasioned by the negligence of the defendant company, while the decedent was employed on the towboat Defender owned by the defendant company, the boiler of which exploded on January 3, 1905, within the jurisdiction of the District Court of the United States for the Southern District of West Virginia, and which explosion killed said Seese.

The defendant now petitions to have this action dismissed on the ground that on January 14, 1905, it instituted proceedings in the District Court of the United States for the Southern District of West Virginia under the provisions of the act of Congress of March 3, 1851, for limitation of liability by reason of said accident, which said proceedings were so prosecuted that said court ordered:

"That all and every person or persons who may have, or claim to have, suffered damage by reason of the blowing up and explosion of the boilers of the steamboat Defender on the 3d day of January 1905, and the personal representatives of all such persons, be restrained from prosecuting any suit or suits against the said Defender, or her freight, or against the Monongahela River Consolidated Coal & Coke Company, by reason of said explosion, except in these proceedings [and] that all and every person or persons who may have or claim to have suffered damage by reason of the blowing up or explosion of the boilers of the steamer Defender on the 3d day of January, 1905, and the personal representatives of such of them as were killed by said explosion, be restrained from prosecuting any suits or proceedings at law except herein against the steam towboat Defender, or her freight, or against the Monongahela River Consolidated Coal & Coke Company, by reason of said explosion."

To this petition the defendant attaches a certified copy of the record in the proceedings had in said District Court of West Virginia and the rule granted on the plaintiff to show cause why this action should not be dismissed. In answer to this rule the plaintiff has filed a general demurrer, and on the argument of the rule, while admitting that said

statute had been decided to apply to accidents of this character, and that proceedings to avail of the limited liability under its provisions could be instituted before suit brought on any claim for damages, yet insisted that the statute was not intended to apply as against a dead man and could not be urged against an administrator who had not been appointed at the time the proceedings were instituted or completed, and also on the ground of their claim, as set forth in the statement filed in this case, of alleged knowledge and privity on the part of the defendant. An answer to the last point will be found in Re Whitelaw (D. C.) 71 Fed. 733, in which case it is distinctly declared that the court in which proceedings are instituted for the purpose of obtaining the benefit of the provisions of said act of 1851 is the court, and the only court, which can determine whether there is knowledge and privity on the part of the owners of the vessel; and the case of Providence & New York Steamboat Co. v. Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038, which decides that the court in which such proceedings have been instituted under the provisions of the act of 1851 has exclusive jurisdiction of all claims for damages.

The fact that Seese's administratrix was not appointed until after the monition issued in the District Court of West Virginia, possibly not until after the return day thereof, is not sufficient to give this court jurisdiction. Administration could have been had at any time after the death of Seese, and, if the fact that it were delayed until after orders and decrees were made in the court in which proceedings had been instituted under the act of 1851 would avail, there would be an incentive in every such case to delay administration until such date and thus avoid the effect of such proceeding. The intent of the act was to give the court in which such proceedings were instituted exclusive and inclusive jurisdiction to settle in that one proceeding all claims arising out of the accident upon which said proceedings were based. If any grace is to be allowed and exception made by reason of the fact that there was no personal representative of the deceased at the time the order was made in that court, application therefor should be made there.

The rule is made absolute, and the action is dismissed for want of jurisdiction.

In re SICKMAN & GLENN.

(District Court, W. D. Pennsylvania. August 2, 1907.)

No. 3,312.

BANKRUPTCY—ADMINISTRATION OF ESTATE—PARTNERSHIP AND INDIVIDUAL DEBTS.

An individual purchased the business and property of a corporation, and assumed its debts, giving his notes for the same. Shortly thereafter he entered into a partnership which took over the property, and agreed as between the partners to assume and pay such debts. The partnership was subsequently adjudged bankrupt, having paid but a small part of the debts and its assets, consisting chiefly of the property acquired from the corporation. *Held*, that the claims of the creditors of the corporation

were debts of the partnership estate, rather than of the partner who first assumed their payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 555–557.]

In Bankruptcy. On certificate from referee.

C. S. Crawford and Sylvester J. Snee, for claimants.
Wallace & Watson, for objecting creditors.

EWING, District Judge. The question certified by the referee is whether the claims of the Willson Bros. Lumber Company, the Empire Lumber Company, Lemuel Curry and R. M. Curry, William Curry, and Annie B. Sickman, respectively, were the debts of the partnership of Sickman & Glenn, or the debts of Jerry A. Sickman, individually. This certificate is made upon the petition of Flint, Erving & Stoner Company, creditors of said bankrupts, which petition asks that review be had regarding the claims of the Empire Lumber Company, Castle Shannon Savings & Trust Company, Wm. Curry, Willson Bros. Lumber Company, Lemuel Curry, and R. M. Curry, and of Jacob Linhart. It thus appears that the question certified by the referee omits the claims of the Castle Shannon Savings & Trust Company and Jacob Linhart, and embraces the claim of Annie B. Sickman, which is not included in the said creditors' petition for review. In the papers accompanying the certificate of the referee no request for a review of his ruling in regard to the claim of Annie B. Sickman appears, nor in those papers, including the testimony, is any information furnished in regard to the claim of Jacob Linhart. Our review of the action of the referee will therefore be confined to the claims named, other than those of Annie B. Sickman and Jacob Linhart.

The finding of the referee in regard to the former of these claims seems to be in accord with the wishes of these petitioners for review, and it is supposed, therefore, that such finding is satisfactory. If the claim of Jacob Linhart is of the character of the other claims embraced in the question certified, it can be disposed of in accordance with our views regarding those claims. The facts of the case very briefly are that up until the latter part of May or the 1st of June, 1905, a certain corporation called the Broughton Lumber Company had by itself, or through the intervention of the trustee of the creditors, been conducting the business, and at that time, by an arrangement then made, Jerry A. Sickman took over the property and assets of the Broughton Lumber Company, and assumed its indebtedness, and gave as evidence thereof to these creditors his own promissory notes, indorsed by his father and Lemuel Curry, who had been stockholders of said Broughton Lumber Company, and also by R. M. Curry. Jerry A. Sickman conducted this business for about a month, when he took into partnership with him John W. Glenn, forming the partnership of Sickman & Glenn, the bankrupts whose estate is now being administered. In forming such partnership, the agreement between Sickman & Glenn was that they should be equal partners, and that they should, as such partners, discharge the liabilities incurred by Sickman when he took over the property and assets of the Broughton Lumber Company, which assets now

became the property of such partnership. In this manner all the assets of the Broughton Lumber Company passed into the hands of Sickman & Glenn, and constitute to-day the principal, if not all the assets, of this partnership.

Both Sickman and Glenn testify positively as to this arrangement between them that they were to discharge the indebtedness taken over from the Broughton Lumber Company by Sickman, and they are corroborated by the testimony of some of the creditors, who testify that the partnership always admitted its liability for that indebtedness, and promised to discharge it. The notes originally given by Jerry A. Sickman for the debts of the Broughton Lumber Company, so far as they fell due prior to the proceeding in bankruptcy, were renewed from time to time by other notes of like character, executed by Jerry A. Sickman. Sickman & Glenn were adjudicated bankrupts in the fall of 1906, without having discharged any considerable part of the indebtedness of the Broughton Lumber Company. The claims here excepted to are those of the Broughton Lumber Company assumed by Jerry A. Sickman and subsequently by the bankrupt partnership of Sickman & Glenn, and are now objected to on the ground that they are individual debts of Jerry A. Sickman, and not payable out of the partnership assets.

The objecting creditor was not a creditor of the Broughton Lumber Company, but primarily of the partnership of Sickman & Glenn. It will be seen from what has been stated that the fund for distribution arises largely from assets originally of the Broughton Lumber Company, that the indebtedness of the Broughton Lumber Company was unquestionably assumed by Sickman & Glenn, and that it is only right and proper that these assets of the Broughton Lumber Company, upon the faith and credit of which the indebtedness was presumably incurred, should answer for that indebtedness in the hands of Sickman & Glenn, when they themselves agreed to such proposition when they took the assets of the Broughton Lumber Company into their possession.

Under the facts in this case, it can hardly be doubted that these several creditors could successfully maintain an action against Sickman & Glenn for the amount of their claims. Kountz v. Holthouse, 85 Pa. 235; White v. Thielens, 106 Pa. 173; Adams v. J. L. Leeds Co., 195 Pa. 70, 45 Atl. 666.

It is therefore concluded that the referee was correct in determining that these claims were properly debts of Sickman & Glenn, rather than of Jerry A. Sickman individually; and his action in the matter is affirmed.

UNITED STATES v. STACEY et al.

(District Court, S. D. Alabama. August 5, 1907.)

HOMESTEAD—EXEMPTION—JUDGMENTS IN FAVOR OF UNITED STATES.

A homestead exemption given by the laws of a state may be asserted against a judgment in favor of the United States in a civil cause, and also, by virtue of Rev. St. § 1041 [U. S. Comp. St. 1901, p. 724], which provides that judgments for a fine or penalty may be enforced by execution "in like manner as judgments in civil cases are enforced," against a judgment

Imposing a fine, even though under the state decisions the exemption does not extend to executions on judgments for torts or for fines imposed under the criminal laws of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 162.]

On Claims for Homestead Exemption.

Wm. H. Armbrecht, for contestant.

Stevens & Lyons, McIntosh & Rich, and R. P. Roach, for defendants.

TOULMIN, District Judge. These are claims of exemption of homesteads levied on under executions issued on judgments in forfeited bail bond cases and in causes in which judgment or sentence was rendered imposing the payment of fines.

The statute of Alabama provides that the homestead of every resident of this state, not exceeding in value $2,000 and in area 160 acres, shall be exempt from levy and sale under execution or other process for the collection of debts contracted, etc. Code Ala. 1896, § 2033. The Supreme Court of Alabama has decided that the exemption does not extend to judgments and executions in actions of tort and for fines imposed under the criminal laws of the state. But the Supreme Court of the United States, in the case of Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196, said:

"Nothing can be more clear than this, as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which property levied on is found, and that by this provision [referring to section 1042, Rev. St. U. S.] in favor of poor convicts it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases."

The court also refers to section 5296, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3608], as sustaining this conclusion. Section 5296 is found under title "Remission of Fines." I think this section clearly indicates that Congress intended that a poor convict, in taking the oath prescribed in section 1042, should be discharged from all further liability under the sentence imposing the payment of a fine; in other words, that the fine is thereby remitted. Moreover, section 1041, Rev. St. U. S. [U. S. Comp. St. 1901, p. 724], provides that the judgment for the payment of a fine may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. If a judgment in a civil case may not be enforced by execution against the exempt property of the defendant, it follows that a judgment for the payment of a fine may not be enforced against such property. Whatever may have been the ruling of the Supreme Court of Alabama on the subject, the legislation of the Congress, as construed by the Supreme Court of the United States, thereon, is the authority which is to control this court. In Clark v. Allen (D. C.) 114 Fed. 374, it is held that the exemption of a homestead may be asserted against a fine due to the United States government. See, also, same case (D. C.) 117 Fed. 699.

It is not disputed that the proceedings on the forfeited bail bonds are civil actions. My conclusion is that the defendants are entitled to the exemptions claimed by them. Judgment will therefore be entered against the plaintiffs for the cost of the levy and contest and for the release of the property from the levy.

A like judgment will be entered in each case.

DELAWARE, L. & W. R. CO. v. INTERSTATE COMMERCE COMMISSION et al.

(Circuit Court, S. D. New York. August 10, 1907.)

INJUNCTION—PRELIMINARY INJUNCTION—SUIT AGAINST INTERSTATE COMMERCE COMMISSION.

A preliminary injunction to restrain the enforcement of an order of the Interstate Commerce Commission pending a hearing on the merits refused.

On Motion for a Preliminary Injunction.

J. L. Seager, for Delaware, L. & W. R. Co.
L. A. Shaver, for Interstate Commission.
Foley & Powell, for Preston & Davis.

LACOMBE, Circuit Judge. All questions as to the propriety of the order made by the Commission and as to its power and jurisdiction may conveniently be disposed of at final hearing. The only reason advanced for preserving the status quo by preliminary injunction is the risk of fire, which would imperil, not only the property of plaintiff and other shippers by it, but also buildings owned by others in the neighborhood of its terminal. But the Commission expressly provided that the railroad company might take all needful precautions against a conflagration or other liability to accident. If there is risk because of delay in unloading the tank cars, it may require the consignee to be more expeditious. If the valves or cocks of the unloading apparatus are worn, or defective and leaky, it may require them to be replaced with efficient ones. If a pail is insufficient to catch the drippings, it may require the substitution of some receptacle with a broader opening. If the method of unloading from the bottom of the tank by gravity inevitably results in the spilling of oil, it may insist that a different method be employed, by a pump or what not. If, as seems most probable, the sole cause of the trouble is careless manipulation, it may refuse to allow the work to be done by persons who neglect to give proper attention to it and may insist that the consignee shall send employés to take the oil who will take proper precautions. Upon the proof, there seems to be no sufficient reason for any action by the court in advance of final hearing.

The motion is denied.

CLARK v. LYSTER.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1907.)

No. 2,458.

1. PARTNERSHIP—PARTNERSHIP PROPERTY—REAL ESTATE USED IN BUSINESS.

Real estate not purchased with partnership funds does not become partnership property, though used for partnership purposes, unless there is some agreement that it shall be so considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 101–108.]

2. MORTGAGES—MORTGAGEABLE INTEREST—ELIGIBILITY TO RECORD.

Two partners in a manufacturing business who owned the real estate used therein as equal tenants in common entered into a contract by which one retired from active participation in the business but remained as a silent partner for a term of five years, leaving the most of his capital invested. He also conveyed to his partner his half interest in the real estate "as a basis of credit," but took a bond for its reconveyance absolutely and unconditionally at the end of the term without subjecting it, as between the parties, to the risks of the business. After the expiration of the term, when he had become entitled to a reconveyance but had not received it, he executed a mortgage on his interest in the real estate to secure a valid indebtedness. *Held*, that such real estate was not property of the partnership but of the individual partners; that the mortgagor was the equitable owner of a half interest therein which was mortgageable as real estate, and that the mortgage given was valid, no rights of partnership creditors having intervened, and was entitled to record under Gen. St. Kan. 1901, § 1221, if not as a technical mortgage, as "an instrument in writing" affecting real estate, which record was constructive notice to all subsequent purchasers of its contents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 10, 11, 201.]

3. ESTOPPEL—EQUITABLE ESTOPPEL—ACTS CREATING.

In a suit to foreclose a mortgage, given to complainant by his son, against a grantee of the property, it appeared that defendant and the mortgagor were partners in a manufacturing business, and owners as tenants in common of the real estate used in the business. They entered into a contract by which the mortgagor retired as an active partner, but remained for a term of five years as a silent partner, leaving the most of his capital in the business, and also making defendant a loan to be used in the business and accounted for subject to its risks. He also conveyed his interest in the real estate to defendant "as a basis of credit," but took a bond for its reconveyance at the end of the partnership term. About that time he and defendant became involved in litigation respecting the latter's accounting under the partnership agreement, which did not, however, involve or affect the real estate. Pending such litigation, and after he had become entitled to a reconveyance of the real estate but had not received it, he executed the mortgage in suit to complainant, covering his interest in such real estate, to secure a valid indebtedness, which mortgage was duly recorded. Subsequently a settlement of the litigation was effected between the parties by which defendant paid the mortgagor a sum of money in full of his interest in the business and the loan and received a quitclaim deed to the mortgagor's interest in the real estate. Nothing was said in regard to the mortgage, and defendant had no actual knowledge of it. Complainant, who resided in another state, hearing of the pending settlement, visited his son, and, on completion of the settlement, received part payment of the mortgage debt from the proceeds, a portion of which he gave to his son to be invested for the benefit of his family. It was in dispute whether he arrived before or after the completion of the

settlement, but in any event he took no part therein. *Held*, that there was nothing in such facts or in complainant's conduct which created an equitable estoppel to prevent him from enforcing his mortgage against the property for the balance due him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 165–187.]

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

This was a bill in equity to foreclose a mortgage given April 27, 1901, by Herbert H. Clark and his wife to Harvey S. Clark, his father, conveying an undivided one-half interest in certain real estate situated in Wilson county, Kan., to secure the payment of certain notes amounting to $35,000 described in the mortgage, upon which $19,500 remained unpaid when the suit was brought. This mortgage was duly recorded in the office of the register of deeds of Wilson county on April 29, 1901. The mortgagors and also one Frederick E. Lyster, who held the title to the mortgaged premises at the time the suit was brought, were originally made defendants. Subsequently the suit was dismissed as to the Clarks and prosecuted only against defendant Lyster. His answer admits the execution of the mortgage as charged, but avers that at the time it was given Clark, the mortgagor, had no mortgageable interest in the land conveyed, that the notes claimed to have been secured by the mortgage had all been paid and satisfied, and that the mortgagee by reason of certain facts was estopped in equity from enforcing his security. The main facts, as disclosed by the pleadings, proof, and proceedings below, are as follows: Defendant Lyster and Herbert Clark, the mortgagor, had prior to April 27, 1895, been copartners in the manufacture of linseed oil, and were then the owners in fee simple, as tenants in common, each of an undivided one-half interest in the real estate which had been used by them in connection with their manufacturing business, the one-half of which belonging to Clark constituted the land which he subsequently mortgaged to his father. Their partnership was on that day dissolved, and a new agreement entered into by which Clark was to retire from active participation in the business, but to retain as a silent partner for a term of five years thereafter his interest in it. He agreed to leave his portion of the partnership capital, except $5,000, in the business, to loan Lyster $25,000 for five years, to pay annually to Lyster $2,500 in lieu of rendering personal services in carrying on the business, and in order to afford Lyster a basis of credit and commercial standing he agreed to convey and did convey to Lyster by a quitclaim deed his one-half undivided interest in the mill property, taking from Lyster a bond for a deed to reconvey the same to him on September 1, 1900. They proceeded with the business under the new agreement until about the expiration of the term, when Clark brought his action against Lyster to wind up their partnership business and for an accounting of all moneys due to him from Lyster under the agreement of April 27, 1895. On March 1, 1902, while that action was pending, Clark and Lyster settled and compromised all their differences involved in the suit. Lyster paid Clark $40.000 in full of all his dues, whether for money loaned or profits made. Clark dismissed his suit, and agreed to and did convey by a quitclaim deed his one-half equitable interest in the mill property which he had on April 27, 1901, mortgaged to his father and for which he then held Lyster's bond for a deed. At the time of that settlement Lyster had no actual as distinguished from constructive knowledge of the existence of the mortgage sued on, or of the fact that Clark's father had any right or interest in the property, and believed he was acquiring from Clark an unincumbered title to the same. After Clark received the $40,000 from Lyster pursuant to the terms of the settlement, he paid more than $16.000 of it over to his father in partial satisfaction of the mortgage debt. and the latter, being then 79 years old, made a present to his son of $10,000 to be invested for the support of his family. Lyster, after making his settlement with Clark on March 2, 1902, under the belief that he was the owner of an unincumbered title to the land in question, erected thereon permanent improvements of the value of $20,000, and was not actually informed of complainant's claim until this suit was be-

gun, July 10, 1902. The court below by consent of parties appointed a special master to take testimony and return the same, with his findings of fact based thereon, to the court. The master heard the proof, made a finding of the foregoing main facts, and also found (using his language) that: "Close confidential relations existed at all times between Harvey S. Clark and Herbert H. Clark; the father was generous to the son, and to a considerable extent was dominated by the son. The settlement was brought to a close after Harvey S. Clark had come to Kansas City in order to be present when the settlement was made, and at a time when Harvey S. Clark was dwelling with his son Herbert H. Clark. Of the proceeds of said settlement Harvey S. Clark presented Herbert H. Clark with about $10,000 to invest for the latter's family, although Herbert H. Clark was then still indebted to Harvey S. Clark in the sum of nearly $20,000. From these facts, as well as from the contradictory evidence which Harvey S. Clark gave and the lack of interest which he manifested while testifying, I find that Harvey S. Clark authorized the settlement which was made by Herbert H. Clark with Lyster, and that the attempt to foreclose the written instrument described in the bill of complaint is an afterthought conceived by Herbert H. Clark, who overpersuaded his father to undertake it." He also specially found that "neither during the negotiations for settlement nor at the time of the settlement and payment of the $40,000 was anything said one way or the other by any of the parties engaged therein concerning the said mortgage," and that Clark, in consideration of the receipt of $40,000 from Lyster, agreed to and did accept the same in full settlement and satisfaction of the indebtedness due him from Lyster, which he found to be $38,279.45, and agreed "to make, execute and deliver to said Lyster at the time said $40,000 is paid a good and sufficient quitclaim deed of conveyance of all of his right, title and interest in and to" the property which was mortgaged. He also specially found that the issue involved in the accounting suit between Clark and Lyster "did not embrace or involve or include any questions pertaining to the real estate or the reconveyance thereof or other matters provided for in the bond of date April 27, 1895, but only as to the moneys loaned and left in the business by the said Herbert H. Clark and the earnings of the business." The master reported in favor of a dismissal of the bill on the ground that it would be unjust and inequitable to defendant Lyster to have the mortgage enforced. The Circuit Court overruled exceptions duly filed to the master's report, confirmed the same, and entered a decree dismissing the bill. From that decree an appeal is prosecuted to this court.

Thomas J. White and W. Littlefield (A. N. Gossett, on the brief), for appellant.

Charles W. Webster (John P. Gilmer and J. W. Crowley, on the brief), for appellee.

Before SANBORN and ADAMS, Circuit Judges.

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

Notwithstanding the fact that Harvey S. Clark, the mortgagee, has died since the institution of this suit and his personal representative has been substituted in his place, we shall frequently refer to the parties as they originally appeared. The substantial facts of the case are, as observed by the learned trial judge, practically undisputed, and we are to determine and adjudicate the rights of the parties thereunder. There is no doubt about the bona fides of the transactions between Harvey S. Clark, the mortgagee, and his son Herbert, which resulted in an indebtedness of the latter to the former in the amount of $35,000, the giving of the notes to represent the indebtedness, the execution of the mortgage to secure their payment, or the actual pur-

pose of the parties to pledge whatever interest the son had in the real estate mortgaged to secure the payment of his indebtedness to his father. It is conceded that the son had paid the entire indebtedness excepting $19,500, and that the latter amount constituted a bona fide debt due on one of the notes described in the mortgage from the son to the father at the time this suit was brought. Notwithstanding the fact that numerous assignments of error are made, it is clear, as treated by the trial court, that two controlling questions are decisive of the case: First. Was the son's interest in the land which was conveyed by the mortgage subject to alienation as land, so as to entitle the mortgage deed to be recorded in the land records of the county and render its record constructive notice to subsequent purchasers? Second. Was the mortgagee's conduct in receiving from his son, the mortgage debtor, a part of the proceeds of the settlement between him and Lyster and otherwise, such as estops him in equity from foreclosing his mortgage for the balance due him? These questions will be considered in their order.

To properly apply the law, an accurate understanding of the relation of the parties as between themselves and as to creditors should be first stated. As between the mortgagor, Herbert Clark, and Lyster, the former undoubtedly owned the land in question and had a recognized vendible interest in it in 1895. The contract and bond for a deed executed by Lyster to Herbert on April 27, 1895, recited that Clark was then "the owner in fee simple of an undivided one-half interest" in the premises, and he then conveyed the same to Lyster for the purpose, as stated in the contract, of giving him credit and commercial standing as the managing partner of the partnership then formed between them. The contract and bond clearly disclose that as between the parties, so far as their rights against each other were concerned, the undivided interest conveyed by Clark to Lyster was not to be treated as partnership property, or as such made subject to any demands of Lyster against Clark on any possible accounting which might accrue to him. The contract and bond carefully discriminated between the loan of $25,000 made by Clark to Lyster and the conveyance of Clark's undivided interest in the land to Lyster. It subjected the loan to all the chances and hazards of the business. It provided that "on the first day of September, 1900, he" (Lyster) "will pay to said second party" (Clark) "the sum of $25,000 so loaned to him, conditioned, however, that in case of loss of any part of said loan by the first party in the legitimate transaction of the business herein provided for, then one-half of said amounts so lost beyond the control of said first party" (Lyster) "shall be deducted from said loan and the remainder of said amount" ($25,000) "shall be considered the amount due from the party of the first part to the party of the second part," etc. On the other hand, the contract and bond subjected the undivided interest transferred by Clark to Lyster to none of the chances and hazards of the business. It contemplated and in terms provided that it should be conveyed to Lyster and employed by him "as a basis of credit and commercial standing for the advantage and upbuilding of the business"; it contained an express covenant in the form of a bond that the interest should be reconveyed by Lyster to Clark on Septem-

ber 1, 1900, and, in the same clause which subjected the money to the chances and hazards of the business, it provided, concerning the land conveyed by Clark, as follows:

"That at the expiration of the five years for which this contract runs he" (Lyster) "will reconvey the premises herein described as hereinbefore provided" (referring to the absolute and unconditional terms of the bond) "to the said second party, his heirs or assigns, inevitable wear, decay, loss by fire or otherwise excepted."

From these provisions of the contract it appears that according to the intent, purpose, and agreement of the parties the land was not to become partnership assets, but was to remain the individual property of Clark and be reconveyed to him absolutely and unconditionally on a day fixed, without regard to any liability which might then exist in favor of Lyster against Clark arising out of the partnership business. Whether and how far real property is partnership assets depends upon the intention or agreement of the parties. 1 Jones on Mortgages, § 119; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Collumb v. Read, 24 N. Y. 505.

American and English cases very generally hold that real estate not purchased with partnership funds does not become partnership property, though used for partnership purposes, unless there is some agreement that it shall be so considered. Story on Partnership (7th Ed.) §§ 94 and 95, note B, and cases cited. A mere agreement to use real property for partnership purposes is not sufficient to convert it into partnership stock. There must be some evidence of further agreement to make it partnership property. 1 Lindley on Partnership (2d Am. Ed.) p. 332 et seq., and cases cited; Shafer's Appeal, 106 Pa. 49; Alexander v. Kimbro, 49 Miss. 529; Ware v. Owens, 42 Ala. 212, 94 Am. Dec. 672.

In Frink v. Branch, 16 Conn. 260, 269, facts were considered very similar to those in this case, and it was there held that the property was not partnership assets; the court saying:

"This property was not purchased with common funds, nor was any common capital withdrawn from the power of creditors to make the purchase, nor was there any agreement that the property thus owned in common should become partnership stock or constitute any part of the capital of the company. It was agreed, by parol only, that this property should be improved by the company in the prosecution of its business; but this agreement extended only to its temporary use. It did not, nor could it, affect the title to the land, even as between the parties, much less as the rights of others might be involved."

In Reynolds v. Ruckman, 35 Mich. 80, which was a suit for the foreclosure of a mortgage given by one of two partners who held an undivided one-half interest as tenant in common with his copartner in property made use of for partnership purposes, the defense set up was that it was partnership assets. Chief Justice Cooley, in delivering the opinion of the court, said that cases "in which the lands have been purchased with partnership funds can have no application here. * * * Real estate held by partners may or may not be partnership property; but usually it is not so unless partnership assets have been used to purchase it, or unless it was put in originally as a part

of the joint estate. But generally the fact that two or more persons make use of property in which their interests are apparently several, for partnership purposes, is very far from indicating an understanding that it is partnership estate."

Before the time arrived for the execution of the deed from Lyster to Clark, pursuant to the terms of the contract and bond, they became estranged; litigation ensued, and Clark brought his action against Lyster for an accounting concerning the partnership business. According to the proof and to the finding of the special master, that suit involved no question concerning the real estate or the reconveyance thereof by Lyster, but related exclusively to an accounting for the money loaned and left in the business by Clark and the earnings of the business. No creditors of the firm appeared or intervened in that suit, and, so far as this record discloses, there were no creditors of the firm at the time that suit was settled in March, 1902. There were none in April, 1901, when Clark executed his mortgage to his father, and no questions are now involved in this suit which in any manner concern creditors. So that for the purpose of this case we are dealing with no assets in which creditors or any other persons except Clark and Lyster and the mortgagee of Clark have any rights. In this condition of things the learned trial judge held that on April 27, 1901, when the mortgage was given by Clark, he had no interest in the land which he could mortgage, but had only an equitable right to an accounting; that the mortgage in question amounted only to an assignment of Clark's right as a partner to enforce an accounting; and cited as sustaining his conclusion the following cases: Bank v. Carrollton R. R., 11 Wall. 624, 20 L. Ed. 82; Shanks v. Klein, 104 U. S. 18, 26 L. Ed. 635; Rommerdahl v. Jackson, 102 Wis. 444, 78 N. W. 742; Collumb v. Read, supra; Goldthwaite v. Janney & Cheney, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56; Page v. Thomas, 43 Ohio St. 38, 1 N. E. 79, 54 Am. Rep. 788; Seeley v. Mitchell's Assignee, 85 Ky. 508, 4 S. W. 190; Beecher v. Stevens, 43 Conn. 588; Hewitt v. Rankin, 41 Iowa, 35; Lindley on Partnership (2d Am. Ed.) * 341 and note B. Those were cases in which one partner assigned his entire interest in the partnership property to an outsider, or in which title to real estate purchased with partnership funds or originally contributed to the partnership capital was involved. In the first class of cases it was held that the outsider did not, by the assignment, become a partner, but acquired the right to an accounting only. In the second class of cases it was held that the real estate, in whosesoever name it stood, was held in trust for creditors and other copartners till their interests were satisfied or waived.

By reason of the peculiar facts involved in those cases and the legal principles applicable to them they afford no authority for the disposition of this case, which involves totally different facts and is governed by different principles. The case of Hewitt v. Rankin, supra, was a suit to foreclose a mortgage upon partnership property in which priority of liens was involved. The Supreme Court, in delivering its opinion, said:

"Real estate held by a partnership is to be regarded as the property of the firm, as to the creditors and all persons dealing with it, where necessary to

protect their rights. * * * When the business of the partnership is closed, and its debts are paid and there are no equities in favor of third persons requiring real estate of the firm to be held subject to the foregoing rule, the partners, or their representatives, hold a direct interest therein, and, as between them, it is to be regarded as real estate, and subject to all the rules applicable thereto. In such cases it is to be regarded as the real estate of the partner in favor of his individual creditors. The conversion of real estate into personalty under the rule first above stated is a device of equity in order to effectuate the settlement of partnerships and to devote all the property to the payment of the firm debts, a result highly equitable, which the courts will never fail to attain. The reason of the rule ceasing in the absence of creditors of the firm, or others having like equities, the rule itself should no longer be applied. Hence the exception we have just stated." Citing Wilcox v. Wilcox, 13 Allen (Mass.) 252, and a number of other cases.

Eight months before the time Clark executed the mortgage to his father the partnership between him and Lyster had been dissolved; there were no outstanding debts, and Lyster had no direct or contingent right in Clark's interest. Clark then, according to the true intent and meaning of their contract, was the equitable owner of the undivided interest in the land, unaffected by any of the partnership obligations. Lyster was in default. He had allowed eight months to pass without complying with the imperative condition of his bond to reconvey Clark's interest to him. In that condition of things, if Lyster had done his duty and had reconveyed the land to him according to his obligation, Clark would have had the combined legal and equitable title to it, and could undoubtedly have mortgaged or sold it at his pleasure.

In view of these facts, it is contended by the defendant that as Clark did not have the legal title to the land when he executed the mortgage to his father, but only an equitable right to it by reason of Lyster's bond, he had no mortgageable interest in it. This is not the law. Clark had a perfect equitable title which, except for Lyster's default, would have been converted into a legal title. That equitable right was the subject of sale and mortgage. Reed v. Munn (C. C. A.) 148 Fed. 737, recently decided by this court. It was so held by the Supreme Court of Kansas in Jones v. Lapham, 15 Kan. 540, 544. That case involved the very question now under consideration. The holder of a bond for a deed had given a mortgage upon his equitable right quite as Clark did in this case. Mr. Justice Brewer, then Judge of the Supreme Court of Kansas, said concerning it as follows:

"Again, it is said that Hull had no mortgageable interest in the land. This is a mistake. True, he did not hold the legal title, but he had an interest in the property. A bond for a deed is often in equity declared to be equivalent to a conveyance of the property with a mortgage back. His was an interest which was the subject of sale, and would pass by a deed of the property. Gen. St. 1869, p. 999, c. 104, § 1, cl. 8; page 185, c. 22, § 2. It was an interest which he could use as security for a loan, and could pass for that purpose by an ordinary real estate mortgage."

That ruling is binding upon us as a rule of property established by the highest judicial tribunal of a state. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

The mortgage of Clark to his father was a recordable instrument under the laws of Kansas. It was an instrument conveying and af-

fecting real estate. "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of the register of deeds of the county in which such real estate is situated." Section 1221, G. S. 1901. It was filed and recorded in the office of the register of deeds of Wilson county on April 29, 1901, and imparted notice to everybody of its contents. "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice." Section 1222, G. S. 1901. Even if the instrument recorded was not a mortgage, technically speaking, it was an instrument of writing recorded in the county where the land in question was situated, and as such imparted notice to every person of its contents and of the extent to which it affected Clark's title. Section 1, of chapter 124, p. 232, of the Session Laws of Kansas of 1901, obviously intended as a curative and remedial provision, reads as follows:

"All deeds, mortgages, releases, powers of attorney, leases, contracts, conveyances and other instruments of writing now recorded, copied or noted in the proper books of the office of register of deeds of the several counties in the state of Kansas, shall, upon the passage of this act, be deemed to impart notice to subsequent purchasers, encumbrancers, lessees and all other persons whomsoever so far as and to the extent that such deeds, mortgages, releases, powers of attorney, leases, contracts, conveyances and other instruments of writing may be found recorded, copied or noted on said books of record, notwithstanding any defects existing in the execution, acknowledgment of recording or certificate of recording of the same."

That section took effect May 1, 1901. Complainant's mortgage had then been recorded two days. Lyster purchased the property from the mortgagor nearly a year thereafter, at a time when the public land records fully disclosed the existence and effect of the incumbrance.

Within the purview of each and all the foregoing statutes, the recording of the mortgage was notice to every one of the contents of the instrument and the extent to which it affected the title to the real estate conveyed. In any view we may take of the mortgage in question, whether as a perfect deed of conveyance or an imperfect execution of an intention, it was a recordable instrument under the laws of Kansas, and its record imparted full notice of its contents and effect to all persons whomsoever. The fact disclosed by the record, that Lyster had no actual knowledge of the existence of the mortgage or that he believed the land he was about to purchase from Clark was unincumbered, is quite immaterial. He was bound by law to take notice of the recorded incumbrance, and is conclusively affected with all he could have ascertained by doing so. Poplin v. Mundell, 27 Kan. 138; Smith v. Jones, 37 Kan. 292, 15 Pac. 185; Kuhn v. Nat. Bank of Holton (Kan.) 87 Pac. 551.

The only other question requiring consideration is whether Harvey S. Clark, the mortgagee, is estopped from foreclosing his mortgage. He was the holder in good faith of a mortgage to secure

a just debt due from the mortgagor to him. He did nothing or said nothing to induce Lyster to purchase his son's interest. He did nothing or said nothing to conceal the fact that his son's interest was subject to a mortgage, or to induce Lyster to refrain from examining the land records to ascertain whether the son's interest was free from incumbrance. He lived in Illinois, and when informed that his son was about to settle his suit against Lyster and collect a large amount of money he went to Kansas City, where his son resided and where the collection was to be made, for the purpose of securing payment of his son's debt to him. By reason of the estrangement between the son and Lyster they had no personal interviews, but negotiated their settlement through their solicitors. There is a conflict of evidence as to whether the father arrived in Kansas City before or after the settlement was concluded, and before or after the son had executed his quitclaim deed to Lyster; but however that may be, it is certain the father did not see or have any interview with Lyster or his solicitors until after the transaction had been fully concluded. There was, therefore, no opportunity for this aged man, however disposed he might have been, to deceive Lyster, or any one acting for him in the matter. His chief and only offending is found by the special master to consist of having "close confidential relations with his son"; of being "generous to his son"; of being dominated by his son "to a considerable extent"; of dwelling with his son while in Kansas City attempting to get his debt paid or reduced; of presenting to his son $10,000 out of the money received from him "to be invested for the benefit of his family." From such relations with and disposition toward his son, which seem to us altogether natural and blameless, together with what the master denominates "contradictory evidence" given by the father (without referring to it, and which after a patient investigation we are unable to discover), and a "lack of interest" (a commendable frame of mind for a witness) which the master says the old gentleman manifested while testifying, he reached the conclusion that the father authorized the settlement between the son and Lyster, and that it would be unjust and inequitable to permit him to foreclose his mortgage to secure the payment of $19,500, due him from the son. Suppose it be true that the father did authorize the settlement which the son made with Lyster, that fact would have no significance unless the settlement as made purported to involve the conveyance to Lyster of an unincumbered title to the sons's one-half interest. But there is no claim that such was the fact. The settlement as made required the son to give a quitclaim deed to Lyster for his one-half interest. That is entirely consistent with the fact as it existed that his interest was incumbered.

From the facts disclosed by this record, and even from the findings made by the master, there is no substantial ground for imputing to Harvey S. Clark, the mortgagee, any fraudulent, wrongful, misleading or injurious conduct toward Lyster which in any manner tended to induce him to believe he was purchasing an unincumbered title to the son's undivided interest, or to refrain from resorting to the land records and making the inquiry which common prudence and the law of the land required of him. The worst that can be said against the

father is that he did not ascertain the whereabouts of the respective solicitors for his son and Lyster while they were negotiating the terms of the settlement and volunteer to instruct Lyster concerning his duty. If he had been present with them he might lawfully have observed silence on the subject under consideration. Files v. Rankin (C. C. A.) 153 Fed. 537, recently decided by this court. But he was in fact both distant from them and absolutely silent. The rule caveat emptor applies, and Lyster cannot complain.

It is again said, that because the father received of a son a part of the proceeds of the settlement made with Lyster and was generous to his son's family, these facts in some way make against the father's equity in this case. We fail to see in them anything injurious to Lyster. Whatever became of the money paid by Lyster to the son did not concern the former. It was not his money. He owed money to the son which he paid, and the son owed money to his father, a part of which he paid, and the father afterwards made a donation to the son's family. If there was any doubt about the mortgage debt these acts might have been significant; but on the proof and findings no such doubt exists. Accordingly, the acts in question must be referred to their natural motive—a desire to close a business transaction, and to practice, so far as the father is concerned, a little of the praiseworthy generosity which the master finds characterized his general conduct toward his son. By such inoffensive conduct as that already considered, defendant Lyster contends that complainant's contract, duly and formally executed in writing and under seal, should be set aside and his rights thereunder forfeited. To strike down rights secured with such care and formality by resort to the doctrine of estoppel in pais, every consideration of justice requires that the proof should be clear, cogent, and convincing, and the facts leading to that result should be clearly established. Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 334, 23 L. Ed. 927; First National Bank v. Marshall & Ilsley, 28 C. C. A. 42, 83 Fed. 725, 735. The evidence adduced in this case falls far short of that reasonable requirement, and facts are not established from which complainant can be justly and equitably decreed to be estopped from enforcing his legal rights.

Again, equitable estoppel is generally predicated upon positive or constructive fraud, or gross negligence tantamount to it. Unless one or the other of these elements are found in a case, estoppel does not ordinarily exist. 1 Story's Eq. Jur. 391; Brant v. Virginia Coal & Iron Co., supra; Hobbs v. McLean, 117 U. S. 567, 580, 6 Sup. Ct. 870, 29 L. Ed. 940; John Shillito Co. v. McClung, 2 C. C. A. 526, 51 Fed. 868, 876. Tested by the last-mentioned rule, the record fails to disclose any such conduct or acts on complainant's part as requires or justifies us in holding him estopped from foreclosing his mortgage. Moreover, it is essential, as a general rule governing equitable estoppel, that the party claiming to have been influenced by the conduct of another to his injury must himself have been ignorant of the true state of facts, and not have been guilty of negligence or want of due care in availing himself of opportunities open to him for ascertaining knowledge of such facts. Debenture Co. v. Hopkins, 63 Kan. 678, 66 Pac. 1015. "Equity will not assist a man whose condition is at-

tributable only to that want of diligence which may be fairly expected from a reasonable person." Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Burk v. Johnson, 146 Fed 209, 216, 76 C. C. A. 567. "It is also essential for its" (principle of equitable estoppel) "application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties or both have the same means of ascertaining the truth, there can be no estoppel." Brant v. Virginia Coal & Iron Co., 93 U. S. 337, 23 L. Ed. 927. See, also, Bloomfield v. Charter Oak Bank, 121 U. S. 135, 7 Sup. Ct. 865, 30 L. Ed. 923.

The record in this case discloses, and the master finds, that nothing was said between the parties at the time of the settlement between Clark and Lyster one way or the other about the mortgage in suit. Lyster testified that he made no examination of the land records to ascertain the condition of the title. From these facts it is clearly apparent that he did not rely upon any representation, act, or conduct of the complainant, and that he by his failure to examine the land records—the appropriate place for information, and one to which all persons are required to resort—was guilty of that negligence and indifference to his own rights which disentitles him to any equitable consideration. In the cases of Johnson v. Williams, 37 Kan. 179, 14 Pac. 537, 1 Am. St. Rep. 243, and Kuhn v. Nat. Bank, supra, the Supreme Court of his own state has so declared.

It is claimed that defendant, during the two months or more which elapsed after receiving Clark's quitclaim deed and before this suit was instituted, made extensive repairs upon the premises in question; that they were of little value before the repairs were made, and that their present value is largely given to them by defendant's expenditures. There is a sharp dispute about the value of the premises before the repairs were made, but, whatever be the fact in that particular, the defendant, from what has already been said, is the author of his own misfortune. It cannot be contended that complainant by dint of any word, act, suggestion, or influence so misled or induced him to spend any money on the premises, or to refrain from examining the land records to ascertain the truth about his title, as to estop him from asserting his lawful rights.

The decree below dismissing the bill cannot be sustained. It must be reversed, and the cause remanded to the Circuit Court with instructions to enter a decree in favor of the complainant; and it is so ordered.

DOWAGIAC MFG. CO. v. McSHERRY MFG. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 18, 1907.)

No. 1,711.

1. COURTS—CIRCUIT COURT OF APPEALS—JURISDICTION IN MANDAMUS.
A Circuit Court of Appeals of the United States has no power to interfere by mandamus with the action of a Circuit Court, where the question involved relates to its jurisdiction as a Circuit Court of the United States, but the application in such case must be made to the Supreme Court; but such want of power in the Circuit Court of Appeals does not exist where the question involved relates to the jurisdiction of a Circuit Court as a judicial tribunal of original jurisdiction, having no relation to its limitation as a national court.
[Ed. Note.—Jurisdiction of Circuit Court of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

2. MANDAMUS—SUBJECTS AND PURPOSES OF RELIEF—CONTROLLING JUDICIAL ACTION.
Mandamus will lie to control the action of an inferior court when it assumes to act beyond its jurisdiction, or where it refuses to take jurisdiction of a case and proceed to judgment therein when it is its duty to do so, and there is no other adequate remedy, but not to control its action in a matter which is within its jurisdiction to hear and determine.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 62.]

3. EQUITY—DECREE—BILL OF REVIEW—GROUNDS—FRAUD.
Fraud in obtaining a decree cannot be made the basis of a bill of review, but only of an original bill to impeach the decree for fraud; the radical difference between the two kinds of bills being that a bill of review is a continuation of the original litigation, whereas a bill to impeach a decree for fraud is new and independent litigation.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1090.]

4. JUDGMENT—EQUITABLE RELIEF—PENDENCY OF APPEAL—EFFECT.
A bill to impeach a decree for fraud, the relief sought being an injunction to restrain its enforcement, is not the same in purpose as an appeal, and the court which rendered the decree has jurisdiction to entertain such a bill, although an appeal from the decree is pending.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 771.]

On Petition for Writ of Mandamus Directed to the Circuit Court of the United States for the Western Division of the Southern District of Ohio, and the Judges Thereof.

F. L. Chappell, for petitioner.

B. F. Harwitz and E. E. Wood, for respondents.

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

COCHRAN, District Judge. The writ of mandamus sought by the petition herein is one commanding that an order be entered vacating an order made May 20, 1907, granting a preliminary injunction. That order was made in a suit brought in said court May 15, 1897, by the petitioner, Dowagiac Manufacturing Company, as plaintiff, against the respondents, McSherry Manufacturing Company, C. R. Oglesby, and T. O. Eichelberger, as defendants, for infringement of certain letters patent, in which an injunction and an accounting were sought.

It was made on application of the defendant C. R. Oglesby, upon what was termed a cross-bill filed by him April 27, 1907. This pleading was filed and said injunction was granted after a final decree in said suit and whilst appeal therefrom was pending in this court, which is still undisposed of. That decree was rendered August 14, 1906. By it the plaintiff recovered of the defendants the sum of $47,855.95 and costs. It was not superseded on the taking of the appeal, and on April 18, 1907, the time within which it might be having elapsed, the plaintiff caused an execution to issue and be levied on certain real estate owned by the defendant Oglesby. The preliminary injunction granted restrained proceedings on said execution until the further order of the court. The relief prayed by said pleading was an injunction against further proceedings thereon, and the ground upon which it was sought was that said decree, as to the defendant Oglesby, had been obtained by fraud. The fraud complained of was that said defendant had been president of the defendant company, but at the time of the filing of the bill had ceased to be such, or a stockholder in the company; that individually he had not infringed, or received any profits from the infringement of, the letters patent in suit; that after answer filed plaintiff's solicitor and managing counsel represented to him, on inquiry by him as to why he had been made a party to the suit, that it was usual and ordinary in patent cases to make officers of corporations parties thereto, that he was a mere nominal party, and that he need not give the matter further concern or attention; and that, relying on said representation, he did not give the matter further concern or attention and had no knowledge of the proceedings thereafter had until subsequent to the rendition of the final decree and service of copy thereof on him.

This case presents the question as to whether this court has the power to and should interfere by mandamus with this action of the lower court? It would seem that a Circuit Court of Appeals of the United States has no power to interfere by mandamus with the action of a Circuit Court thereof, where the question involved relates to its jurisdiction as a Circuit Court of the United States. In the case of United States v. Severens, 71 Fed. 768, 18 C. C. A. 314, we held that, where its decision in regard thereto can be carried directly to the Supreme Court upon certificate under the fifth section of the Circuit Court of Appeals act, the application for a writ of mandamus must be made to that court. In the cases of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, and In re Pollitz, 206 U. S. 323, 27 Sup. Ct. 729, 51 L. Ed. 1081, the question arose in removal cases. The application for the writ was made in each instance to the Supreme Court. In the Wisner Case it was granted, whereas in the Pollitz Case it was denied, but not on the ground that that court was not the proper court to which to make the application. In view of these decisions it would seem that in such cases it is not proper to make the application to the Circuit Court of Appeals, and that therefore in no case has that court power to interfere by mandamus with the action of a Circuit Court of the United States where the question involved relates to its jurisdiction as a Circuit Court of the United States.

If so, the only case in which that court can have power to interfere

by mandamus with the action of the Circuit Court, where the question involved relates to its jurisdiction, is where the question is as to its jurisdiction as a judicial tribunal of original jurisdiction. In the case of United States v. Swan, 65 Fed. 647, 13 C. C. A. 77, we heard, but denied, an application for mandamus in such a case. The question here is as to the jurisdiction of the lower court as a tribunal of original jurisdiction. There is nothing, therefore, in the nature of the case itself against this court's power to grant the mandamus sought. If it is not right that the writ should be granted, it is because the case does not come within the principles allowing the issuance of a mandamus applicable to such cases. In the Pollitz Case Mr. Chief Justice Fuller had this to say as to when a writ of mandamus will not be issued by the Supreme Court to a Circuit Court, to wit:

"But mandamus cannot be issued to compel the court to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction; nor can the writ be used to perform the office of an appeal or writ of error."

He referred to two instances in which it will be issued. One he referred to in these words:

"Where the court refuses to take jurisdiction of a case and proceed to judgment therein when it is its duty to do so, and there is no other remedy, mandamus will lie unless authority to issue it has been taken away by statute."

The other, he referred to, in these words:

"And so where the court assumes to exercise jurisdiction on removal, when on the face of the record absolutely no jurisdiction has attached."

The sum of these expressions is that the writ will not be so issued when the action of the Circuit Court is within its jurisdiction. It will be issued when it is not up to or goes beyond its jurisdiction and there is no other adequate remedy.

In that case a suit brought by a citizen of New York, against a citizen of Ohio and citizens of New York in the proper state court of New York had been removed by the citizen of Ohio into the Circuit Court of the United States for the Southern District of New York on the ground that it involved a separable controversy between him and plaintiff, who were of diverse citizenship. That court, on motion to remand, held that there was such a controversy in the suit and overruled the motion. The application for the writ was denied, for the reason that it was within the jurisdiction of that court to hear and determine the question as to separable controversy on which its jurisdiction depended, and error in regard thereto could be raised only by appeal after final decree. In the Wisner Case, where the writ was granted, a suit brought by a citizen of Michigan against a citizen of Louisiana in the proper state court of Missouri had been removed to the Circuit Court of the United States for the District of Missouri, Eastern Division, and that court had overruled a motion to remand and taken jurisdiction of the suit. The writ was granted, for the reason that the action of the lower court was beyond its jurisdiction. The suit could not have been originally brought there, and hence could

not be removed thereto. Its jurisdiction depended on no question which it had the jurisdiction to determine as in the Pollitz Case.

The same principles apply here, though the only question as to jurisdiction involved is in respect to the authority of the lower court as a judicial tribunal of original jurisdiction. If the action of the lower court was within its jurisdiction as such a tribunal, it cannot be interfered with by mandamus, no matter how erroneous it may have been. Error therein can be inquired into only upon appeal from the order granting the preliminary injunction. It is only in case its action went beyond its jurisdiction as such a tribunal that the petitioner can be entitled to the mandamus it seeks. It is claimed that it did go beyond such jurisdiction, and that on the ground that, pending the appeal from its final decree, the lower court was without jurisdiction to grant said injunction. The case of Ensminger v. Powers, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732, is cited in support of this position. In that case it was held that a bill of review cannot be filed pending an appeal from a final decree. There a final decree in favor of the defendant was entered by the Circuit Court in December, 1873. An appeal therefrom to the Supreme Court was taken by plaintiff in January, 1874. This appeal was dismissed in December, 1875, for failure of appellants to file and docket the cause on the appeal. In September, 1876, a bill of review for error of law was filed. It was claimed that it was filed too late, as the time within which ordinarily a bill of review may be filed is the time limited by statute for taking an appeal from the decree sought to be reviewed, which in this instance was two years. It was held that the time during which said appeal was pending should be deducted, and that therefore the bill was filed in time. The ground upon which it was held that such deduction should be made was that, pending the appeal, the plaintiffs had no right to file a bill of review. Mr. Justice Blatchford said:

"The pendency of the appeal by Bridget Power would have been a valid objection to the filing of a bill of review by her for the errors of law now alleged, and inasmuch as the appeal was not heard here on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no supersedeas, the Circuit Court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such relief was beyond its control."

It is to be noted, however, that this holding has relation to a bill of review. Concerning such a bill Judge Sanborn, in the case of Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569, had this to say:

"The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are: (1) Error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the decree; and (3) newly discovered evidence which could not have been found and produced by the use of reasonable diligence before the decree was rendered."

The alleged cross-bill filed in the lower court cannot, therefore, be characterized as a bill of review. The ground upon which it sought relief was neither one of the three grounds upon which such a bill can be sustained, but another and entirely distinct ground, to wit, that

the decree had been obtained by fraud. Such a ground of relief can be made the basis, not of a bill of review, but only of an original bill, or, as it is sometimes called, an original bill in the nature of a bill of review. 2 Beach, Mod. Eq. Pr. § 884. Daniell's Chancery Pleading and Practice (5th Ed.) p. 1584, characterizes such a bill as a bill to impeach a decree for fraud. In the case of Tilghman v. Werk (C. C.) 39 Fed. 680, Judge Jackson said that such a bill "lies only for fraud; and such fraud, as has been said by very eminent judicial authority in an English case, must be actual and positive, showing a mala mens—a meditated and intentional contrivance to keep the opposite party and the court in ignorance of the real facts of the case and thus obtain the decree. Patch v. Wood, L. R. 3 Ch. 203."

The radical difference between these two kinds of bills is that a bill of review is a continuation of the original litigation, whereas a bill impeaching a decree for fraud is not. It is new and independent litigation. The rules applicable to the two kinds of bills are different. As, for instance, it is well settled, in certain jurisdictions at least, that a bill of review cannot be filed after a decree has been affirmed on appeal, at least where the ground thereof is newly discovered evidence, unless the right to file it has been reserved in the decree of the appellate court, or permission be given on application to that court directly for that purpose. Southard v. Russell, 16 How. 545, 14 L. Ed. 1052; 2 Bates on Fed. Eq. Proc. § 717. But such is not the case as to a bill to impeach a decree for fraud. It can be filed without such leave being first had. 2 Daniell's Ch. Pl. & Pr. (5th Ed.) 1584; 2 Beach, Mod. Eq. Pr. § 884; Ritchie v. Burke (C. C.) 109 Fed. 16, 18.

It may be said, however, that the ground upon which a bill of review cannot be filed pending an appeal from the decree sought to be reviewed exists with equal force when a decree is sought to be impeached for fraud pending an appeal therefrom, and should equally prevent such a bill being filed during the pendency thereof. The reason why a bill of review cannot be filed pending an appeal from the decree sought to be reviewed was not pointed out in the case of Ensminger v. Powers. Probably it is this: An appeal and a bill of review are both direct attacks upon the decree itself. Each is a different mode of seeking to have the same thing done; i. e., to have the decree vacated and set aside. The success of either will render the other unnecessary so far as the effect on the decree is concerned; and, as the appeal is first in time, it should be given the right of way. If this is the true reason for this rule, there is room to hold that it applies in case a bill impeaching a decree for fraud is filed, pending an appeal therefrom, where the bill is limited to seeking to have the decree vacated and set aside, or in so far as it seeks to have such relief; and it is hard not to yield to the position that it should be given the same effect in such a case, or to such an extent, as in case of a bill of review. It may be urged that the fact that the latter is a continuation of the original litigation, whereas a bill of the other kind is not, is not sufficient to require a different rule.

But a bill impeaching a decree for fraud need not, in so far as it seeks relief, concern itself with the decree. It may be limited to seek-

ing an injunction against its enforcement or to depriving the party in whose favor it has been rendered of the benefit which he has derived from it. Indeed, it may be that such is all that such a bill is ever properly concerned with. If such a bill is so limited, the above reasoning cannot be applied to prevent its being filed pending an appeal from the decree. The two proceedings are not in such a case seeking the same relief. The appeal is seeking to have the decree vacated and set aside, whereas the bill is seeking to prevent its enforcement or to obtain a restoration of the benefits derived under it. It is on the ground that such a bill may be so limited, or such is its proper nature, that it has been held that a Circuit Court of the United States can give relief against a decree of a state court obtained by fraud. It was so held in the cases of Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524, and Marshall v. Holmes, 141 U. S. 597, 12 Sup. Ct. 62, 35 L. Ed. 870, where the bills sought an injunction against an enforcement of the decrees, and also in the cases of Johnson v. Waters, 111 U. S. 667, 4 Sup. Ct. 619, 28 L. Ed. 547, and Arrowsmith v. Gleason, 129 U. S. 99, 9 Sup. Ct. 237, 32 L. Ed. 630, where the bills sought a restoration of benefits derived under them. In the case of Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407, it was held that a federal court had no jurisdiction of a direct attack on the decree of a state court. Mr. Justice Bradley there said:

"The question presented with regard to the jurisdiction of the Circuit Court is whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Court could not properly entertain jurisdiction of the case. Otherwise the Circuit Courts of the United States would become invested with power to control the proceedings in the state courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524, the case might be within the cognizance of the federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the state courts; and in the other class the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof."

It must be held, therefore, that there is nothing in the case of Ensminger v. Powers that militates against the lower court having jurisdiction, pending an appeal to this court from its decree, to hear an application for an injunction against the enforcement thereof on the ground that it had been obtained by fraud, and of granting such application if a proper case for such a relief was made. This was all the relief which said alleged cross-bill sought, and is all the relief granted by the preliminary injunction complained of.

The fact that a reversal of the decree on the appeal will render unnecessary the continuation of the injunction, or, rather, deprive it of further effect, is not against the court's jurisdiction to grant it. Nor is the fact that the decree might have been superseded, and was not. It is inequitable that a decree shall be enforced, and the party affected by it shall be harassed thereby, when that decree has been obtained by fraud, and this equity on his part is not weakened by either circumstance. He should not be put to the necessity of superseding such a decree, nor run the risk of not getting back property taken from him thereunder. The action of the lower court, therefore, was clearly within its jurisdiction as a judicial tribunal of original jurisdiction.

It is urged, however, that the cross-bill contradicts the record in alleging that the defendant Oglesby had ceased to be a stockholder and president of the defendant company at the time of the filing of the bill; the record showing that he ceased being so shortly after the filing of the bill, and not before; that the subject-matter of the cross-bill could have been raised in the answer filed before decree, and was not, therefore, proper subject-matter for a cross-bill; and that a cross-bill cannot be filed after a final decree. The case of Dickerman v. Northern Trust Co., 80 Fed. 450, 25 C. C. A. 549 is cited in support of the second proposition just stated, and the cases of Rogers v. Riessner (C. C.) 31 Fed. 591, and Bronson v. La Crosse & Milwaukee R. R. Co., 67 U. S. 528, 17 L. Ed. 359, are cited in support of the third and last one.

But it is not true that the subject-matter of the cross-bill could have been raised by answer filed before decree. The subject-matter of the cross-bill was not defendant Oglesby's liability to plaintiff, but that the decree against him had been obtained by fraud. This could not have been set up before the decree. It is true, however, that a cross-bill cannot be filed after final decree. This position was urged in the lower court against the granting of the preliminary injunction, and Judge Clark, who heard the matter, responded to it in these words:

"It is not necessary to undertake now to fix the technical name of the bill, or petition, as it may be called, filed in this case, or to determine whether technically it should be called an original bill, cross-bill, a bill in the nature of a bill of review, or a petition in the cause. There can be no doubt that such jurisdiction and power as exists to grant an injunction pending the appeal before the Circuit Court of Appeals exists in the judge of the court below, and that also such power as the judge may exercise, if properly invoked by a pleading or petition in this same case, rather than by an independent bill. The subject-matter and purpose of the pleading must be looked to, to determine its proper designation under the law of procedure, and not the name under which it may be filed in court."

But, the lower court having jurisdiction to hear and determine a case of the kind presented by said pleading, it was within its jurisdiction to determine also as to the propriety and sufficiency of the proceedings by which it was presented. If it has erred in this particular, the error can be corrected by this court only upon an appeal from the order granting the preliminary injunction. It cannot do so by mandamus.

The petition for the writ is denied.

PRINDLE v. BROWN et al. *

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 634.

1. PATENTS—REMEDY IN EQUITY FOR REFUSAL OF PATENT—SCOPE.
The broad scope of Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], authorizing a suit in equity to establish the right to a patent, was in no way limited or qualified by Act Feb. 9, 1893, c. 74, 27 Stat. 434 [U. S. Comp. St. 1901, p. 3391], providing for appeals from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia.

2. SAME—SUFFICIENCY OF BILL.
A bill filed under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to establish the right of complainant to a patent which alleges that "before the sixth day of June 1900" complainant "was the true, original, and first inventor" of the device in issue, that on that day he filed his application for a patent therefor, and that on May 28, 1900, defendant filed an application for the same invention on which after interference proceedings he was awarded a patent, is not fatally defective on general demurrer.

3. SAME—ALLEGATION OF DATE OF INVENTION.
A bill which states the date of an application for a patent is not to be held to state that the invention was then first completed or reduced to practice unless nothing is alleged showing invention prior thereto, and a further allegation that the invention was made prior to such date covers the fact of reduction to practice, and is sufficient to carry the date back of the application.

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

For opinion below, see 136 Fed. 616.

Edwin J. Prindle, pro se.
William Quinby, for J. T. Brown and O. A. Miller.
Emery & Booth, for Walter E. Trufant.

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

PUTNAM, Circuit Judge. This is a bill seeking to establish a patent for an invention in accordance with section 4915 of the Revised Statutes [U. S. Comp. St. 1901, p. 3392]. It was heard on demurrer in the Circuit Court, and dismissed; whereupon the complainant appealed to us. There was also filed in the Circuit Court a cross-bill, which was likewise dismissed on demurrer; but, there being no appeal from that decree, we have no occasion to consider that proceeding.

The application of the complainant below for a patent was decided against him by the Commissioner of Patents, whose decision was affirmed by the Circuit Court of Appeals of the District of Columbia, as appears by Prindle v. Brown, 24 App. Cas. D. C. 114. That proceeding was brought under section 4914 of the Revised Statutes, as amended by the act to establish the Court of Appeals of the District of Columbia, approved on February 9, 1893 (27 Stat. 434, c. 74). Section 4914 directs that the case be heard on the evidence produced before the Commissioner of Patents. It has never been held to preclude a proceeding under section 4915; and the propositions of the Supreme

*Rehearing denied October 16, 1907.

Court in Re Hien, 166 U. S. 432, 439, 17 Sup. Ct. 624, 41 L. Ed. 1066, leave no opportunity for any contention that the broad range of section 4915 has been in any way limited or qualified by the act of 1893.

The bill in the Circuit Court was filed by the present appellant against Brown, Miller, and Trufant. Trufant answered, and did not demur. Brown and Miller demurred jointly. One of the grounds of demurrer is that Trufant has no interest in any pending issue, and was not a proper party respondent, and that the bill should be dismissed as against him; but no point as to parties has been made before us. The demurrer contains 12 different assignments of causes of demurrer; and, although the arguments at bar took a very broad range, we are unable to perceive that any topic is presented here except the following:

The bill alleges at the beginning of it that, "before the 6th day of June, 1900," Prindle "was the true, original, and first inventor" of the improvement in issue, and that an application for a patent therefor was filed by him on that day, the ultimate refusal of which application is the subject-matter of this litigation. It also alleges that Trufant on September 27, 1899, filed an application for a patent for the same invention; that this application was abandoned; that on August 1, 1901, he filed a second application; that the later application was put in interference with Prindle and Brown; and that finally priority was awarded to Brown by the Commissioner, which decision was sustained on appeal, as we have already said. The bill nowhere alleges or admits that Trufant obtained a patent. There are allegations that Trufant disclosed an invention to Miller, and that Miller, "seeking surreptitiously to appropriate the aforesaid invention," disclosed it to Brown, and caused Brown to file in the Patent Office an application on May 28, 1900, and that this resulted in the patent to Brown which the complainant now seeks to supersede. The bill does not allege whether Trufant conceived the same invention that the complainant conceived, or derived the knowledge of it from the complainant, or, indeed, whether he conceived any invention whatever. This is of no consequence as the case stands. The only material thing on this appeal in all these allegations is that an application was made by Trufant, and also one by Brown on May 28, 1900. This was eight days before the application was made by the complainant; so that if the complainant's pleadings limit him under the ordinary rule that, when no other date is disclosed, the invention does not run back of the day of the filing of the application, it follows that the bill cannot be sustained. But we do not find any such condition of pleadings.

The view of the learned judge of the Circuit Court was that, on the allegations of the bill, it cannot be said that Prindle's invention preceded the date of the filing of his application on June 6, 1900; but the bill alleges that Prindle was the true, original, and first inventor, and at various points it repeats that he was the inventor. It is true that, if the only thing alleged was that Prindle's application was filed on June 6th, the dates would negative priority on the part of Prindle; but the word "before," which we have shown is connected in the bill with the words "the 6th day of June," leaves no contradiction on the face of the pleadings. Therefore the record stands that Prindle was the true, original, and first inventor, which is all that is required

by section 4892 of the Revised Statutes [U. S. Comp. St. 1901, p. 3384], as amended, in regard to the mere particular of priority. This, of course, overrules to the common understanding the allegations of the dates of the applications made by Trufant and Brown. The other dates given in the bill stand without support from anything else in the proceedings.

The only difficulty, therefore, is that the words "before the 6th day of June" are uncertain because they do not allege a precise date, and therefore do not conform to the ordinary rules of pleading. This uncertainty, however, does not relate to any matter of substance, because, so far as the substance is concerned, Prindle's priority is positively alleged. It relates only to a matter of form. The demurrer assigns 12 alleged errors in the pleadings, none of which have been brought to our attention by the respondents; but it fails to make any assignment against the allegation "before the 6th day of June." Being an uncertainty in a mere matter of form, this is good even at common law unless especially assigned as error. 1 Chitty on Pleading, *277, *709. The same rule also applies in equity. Story's Equity Pleadings (10th Ed.) § 528.

But the rule in equity goes even farther. The respondents maintain that, on a demurrer of this character, the bill should be dismissed unless its allegations contain distinct and "unmistakable averment" of what is necessary to maintain the suit. So strong a rule as this is not applicable even at common law, except as to pleas in abatement, which are required to be certain to a certain intent; and in equity the rule is the reverse. Equity seeks to act on the merits, which is not always attainable on a demurrer; and therefore equity will usually direct an answer unless the demurrer shows that, for want of proper allegations, it is "an absolutely certain and clear proposition that the bill would be dismissed at the hearing on the merits." Daniell's Chancery Practice (6th Am. Ed.) 543. It is worth while in this connection to turn to Swift v. United States, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. Ed. 518, for a statement of the rule which secures a liberal interpretation pro and con of pleadings in equity, to the effect that they are to be taken to mean what their language fairly conveys to a dispassionate reader, in accordance to a fairly exact use of English speech. The reason for the difference in practice on demurrer between common law and equity is very plain. According to proper pleadings at common law, a plaintiff's case is stated succinctly, while in equity the relations of the parties are more frequently complicated, and the circumstances which may shade the relief to which he is entitled, if any, or which may indeed bar his right to relief at all, are often so mixed that it is not easy for the court to perceive their precise bearings until the facts are all worked out at the hearing on the merits. The practice in this respect was applied by the Supreme Court, and the reasons therefor worked out under very important and interesting conditions, in Kansas v. Colorado, 185 U. S. 125, 144, 145, 22 Sup. Ct. 552, 46 L. Ed. 838; and the wisdom exercised by the court in postponing consideration of matters of law appearing on the pleadings until the hearing on the merits was made very apparent by the further opinion in the same case, passed down on May 13, 1907,

with a judgment dismissing the bill. Of course, this does not relate to matters necessary to good pleading when specifically pointed out by the demurrer. Taking the bill together, it is impossible to conceive that the complainant had any intention on the question of priority except to assert it in his own behalf and to frame his allegations accordingly; and therefore, for the reasons we have stated, we are justified in entering a judgment which will postpone that question to the hearing on the merits, unless, having in view their right to a specific date of invention, on subsequent proceedings in the Circuit Court, and on proper terms, the respondents make the issue more specifically than they have so far done.

Much has been said to us in reference to the reduction of an invention to practice by the filing of an application for a patent therefor, and in some manner the parties seem to have impressed the learned judge of the Circuit Court with the thought that that involved the more important issue in the case. Consequently his opinion apparently relies on a proposition that the allegation in the bill of the date of Prindle's invention must be taken to state its reduction to practice by the application of June 6th. It is true that there is no patentable invention in a mere mental operation, and that the general rule is that, in order to constitute a patentable invention, the mental operation must in some way be put into concrete form. Prof. Robinson's work on Patents (volume 1, 178) well says:

"No mental operation, however definite and valuable may be its result, is a complete inventive act. That which rests in thought only as a mere theory or intellectual conception can never be a means producing physical effects."

It is also true that the Patent Office and the courts, where no date is proven except that of the application for the patent, give the patentee the benefit of that date where his application, specifications, and claims explain what, if constructed in conformity therewith, would constitute a workable and useful machine. It is also true that it is sometimes said, as was said by the parties in this case, and also by Mr. Walker in his work on Patents (4th Ed. § 141b) that such an application is a "constructive reduction to practice." The use of such expressions in connection with an application seems to be an unnecessary paraphrase, because an application of the character which we have described is of itself a positive and absolute exhibition of everything which the statute requires to constitute an invention. It is not necessary in order to complete an invention that there be a machine constructed, or even a model. The invention may be disclosed by the application sufficiently to entitle the patentee to priority as of the date of the application, or it may have been disclosed by a machine or model, or in some other concrete manner, a long time before the application was filed, so that the patent whenever applied for would go back to that disclosure. Consequently, a bill which states the date of an application for a patent is not to be held to state that the invention was then first completed, except in the special case, which is not an unusual one, that nothing is alleged showing invention prior thereto. Under some circumstances, the court is then compelled to accept that date; but, as further said by Prof. Robinson in connection with the extract we

have already made from his work, a statement which is also clearly true, "an invention does not exist until the generated idea has been reduced to practice." Therefore, when a bill alleges an invention, it covers the fact of reduction to practice, whatever that may be, without any further allegation in reference thereto. Therefore the bill alleges priority of invention by Prindle, though in an irregular manner.

We must reverse the decree of the Circuit Court; but, as the case will go back to that court for further proceedings, we do not intend by such reversal to bar the respondents from securing the advantage of a proper allegation of the date of the complainant's invention if they are of the opinion that they can obtain any advantage therefrom. Therefore, unless the bill is amended, the Circuit Court may, on a demurrer, allowed on proper terms and specifically pointing out the defect in form which we have discussed, or other defects in form, compel the complainant to perfect his bill in whatever particulars it should be perfected. Although a proper allegation of the time of invention is sometimes very useful for those sued as infringers, yet it is so often unimportant, and, under the circumstances of this case, the lack of it is so purely formal that the bill should not be dismissed unless the complainant's attention is first brought directly to the point, and an opportunity given him to meet it by amendment or otherwise.

The decree of the Circuit Court is reversed, and the case is remanded to that court with directions to proceed in conformity with law; and the appellant recovers his costs of appeal.

MAUNULA v. SUNELL.

(Circuit Court, D. Oregon. August 12, 1907.)

No. 3,046.

1. PATENTS—INVENTION AND INFRINGEMENT—NET LEADER.
   The Haataja patent No. 587,308 for a net leader covers a new combination of old elements, which produces an old result in a more facile, economical, and efficient way, and discloses patentable invention as contradistinguished from mechanical skill, also *held* infringed.

2. SAME—EVIDENCE OF INVENTION.
   The fact that there existed a mechanical requirement for a machine to do a certain thing for a long time which was first supplied by the machine of a patent is highly evidentiary of inventive application and genius.

3. SAME—INFRINGEMENT—USE OF EQUIVALENT PARTS.
   The inventor of a combination is himself entitled to apply and adapt the equivalents of the parts to his own use, and his patent covers any alterations which are formal and adapted to perform the same function in substantially the same manner as fully and effectively as the parts described.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 386.]

4. SAME—EQUIVALENTS—IMPROVEMENT PATENT.
   If a patented improvement is of great utility and denotes a marked and signal advance in the state of the art, although not entitled to be denominated a pioneer, the law accords to the inventor a larger range of equivalents than it does where the improvement is of lesser or minor importance.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 386.]

5. SAME—CONSTRUCTION OF CLAIMS—ERROR IN DESCRIPTION.

Under the rule that language of a patent should be so construed as to save rather than destroy it, a claim in a patent of "rotatably mounted bars * * * substantially as described" as an element of a combination is not void because the specification and drawings show a rotatable and a fixed bar, there being no doubt as to the thing intended.

In Equity. Suit for infringement of letters patent No. 587,308 for a net leader granted to Epraham Haataja August 3, 1897. On final hearing.

On March 18, 1884, Erik Maunula, the plaintiff, was granted letters patent upon a machine for casting leads upon fish-net lines. In its construction it consisted of an extended arm attached by one end to a table. On the under side of the arm was a series of half-molds; on the upper side a groove and holes extending through into the cavities formed by the half-molds. Within the groove was a slide, having a trough along the top and holes drilled through to correspond with the holes in the groove. These holes were chamfered from the top so as to form sharp angles with the lower edge of the slide. An extension of the slide formed a handle for convenient manipulation. Attached to the table underneath by a pivot was a reel-shaft extending out even with the arm above. Upon this shaft was constructed a reel with four arms, and upon the outer sides of two of these arms was formed a series of half-molds corresponding with the half-molds upon the stationary arm; the reel being so adapted that these half-molds were brought into complement with those upon the extended arm, thus forming when in position a series of complete molds. The other two arms of the reel were adjustable so that they could be lengthened or shortened as desired. The cord to be leaded was wound around the reel, passing through the half-molds upon the two arms thereof. One mold-arm was then brought into juxtaposition with the stationary arm extending from the top of the table, and by means of certain devices the two half-mold arms were clamped securely together. When in this position the molten lead was poured into the groove in the slide, and, running through the apertures into the molds, formed sinkers around the cord for weighting it down. By drawing the slide outwardly the metal that remained in the holes was cut off. The clamps were then released, and, the reel being rotated, the opposite arm was adjusted with the one extending above the table in the same manner, and the cord leaded as before. When this was done, a new length of cord was wound upon the reel, and the same process repeated, and so on. The distance between the leads was regulated by extending or shortening the other two arms of the reel, and thus was obtained uniformity in leading the cord.

On August 3, 1897, Epraham Haataja secured letters patent for a new and useful improvement on net-leaders. The device consists of a base rectangular in form, in the center of which is secured a mold-block containing in the top thereof a series of half-molds, elliptical in form. Attached to the mold-block on either side are removable closure-strips, provided with openings corresponding with the half-molds. On the end of this mold-block is hinged a similar block, having a series of half-molds underneath complementary to those contained in the stationary block, provided with corresponding closure-strips, so that when the blocks are brought together they form a series of complete molds for casting leads upon the cord. The closure-strips are removable, with a view to regulating the size of aperture in the molds to suit the size of the cord desired to be leaded. Along the top of the upper or hinged mold-block is a groove, concave in form, containing holes entering the half-molds from the tops thereof. Within this groove is arranged a slide, containing a trough, through which there are apertures corresponding with those in the groove; the apertures being chamfered from above so as to form a sharp cutting edge at the bottom of the trough. Attached to the slide at the outer end is a crank, provided with a handle, by means of which the slide is rotated with reference to the groove; the crank being so contrived as to limit the range of rotation. Guides are attached to the base at either end of the mold-block and at right angles thereto, extending upon both sides, and upon these guides

are annexed bars parallel with the mold-block, so provided with slides as to be movable upon the guides, by means whereof the distance between the mold-blocks and bars is regulated. The slides are provided with thumbscrews for making the bars fast upon the guides. The bars are provided with pins, curved outwardly, the pins upon each bar corresponding to half the number of the molds in the blocks; one of the bars being rotatably and the other fixedly attached. The rotatable bar is provided with a handle, standing at right angles with it, which is secured by a latch-hook to render the bar stationary as desired. The process of leading the line or cord is to attach it to a pin on one of the bars, pass it through the half-mold in the stationary mold-block to and around a pin on the opposite bar, and through another half-mold, and so on. When all the molds are thus engaged, the upper or hinged mold-block is closed down upon the lower and clamped at the end, and the molding is done as in the Maunula machine. The leads are cut, however, by a rotation of the trough slide by means of the crank, in place of a longitudinal movement by drawing the slide outward. Maunula became the owner by assignment of these letters patent, and of later years has been manufacturing and selling machines differing from the one described by the letters patent in particular as follows: The mold-blocks are so constructed as to form perfect molds without the closure-strips. The upper block is attached to the lower at the end by a stem, consisting of a round bolt extending through the lower block; the upper block being made to hinge on the stem, so that such block may be raised at the outer end by means of the hinge, and swung around laterally by means of the bolt, and laid out of the way while arranging the cord through the molds and detaching it again. The guides consist of thin pieces of iron, those at one end being notched from the top at short intervals, and those at the other containing holes corresponding with the notches. The bars are rotatably constructed, with pin extensions upon either end, one of which is adjusted in a hole of the guide upon one side and the other in a notch upon the other side; such bars being provided with handles, which in turn are secured by latch-hooks. The upper mold-block is provided with a groove and a slide, with a trough similar to that in the Maunula machine, but with an additional contrivance at the hinged end in the way of a lever for forcing out the slide in cutting the lead. The interstices between the leads upon the cord are regulated by moving the bars farther from or nearer the mold-blocks, by means of the holes and notches in the guide.

The pleadings and proof show that the defendant leased one of these machines from the plaintiff, and while having it in his possession made a model therefrom, and had constructed a machine of identical pattern, save that the pins in the bars used for arranging the cord with reference to the molds are curved backwards, paralleling the bars instead of lateral thereto, and claims the right to use such machine and to manufacture others, and to put them upon the market for profit. The purpose of this suit is to enjoin the defendant from manufacturing and using such machines, on the ground that they infringe the Haataja patent.

Fulton Bros., for plaintiff.
Williams, Wood & Linthicum and T. J. Geisler, for defendant.

WOLVERTON, District Judge (after stating the facts as above). The defendant has interposed four defenses to the bill of complaint, which, briefly stated, are as follows: First, that the Maunula patent anticipates the Haataja invention, and therefore that the patent for the latter is void; second, that defendant's machine does not comprise all the elements of the combination as specified in the alleged Haataja letters patent, and therefore that defendant does not infringe such letters patent; third, that the third claim of the Haataja letters patent sets forth a subcombination of parts not supported by anything contained in the specifications; and, fourth, that defendant's machine does not

infringe the Haataja letters patent, because it comprises an element or ingredient not common to the latter.

I think it may be safely premised that the Maunula machine exhibited novelty and invention. This becomes at once apparent by a consideration of the state of the art prior to the time when the invention was evolved. As disclosed by the testimony, the manner of leading cord prior to that time was to wrap the lead about it and make it secure by hand, no other method being known to the art. Were it not, therefore, for this invention, the patent for which has become extinct because of its existence for more than 17 years, there could be no question that the Haataja patent possesses the quality of novelty. So we come naturally to the question whether the Maunula letters patent anticipate the Haataja machine.

The claim of the plaintiff is that the Haataja letters patent cover a combination of old elements, producing an old result, but in a more facile, economical, and efficient way; therefore, that the device is new, and the result of inventive genius and power. If the machine is of this character, it was patentable. The rule is comprehensively stated by Sanborn, Circuit Judge, sitting in the Court of Appeals, Eighth Circuit, as follows:

"The second claim of the first patent to Hien is for a combination of old mechanical elements in a new way. It is not for new elements, but for a new method of combining old elements; and a new combination of old elements, whereby a new and useful result is produced, or an old result is attained in a more facile, economical, and efficient way, may be protected by patent as securely as a new machine or composition of matter." National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 706, 45 C. C. A. 544.

And recognized by Morrow, Circuit Judge, in the case of Moore v. Schaw (C. C.) 118 Fed. 602, 606, which affords apt illustration as well:

"All of these results appear to have been accomplished by the complainant's device, and in the art of riveting it is certainly a new and useful result to produce a device which will accomplish several times as much work in a given time as any mechanism before in use, and requiring less expensive labor to operate it; and the adaptation of old elements to this new use required, in my judgment, the exercise of the inventive faculty."

See, also, Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Rees v. Gould, 15 Wall. 187, 21 L. Ed. 39; Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 53 C. C. A. 341.

That the combination is new is manifest from the different arrangement of the mold-blocks, the substitution of the guides and bars for the reel, and the wide dissimilarity in the manner of operating the machine. But it is urged that this is not the result of inventive genius, but of mechanical skill only. It is unquestioned that the Haataja machine is of superior utility to that of the Maunula patent. The latter was cumbersome, slow, and tedious of operation. The Haataja machine may be operated with much greater facility, and is productive of largely increased results. It is a fact in evidence that the Maunula machine was scarcely used at all, while, upon the production of the present invention, its utility was at once appreciated by the public, and a demand for its manufacture became importunate. While the new

arrangement may seem simple, and a look at it from the retrospective standpoint might be suggestive that it is the result of the commonest kind of mechanical skill, yet the fact that there existed a mechanical requirement for such a utility for a long time, and that it was not discovered or applied until a later period, is highly evidentiary of inventive application and genius. So, bearing in mind that the letters patent prima facie establish inventive genius, considered in connection with the historical growth and development of the alleged improvement, I conclude that the combination is the result of inventive genius as contradistinguished from mechanical skill applied to the different arrangement of old elements. See Gandy v. Main Belting Company, 143 U. S. 587, 594, 12 Sup. Ct. 593, 36 L. Ed. 272; Krementz v. S. Cottle Co., 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Star Brass Works v. General Electric Co., 111 Fed 398, 49 C. C. A. 409.

In avoidance of this conclusion, defendant insists that his machine, that is, the one constructed by him and inveighed against by the bill of complaint, does not impinge upon the Haataja patent because it does not combine all of the elements of the patented combination. The most important of the elements which it is claimed are not combined in his machine are the closure-strips, removably attached to the mold-blocks, the manner of the adaptation of the cut-off, and the arrangement and adaptability of the guides and pin-bars. Other alleged dissimilar ingredients are enumerated, but these are sufficient for a determination of the principle governing all.

Mechanical equivalents are not patentable, and their employment in combination with other elements of the patented device does not avoid infringement. A mechanical equivalent is defined by Mr. Walker, in his work on Patents, fourth edition, section 354, "as a thing which performs the same function, and performs that function in substantially the same manner, as the thing of which it is alleged to be an equivalent."

Applying the definition, it is said in National Hollow B. B. Co. v. Interchangeable B. B. Co., supra:

> "Mere changes of the form of a device or of some of the mechanical elements of a combination secured by patent will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention."

And, as illustrative, Circuit Judge Townsend applies the principle in New Departure Bell Co. v. Bevin Bros. Mfg. Co. (C. C.) 64 Fed. 859, 864, as follows:

> "It is true that in the patent in suit the base plate is stationary, while in the defendant's device it is caused to rotate, and that the levers are differently arranged in the two devices. But in each case the different parts operate to perform the same functions in substantially the same way, and the alleged differences of operation are merely such colorable and formal ones as result from the use of mechanical equivalents."

To the same purpose see National Typographic Co. v. New York Typograph Co. (C. C.) 46 Fed. 114, Columbus Watch Co. v. Robbins, 64 Fed. 384, 12 C. C. A. 174, Ide v. Trorlicht, Duncker & Renard

Carpet Co., 115 Fed. 137, 149, 53 C. C. A. 341, and Shelby Steel Tube Co. v. Delaware Seamless Tube Co. (C. C.) 151 Fed. 64.

The principle thus stated and elaborated has pertinent application as it respects all the ingredients or elements enumerated above in their relation to the Haataja patent. The function of the closure-strips is to form the apertures through which the cord is to pass when laid through the molds, which apertures are to be of size adapted to press closely upon the cord so as to prevent the escape of the molten lead. Now, the molds devised in the mold-blocks of defendant's machine are provided with like apertures (but contained in the solid pieces), which press the cord and prevent escape in identically the same way. So that the function to be performed is the same as it respects both devices, and it is performed in substantially the same manner by compressing the cord and thereby forming a perfect mold. True, the closure-strips are removable, so that others may be substituted with apertures adaptable to the size of the cord to be leaded; but these are of little utility, as experience has demonstrated that different sized molds are required for different sized cord, because the heavier cord needs the heavier sinker to carry it down. The closure-strips, therefore, in combination with the mold-blocks, perform identically the same function as the mold-blocks constructed by the defendant for his machine, which is an alleged infringement upon the Haataja patent; and, vice versa, the mold-blocks of defendant's machine are a mechanical equivalent for the molds secured by the Haataja patent. It is a rule in patent law that the mere making of a device in one piece formerly constructed in two parts mechanically attached is not invention. Standard Caster & Wheel Co. v. Caster Socket Co., 113 Fed. 162, 51 C. C. A. 109. So the court says, in Howard v. Detroit Stove Works, 150 U. S. 164, 170, 14 Sup. Ct. 68, 70, 37 L. Ed. 1039, 1041: "It involves no invention to cast in one piece an article which has formerly been cast in two pieces and put together."

Replying to this application of the principle, counsel for defendant say that then the Haataja patent as it respects this device was anticipated by the Maunula patent, and I think they are right. But the argument overlooks the theory, which is well founded, that the Haataja patent is a combination of old elements producing more efficient and expeditious results. The inventor of a combination is himself entitled to apply and adapt the equivalents for his own use. Indeed, his patent covers the equivalents as fully and effectively as it does the invention. Thus, where the alterations are formal but are adapted to perform the same function, in substantially the same manner, the patentee is guaranteed the exclusive right to their employment for his sole benefit, and, if any one assumes to utilize such alterations in combination with the patentee's combination, he becomes an infringer as certainly as if he had adopted the entire patented device. The change or new adaptation must be one of substance, and not a mere form, to avoid infringement. In other words, the substitute for the omitted ingredient must be a new one, or must be adapted to the performance of a substantially different function, or else it will inure to the right of the patentee. Rees v. Gould, supra, is a very instructive decision upon

the subject, and covers almost the entire range of the present controversy.

What has been said as to the closure-strips applies in the main to the cut-off and the new arrangement of the guides and pin-bars. They perform identically the same functions as the old, and in practically the same manner. Instead of cutting the leads by rotary action, the defendant's machine cuts them by longitudinal process; but they are cut, nevertheless, at the same juncture, and the result is the severance of the neck from the molded product, all without a particle of functional difference. So with the guides and the pin-bars. The latter are adjusted upon the former by means of holes and notches therein, in place of the slides, and both pin-bars are rotary; but they perform no different function whatever, and they perform the function in substantially the same way. The purpose of the rotary action in the pin-bars is to secure and release the cord with facility and bring about uniformity in the product. But a rotary motion in one bar while the other remains stationary answers the same purpose, so that the same function is performed whether one or both are rotatable. So I conclude that as to these features, and others pointed out but of similar character, they are but mechanical equivalents, and the adaptation of them by the defendant constitutes an infringement of the Haataja patent, now owned and controlled by the plaintiff.

I have not overlooked the contention of defendant that the Haataja patent evidences an improvement and not a pioneer in the way of invention, and therefore that a strict construction should be applied in the ascertainment of equivalents, and that no device will impinge unless it is practically of identical construction and operation. As it pertains to pioneer inventions, a broad and liberal rule obtains in the ascertainment of what contrivances and devices are to be deemed equivalents, which is for the adequate protection of the inventor who has successfully employed his faculties in producing a novel and, at the same time, a useful piece of mechanism. Not so with a mere improvement which, added to another person's invention, performs practically the same function as the prior device. In such a case, the rule as to equivalents is greatly narrowed, and to infringe means to produce and adapt nearly the exact device claimed for the improvement. But between these two rules there is a range of flexibility that has relation to the state of the art and the vitality and importance of the advancement made therein by the improvement. If the improvement is of great utility and denotes a marked and signal advance in the state of the art, although not entitled to be denominated a pioneer, the law accords to the inventor a larger latitude of equivalents than it does where the improvement is of lesser or minor importance. Each case, therefore, is largely to be determined by its own peculiar features; it being of paramount importance that the inventor be protected against encroachment upon the output of his genius, according as his merits shall suggest. Miller v. Eagle Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 561, 18 Sup. Ct. 707, 42 L. Ed. 1136; Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 406.

et seq., 25 Sup. Ct. 697, 49 L. Ed. 1100; National Hollow B. B. Co. v. Interchangeable B. B. Co., supra. The Haataja combination, to my mind, is of far greater account than a mere improvement, and the inventor should be accorded a larger protection by reason thereof.

In this relation should be considered the further objection which is the basis of defendant's fourth defense. It is insisted that, by reason of the setting of the pins in relation to the pin-bars in defendant's machine, being curved in line with the bars rather than laterally, they are suited to a more ready release of the cord without rotation of the bars. But this partakes more of the application of genius to avoid infringement than to invent or construct something really new or novel. The functional difference between the two contrivances is not appreciable.

The third objection relates to claim 3 as contained in the Haataja letters patent, which reads as follows:

"In a net-leader, the combination with a series of molds, of rotatably-mounted bars provided with pins, adjustable relative to said molds, substantially as described."

The specific objection is that it does not accurately describe the device, as it speaks of rotatably-mounted bars, when by reference to the specifications and drawings but one bar is so mounted. The rule seems to be that the claims are construed in connection with the drawings and specifications, and assuredly would this be so where reference thereto is made in the claim by the use of the qualifying words "substantially as described." There was possibly a mistake in drafting the claim, as but one bar was designed to be rotatably-mounted, but by reference to the drawings and specifications there can be no doubt as to the patentee's intention, and I am not inclined to permit a mere technicality to defeat the patent. If the word "rotatably" had been omitted, the claim would have been technically sufficient, no doubt; but, when reference is made to the description of the invention, there can be no cavil as to what was designed to be claimed, and the claim is not rendered void by the discrepancy. Further than this, specific statements in subsequently enumerated claims show that one of such bars is fixedly attached while the other is rotatably attached. By reference to the nine claims exhibited by the letters patent it will be seen that each particular element of the patentee's device is claimed separately and in combination; and it is made perfectly clear from a reading of the claims alone, without reference to the description, that the device consists, among other elements, of one fixedly and one rotatably attached bar, not two rotatably attached bars.

Two principles tersely stated by Sanborn, Circuit Judge, in National Hollow B. B. Co. v. Interchangeable B. B. Co., supra, are applicable here:

"When the intention of the parties is manifest, it should control, regardless of inapt expressions and technical rules. In cases of doubtful validity or of ambiguous terms, that construction should be adopted which sustains and vitalizes the agreement, rather than that which destroys or paralyzes it."

And so Coxe, District Judge, pertinently says, in Gaisman v. Gallert (C. C.) 105 Fed. 955, 958:

"When forced to choose between a construction which destroys and one that saves the patent the court should not hesitate to adopt the latter."

Thus it is plain that, if this were a case of doubtful intendment as it respects the claim, that construction should be adopted which would lend support to the patent. However, looking through all the claims, the description, and the drawings and specifications, the intention of the claimant becomes perfectly manifest. So that the patent is not rendered invalid by the incongruity of statement in claim 3.

It results from these considerations that the injunction against infringement should be made permanent as prayed, and a decree will be entered accordingly.

THOMSON-HOUSTON ELECTRIC CO. v. ELECTROSE MFG. CO. et al.

(Circuit Court, E. D. New York. August 16, 1907.)

1. PATENTS—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.

Where a number of suits for infringement between the same parties, each based on a different patent, are related, the patents having to do with similar subject-matter, so that, if joined, all could be tried upon the same record, the court may properly retain jurisdiction in equity, even though in some of them an adequate remedy may exist at law, because of the near expiration of the patent.

2. SAME.

The fact that profits are recoverable in a suit in equity for infringement of a patent under Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], and not in an action at law, while not in itself any basis for equitable jurisdiction, is a reason why that jurisdiction should not be relinquished when it may be upheld on other grounds.

3. APPEARANCE—DISTRICT OF SUIT—WAIVER OF OBJECTION.

The objection that a court is without jurisdiction of a suit for infringement of a patent because not brought in the district of which defendant is an inhabitant or a district in which infringement was committed, and defendant has a regular and established place of business, if apparent on the face of the pleadings, is waived by the filing of a general demurrer or any other act which constitutes a general appearance.

4. PATENTS—DEFENSE OF LACHES.

A bill for infringement of a patent which alleges acts of infringement within six years need not specifically allege that complainant has been diligent.

5. SAME—SUFFICIENCY OF BILL—MULTIFARIOUSNESS.

A bill for infringement against a corporation and an individual described as its president and general manager, which charges that defendants have and each of them has committed certain acts of infringement, sufficiently alleges a joint infringement, and is not demurrable for multifariousness.

6. COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Circuit Courts of the United States being given exclusive jurisdiction of suits relating to patents by Rev. St. § 711 [U. S. Comp. St. 1901, p. 577], diversity of citizenship between the parties is not essential to such jurisdiction.

7. PATENTS—INFRINGEMENT—PLEADING—JURISDICTIONAL ALLEGATIONS.

Under Act March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589], which authorizes a suit for infringement of a patent in any district "in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business," it is not essential that the bill should use the words, "regular and established,"

In characterizing defendant's place of business, if it appears that it is such from the facts alleged.

8. SAME.

In a bill for infringement of a patent against a corporation and an individual, which charges that the corporation has a regular and established place of business within the district where its business is conducted by its codefendant as its president and general manager, and where they have committed joint acts of infringement, it is not necessary to allege affirmatively that the individual defendant is either an inhabitant of the district, or has a regular and established place of business therein.

9. SAME—SUFFICIENCY OF BILL—ALLEGATIONS ON INFORMATION AND BELIEF.

A bill for infringement of a patent is not demurrable because material facts are alleged on information and belief.

10. SAME.

A bill for infringement of a patent against two defendants *held* not demurrable as being too vague and uncertain in its allegations.

In Equity. On demurrers to bills.

T. J. Johnston, for complainant.

Dickerson, Brown, Raegener & Binney (Louis C. Raegener and S. L. Moody, of counsel), for defendants.

CHATFIELD, District Judge. The complainant herein has brought four separate actions, upon four separate patents, against the defendant company and its president and general manager, and a fifth suit against the defendant company alone, in each action alleging infringement of the patent therein referred to. The defendant has demurred separately to each action, and the five demurrers have been argued together. Most of the objections raised apply to all of the suits, and the demurrers will be considered together, where necessary; the separate grounds of demurrer to the different actions being distinguished and considered separately in this opinion.

In each of the actions the bill of complaint was filed upon the 9th day of November, 1905, and in each action the demurrer was filed upon the 5th day of February, 1906. The numbers of the patents, dates of issue, and dates of expiration, are shown by the following table:

	No. of Patent.	Date.	Expires.
Suit No. 1	394,039.	Dec. 4, 1888.	Dec. 4, 1905.
" " 2	396,311.	Jan. 15, 1889.	Jan. 15, 1906.
" " 3	393,317 & 396,312.	Nov. 20, 1888. Jan. 15, 1889.	Nov. 20, 1905. Jan. 15, 1906.
" " 4	435,870.	Sept. 2, 1890.	Sept. 2, 1907.
" " 5	446,985.	Feb. 24, 1891.	Feb. 24, 1908.

The first six grounds of demurrer apply generally to each complaint, and are similar in each action. These grounds of demurrer are to the effect that the complaint does not state a cause of action

as a whole, or as against either defendant; that the complainant is not entitled to relief against either defendant, and has no jurisdiction over either defendant, upon the allegations of the bill. These general grounds of demurrer depend upon the various other and more specific grounds, and therefore, as is admitted by the defendant, will be sustained or overruled according to the rulings upon the subsequent grounds stated, and need not be considered separately, nor except as the subsequent causes of demurrer are disposed of. We will, therefore, proceed with a consideration of the other grounds of demurrer separately.

The seventh ground of demurrer alleged in each action is addressed to the discretion of the court, and the same point is involved in the thirteenth and fourteenth causes of demurrer to each action, and can therefore be considered together. The seventh ground of demurrer is that the complainant by its own laches, delay, and acquiescence should be barred from maintaining the suit, and that the bill fails to show due diligence. The thirteenth ground of demurrer is that the complainant has a full, adequate, and complete remedy at law. The fourteenth ground of demurrer is that by reason of the date of expiration of the patent in each case, except the last two, within a few days or weeks after the beginning of the action, the complainant should not have an injunction or any equitable relief, but should be relegated to its remedies at law for damages. Each complaint alleges that, "since a time six years immediately before the filing of this bill of complaint," the defendants have infringed the particular patent referred to in the particular suit. This plainly means within the space of six years, not during all of six years.

The defendants insist that inasmuch as in four of the five cases at the present time the patent has expired, and that no injunction can issue except as to articles made prior to the expiration of the patent, and that as to three of the suits at the time of beginning the action it was impossible to obtain a preliminary injunction because of the almost immediate expiration of the patent, and because in suit No. 3, one patent, and in suit No. 1, another patent, had already expired, by the return day of the subpœna—the complainant should not be allowed equitable jurisdiction and relief. A number of cases are cited in which applications for final injunctions have been entertained or dismissed, according to the number of days which the patent had to run after the filing of the bill in equity. The principle is involved in Keyes v. Eureka Consolidated Mining Co., 158 U. S. 150, 15 Sup. Ct. 772, 39 L. Ed. 929, in which Chief Justice Fuller cites from the case of Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, as follows:

"As to the first point, the bill does not show any special ground for equitable relief, except the prayer for an injunction. To this the plaintiff was entitled, even for the short time the patent had to run, unless the court had deemed it improper to grant it. If, by the course of the court, no injunction could have been obtained in that time, the bill could very properly have been dismissed, and ought to have been."

It is apparent that the five actions to which demurrers have been interposed are related, that the patents have to do with similar sub-

ject-matter, and that, if the bills were joined, the various issues could be disposed of upon one record. In such a case it would be no abuse of equitable jurisdiction to retain such jurisdiction over all of the five causes of action, even if in some of them it should appear that an adequate remedy at law existed. In the same way in these actions, it seems that the discretion of the court could be exercised for the purpose of retaining equity jurisdiction, in order to dispose of the five actions together, rather than to send one or more to a court of law for consideration, by a jury, of the same and similar points which must be taken into account in the equitable action. Further, as has been held in Beedle v. Bennett, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074, the expiration of the patent does not defeat jurisdiction, and the question of recovery for profits, which is made one of the elements of damage by section 4921 of the Revised Statutes [U. S. Comp. St. 1901, p. 3395], is to be taken into account upon a decree rendered on a bill in equity, and such a recovery can only be had in a suit in equity, and not in an action at law. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263; Brown v. Lanyon, 148 Fed. 838, 78 C. C. A. 528. This is not of itself any basis for equitable jurisdiction, but is a reason why that jurisdiction, when possible on other grounds, should not be relinquished. A further reason for retaining equitable jurisdiction in these cases is that the defendants have demurred generally to the complaints, thereby admitting the jurisdiction of this court by this pleading. Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659, in which a demurrer on other grounds than that of jurisdiction, is held to be equivalent to a general appearance; and Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, in which a general appearance was held to be a waiver of objections to jurisdiction. The provisions of Act March 3, 1897, c. 395, 29 St. 695 [U. S. Comp. St. 1901, p. 589], have narrowed the scope of section 711, Rev. St. [U. S. Comp. St. 1901, p. 577], in so far as it has diminished the number of districts in which a suit might be brought. And it is settled, as held by Judge Coxe, in the case of Bowers v. Atl. G. & P. Co. (C. C.) 104 Fed. 887, that compliance with the requirements of the act of March 3, 1897, is necessary in order that jurisdiction may be had. It is evident that such a question of jurisdiction can be raised at any time; but, if the defect is apparent upon the pleadings, and is waived by a general appearance, it does not seem to the court that it can be urged thereafter.

As to the point that the complainant in its bill has failed to show due diligence, it is sufficient to say that it has brought its suit within the statutory time, and that, for the reasons above mentioned, it seems proper to retain equitable jurisdiction. Therefore the absence of a specific statement that it has been diligent is not fatal.

The eighth cause of demurrer in each case alleges the bill to be multifarious by joining together the Electrose Manufacturing Company and Louis Steinberger, in matters in which it is claimed they are not jointly interested. It is argued that Mr. Steinberger is not sued as president and general manager, and that, if he were, no relief

could be asked against him. But it appears by the bills of complaint that the company and Mr. Steinberger, who is described as its president and general manager, have, and each of them has, done the things alleged, and relief is asked against these two defendants jointly, and the complainant assumes the responsibility of proving its cause of action against both defendants. It does not seem to be a proper ground of demurrer to attempt to draw conclusions as to what the complainant actually means or intends. It is bound by its allegations, and the word "jointly" is unnecessary, so long as the complaint shows an allegation of joint infringement. The effect of this complaint is merely to put greater obligations in the way of proof upon the complainant, but the complaint should not be held defective for that reason alone.

The ninth ground of demurrer, that the citizenship of the defendant Louis Steinberger is not shown, as required by equity rule No. 20, was not urged upon the argument; it being apparent that this objection should be raised by motion and not by demurrer. Mining Co. v. Douglass (C. C.) 123 Fed. 936. In addition, the Circuit Court having jurisdiction of cases relating to patents, by section 711 of the Revised Statutes, the citizenship of the defendant does not seem to be a necessary allegation of jurisdiction, if the other jurisdictional facts are shown.

The tenth cause of demurrer is that the complaint does not show that the defendant company is an inhabitant of this district, nor that it has a regular and established place of business in the district.

Each bill of complaint alleges that the defendant company is a corporation of Illinois, "having its office and place of business in the city of Brooklyn, in said state and district, and doing business therein" (the "said district" being the Eastern District of the state of New York); and that Steinberger is the president and general manager of the defendant corporation. Each complaint alleges that within the six-year period the defendants, within the Eastern District of New York, have made, used, and sold, etc., the devices referred to, and are continuing so to do. By the provisions of 29 Stat. 695, approved March 3, 1897, jurisdiction was given to the Circuit Courts of the United States in law and in equity, in suits for infringement of letters patent, in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement, and have a regular and established place of business. It is not considered that the words "regular and established" must be used in the allegations of the complaint if these jurisdictional facts are shown by the complaint itself. The cases cited (Bowers v. Atlantic G. & P. Co. [C. C.] 104 Fed. 887; Shaw v. Amer Tobacco Co., 108 Fed. 842, 48 C. C. A. 68; Streat v. Am. Rubber Co. [C. C.] 115 Fed. 834; Feder v. A. B. Fiedler & Sons [C. C.] 116 Fed. 378) are to the effect that both of these requisite allegations of jurisdiction must be shown; that the defendant, if not an inhabitant, must have a regular and established place of business at the time of commencing the suit; and that the alleged acts of infringement must have been committed within the district where the suit is brought. The complaints in the present actions plainly show

sufficient to bring the pleadings within the requirements of the section, although the exact language is not used.

The eleventh cause of demurrer to each action is that the defendant Steinberger is not alleged affirmatively to be either an inhabitant of the Eastern District of New York, or to have a regular and established place of business in said district; but (for the reasons stated as to the tenth alleged cause of demurrer) it is apparent that Steinberger in his capacity as president and general manager is alleged to have been conducting the business of the defendant company, and that he performed the acts claimed to be infringements within the said district. The complaint is therefore sufficient, although, again, not as definite and as exact in following the language of the statute as it might have been made.

The twelfth alleged cause of demurrer in each case, that the material facts are alleged upon information and belief, was not urged upon the argument, and would seem to be an objection to any use of the pleadings as affidavits upon a motion, rather than as a ground of demurrer to the sufficiency of the complaint.

The only remaining alleged ground of demurrer is the fifteenth, in suit No. 1, which is not raised with reference to any of the remaining actions. This fifteenth alleged cause of demurrer to suit No. 1 is to the effect that the title of the bill shows that the action is against the Electrose Manufacturing Company and Louis Steinberger; that the introduction of the bill shows the residence of the company alone; that the stating part of the bill and the prayer for relief are against the company and Steinberger; and that, therefore, the bill upon its face is "altogether vague and uncertain and insufficient and improper to be answered by these defendants, or either of them." As to this alleged cause of demurrer, it is necessary only to say that the necessary allegations showing a right to bring the suit in this district with respect to the company are present; that the allegations by which the defendant Steinberger is made a party to the suit are also present; and that the bill is not so vague, insufficient, and uncertain as to cause any doubt as to what the cause of action may be which is alleged against the defendant Steinberger. Nor is his participation, so far as the allegations are concerned, left out to such an extent that no alleged cause of action is shown. Any possible criticism on this ground would have to be taken advantage of by motion, and this alleged cause of demurrer must also be overruled.

The complaints, therefore, in all respects, having been held sufficient, so far as the various alleged causes of demurrer are concerned, the demurrers will be overruled separately, with leave to the defendants to answer over.

THOMPSON v. AUTOMATIC FIRE PROTECTION CO. et al.

(Circuit Court, E. D. New York. August 7, 1907.)

SPECIFIC PERFORMANCE—SUFFICIENCY OF BILL.

A bill for specific performance of a contract by one of the defendants to assign to complainant a patent for an invention alleged to have been made by such defendant while in complainant's employment, the applica-

tion for which patent he had assigned to his codefendant, *held*, on demurrer, to state a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 356–372.]

In Equity. On demurrer to bill.

For former opinion, see 151 Fed. 945.

Duncan & Duncan, for complainant.

Griggs, Baldwin & Pierce (Arthur J. Baldwin, of counsel), for defendants.

CHATFIELD, District Judge. The defendant the Automatic Fire Protection Company has demurred to the bill of complaint filed in this cause, and states as its grounds of demurrer (1) that the complaint does not show a case which ought to entitle the complainant to such discovery or relief as is prayed for; (2) that the allegations of the bill of complaint are too uncertain, vague, and indefinite to authorize a court of equity to grant any relief.

Generally stated, the alleged cause of action appears to be as follows: The complainant is a resident of the state of New Jersey, and the defendant Shipman a resident of the city of New York and county of Kings, while the Automatic Fire Protection Company was organized under the laws of the state of Maine and has an office in the state of Illinois. The complainant, Thompson, is alleged to be the managing head of a corporation known as the Manufacturers' Automatic Sprinkler Company, doing business in New York City. The defendant Shipman was a workman in the employment of that company. Prior to the year 1901 Thompson had obtained certain patents upon automatic sprinklers, and between the years 1901 and 1903 made arrangements with Shipman by which Shipman was to work out of his regular hours of employment for Thompson upon the machines relating to these patents. Thompson agreed to pay Shipman the reasonable value of the work done by him, and, if Thompson saw fit, a further sum, in return for which Shipman was to work out further practical developments of said inventions. Any inventions or improvements devised jointly or separately by Shipman and Thompson were to be disclosed and assigned to Thompson, including any patents that Shipman himself might obtain thereon. The complaint alleges performance, and that Shipman, during the time of the employment, invented a certain automatic alarm valve, which he refused and neglected to disclose to Thompson, and refused to assign to him. In the month of April, 1903, Shipman left Thompson's employment, and on May 2d filed an application for a patent on the invention of his own. Subsequently Shipman made arrangements with certain other individuals, and assigned his application and patents to the Automatic Fire Protection Company, the codefendant, in furtherance, as it is alleged, of the scheme on the part of Shipman to defraud Thompson of his rights thereto.

No application has been made to make the complaint more definite and certain. The demurrer is based upon objections which, if further information is desired by the defendants, might be sufficient for the granting of such motion. But it would seem that the allegations are sufficient to show a cause of action, and the complainant demands

specific performance and an injunction. The defendant Shipman herein, according to the bill of complaint, seems to have been employed upon a quantum meruit, and the defendant Shipman urges that the arrangement set forth would be a practical mortgage in perpetuity of his labor and talents. The fact that the defendant Shipman terminated the employment and left the service of the complainant seems to answer this objection; and there does not seem to be any reason for distinguishing this case from those in which a workman has been hired, in consideration of his employment at a stated salary, to work upon inventions or machines which are in process of improvement, and to assign any patentable improvements that he may make. Thibodeau v. Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480, Mississippi Glass Co. v. Franzen, 143 Fed. 501, 74 C. C. A. 135, and Hulse v. Bonsack Machine Co., 65 Fed. 864, 13 C. C. A. 180, do not seem to be materially different in principle.

As to the further ground, that the Automatic Fire Protection Company is a purchaser for value without notice of the equitable claims to the patent rights, that a court of equity cannot interfere with these rights, and that no relief can be given in relation to disclosures by Thompson to Shipman, which had been merged in a patent granted to Shipman, it would appear that the complaint alleges sufficient to raise the issue, and that this question should be disposed of upon the merits at final hearing.

The other objection, that there is no direct allegation that the patent obtained by Shipman was connected with the subject-matter of the contract between Thompson and Shipman, does not seem to be well founded. No other inference can be drawn from the allegations of the complaint, and, if this theory is not the basis of the action, the final hearing may be fatal to the complainant.

It is considered, therefore, that the bill of complaint is sufficient for the purposes of the action, subject to any motions which the defendants may be advised to make with reference to making the bill of complaint more definite and certain, if defendants need further information.

The demurrer will be overruled, with leave to defendants to answer over.

In re SORG.

(District Court, W. D. Pennsylvania. August 2, 1907.)

(No. 3,293.)

1. BANKRUPTCY—GARNISHMENT OF TRUSTEE—PROCEEDS OF EXEMPT PROPERTY.
An attachment execution issued on a judgment on a note waiving exemptions and served on the debtor's trustee in bankruptcy, who holds proceeds of exempt property sold, is invalid and ineffective to create any lien or claim upon the fund, which is in custodia legis, and not subject to attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 677.]

2. SAME—EXEMPTION—ADMINISTRATION OF EXEMPT PROPERTY.
A court of bankruptcy has no jurisdiction to administer property set aside to a bankrupt under his claim for exemption.

In Bankruptcy. On certificate from referee.

George C. Lewis, for bankrupt.
R. B. Petty, for claimant George Altmeyer.

EWING, District Judge. The question certified by the referee is whether the bankrupt is entitled to his exemption claimed, or whether the same should be distributed to George Altmeyer, claiming the sum due by virtue of writs of execution issued upon a certain judgment in favor of Altmeyer waiving the benefit of the exemption law. A creditors' petition was filed against Sorg on the 31st of July, 1906, and on the same day James F. Richards was appointed receiver, and on his petition setting forth, inter alia, that George Altmeyer had issued execution against the said Albert M. Sorg, at No. 170, August term, 1906, on a judgment confessed July 26, 1906, a restraining order was issued and the property levied upon taken possession of by the receiver and subsequently sold. Sorg was adjudicated a bankrupt October 10, 1906, and in his schedules filed October 30th he claimed $300 exemption out of the funds arising from the sale of his estate by the receiver on August 15th preceding. Subsequently Altmeyer issued an attachment execution, and served the same on Richards, who had then been elected trustee of the estate as garnishee, claiming to attach this exemption fund in his hands, and he now seeks by virtue of his judgment and levy and said attachment execution to have the trustee pay to him the $300 exemption claimed by the bankrupt, instead of delivering the same to the bankrupt.

The judgment and levy made prior to the filing of the petition in this case were avoided by section 67f of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450]). In re Richards, 3 Am. Bankr. Rep. 145, 96 Fed. 935; In re Wilkes, 7 Am. Bankr. Rep. 574, 112 Fed. 975; In re Tome, 8 Am. Bankr. Rep. 285, 115 Fed. 906. And the attachment execution served on the trustee subsequently is invalid and ineffective, because the fund was then in custodia legis. In re Renda, 17 Am. Bankr. Rep. 521, 149 Fed. 614. Moreover, the bankrupt court has no jurisdiction to administer property set aside to the bankrupt under his claim for exemption. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061.

The referee was of opinion that the bankrupt was entitled to his exemption, and awarded the same to him; and his action therein is affirmed.

In re GEMMELL.

(District Court, W. D. Pennsylvania. August 2, 1907.)

No. 3,204.

BANKRUPTCY—EXEMPTIONS—WEARING APPAREL.

A diamond ring, worth several hundred dollars, and worn by a bankrupt himself, is not exempt under a state statute as "wearing apparel."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 659.]

In Bankruptcy. On exceptions to report of referee.

J. H. Longenecker, for trustee.
R. C. Haderman, for bankrupt.

EWING. District Judge. On January 9, 1907, the trustee of the estate of said bankrupt presented his petition to the court, praying for an attachment of said bankrupt for his neglect and refusal, after notice by the trustee, to surrender a diamond ring alleged to belong to his estate, and thereupon the petition was referred to S. R. Longenecker to take testimony and make report, with the form of decree he recommended.

From the report of the referee, who recommends that an attachment issue against the said bankrupt, and from the testimony taken on the hearing had before him, it appears that at the time the petition in bankruptcy was filed and subsequent thereto the bankrupt was the owner of a diamond ring, the value of which was variously estimated at from $400 to $1,000, which ring he did not include in his schedules, but which at the time of his examination before the referee he agreed to deliver up in case it was not exempt under the wearing apparel provision of the exemption law of this state. The bankrupt filed exceptions to the referee's finding and the decree he recommends, and the whole contest here is as to whether or not said ring is properly included within the provisions of the exemption law of Pennsylvania of 1849 as wearing apparel.

This ring was worn and owned by the bankrupt himself, not by his wife, nor any other member of his family; and, if there be anything about a gentleman's attire more unnecessary and less worthy to be included within the phrase "wearing apparel" than a diamond ring, I do not know what it can be. Watches of moderate value have been held to be included among "wearing apparel," and in one instance even a diamond stud of the value of $250, but that only after it had been conclusively shown that the owner had worn it for a number of years to fasten his shirt bosom together and apparently had nothing to take its place. The financial condition of this bankrupt for a considerable time prior to this proceeding was not such as to warrant him in indulging in such extravagances.

He made no claim for exemption, "except petitioner's personal effects, wearing apparel, and such items belonging to the person as are exempt by the laws of the state of Pennsylvania, relating either to himself or members of his family." Pursuant to this claim no list of exempt property was ever made or requested, and no enumeration thereof asked, by the bankrupt. It might be, if this were an heirloom or a ring of comparatively little value, that it would be allowed as "wearing apparel"; but to permit persons in straitened financial circumstances to invest large sums of money in articles of value only for mere personal adornment at the expense of their creditors would be rank injustice. The bankrupt himself values this ring at from $750 upwards, and states that on several occasions he had made presents to his wife of diamonds for which he had paid from $100 to $200 at a time, and yet his creditors have been during all this time deprived of payment largely because of such expenditures by him. In Dox's Appeal, 30 Pa. Super. Ct. 393, it was decided that a diamond ring could

not properly be classed as wearing apparel under a bequest in a will, and, if not wearing apparel under these circumstances, I do not think a ring of this value could properly be classed as wearing apparel under the exemption law.

The exceptions to the report of the referee are therefore overruled and dismissed, and it is now directed that the bankrupt deliver up to the trustee, within 10 days after notice of this order, the said diamond ring, or pay him the fair value thereof.

In re HAASE.

(District Court, S. D. New York. March, 1907.)

BANKRUPTCY—DISCHARGE—FORMER DISCHARGE WITHIN SIX YEARS.

Under Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4b, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], which provides that the judge shall discharge a bankrupt unless he has "(5) in voluntary proceedings been granted a discharge in bankruptcy within six years," the six years is measured backward from the time of the hearing on the application for the second discharge, and not from the time of the commencement of the second proceeding.

In Bankruptcy. Discharge. On exception to objections.

Stern, Singer & Barr (William J. Barr), for creditor.
Edward Fillmore, for bankrupt.

HOUGH, District Judge. The specifications of objection declare that the bankrupt was granted a discharge in this court on the 19th of December, 1900, and "within six years before the commencement of this proceeding." By "this proceeding" is meant the filing of the present petition in bankruptcy. It is argued that (section 14b, subd. 5, Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), under the Ray amendment the discharge now prayed for cannot be granted (Act Feb. 5, 1903, c. 487, § 4b, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]). As section 14b now stands, the words applicable to the present contention are these:

"The judge shall * * * discharge the applicant unless he has in voluntary proceedings been granted a discharge in bankruptcy within six years."

I cannot perceive how this language bears any construction other than that the six years is measured backward from the time of hearing. This is the view taken in the last edition of Collier on Bankruptcy, and in Re Jordan, 15 Am. Bankr. Rep. 449, 142 Fed. 292. That case was not decided upon the facts of In re Little, 13 Am. Bankr. Rep. 640, 137 Fed. 521, but upon the reasoning thereof, and both the reasoning of the Little Case and the decision in the Jordan Case appear to me correct interpretations of the section under consideration. It is to be remembered that prior to the amendment of 1903 there was nothing to prevent successive petitions being filed by habitual bankrupts within a few months of each other, and there is still nothing to prevent such petitions being presented. The effect of the Ray

amendment was to limit an existing right or privilege; and, while I personally think that the law ought to be at least as stringent as is contended by the objecting creditors, it appears to me too plain for further argument that Congress did not make the law in that shape.

The exception to the objection is sustained.

UNITED STATES v. BITTEL, TEPEL & EILERS.

(Circuit Court, S. D. New York. June 13, 1892.)

No. 539.

CUSTOMS DUTIES—CLASSIFICATION—JAPANNED SKINS—UPPER LEATHER.

Japanned skins used for uppers are within the provision in paragraph 456, Tariff Act October 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 601, for "dressed upper leather, including * * * japanned leather," rather than under the provision in the same paragraph for "japanned calfskins," the latter provision being limited to japanned skins, which are not upper leather.

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

Affirmed, 4 C. C. A. 680.

The decision of the Board of General Appraisers reversed the assessment of duty by the collector of customs at the port of New York on merchandise classified as "japanned calfskins," under paragraph 456, Tariff Act October 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 601, and claimed by the importers to be dutiable under the provision in the same paragraph for "dressed upper leather, including * * * japanned leather." This contention was sustained by the Board on the authority of a former decision. G. A. 272 (T. D. 10,719).

Thomas Greenwood, Asst. U. S. Atty.

Curie, Smith & Mackie (W. Wickham Smith, of counsel), for importers.

LACOMBE, Circuit Judge. I am inclined to the opinion that the words "japanned calfskins" in the section must be construed as meaning only such as are not upper leather, dressed or undressed. It appears from the finding of the Board that the article is commercially known as "patent leather," and is, in fact, an upper leather.

The decision of the Board of General Appraisers is affirmed.

HOME TELEPHONE & TELEGRAPH CO. v. CITY OF LOS ANGELES et al.

(Circuit Court, S. D. California, Southern Division. July 8, 1907.)

No. 1,243.

1. TELEPHONES—RATES—REGULATION—STATE POWER.

A state has power to regulate charges for telephone service and to delegate such power to municipalities.

2. SAME—CITY CHARTER—CONSTRUCTION—AUTHORITY OF CITY.

Const. art. 4, § 33, provides that the Legislature shall pass laws for the regulation of charges for services performed and accommodations

furnished by telegraph companies. Los Angeles City Charter, art. 3, § 12, provides that all legislative power of the city is vested in the council, subject to the mayor's veto power, and section 31 declares that the council shall have power by ordinance to regulate telephone service, the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections, etc. *Held*, that the city council's power to fix telephone rates was not limited to a determination of the charges to be made by a telephone company permanently by contract so as to preclude the council from subsequently passing another ordinance changing the rates.

3. SAME—TELEPHONE RATES—MUNICIPAL AFFAIR—DISCRIMINATION.
The regulation and fixing of charges to be made by telephone companies doing business within a city is none the less a "municipal affair" within the jurisdiction of a city, because rates so fixed would not be uniform throughout the state; the reasonableness of the charge depending on the value of the plant, cost of maintenance and operation, etc., which varies in different localities.

4. SAME—REGULATION OF CHARGES—MODE.
Const. art. 4, § 33, provides that the Legislature shall pass laws for the regulation and limitation of the charges for services performed and accommodations furnished by telegraph companies; and, where laws shall provide for the selection of any person or officer to regulate or lower such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated and no person shall be selected who is an officer or stockholder of any such corporation. *Held*, that such provision does not contemplate the accomplishment of its purposes by general state law, or through commissions, but by a suitable delegation of power to municipalities.

5. SAME—ORDINANCE—VALIDITY.
Under Los Angeles City Charter, art. 3, § 31, authorizing the city council to fix and determine the charges to be made for telephone services, the city had power to pass an ordinance requiring telephone companies to report to the city council the value of their plant, receipts, and expenditures in order to enable the city to prescribe reasonable rates.

6. SAME—TELEPHONE RATES—POWER TO FIX—POLICE POWER—SURRENDER.
Control of telephone rates by a municipality is an exercise of police power of the state; and, while this right may be surrendered or suspended by contract, such suspension will not be presumed.

7. SAME—REGULATION OF RATES—RIGHTS OF MUNICIPALITIES—SUSPENSION.
A city being authorized to fix and regulate telephone rates granted a franchise under Cal. St. 1901, p. 267, c. 103, providing for the sale of franchises under which complainant's assignor and his assigns were given the right for a period of 50 years to construct, maintain, and operate a telephone line. The ordinance fixed the charges not to exceed $60 per annum for business telephones and $30 per annum for private telephones until the exchange comprised more than 10,000 telephones, after which the rates should not be increased by more than a sum equal to $6 per annum for each 1,000 phones connected in excess of the 10,000. In consideration for this franchise, the telephone company furnished 30 telephones to the city gratis and also provided 150 pairs of wires in its conduits and the upper arms of its poles for the use of the city's police and fire alarm telegraph system and agreed to pay a 2 per cent. gross earnings tax. *Held*, that the city by such ordinance did not surrender its right to regulate rates for the 50-year term of the franchise, but that the city was entitled to reduce the rates below the maximum charge so fixed during such term.

8. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT.
Where a city by granting a telephone franchise had not surrendered its charter right to fix telephone rates, the subsequent passage of an ordinance establishing lower rates than the maximum rates fixed by the

franchise ordinance was not an impairment of the telephone company's contract franchise rights.

9. SAME—EQUAL PROTECTION OF LAWS.
Where a city was authorized by its charter to regulate telephones and to fix and establish rates, an ordinance fixing lower rates for one company than those another company was permitted to charge within the same city was not invalid as denying the first company the equal protection of the laws.

10. SAME—UNLAWFUL DISCRIMINATION.
The mere fact that different rates were prescribed by ordinance for two companies operating telephone lines within a city did not of itself establish unlawful discrimination against either.

11. INJUNCTION—ORDINANCES—RIGHT TO ENJOIN ENFORCEMENT.
Where a city having the charter right to regulate telephones and fix rates passed an ordinance requiring telephone companies to submit a statement of the value of their plants with their receipts and disbursements in order that the city might establish reasonable rates, complainant telephone company, while refusing to comply with such ordinance, could not seek to enjoin the enforcement of rates established by the city council, in the absence of such information, on the ground that the ordinances were void.

12. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—NOTICE.
Where a city had charter power to regulate telephones and fix rates, a telephone company had no right to notice of the passage of an ordinance fixing the rates it was authorized to charge, so that such ordinance passed without notice was not unconstitutional as depriving the telephone company of its property without due process of law.

In Equity. Demurrer to the bill.

This suit was brought to restrain the enforcement of two ordinances attached to the bill, respectively, as Exhibits C and D, and hereinafter more fully set forth.

The allegations of the bill are substantially as follows:

The city of Los Angeles exists, and since 1888 has existed, under a freeholders' charter.

That by section 2 of said charter said city is vested with power to provide and maintain a proper and efficient fire department, and make and adopt such rules and regulations for the preservation of property endangered by fire as may by it be deemed expedient, and to make and enforce within its limits local police, sanitary, and other regulations deemed by it expedient to maintain the public peace and protect property, and to exercise all municipal powers necessary to the complete and efficient management and control of municipal property and for the efficient management of the municipal government, whether such powers be expressly enumerated in such charter or not, except such powers as are forbidden or are controlled by general laws.

That all legislative power of said city is vested in the city council, subject to the power of veto and approval by the mayor.

That under section 31 of said charter said council has power by ordinance to regulate telephone service and the use of telephones within the city and to fix and determine the charges for telephone and telephone service and connections, and to prohibit or regulate the erection of poles for telephones, telegraph or electric wires in the public grounds, streets, or alleys of said city, and the placing of wires thereon, and to require the removal from the public grounds, streets, or alleys of any or all such poles and the removal and placing under ground of any or all telegraph, telephone, or electric wires.

That by section 33 of said charter the council is required by ordinance to provide for maintaining a fire alarm and police telegraph system.

That "it is further provided in and by said charter that said council shall also have full power to pass ordinances making contracts and upon any other subject of municipal control or to carry into effect any other powers of the municipality."

That prior to December 9, 1901, an application was filed with the governing or legislative body of defendant by M. A. King for a franchise to construct, maintain, and operate a telephone system, and that, on the 6th day of February, 1902, an ordinance, attached to the bill as Exhibit B, was passed granting said franchise, and that all the steps and proceedings required by law and the provisions of said charter for the advertisement and sale of said franchise and the approval thereof, and all other matters connected therewith, were duly had and taken.

That, by regular assignments from M. A. King and others, plaintiff became and now is the owner of said franchise and telephone system.

That immediately upon the taking effect of said ordinance as aforesaid the assignors of this plaintiff, pursuant to the terms thereof, commenced the work of constructing and laying down the conduit required by said ordinance in the district therein described, and continuously prosecuted said work in good faith and completed the same in full compliance with the conditions of said ordinance relating thereto, and within the period therein prescribed, so that within said period a complete conduit system was established of sufficient capacity and extent to accommodate at least 10,000 subscribers and to provide a general telephone service in all parts of said telephone conduit district, and that likewise the said assignors of this plaintiff did, pursuant to the terms and conditions of said ordinance and in good faith, expend for material and labor used and performed in the construction and installation in connection therewith of wires, switchboards, and telephonic apparatus and appliances, and within the time specified in said ordinance, sums greatly in excess of the sums therein specified to be so expended, and did so expend more than the sum of $200,000 within 36 months after the grant of said franchise.

That the assignors of plaintiff did also, within the periods of said ordinance provided, after the grant of said franchise, file a statement, verified as therein provided, showing in detail the sums expended as required by and in compliance therewith, and did also cause to be erected and maintained poles of a size and character satisfactory to the street superintendent of said city of Los Angeles, and that the assignors of said plaintiff and this plaintiff have executed and complied with and observed, and that the said defendant the city of Los Angeles has never at any time claimed or pretended that plaintiff's assignors and this plaintiff had not executed, complied with, and observed the terms, covenants, and provisions of said ordinance as aforesaid.

That all of the work done and performed by plaintiff's assignors and by this plaintiff as aforesaid, and the expenditures made by it for any and all equipment and appliances as aforesaid, were made, done, and performed pursuant to and in reliance upon the terms, covenants, and provisions of said Ordinance No. 6,959 of said city of Los Angeles, and not otherwise, and that the system of plaintiff in said city of Los Angeles is now and at all times has been maintained and operated pursuant to and in reliance upon the terms, conditions, and covenants of said ordinance and not otherwise, and that plaintiff has no rights of property in the said city of Los Angeles except such as were acquired under the said Ordinance No. 6,959.

That pursuant to the powers vested in it by law and the provisions of said charter, and in order to provide for maintaining a fire system and police telegraph system, the said defendant the city of Los Angeles required in and by section 8 of the said ordinance that this plaintiff should furnish to the said city of Los Angeles, if required by it, free of any charge at all during the life of the said franchise granted by said ordinance, the use of all necessary conductors, not exceeding 150 pairs in said conduit, for the uninterrupted use of a fire system and police system of said city, and for like purpose the free use of the top cross-arm on each of the poles erected or maintained under said franchise during the whole term thereof; that this plaintiff, in constructing and laying said conduits and in constructing and erecting its pole lines and in providing its equipment, made provision for said 150 pairs of lines in said conduits and for the maintenance and operation thereof, and provided that said top cross-arms on each of said poles, and in all respects and at additional cost and expense to it arranged to comply with such provisions of said ordinance, and is now, and at all times has been, able and willing to

furnish said conductors, and has as aforesaid reserved the top cross-arm on each of said poles for the use of said city.

That it is also provided in and by section 8 of said ordinance that there shall be furnished to the said city of Los Angeles, free of any charge, 30 telephones which shall be connected with the telephone system of plaintiff, and that this plaintiff did, within the time provided and specified in said franchise, so furnish to the defendant said 30 telephones, and did connect the same with the telephone system of this plaintiff, all at its own cost and expense, and without charge to the said city of Los Angeles, and that the said city of Los Angeles is now, and ever since has been, using free of charge as aforesaid the said 30 telephones.

That section 1 of said ordinance provides: "That said conduit, said poles, and the wires inclosed therein or attached thereto, shall be constructed, erected and installed, and at all times maintained, and said right, privilege and franchise is hereby granted, and shall at all times be exercised and enjoyed, in accordance with and subject to each and every of the terms of this ordinance and not otherwise."

That section 9 of said ordinance provides: "That all telephone lines constructed or operated under said franchise shall have complete copper metallic circuits, and that the conduit system constructed and laid down under said franchise shall be of such size and capacity as to accommodate wires, cables and conductors, sufficient to provide for ten thousand telephones. That the rent or charge for unlimited, independent, metallic circuit, telephone service, in the system established or maintained under said franchise so long as said system does not connect and exchange with more than 10,000 telephones, shall not exceed $60 per annum for a telephone installed in any business office or premises, or $30 per annum for a telephone installed in a private residence, and that when said system shall comprise more than 10,000 telephones, the annual rental or charge for the telephone service shall not be increased by more than a sum equal to $6.00 per annum for each one thousand telephones in said city connected with said telephone system in excess of 10,000."

That the rate established by said franchise was at said time lower than any which had ever been charged for telephones in said city, and lower than any other company than plaintiff now charges for telephone service in said city, and that there was not at any of the times herein mentioned any system of telephone lines with complete copper metallic circuits, other than the system of plaintiff.

That at the time of the advertising and sale of said franchise there was in operation in said city of Los Angeles one system of telephonic communication only, and that the corporation owning the same continues to do business in said city.

That at the time said franchise was advertised for sale and sold the city required the use of 150 pairs of lines as provided for in said franchise and the use of the top cross-arm of each pole to be erected under said franchise for the fire alarm and police telegraph system of said city, and said city needed the use of 30 telephones, as provided in said franchise; and all of said telephones have been used by the said city ever since the construction of said plant of plaintiff, and are now used by the city, and the city is using some of the lines in the conduit of plaintiff, and the top cross-arm of some of its poles, and the city has need for the things it is using as aforesaid for public benefit and in the discharge of its functions.

That by section 10 it is provided that the owner of said franchise shall in no way enter into any combination at any time, directly or indirectly, with any person or persons, or any corporation, concerning the rate to be charged for telephone or telegraph service.

That the reasonable value to the said city of Los Angeles of the use of said 30 telephones provided by said franchise to be furnished free of charge, and the free use of 150 pairs of lines for the fire system and police telegraph system of said city, and the free use of the top cross-arm on each of the poles erected and maintained under said franchise, are and will be during the life of said franchise of the sum of $450,000. That 2 per cent. of the gross annual

receipts required by said franchise to be paid to the city of Los Angeles will amount to more than the sum of $500,000.

That the plaintiff and its assigns, acting under and pursuant to the terms of this franchise and not otherwise, and particularly on the clauses thereof declaring maximum rates, have constructed more than 5 miles of underground conduit and constructed more than 100 miles of pole lines, and have installed more than 20,000 telephones in said city, and did, in compliance with said franchise, and at great additional expense, construct and erect and is now operating a system of telephone lines having complete copper metallic circuits.

That, on March 27, 1905, the city council of said city passed an ordinance, which is attached to the bill, marked Exhibit C, the twelfth section of which provides as follows: "Sec. 12. It is hereby made the duty of every person, firm or corporation supplying telephones, telephone service or telephone connections to the city of Los Angeles or its inhabitants, to furnish to the city council in the month of January of each year, a statement in writing verified by the oath of such person, or of a member of such firm, or of the president or secretary of such corporation, as the case may be, showing in detail, the amount received by such person, firm or corporation from the renting of telephones, the furnishing of telephone service and the making of telephone connections within the city of Los Angeles, and the revenue derived by such person, firm or corporation, or in any manner arising from the use or operation of a telephone system in the city of Los Angeles, in connection with a telephone system outside of the city of Los Angeles, during the year preceding the date of such statement, and showing in detail all expenditures made by such person, firm or corporation, during the same time for supplying telephones, telephone service and telephone connections to the city of Los Angeles and its inhabitants, and for the purchase, construction and maintenance respectively of the property necessary for the carrying on of such business. Every such person, firm or corporation shall furnish a detailed statement verified in like manner as the statement, hereinbefore in this section mentioned, containing an itemized inventory of all of the works, lines, plant and property owned or used by such person, firm or corporation and necessary or convenient to the carrying on of the business of supplying telephones, telephone service and telephone connections to the city of Los Angeles, or to the inhabitants thereof, and showing the actual cost and present cash value of each item thereof."

That plaintiff has not complied with said section 12 of Ordinance C, nor any part thereof, and plaintiff declines to comply therewith for the reasons herewith set forth.

That said city has arrested and commenced prosecutions against plaintiff's officers, and will continue to arrest and prosecute plaintiff's officers for violations of Ordinance C, unless restrained therefrom.

That defendant, on February 28, 1906, passed an ordinance which is attached as Exhibit D to the bill, fixing rates to be charged by plaintiff for telephone service, and forbidding plaintiff, under penalty of imprisonment, from collecting the rates provided and fixed in ordinance Exhibit B, and will, unless restrained by this court, continue from time to time to pass other similar ordinances.

That the said city, on February 28, 1906, adopted another ordinance, attached to the bill as Exhibit E, whereby a competitor of plaintiff in said city, engaged in like business, was allowed to charge for telephone services sums greatly in excess of that which by said Ordinance D plaintiff is permitted to charge.

That Ordinances C and D, if carried into execution, will impair the obligations of a contract, Exhibit B, and deprive plaintiff of its property without due process of law, and abridge the privileges and immunities of this plaintiff, and deprive it of the equal protection of the law, and that the adoption of said ordinances, Exhibits D and E, fixing the different rates to be charged for the same services, deprives plaintiff of the equal protection of the law and discriminates against plaintiff in favor of the Sunset Telephone & Telegraph Company, a similar corporation, all of which is in violation of the Constitution of the United States, and particularly in violation of article 1, § 10, cl. 1, of said Constitution of the United States, and the fourteenth amendment

thereto, and also is in violation of the Constitution of the state of California.

That said Ordinance D is void, for that it is not a general law adopted by said city for the government of all corporations similar in character to plaintiff, but is directed solely against, and applicable to, plaintiff, and discriminates against plaintiff.

That said Ordinances D and E are void, for that said city never had, under the Constitution and laws of the state of California, any power or authority to regulate or fix rates to be charged by telephone corporations for services rendered by them, except that the city of Los Angeles had and has the power to contract for rates to be charged, and had and has the right to contract in the manner and form as shown by said ordinance, Exhibit B.

That, if the provisions of said charter operate to give the city of Los Angeles the right to fix rates other than by contract or purport or attempt to give it a continuing power to fix and regulate rates of this plaintiff, such provisions of said charter are void, for that in and by the Constitution of the state of California the power to fix such rates, if such power exists at all, can only be exercised by authority of a general law applicable to all municipalities and affecting all corporations similar to plaintiff, and that the Legislature of the state of California has no authority by virtue of said Constitution or otherwise to delegate the power of so fixing rates from time to time to any one municipality or other political subdivision at all, to the exclusion of the others, and has no authority by delegation of its powers to fix the rates to be charged by plaintiff.

That the Legislature of said state of California has never passed, nor is there now, nor has there ever been, in force any general law or statute authorizing the fixing or regulation of rates as aforesaid, but that such general power has been and is withheld from other cities and municipalities within the state.

Ordinance D is as follows:

"Exhibit D.

"Ordinance No. ———. (New Series.)

"An ordinance fixing the rates to be charged and collected by the Home Telephone & Telegraph Company, a corporation, for telephones, telephone service and telephone connections, in the city of Los Angeles, during the year commencing July 1st, 1906, and ending June 30th, 1907.

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. That the rates to be charged and collected by the Home Telephone & Telegraph Company, a corporation, for telephones, telephone service and telephone connections in the city of Los Angeles, furnished to the city of Los Angeles, or to the inhabitants thereof, for the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, are hereby fixed as follows:

"(1) For each telephone installed and maintained in any business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $5.00 per month.

"(2) For each telephone installed and maintained in any house or place other than a business office or premises, connected with the central exchange by an independent or individual circuit, with unlimited service, $2.00 per month.

"(3) For each extension telephone, $1.00 per month.

"(4) For each private telephone exchange connected with the central exchange by an independent circuit on one trunk line, $5.00 per month; and for each additional trunk line, $4.00 per month; and for each telephone station in such private exchange, $1.00 per month.

"Section 2. Any person who shall charge, demand, collect or receive, either as officer, agent, collector or employé of the said Home Telephone & Telegraph Company, any rate or compensation for telephones, telephone service or telephone connections in the city of Los Angeles, furnished by the said Home Telephone & Telegraph Company to the city of Los Angeles or to any inhabitant thereof, during the year commencing on the 1st day of July, 1906, and ending on the 30th day of June, 1907, in excess of the rates fixed by this ordinance, shall be deemed guilty of a misdemeanor,. and upon conviction

thereof, shall be punishable by a fine in a sum not exceeding one hundred dollars, or by imprisonment in the city jail for a period not exceeding ninety days, or by both such fine and imprisonment."

There is no express provision in the charter conferring upon the city contractual power, as alleged in the bill, and presumably that allegation is the statement of the pleader's conclusion as to an implied power. However, this matter, as appears from the opinion of the court, is immaterial here.

Oscar A. Trippet and A. B. McCutchen, for complainant.
W. B. Mathews and Leslie R. Hewitt, for defendants.

WELLBORN, District Judge (after stating the facts as above). Plaintiff cites numerous authorities showing this to be a case of equitable and also of federal cognizance. Defendants, however, have not suggested any lack of jurisdiction in either respect, nor is there any ground for such contention. No further reference, therefore, will be made to plaintiff's authorities on this point.

The questions about which the parties are at issue may be conveniently grouped under three general heads as follows: First. Did the laws of the state of California, at the time of the passage of the ordinances attached to the bill as Exhibits C and D, and here sought to be annulled, the former requiring telephone companies to report to the city council their receipts, expenditures, and value of plant, and the latter fixing the rates to be charged by plaintiff for telephone service, confer upon the city of Los Angeles power to regulate charges for such service? Second. Was such power, if the city possessed it, bargained away by Ordinance No. 6,595, Exhibit B to the bill, which granted to M. A. King, plaintiff's assignor, the franchise under which plaintiff is now operating? This question is included in the next one, and a strictly logical arrangement would require its assignment there, but, on account of its importance, indeed pivotal character, I have given it a separate heading. Third. Do said ordinances, Exhibits C and D, contravene that clause of section 10 of article 1 of the Constitution of the United States, which forbids any state to pass a law impairing the obligations of contracts, or those provisions of the fourteenth amendment to said Constitution, which forbid a state to deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws? These questions will be considered in the order in which they are propounded, and references hereafter to the ordinances attached to the bill will be by the letters which distinguish them respectively as exhibits.

1. That a state has power to regulate charges for telephone service is well settled (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., T. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Spring Valley W. Co. v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. Ed. 173; R. R. Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; Hockett v. State, 105 Ind. 259, 5 N. E. 178, 55 Am. Rep. 201; Knoxville v. Knoxville W. Co., 107 Tenn. 650, 64 S. W. 1075, 61 L. R. A. 888); and it is equally well settled that this power may be delegated to municipalities (Des Moines Gas Co. v. Des Moines, 44 Iowa, 505, 24 Am. Rep. 756; People v. Suburban R. R.

Co., 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; St. Louis v. Bell Telephone Co., 96 Mo. 623, 10 S. W. 197, 2 L. R. A. 278, 9 Am. St. Rep. 370; McQuillan on Municipal Ordinances, § 583; Danville v. Danville Water Co., 180 Ill. 233, 54 N. E. 224).

The remaining question for determination here is this: Was said power, at the times of the adoption of said ordinances, vested in the city of Los Angeles, by delegation from the state of California? Section 31 of the charter of said city, then and now in force, is as follows:

"Sec. 31. The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes and erection of lamp posts, electric towers and other apparatus, and to regulate the sale and use of gas and electric light, and fix and determine the price of gas and electric light, and the rent of gas meters within the city, and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service, and connections; and to prohibit or regulate the erection of poles for telegraph, telephone or electric wires in the public grounds, streets or alleys, and the placing of wires thereon; and to require the removal from the public grounds, streets or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone or electric wires."

Plaintiff's contention, that the power conferred is only a power to fix and determine charges once for all, that is, permanently, by contract, cannot be sustained. Certainly no such limitation is expressed, nor can it be reasonably inferred. The words themselves, "fix and determine," when applied to rates, fairly import a continuing power of regulation. Atlantic & Pacific R. R. Co. v. U. S. (D. C.) 76 Fed. 186. The term "by ordinance" in said section is hardly appropriate to denote a contractual method for the exercise of the power it qualifies, but does suitably designate power of a legislative character. This view is strengthened by section 12 of article 3 of the city charter, which provides that:

"All legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, as hereafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion."

If, however, the language of section 31 were ambiguous, the doubt should be resolved in favor of that construction which makes the power a continuous one. This precise question was authoritatively decided in the case next below cited, and a precedent more directly in point is rarely found. There the phraseology of the statute under consideration was, that the city council shall have power "to authorize any person or private corporation to construct and maintain the same [waterworks] at such rates as may be fixed by ordinance and for a period of not exceeding 30 years." The opinion in the case quotes a previous construction by the Supreme Court of Illinois, that "the meaning of this language is not that the waterworks are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding 30 years. The clause 'for a period not exceeding thirty years' qualifies the words 'construct and maintain the same' but does not qualify the words 'at such rate as may be fixed by ordinance,'" and then proceeds as follows:

"The statutes are certainly ambiguous, and in resolving the ambiguity in favor of the public the court applied the rule declared in many cases. We

said in the Railroad Commission Cases, 116 U. S. 307, 325, 6 Sup. Ct. 334, 342, 29 L. Ed. 636, by Chief Justice Waite, of the power of the regulation of rates:

" 'This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 561, 7 L. Ed. 939, "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon does not appear." This rule is elementary, and the cases in our reports where it has been considered and applied are numerous.'

"These remarks are obviously applicable to the Illinois statutes. The question is whether the power given to the municipalities of the state was to be continuing or occasional, indeed only special in its purpose, intended to have but one exercise and then bound in contract for 30 years. If the latter had been the intention, it would have been natural to express it. The fullness of sovereignty can be taken for granted, and naturally would be and should be taken for granted. An example is afforded by the act of June 6, 1891. By that act the corporate authorities of any city, which have authorized or shall authorize any individual, company, or corporation to supply water, 'be and hereby are impowered to prescribe by ordinance maximum rates and charges for the supply of water furnished by such individual, company, or corporation. * * *' There is no explicit provision for repetitions of the power—none declaring the power conferred a continuing one. Who now doubts that it is? If rights were claimed and were pleading for a different interpretation, we might have to listen to them, but now undisturbed by them we yield without resistance to that meaning which the subject-matter demands in the absence of negativing words.

"Our conclusion is that the powers conferred by the statutes of 1872 can, without straining, be construed as distributive. The city council was authorized to contract with any person or corporation to construct and maintain waterworks 'at such rates as may be fixed by ordinance, and for a period not exceeding 30 years.' The words 'fixed by ordinance' may be construed to mean by ordinance once for all to endure during the whole period of 30 years, or by ordinance from time to time as might be deemed necessary. Of the two constructions, that must be adopted which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time." Freeport Water Co. v. Freeport, 180 U. S. 599, 21 Sup. Ct. 493, 45 L. Ed. 679.

The various reasons which plaintiff urges in detail against the applicability of said case to the one at bar are not convincing; while the claim, quoting from plaintiff's brief, "that the Freeport Case has been virtually overruled by the Supreme Court in the Detroit Street Car Case and the Cleveland Street Car Case, both of which cases were unanimously decided by the Supreme Court after the Freeport Case," is certainly untenable, in view of the fact that the opinion in the Detroit Case, which was written by Justice Peckham, one of the dissenting justices in the Freeport Case, cites approvingly the Freeport Case (Detroit v. Detroit Cit. St. Ry. Co., 184 U. S. 368–382, 22 Sup. Ct. 410, 46 L. Ed. 592), and the opinion in the Cleveland Case, which was written by Justice White, who wrote the dissenting opinion in the Freeport Case, cites approvingly the Detroit Case (Cleveland v. Cleveland C. Ry. Co., 194 U. S. 517–536, 24 Sup. Ct. 756, 48 L. Ed. 1102). The opinions in the Detroit and Cleveland Cases show that the Supreme Court had before it in each case the Freeport decision, and yet neither of the two last-mentioned justices expressed any

continuing dissent from the Freeport Case, but on the contrary Justice Peckham refers to said case with seeming approval.

So, also, plaintiff's contention that the Broughton act contemplates the fixing of rates only by contract for the whole term of the franchise directly conflicts with the rule and authority above enunciated and cited, and is therefore without merit.

Plaintiff's argument that such regulation, as an exercise of legislative power, cannot be a municipal affair, because it works unlawful discrimination between competing corporations, and violates subdivision 19, § 25, art. 4, and section 21, art. 1, of the state Constitution, and that equal protection of the law as to rates can be had only when by general statutes they are made uniform throughout the state, is not well grounded. The local conditions of public utilities, such as value of plant, costs of maintenance and operation, etc., are so variant in different places, that rates, if reasonable, cannot be the same in all localities. From this consideration, it follows that municipalities should be allowed respectively to fix rates within their corporate limits, and it was to promote and apply this salutary doctrine to all matters of local concern that the provisions of section 8, art. 11, of the Constitution, authorizing freeholders' charters, were ordained as organic laws. Uniformity is the very thing these charters are designed to avoid, and dissimilarity their essential idea.

The Supreme Court of California on this subject has said:

"It may be true, that the freeholder charter scheme confers greater influence in legislative matters upon the inhabitants of the favored cities than is enjoyed by the people who do not reside in said cities. The inhabitants of the favored cities may participate in making laws for others which have no operation at all as to them, while the outsider, when the charter has been once made, has no voice in making such laws for those within the city even when he is vitally and directly interested in them; but if this be an inequality the people have themselves made it, and if a remedy is needed they alone can provide it." People v. Williamson, 135 Cal. 415, 67 Pac. 504.

Nor is there anything contrary to these views in section 6, art. 11, of the Constitution, for the simple reason that the regulation of the charges of a public service corporation within the limits of a city is a "municipal affair." Streets of a city are public highways, in which the people of the whole state are interested, yet the opening and widening of streets are "municipal affairs." Byrne v. Drain, 127 Cal. 663, 60 Pac. 433. The regulation of telephone rates in a city would seem to be more clearly a matter of local concern than the control of streets. On this point plaintiff continues as follows:

"Our construction is reinforced by the consideration of other provisions of the same instrument. Section 33, art. 4, of the Constitution, provides: 'The Legislature shall pass laws for the regulation and limitation of the charges for services performed and accommodation furnished by telegraph companies, * * * and where laws shall provide for the selection of any person or officer to regulate or limit such rates, no such person or officer shall be selected by any corporation or individual interested in the business to be regulated, and no person shall be selected who is an officer or stockholder in any such corporation.' It is plain that by this provision it was not intended to regulate or limit the charges of telegraph companies except by general laws. State v. Mayor (Mont.) 85 Pac. 744."

Plaintiff, through inadvertence, erroneously quotes the first clause of said section, which is as follows:

"The Legislature shall pass laws for the regulation and limitation of the charges for services performed and commodities furnished by telegraph and gas corporations," etc.

The omitted words "and gas corporations" are very significant. If plaintiff's interpretation of the constitutional provision above quoted be correct, then gas corporations cannot be regulated or limited in their charges, except by general laws, whereas plaintiff shows that by section 19 of article 11 the fixing of gas rates is a municipal affair. Moreover, if there were no such constitutional provisions in reference to gas companies, it is manifest that the fixing of gas rates throughout the various cities of the state by a general law would be impracticable, and that it is a matter properly, if not necessarily, confided to the respective municipalities.

Plaintiff repeats its erroneous construction of said section as follows:

"Referring again to section 33 of article 4 of the Constitution of California above quoted, we desire to call the attention of the court to the fact that that section applies to telephone companies. The section refers only to telegraph companies, but telegraph companies and telephone companies stand upon the same footing, and the language used in constitutions and statutes referring to telegraph companies applies to and binds telephone companies. Joyce on Electric Law, § 8; Davis v. Pacific States Telephone Company, 127 Cal. 315, 59 Pac. 698. The foregoing California decision on the subject necessarily settles the construction of the above section of the Constitution. It is plain, therefore, that the framers of the Constitution regarded the regulation of telephone and telegraph charges as not a municipal affair, but provided that the same should be done by general and uniform laws, and evidently contemplated that it should be done by some sort of a commission. It is plain that the fixing of telephone rates cannot be a municipal affair, while the above provision of the Constitution of the state of California is in force. It clearly and distinctly requires the Legislature to pass the laws, and we think it would be a violation of the plain provisions of that section of the Constitution for the Legislature to divest itself of this power by delegating it to a municipal corporation."

No one will claim that it was ever contemplated by the Constitution that gas rates should be regulated by a general law, or through the agency of a commission; and the truth is section 33 of article 4 above quoted does not contemplate the accomplishment of its purposes by a general law, or through commissions, but by suitable delegations of power to municipalities. I am clearly of opinion that the city of Los Angeles, when said ordinances were adopted, was authorized by its charter and the Constitution of the state to regulate charges for telephone service, and that the authority thus conferred upon the city was as ample as that possessed by the Legislature, and that this conclusion results, even though the grant of said authority be considered solely as a delegation from the Legislature. There are strong reasons, however, for a broader and more liberal construction of a freeholders' charter than is usually given to a grant solely from the Legislature. The Supreme Court of the state has said:

"The power of cities under charters to raise money by taxation for municipal purposes does not find its source in any grant by the Legislature, but has been directly granted by the people of the state by the provisions of the Constitution." Ex parte F. W. Braun, 141 Cal. 204, 74 Pac. 780; Security Savings,

etc., Co. v. Hinton, 97 Cal. 214, 32 Pac. 3; Ex parte Pfahler (Cal. Sup.) 88 Pac. 270; St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; St. Louis v. Western U. Tel. Co., 149 U. S. 467, 13 Sup. Ct. 990, 37 L. Ed. 810.

The power acquired by a municipality under a freeholders' charter, so far as concerns its interpretation, is not unlike that conferred by section 11 of article 11 of the state Constitution upon municipal corporations to pass local police and sanitary regulations, and it has been repeatedly held that in the latter case the power is a direct grant from the people and not merely an authority delegated by the Legislature. Ex parte Roach, 104 Cal. 272, 37 Pac. 1044; Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; Denninger v. Recorder's Court, 145 Cal. 626, 79 Pac. 360; Odd Fellows Cam. Ass'n v. S. F., 140 Cal. 226, 73 Pac. 987. Such a charter being an organic act, and so declared by the Constitution, should not the powers of the city thereunder, like those of the Legislature of the state, be liberally interpreted? It is unnecessary, however, to pursue this line of thought further. Section 31 of the charter of the city of Los Angeles is so clear and unambiguous in conferring upon said city control of telephone rates that there is no occasion to invoke collateral aids to interpretation (McPherson v. Blacker, 146 U. S. 27, 13 Sup. Ct. 3, 36 L. Ed. 869), and therefore it is immaterial whether said charter be considered a grant by the Legislature or direct emanation from the people.

I am further of opinion that Ordinance C, requiring telephone companies to report to the city council value of plant, receipts, and expenditures, is an appropriate, if not necessary, means for carrying into effect the power of regulation conferred by section 31 of the charter, and therefore power to pass said ordinance is included in said power of regulation.

Plaintiff's claim that the power of regulation, if conferred, was given to the council as a commission representing the state, independent of the city, and that the council, as a commission, being without legislative power, could not lawfully pass Ordinance C, is untenable. Careful reading of all the sections of article 3 of the city charter satisfies me that the power to regulate rates conferred by section 31 of said article is given to the council not as a commission but as the legislative or governing body of the city. For instance, article 3 of the charter begins with the declaration, in section 12: "The legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor as hereafter given and shall be exercised by ordinance; other action of the council may be by order upon motion." Then, following in its order, is the provision in section 31 of said article, authorizing the council to regulate rates as follows: "The council shall have power by ordinance * * * to fix and determine charges for telephones and telephone service," etc. Reading these sections together, it seems to me that there is no room for controversy, but that the powers conferred by section 31 were given to the council as the legislative or governing body of the city, and not as a commission. This view is not only shown, however, by a careful perusal and comparison of the various sections of

said article of the charter, but is confirmed by the authority which plaintiff itself cites to the opposite contention, namely, Jacobs v. Supervisors, 100 Cal. 121–130, 34 Pac. 630, 633. At the latter page, the court says:

"At the time the section was adopted there was no city and county or city or town other than the city and county of San Francisco of which a board of supervisors was the legislative department, and it may well be presumed that the constitutional convention at that time had particularly in view the city and county of San Francisco when they expressly granted to the board of supervisors the power to establish water rates. But as there were some, and might in the future be other, cities and towns of whose government boards of supervisors did and might not constitute a part, and as other consolidated city and county governments could be established in the future whose legislative department might or might not be boards of supervisors, it was necessary, also, to provide for the fixing of water rates in those kinds of municipalities. And so the section, after declaring that water rates 'shall be fixed annually by the board of supervisors' (that is, of course, when such board was or should be a part of the government), proceeded to provide, also, that in municipalities having no boards of supervisors the 'other governing body' thereof should fix the rates. It is difficult to conceive how any other construction can be put upon the section without entirely eliminating therefrom the prominent and conspicuous words 'board of supervisors.'"

It follows, from the foregoing views, that Ordinances C and D are both valid, unless the power of regulation conferred by the local laws upon the city had been previously surrendered by contract, or is in contravention of some provision of the federal Constitution, and these two questions will be considered in the order in which they have been named.

2. I now come to the second question propounded in the outset of this opinion, namely, did the city of Los Angeles, by Ordinance B, surrender or suspend its power to regulate plaintiff's charges for telephone service?

The power to abandon or suspend its control of rates is not expressly given the city of Los Angeles either by its charter or the Broughton act. St. California, 1901, p. 267, c. 103. It is argued, however, by plaintiff, that in this age telephone systems are among the appropriate instrumentalities for providing and maintaining suitable fire and police departments, and otherwise promoting the efficient administration of municipal government, and therefore the power to contract for telephone rates is inferable from sections 17, 22, and 23 of said charter. It is also argued on behalf of plaintiff that this power to contract for rates is to be implied from the Broughton act, providing for the sale of franchises, on the ground that a sale implies a price. It may well be doubted, however, whether or not authority to provide and maintain suitable fire and police departments, or the more comprehensive authority to efficiently administer the municipal government, as conferred by the city charter, or whether or not the sale of franchises as authorized and provided for by the Broughton act, necessarily or reasonably include authority to surrender municipal control over rates. These provisions of the charter and the Broughton act are unlike the charter provision in Los Angeles City Water Co. v. Los Angeles (C. C.) 88 Fed. 720, from which the court inferred power to fix rates contractually. There the express provision of the charter

was that the city council "shall have the power * * * to provide for supplying the city with water."

It may be that whatever doubts arise on this question should, under the well recognized rule of construction hereinbefore referred to, be resolved against the claimed grant of power and favorably to its retention by the state. However, for the purposes of this hearing, it will be conceded, without further consideration or any decision of the question, that the city, when plaintiff's franchise was granted, had authority by contract to abridge or abandon its control of telephone rates, and it is therefore needless to inquire whether, in granting said franchise, it acted in a proprietary or legislative capacity, or derived its authority from charter provisions or general laws. It is important, however, to determine the character of the power to regulate rates, since this fixes the rule of construction applicable to cases where abandonment or suspension of the power is claimed.

The power of the state to regulate public utilities, including rates, cannot be otherwise than a power of legislation. Where this power has been admittedly conferred upon a city, and the city adopts a suitable ordinance, in execution of this power, such an ordinance is not in any sense a proprietary matter. I can see merit, if not convincing force, in the proposition that a city, when it enters into a contract for a public utility, even though municipal control of rates be thereby abridged or abandoned, acts in a proprietary character, but this proposition by no means takes away from the power thus abandoned its governmental or legislative character. This distinction seems to be presented in the following quotation:

"The power to fix and to regulate the rates which the inhabitants of a city shall pay to business corporations for water, gas, transportation, and other public utilities partakes of the nature of a governmental power and also that of a business power. Are the inhabitants of a city paying rates not fixed by contract to quasi public corporations for public utilities? The power to so regulate these rates that they shall not be unreasonable is a legislative, a governmental power which the state or city may exercise, but may not renounce. Is a city without waterworks and hence without rates at which any one will furnish water therefrom to the municipality or its inhabitants? The making of a contract for the construction and operation of waterworks wherein the parties agree what rates may be collected by the owner of the works from private consumers during a reasonable term of years is the exercise of one of the business powers of the corporation. The purpose of such a contract is not to regulate rates, for there are no rates to regulate. Hence it is that the Legislature of a state, unless prohibited by its Constitution, may empower a city to suspend by contract, and a city may suspend in that way during a reasonable term of years, its power to change or regulate the rates which an individual or corporation may collect of private consumers." Omaha Water Co. v. Omaha, 147 Fed. 1, 5, 77 C. C. A. 267, 271.

In a leading case on this subject it is said:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private (Thorpe v. R. & B. Railroad Co., 27 Vt. 143, 62 Am. Dec. 625); but it does authorize the establishment of laws requiring each citizen

to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim 'Sic utero tuo ut alienus non lædis.' From this source come the police powers, which, as said by Mr. Chief Justice Taney in the License Cases, 5 How. (U. S.) 583, 12 L. Ed. 256, 'are nothing more or less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." Munn v. Illinois, 94 U. S. 124, 24 L. Ed. 77.

In another case a specific designation is made as follows:

"This power of regulation is a power of government continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent." Railroad Commission Cases, 116 U. S. 325, 6 Sup. Ct. 334, 342, 29 L. Ed. 636.

In yet another case it is held, quoting from the syllabus:

"An act of the Legislature of New York (Laws 1888, p. 946, c. 581) provided that the maximum charge for elevating, weighing, and discharging grain should not exceed five-eighths of one cent a bushel; and that, in the process of handling grain by means of floating and stationary elevators, the lake vessels or propellers, the ocean vessels or steamships, and canal boats, should only be required to pay the actual cost of trimming or shoveling to the leg of the elevator when unloading, and trimming cargo when loading. Held, that the act was a legitimate exercise of the police power of the state over a business affected with a public interest, and did not violate the Constitution of the United States and was valid." Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247.

At page 534 of 143 U. S., and page 472 of 12 Sup. Ct. (36 L. Ed. 247), of the same case, appears the following:

"The opinion further said that the criticism to which the case of Munn v. Illinois had been subjected proceeded mainly upon a limited and strict construction and definition of the police power; that there was little reason, under our system of government, for placing a close and narrow interpretation on the police power, or restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society and the new circumstances as they arise calling for legislative intervention in the public interest; and that no serious invasion of constitutional guarantees by the Legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order, and justice, however it might have been swayed for a time by passion, prejudice, or whatever aberrations might have marked its course. We regard these views which we have referred to as announced by the Court of Appeals of New York, so far as they support the validity of the statute in question, as sound and just."

In a still later case, the Supreme Court, referring to the matter of rates, said:

"These acts are urged to establish the power in the village of Rogers Park to grant to the plaintiff in error the right to charge and collect for 30 years the rates prescribed by the ordinance of November, 1888. * * * A strict construction must be exercised. The contract claimed concerned governmental

functions, and such functions cannot be held to have been stipulated away by doubtful or ambiguous provisions." Rogers Park Water Co. v. Fergus, 180 U. S. 624–629, 21 Sup. Ct. 490, 491, 45 L. Ed. 702.

From the foregoing excerpts it is manifest that the Supreme Court classifies the power to regulate rates as governmental and falling within the police powers of the state. Nor does Los Angeles City Water Co. v. Los Angeles (C. C.) 88 Fed. 721, hold anything to the contrary; but, after quoting from a line of decisions which treat the power in question as proprietary, the court there says:

"If, however, it be conceded, contrary to these authorities, and as claimed by defendants, that the power of the city to regulate water rates is legislative or governmental, the city may by contract abridge such power under an implied as well as an express legislative grant, and this rule is recognized in many of the authorities upon which defendant relies."

In the Los Angeles Case there was no dispute but that the city had entered into a contract which limited its power to regulate rates, and the court held that, conceding this power to be legislative, still it was competent for the city to bargain it away. Plaintiff's syllogism, substantially as follows: Police power cannot be bartered away. Power to regulate rates may be surrendered by contract. Therefore, power to regulate rates is not a police power—is manifestly unsound in its first premise. It has been authoritatively and repeatedly held that powers of sovereignty may be contractually abandoned. In the earliest case on this subject it is clearly implied that even the sovereign power of taxation may be thus surrendered; the court saying:

"That the taxing power is of vital importance, that it is essential to the existence of the government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be presumed. We will not say that a state may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist; but, as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." Providence Bank v. Billings, 29 U. S. 514, 560, 7 L. Ed. 936.

So, too, the police power of the state may be surrendered or abridged by contract, if the contract be not prejudicial to the peace, good order, health, or morals of its inhabitants. This qualification is stated by a case cited by plaintiff as follows:

"The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed, or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined." Walla Walla v. Walla Walla Water Co., 172 U. S. 1–15, 19 Sup. Ct. 77, 83, 43 L. Ed. 341.

The police powers, however, include other subjects than those enumerated, and, as said in Munn v. Illinois, supra:

"Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own prop-

erty, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold."

The Walla Walla Case above referred to, so far from holding that regulation of rates is not a police power, holds that where a contract is itself innocuous it may be sustained, even though it abridges the police power. Thus, at page 16 of 172 U. S., and page 84 of 19 Sup. Ct. (43 L. Ed. 341), the court says:

"Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; St. Louis v. Western Union Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Laclede Gas Light Co. v. Murphy, 170 U. S. 78, 18 Sup. Ct. 505, 42 L. Ed. 955. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it."

The same distinction is recognized in another quotation at page 24 of plaintiff's brief, as follows:

"I may add that a law for the purpose of securing and enforcing fair and reasonable charges by common carriers is not to be classed with those laws making for the public health and public morals, the power to enact which cannot be contracted away or parted with by the state." Central Trust Co. v. Citizens Street Ry. Co. (C. C.) 82 Fed. 1–8.

I am clearly of opinion, both upon reason and authority, that control of rates is distinctively a police power of the state. Indeed the decisions of the Supreme Court are conclusive of the question. Such being the character of the power, the rule of construction applicable to cases where parties claim its abandonment or suspension is easily ascertained. The Supreme Court has said:

"This power of regulation is a power of government continuing in its nature; and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall in the case of Providence Bank v. Billings, 4 Pet. 514–561, 7 L. Ed. 939, 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' This rule is elementary, and the cases in our reports where it has been considered and applied are numerous." Stone v. Farmers' Loan & T. Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636.

Again, it has been said:

"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and, unless an exemption is clearly established, the Legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 547, 9 L. Ed. 773, 938; 'It can never be assumed that the government intended to diminish its power

of accomplishing the end for which it was created.' This is an elementary principle." Ruggles v. Illinois, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. Ed. 812.

See, also, Freeport Water Co. v. Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; Danville Water Co. v. Danville, 180 U. S. 619, 21 Sup. Ct. 505, 45 L. Ed. 696; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 21 Sup. Ct. 490, 45 L. Ed. 702; Atlantic & Pacific R. R. Co. v. U. S. (D. C.) 76 Fed. 186.

Bearing in mind the rule of construction applicable to contracts which are claimed to abandon or suspend governmental control of rates, let us now examine Ordinance B, granting to plaintiff's assignor its franchise. The ordinance is entitled as follows:

"An ordinance granting to M. A. King and his assigns the right for a period of fifty years, to construct, maintain and operate conduits and wires," etc., "for the purpose of transmitting sound, signals, conversation, and intelligence by means of electricity and carrying on a general telephone business, together with certain appurtenant and incident rights."

The ordinance then proceeds as follows:

"Section 1. That the right, privilege and franchise is hereby granted to M. A. King and his assigns, to construct, lay down, maintain and operate for the period of fifty years an underground conduit and wires. * * *

"And to transmit sound, signals, conversation and intelligence through and over said wires by means of electricity, together with the right to construct, operate and maintain all necessary feeders, service wires, house connections and such other apparatus and appliances in connection therewith as may be necessary for the purpose of safely and efficiently operating and maintaining said conduit, poles and wires, and carrying on a general telephone business by means thereof. * * *"

Section 9 of the ordinance provides, among other things:

"That the rent or charge for unlimited, independent, metallic circuit, telephone service in the system established or maintained under said franchise so long as said system does not connect and exchange with more than 10,000 telephones, shall not exceed $60.00 per annum for a telephone installed in any business office or premises, or $30.00 per annum for a telephone installed in a private residence, and that when said system shall comprise more than 10,000 telephones, the annual rental or charge for the aforesaid services shall not be increased by more than a sum equal to $6.00 per annum for each one thousand telephones in said city connected with said telephone system in excess of 10,000."

Is it true that, by the provisions of said section of said ordinance, the city of Los Angeles abandoned, for 50 years, its right to reasonably limit plaintiff's charges for telephone service? Can it be said that the abandonment of the power in question has been "shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power"? Certainly there is no express abandonment, and the circumstances of this case, particularly the long period of 50 years, forbid an implication of that sort. I do not mean to assert that, if a contract unequivocally abandoned a legislative power for 50 years, the duration of the abandonment would itself avoid the contract; but what I do say is that such a long period is a strong, if not conclusive, reason why an abandonment should not be implied.

The Supreme Court of Illinois, in a case very similar to this one, said:

"The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants should and would pay such rates for the period of 30 years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. The legal effect was to establish, prima facie, the corporation, in order to discharge the duty it owed to the public, must supply the commodity it had been created to supply at the prices named in the ordinance. It was a mode of regulating and enforcing the discharge of a legal duty—not a proposition looking toward a contract. No contract was necessary to create an obligation on the part of the corporation to supply water at a reasonable rate, for that rested upon it as a duty. Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys, and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same—that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public." Rogers Park Water Co. v. Fergus, 178 Ill. 571–578, 53 N. E. 363, 365.

Furthermore, section 9 of Ordinance B is not a grant, but a limitation. The franchise granted in the first section to construct a telephone system and carry on a general telephone business necessarily implies a right to charge reasonable rates for telephone service (Winona, etc., Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99), and section 9 is but a limitation upon this right. It confers nothing, but simply qualifies what has already been conferred. It does not give any right whatever to the plaintiff, much less a right to charge up to the maximum rate, for 50 years, but is simply a legislative declaration that any charge in excess thereof would at that time be unreasonable. This distinction and its consequences are amplified in Atlantic & Pacific R. R. Co. v. United States, supra, and, after careful reconsideration of the opinion in that case, which was written by myself, I am satisfied with the principles it enunciates, and their application to the case at bar can but lead to the conclusion that section 9 of Ordinance B is not nor was it intended as a covenant surrendering the city's control of rates.

Plaintiff states its opposing contention, in general terms, thus: "A franchise which has fixed maximum rates for the services to be rendered thereunder is a contract as to the rate, and the rate cannot be reduced." I shall not undertake a full review of the cases cited by plaintiff to this contention, but will briefly notice some of them.

Stone v. Yazoo & Mississippi R. R. Co., 62 Miss. 607, 52 Am. Rep. 193, does not sustain the contention, as appears from the first clause of plaintiff's quotation from the case, which is as follows:

"Section 6 of the charter of the appellee confers on the company power to fix from time to time, by its board of directors, the rates at which it will transport person or property over its railroad, provided they shall not exceed the maximum specified in the act."

Thus it will be seen that the right of the company to fix its rates was not an implication from the maximum rate prescribed, but was expressly conferred.

State v. Laclede Gas Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383, 22 Am. St. Rep. 789, although somewhat different in its facts from the case at bar, seems to favor plaintiff's contention. Pingree v. Michigan Central Ry. Co., 76 N. W. 635, 118 Mich. 314, 53 L. R. A. 274, was also decided upon its own peculiar facts, many of which do not exist in the case at bar. The opinion is a long one, and, in order to be properly understood, must be carefully read. Two excerpts from the opinion, however, will clearly show that the mere fixing of a maximum rate does not give a right to charge up to that rate, but such right can exist only where there are other expressions or circumstances, in connection with the maximum rate, showing unequivocally an intent to confer such right. At page 640 of 76 N. W., and page 330 of 118 Mich. (53 L. R. A. 274), the court says:

"It was not, then, a general grant of power, and therefore limited to fixing rates, the reasonableness of which should be determined by the usual methods, and consequently the same power as any individual or corporation would have without it, but was intended to confer a contract right to fix tolls, within the limit of three cents a mile, as plainly as though it had provided that said road should have the right to charge three cents a mile, or less, in its discretion, for transportation of passengers. It will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix tolls to that amount been denied. This case is even stronger than such, inasmuch as the charter expressly fixes the limitation, and unqualifiedly states that such shall be the only limitation of the company's power."

Again, at page 642, 76 N. W., and page 335 of 118 Mich. (53 L. R. A. 274), the court says:

"It is noticeable that in the present case we do not 'find the section granting the power to fix rates by by-law in the same section that declares that by-laws shall not be in conflict with the laws of the state,' nor do we find a mere general authority to fix rates, nor a mere mention of a maximum rate."

It should be observed here, however, that the statement of the court in said quotation, "it will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix toll in that amount been denied," is manifestly erroneous, because maximum rates were prescribed, and the right of the company to fix tolls to that amount was denied in Banking Company v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377.

Borough v. Whitehaven W. Co., 58 Atl. 159, 209 Pa. 166, so far from supporting plaintiff's contention, treats the maximum rate prescribed as a limitation upon, not the grant of a right, and is in perfect accord with the views I have expressed.

Chicago R. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94, affords no support to plaintiff's contention. The full paragraph from which plaintiff quotes is as follows:

"This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the Legislature

steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the Legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that has been done, the charter might have presented a contract against future legislative interference. But it was not, and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of the legislators for protection against wrong under the form of legislative regulation."

All that the court decides in this paragraph is that, if the Legislature had fixed "permanently" a maximum limit in the charter, it might have been a contract against future legislative interference. Indeed, the language of the court implies that the mere fixing of a maximum limit is not a provision against future legislative control, but that, in order to effect this result, the maximum limit must be prescribed permanently in terms.

In Detroit v. Detroit R. R. Co. (C. C.) 60 Fed. 161, the only pertinent fact is found at page 171, as follows:

"By section 8 of the ordinance of 1862 it was provided 'the rate of fare for any distance shall not exceed 5 cents on any one car or on any one named in this ordinance.'"

Whether this section should be construed as a grant, which was the final conclusion of the court, or a limitation, which was the court's first impression, depends largely upon other facts of the case, which do not appear, and I am therefore unable to determine its applicability or force here.

City of Indianapolis v. Central Trust Co. of New York, 83 Fed. 529, 27 C. C. A. 580, simply decides that the plaintiff in good faith claimed a vested contract right to charge a higher rate of fare than that fixed in the ordinance assailed, and that therefore the court had jurisdiction of the case.

Moreover, it is to be inferred from the statement of facts that the ordinance fixing the maximum was passed pursuant to a statute of the state which gave power to the street railway company "to make by-laws among other things for regulating the running of the cars and the rate of fares on the road." If this inference be correct, then it was the statute which gave the power to the company to fix the rates, while the ordinance which prescribed the maximum was but a limitation on that power.

Detroit v. Detroit Cit. Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, is widely and readily distinguishable from the case at bar. The court there held that the rate provisions gave the company a contractual right to charge up to the maximum, on the ground that the ordinance was passed under and pursuant to an act of the Legislature, which expressly directed the parties, that is, the city and the street railway company, to fix rates by agreement. The opinion of the court shows that the meaning it gave to the language fixing maximum rates was demanded by the peculiar circumstances of the case, and that the same language, under other circumstances, would call for a different construction. This idea the court emphasizes as follows:

"It may very well be that language used by a Legislature in merely conferring authority upon a company to fix certain charges for fare might not

be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract, because the statute provided specially for that mode of determining them."

The Supreme Court, in a later case, where the provision as to a maximum rate was that "said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons," said:

"The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377; Ragan v. Aiken, 9 Lea, 609, 42 Am. Rep. 684. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed. Rockport Water Co. v. Rockport, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the fourteenth amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim. We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. Detroit v. Detroit Citizens' Street Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its consumers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law." Knoxville Water Co. v. Knoxville, 189 U. S. 434–436, 23 Sup. Ct. 531, 532, 47 L. Ed. 887.

Not only does this last quotation confirm the views which I have expressed of the Detroit Case, but distinguishes it from Georgia Banking Company v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377, which holds, in substance, that the mere fixing of a maximum rate is not a surrender of the power of future regulation. The rate provision in the latter case was as follows:

"Provided, that the charge of transportation or conveyance shall not exceed 50 cents per 100 pounds, on heavy articles, and 10 cents per cubic foot on articles of measurement, for every 100 miles; and 5 cents per mile for every passenger."

And the court said:

"The question then arises whether there is in the twelfth section of the charter of the plaintiff in error a contract that it may make any charges within the limits there designated. * * * It does not matter in the present case whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied, as to any future action of the Legislature. If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the Legislature had, in 1883, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated. It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms of its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligations of contracts. If the charter in this way provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exception from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the state. There is no such language in the present case. The contention of the plaintiff in error therefore fails, and the judgment must be affirmed."

Cleveland v. Cleveland Street Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, cannot justly be considered a precedent here, since most of the facts on which the decision turned are absent from the case at bar. For instance, the court there said:

"It is undoubtedly true that, immediately before and for a long time prior to the passage of the ordinances concerning the various consolidations and extensions referred to, the respective roads affected thereby were charging a cash fare of five cents over their respective lines, and that the effect of the consolidations and extensions was to secure to the public the benefit of a cash fare of five cents over the whole length of the consolidated and extended lines."

Again, the court says:

"The statutes show that there was lodged by the Legislature of Ohio in the municipal council of Cleveland comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated; the only limitation upon the power being that in case of an extension or consolidation no increase in the rate of fare should be allowed."

In the case at bar, the power to contract, if it exists at all, is but an implied power, and cannot justly be called a "comprehensive power," such as that described in the above quotation.

In the Cleveland Case it was specifically provided:

"That for a single fare from any point to any point on the line or branches of the consolidated road no greater charge than five cents shall be collected, and that tickets at the rate of 11 for 50 cents or 22 for one dollar shall at all times be kept for sale on the cars by conductors."

The clause, "and that tickets at the rate of 11 for 50 cents or 22 for one dollar shall at all times be kept for sale on the cars by conductors," aids somewhat in giving to the rate provision a contractual character; the words "at all times" signifying the life of the franchise, 25 years.

Again, in the Cleveland Case, the court further says:

"The acceptance of this ordinance by the railroad companies affected thereby was required to be in writing and filed with the city."

Again, the court, in that case, said:

"Like provisions were contained in the ordinance of April 8, 1887, authorizing the laying of an additional track and the extension of the lines of the Woodland Avenue & West Side Street Railroad Company, and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908.' The ordinance of August 12, 1887, authorizing a further extension, and the ordinance of June 20, 1892, authorizing the double tracking of a portion of the line, contained similar language."

The clause, "and there was also a declaration, following the authorization of the extension and the rates to be charged on the whole line, that 'the right herein granted shall terminate with the present grant of the main line, to wit, on the 10th day of February, 1908,'" was evidently a circumstance of much weight in the mind of the court; since "the right" which was to terminate on the 10th day of February, 1908, related both to "the authorization of the extension and the rates to be charged on the whole line," that is to say, "the right" granted, included the matter of rates as well as the extension of the road. Furthermore, this right was to terminate in a specific time, 25 years, or, differently expressed, was to continue for that period.

None of the foregoing circumstances are found in the case at bar, and not only are they made prominent by the court in stating the material facts of the Cleveland Case, but the court, in its summary, presumably to the end, that there might be no mistake or doubt as to the grounds of its decision, and that it might not thereafter be improperly invoked as a precedent, emphasizes said facts as among the controlling circumstances of the case in the following unequivocal language:

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter, that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887."

The court looked not merely to one or two of said facts, but was careful to say:

"Taking all the circumstances above referred to into account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592, and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437, 23 Sup. Ct. 531, 47 L. Ed. 887."

Another difference of great importance between the Cleveland Case and the one at bar is that in the Cleveland Case the suspension of the power of regulation was for only 25 years. In the case at bar, the suspension, if held to exist, would be for the period of 50 years. Indeed, this distinction applies to all of the cases cited in this connection except the Freeport Case, where the existence of a contract for rates was denied, and it is worthy of note that plaintiff, in its brief, states that the period of suspension in the Freeport Case, 55 years, was an unreasonable time. It is also worthy of notice that in the Cleveland Case the court refers approvingly to the Knoxville Case, wherein, as I have already shown, it was held that the mere fixing of maximum rates did not displace the municipal power of regulation given by the general law, under which the water company was created. Furthermore, there is no provision in section 9 of Ordinance B as to when the maximum rates there prescribed shall terminate, or how long they shall last. This becomes more noticeable when we read in the same connection the first clause of section 11 of Ordinance B:

"That the person to whom this franchise is granted, or his assigns, shall, during the life of said franchise pay to the city of Los Angeles in lawful money of the United States two per cent. of the gross annual receipts of such grantee and his assigns, arising from the use, operation or possession of said franchise."

Thus, it will be seen that section 11 expressly provides that 2 per cent. of the gross annual receipts of the company shall be paid to the city "during the life of said franchise," whereas the provisions of section 9 as to rates are not fixed, as they were in the Cleveland Case, for a stated time.

It is true that the city by Ordinance B required plaintiff to furnish for the use of the city 30 telephones and 150 pairs of conductors, and to pay to the city 2 per cent. of its gross annual receipts, and these things were doubtless considered an adequate consideration for the franchise granted plaintiff to use the public streets and alleys for the construction and operation of plaintiff's telephone system; but I find no case which supports plaintiff's contention that such a consideration alone is sufficient to show that the city, besides granting the use of the public streets and alleys, intended also to contract as to rates, thus abandoning its control of plaintiff's charges for the unusual period of half a century.

A somewhat elaborate review of the cases, including those above cited, bearing upon the point now under consideration, has been made by the Circuit Court of Appeals of the Eighth Circuit, in a case wherein the court, on grounds substantially the same as in the case of Detroit v. Detroit Citizens' Ry. Co., supra, held that there was a suspension

of the power to regulate rates. Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267.

After much reflection upon the subject, and a careful review of the authorities, I can but conclude that the city of Los Angeles did not, by Ordinance B, abandon or suspend its power to regulate charges for telephone service.

3. My ruling, just announced, that there was no contract as to rates between the city and the plaintiff, disposes of the latter's contention that Ordinance D violates what is known as the impairment clause of the Constitution.

Plaintiff's kindred contention that said ordinance violates the fourteenth amendment seems to be rested on the ground that "equal protection of the laws," within the meaning of said amendment, so far as rates are concerned, is afforded only where the rates are fixed uniformly throughout the state by general laws, and on the further ground that Ordinances D and E, which prescribe different rates for two companies, operating in said city, unlawfully discriminate against plaintiff, and that since Ordinance D makes no provision for notice, it would, if executed, deprive plaintiff of property without due process of law.

The first of these grounds has already been considered, the others will now receive attention.

A moment's reflection shows that the mere fact that different rates are prescribed for two companies does not, of itself, establish unlawful discrimination against either. Such discrimination can result from different rates only where the companies are identical as to those factors which determine just compensation, among them being value of plant, revenues, and expenditures. San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261. These conditions are rarely, if ever, the same in any two companies, and it is obvious that a rate fair to one company might be very unfair to another. To obtain relief on said ground, it is not sufficient to allege discrimination in general terms, but the facts out of which the discrimination grows must be clearly and specifically shown.

Moreover, Ordinance C, whose validity I have already shown, was intended to place before the city council such information as would enable it to do full justice to the plaintiff in the matter of rates. In paragraph 14 of the bill of complaint it is expressly alleged that plaintiff has not complied and declines to comply with said ordinance. Thus it appears that plaintiff has intentionally refused to do that which the law expressly enjoins, namely, furnish the information required by said ordinance, and for the lack of which the unlawful discrimination, if any, presumably resulted. Plaintiff will not be heard to complain in equity of a condition of things brought about by its own willful omission of duty.

It should be remembered, in this connection, that the reasonableness or unreasonableness of the rates fixed by Ordinance D is not before the court, but the only question is whether or not the city had power to fix any rate. In order to raise the question of reasonableness, it would be incumbent upon the plaintiff to allege, as I have already indicated, the particular facts on which the claim of unreasonableness rests.

Covington, etc., Turnpike Co. v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Atlantic & Pacific R. R. Co. v. U. S. (D. C.) 76 Fed. 186; Redlands, etc., Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261. As stated above, however, plaintiff's contention is not that the rates fixed by the city in Ordinance D are so low as to be oppressive, but that the maximum rate fixed in Ordinance B is unalterable for a period of 50 years.

The other ground on which plaintiff bases its claim of an infraction of the fourteenth amendment, namely, that the Ordinance D does not provide for notice, is equally untenable. Said ordinance, being, as I have already held, legislative in character, no notice of intention to pass or consider it was required. Moore v. Haddonfield, 62 N. J. Law, 386, 41 Atl. 946; Cleveland, C., C. & St. L. R. R. Co. v. St. Bernard, 19 Ohio Cir. Ct. R. 299, 10 O. C. D. 415. On this subject of notice the Supreme Court of California has said:

"Whether the fixing of rates by the council be called a legislative, a judicial, or an administrative act, it is certainly not an adversary judicial proceeding, such as, under the Constitution, will conclude private rights. It is a proceeding on the part of the government to which neither the water company nor the rate payers are parties, conducted without notice to them, and without any right on their part to effectually intervene." San Diego Water Co. v. San Diego, 118 Cal. 556, 50 Pac. 633, 38 L. R. A. 460, 62 Am. St. Rep. 261.

To the same effect is the case of Water Works v. San Francisco, 82 Cal. 286–315, 22 Pac. 910, 1046, 6 L. R. A. 756, 16 Am. St. Rep. 116.

The Supreme Court of the United States has also declared notice unnecessary, in the following language:

"Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The Constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the 1st day of July thereafter. It was made by statute the duty of the appellee at least 30 days prior to the 15th day of January in each year to obtain from the appellant a detailed statement, showing the names of water rate payers, the amount paid by each during the preceding year, and 'all revenues derived from all sources,' and the 'expenditures made for supplying water during said time.' It was the right and duty of appellant in January of each year to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should be allowed by ordinance. Act of March 7, 1881 (Laws 1881, p. 54, c. 52) § 2, above cited. Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to have duly considered it and given it proper weight in determining rates. If the state by its Constitution or laws had forbidden the city or its board to receive and consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen. But no such case is now presented. In Kentucky Railroad Tax Cases, 115 U. S. 321, 333, 6 Sup. Ct. 57, 61, 29 L. Ed. 414, it was said: 'This return made by the corporation through its officers, is the statement of its own case, in all the particulars that enter into the question of the value of its taxable property, and may be verified and fortified by such explanations and proofs as it may see fit to insert. It is laid by the Auditor of Public Accounts before the board of railroad commissioners, and constitutes the matter on which they are to act. They are required to meet for that purpose on the 1st day of September of each year at the office of the Auditor at the seat of government. * * * These meetings are public and not secret.

The time and place for holding them are fixed by law.'" San Diego Land Co. v. National City, 174 U. S. 739, 752, 19 Sup. Ct. 804, 809, 43 L. Ed. 1154.

A like ruling, based expressly upon this San Diego Case, was subsequently made in Freeport Water Company v. Freeport, 180 U. S. 587–600, 21 Sup. Ct. 493, 45 L. Ed. 679.

It should be remembered in this connection that Ordinance C provides that rates shall be fixed at a regular or special meeting of the city council, held during the month of February of each year, and makes it the duty of every person, firm, or corporation supplying telephone service to said city or its inhabitants to furnish to the city council in the month of January of each year written statements under oath of receipts, revenues, and expenditures during the year preceding the date of such statement, and also an inventory of all the works, lines, plant, and property owned or used by such person, firm, or corporation, necessary or convenient to carrying on its business, and showing the actual cost and present cash value of each item thereof. These provisions of said ordinance are substantially the same as the provisions of the Constitution and statute referred to in the quotation last above made, and bring the case at bar within the principles there enunciated.

The last three decisions, one by the Supreme Court of California and the other two by the Supreme Court of the United States, are determinative of the question of notice, and it is unnecessary to review in detail the numerous cases from other states referred to in plaintiff's brief. The California cases cited at page 13 of said brief, and that of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, as well as Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, and other cases involving special taxes and assessments, are inapplicable here.

Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970, so far from holding that notice is necessary under the facts of the case at bar, impliedly indicates, that such notice is not required. In that case it was held that notice was necessary largely on the ground that the statute creating the commission made its action final and conclusive, so that the same could not in any way be reviewed by the courts. In the later case, above mentioned, San Diego Land Co. v. National City, 174 U. S. 739–748, 19 Sup. Ct. 804, 807, 43 L. Ed. 1154, the Supreme Court said:

"Upon the point just stated we are referred to the decision of this court in Chicago, Milwaukee, etc., Railway v. Minnesota, 134 U. S. 418, 452, 456, 457, 10 Sup. Ct. 462, 33 L. Ed. 970. That case involved the constitutionality of a statute of Minnesota empowering a commission to fix the rates of charges by railroad companies for the transportation of property. The Supreme Court of the state held that it was intended by the statute to make the action of the commission final and conclusive as to rates, and that the railroad companies were not at liberty, in any form or at any time, to question them as being illegal or unreasonable. This court said: 'This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company.' * * * Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state. What this court said about the Minnesota statute can have no ap-

plication to the present case, unless it be made to appear that the Constitution and laws of California invest the municipal authorities of that state with power to fix water rates arbitrarily, without investigation, and without permitting the corporations or persons affected thereby to make any showing as to rates to be exacted or to be heard at any time or in any way upon the subject. The contention of appellant is that such is the purpose and necessary effect of the Constitution of the state. We are not at liberty so to interpret that instrument." San Diego Land Co. v. National City, 174 U. S. 739–748, 19 Sup. Ct. 804, 808, 43 L. Ed. 1154.

In the case at bar, as held in San Diego Water Co. v. San Diego, supra, and San Diego Land Co. v. National City, supra, the action of the city council in fixing telephone rates is not final or conclusive, but open to judicial examination as to whether or not the rates so fixed are reasonable. This last case is fully in point, and holds, upon facts substantially similar to those in the case at bar that notice is unnecessary. The ruling made by me as to the power of the city over telephone rates and the construction of section 9 of Ordinance B sufficiently answer plaintiff's contention as to an estoppel.

My conclusions upon the whole case may be summarized as follows: The charter of the city of Los Angeles, at the time of the passage of the ordinances sought to be annulled, conferred upon said city power to regulate charges for telephone service, and said power was not surrendered or abridged by the grant of plaintiff's franchise, or otherwise, nor do said ordinances, or either of them, contravene any of the provisions of the Constitution of the United States.

The demurrer to the bill is accordingly sustained.

UNITED STATES v. BANISTER REALTY CO. et al.

(Circuit Court, E. D. New York. May 9, 1907.)

1. NAVIGABLE WATERS—NAVIGABLE WATERS OF THE UNITED STATES DEFINED.
The term "navigable waters of the United States" applies: First, to all waters capable of sustaining or being used for interstate or foreign commerce, covering every part of any body of water, tidal or otherwise, any portion of which is capable of such use; and, second, to all waters under the admiralty and maritime jurisdiction of the United States and over which the District Court of the United States can exercise its peculiar admiralty jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 5–11.]

2. SAME—POWER OF CONGRESS OVER—CONSTITUTIONAL GRANT.
The power of Congress to legislate with respect to the navigable waters of the United States does not rest alone upon the constitutional provision giving it power to regulate interstate commerce, nor alone upon the provision extending the judicial power of the United States to all cases of admiralty or maritime jurisdiction, which vests Congress with power to legislate on all matters necessary to carry into execution such judicial power, but may be sustained under either or both provisions, and the various acts relating to obstructions to navigation are within such power where such navigation comes within the provisions of interstate or foreign commerce, or within the admiralty and maritime jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 2.]

3. SAME—SUIT TO ENJOIN OBSTRUCTION—PRELIMINARY INJUNCTION.

A preliminary injunction granted pending final hearing of a suit by the United States for a permanent injunction against the closing of the inlet connecting the Bay of Far Rockaway, on the southern coast of Long Island, with the ocean; the principal question at issue being as to whether or not such bay is at the present time navigable water within the jurisdiction of the United States, and it appearing that it has been such navigable water, until recently at least, and that the obstruction, if made, would have a tendency to change its character as such, by preventing the ebb and flow of the tide therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 61–65, 135–143.

Obstructions to navigation, jurisdiction of federal courts, see note to Bailey v. Mosher, 11 C. C. A. 318.]

In Equity. On motion for preliminary injunction.

William J. Youngs, U. S. Atty.
Hirsh & Rasquin, for defendants.

CHATFIELD, District Judge. Far Rockaway Bay is an ever-varying salt water and tidal indentation in the southern coast line of Long Island. Upon the latest United States government charts it is called the "Bay of Far Rockaway," separated from the Atlantic Ocean proper by a strip of land, designated "Far Rockaway Beach," and connecting with the ocean by an inlet called "Little Inlet." To the eastward on the chart lies a similar strip of shallow salt water, and this, in turn, by various bays, inlets, and larger indentations, connects directly with the broader and much deeper Great South Bay. The entire surface and waters of Long Island are included within the Eastern district of New York. Along the south shore of the Island runs a series of bars and strips of sand, in some places forming a substantial beach, and in others consisting merely of shoal water in front of the main land, at a greater or less distance therefrom. These beaches and bars constantly shift, and, as will be shown later, extreme and frequent as well as violent changes have occurred in the beach in front of the water called the "Bay of Far Rockaway" on many occasions during the past century.

At the present time, the condition of the locality called the "Bay of Far Rockaway" is very different from that shown on the government charts, and not only has the tidal portion been materially reduced in extent, but Little Inlet seems now to have no connection with the Bay of Far Rockaway. The eastern portion of the bay has entirely disappeared, and the mainland and the former beach are directly connected by a dry section of sand. A new inlet, smaller in many ways than the Little Inlet shown upon the charts, has been forced through the beach, at one point and then at another, with a general tendency to work westerly, thereby shortening the extent of the Bay of Far Rockaway, and increasing the amount of the solid mainland immediately east of the inlet. As shown by the moving papers herein, some seven bridges on trestles, at heights varying from five to six feet above the level of high water, have been built across the water now comprising this bay. These bridges have no draws, and no permit has been obtained from the War Department for their erection, with the exception of

one, the second bridge counting from the east. For this bridge a permit was granted by the War Department, on July 16, 1895, allowing the erection of a trestle with a draw. The statement upon which the application for this permit was made is as follows:

"To the Honorable Secretary of War, Washington, D. C.—Dear Sir: The Ocean Causeway Company propose to build a causeway and bridge across Far Rockaway Bay to connect Hicks Beach, Long Island, with Shelter Island, New York, for the purpose of giving to the residents of that locality access to said island with vehicles. The depth of water in the channel way where it is proposed to erect this bridge varies from one to four feet at mean low water, and the proposed draw span in the new bridge of at least thirty-five feet in the clear, will make navigation in the neighboring waters unobstructed. We therefore respectfully request that you will grant us authority to build said bridge and causeway subject to any conditions you may deem proper to impose. Accompanying this is a plan of the bridge and drawings showing its location. Very respectfully, Geo. C. Rand, Prest.,
"107 Wall St., New York."

It further appears from the moving papers (affidavit of James Stillwaggon, verified March 18, 1907) that in 1903 this draw was closed and permanently fastened, during the course of rebuilding by the defendant corporation.

Through the access gained by these bridges a substantial use of the beach for bathing purposes has been made possible, and large bath houses have been erected. Recently the defendant the Banister Realty Company applied to the War Department for a permit to pump sand from the Atlantic Ocean, for the purpose of filling in to the north and east of the Bay of Far Rockaway, on certain territory owned by the company, and such permit was granted in the following language:

"Referring to your application of March 31st, last, for permission to dredge sand from the Atlantic Ocean, at Far Rockaway, Long Island, N. Y., also to fill in land of the Banister Realty Company at that place, the area to be filled in being shown in red on blue print submitted, I beg to inform you that the War Department will interpose no objection to the proposed work, it being understood that there shall be no unreasonable interference with navigation thereby, that suitable provision shall be made to prevent the escape of the dredged material into Far Rockaway Bay and Mott Creek, and that this action does not authorize any injury to private property or invasion of private rights nor any infringement of local and state laws or regulations.
"Very respectfully, Robert Shaw Oliver,
"Assistant Secretary of War."

A pumping station was erected east of the location of the present inlet, outside of low-water mark, and the sand was piped over one of the bridges above mentioned and deposited on the mainland. The action of the storms, forcing the inlet gradually westward, undermined the pumping plant, and pierced the beach at a point just west of the pumping station, and almost in the exact spot where, some years ago, two bulkheads were constructed for the purpose of protecting the beach from the encroachments of the ocean. Part of the bulkheads were washed away, and the present inlet formed. This the defendants claim is in the neighborhood of 30 feet wide and 1 foot deep at low water, and 85 feet wide and 2 feet deep at high water, on an average, and is plainly shown on the photograph, Defendants' Exhibit M, March 16, 1907; the bath houses shown in this picture being to the west of the inlet. The piercing of the inlet at the present location

occurred about January, 1907, and the defendant company proceeded to drive a line of piling, and to reinforce the same by bags of sand, between the two lines of old bulkhead and directly across the inlet. At the time of driving the piling, this inlet was the only place in which the tide ran in and out to the section called the "Bay of Far Rockaway," and, as is shown by the chart submitted by the defendants, the water in the bay at high tide is never as high as in the ocean; the inlet not now being of sufficient capacity to allow the bay to fill up to the ocean level during the period of any flood tide.

The present action was brought by the United States to effect the removal of this piling, and the plaintiff also obtained an order to show cause why an injunction pendente lite should not issue.

At the various points at which cross-sections have been taken, as shown by the defendants' map No. 1,875, surveyed March 20, 1907, this body of water called the "Bay of Far Rockaway" is from 1 to 2 feet deep in the sections measured. As shown by the affidavits, the present bay is not only growing shallower, but, from the encroachments of the beach at the easterly end, and the building up of improvements on the mainland at the westerly end, it is filling in rapidly and becoming smaller in extent. The bridges above referred to are shown by photographs introduced by the defendants. A small sail boat, of a size suitable substantially for pleasure only, and almost within the class of a rowboat or skiff, is pictured near one of the bridges, resting upon the mud. A man beside the boat is in water not much above his ankles, indicating the depth of the water at the point where one of the largest bridges crosses.

A further examination of the affidavits submitted on behalf of the defendants, and of the charts accompanying these affidavits, shows that a record exists from as far back as 1802, when the beach as a whole, for a considerable distance east and west of the locality under discussion, extended in an unbroken stretch far to the south (that is, out in the ocean) from the present low-water mark. The first opening in this beach seems to have been Hog Island Inlet, which enters what is called "Broad Channel" and several bays forming the westernmost of the indentations directly connecting with Great South Bay. In 1836 the coast line had not changed, unless to work inland to a slight extent; but in 1862, 1863, and 1864 this solid beach was entirely washed out, and apparently the different portions of tidal water of Far Rockaway Bay date from that time. The various bars and beaches between the Bay of Far Rockaway and the Atlantic Ocean have been built up, and have shifted and changed continuously down to the present time. At all times, however, since 1864, there has existed some beach or bar between the Bay of Far Rockaway and the Atlantic Ocean, and the limits of the bay have been more or less distinct. In 1879 the beach itself was far to the south of where it is now and much wider in extent. The bay, also, was then several times larger than at present. Hog Island Inlet, of which mention has been made, has shifted to the west and to the east of where it was at the beginning of these records, but is now not far from the original locality. In 1896, and again in 1900, the shifting of the beach and the cutting of a new inlet began to narrow the bay, threatening its complete de-

struction, unless the filling in from the northward and eastward is halted, or unless the mainland is further washed out by the action of the ocean.

At various points to the west, the north, and the east of the present bay, improvements in the way of buildings, roads, and docks have not only protected the mainland, but caused the deposit of sand and a gradual encroachment upon the waters of the bay from filling in by the tides. The effect also of the building of the bridges and of the structures erected upon the beach has been to interfere with the force of the tides and of storms and to increase the rate of filling up from natural causes. It may be questioned whether, if left alone, the bay would not soon become a mere channel, or disappear entirely, if no extraordinarily severe storm or attack by the ocean occurs, and under this natural process the navigable character of this, as of any portion of tidal water, may be entirely lost. When so lost, the land would come under the exclusive jurisdiction of the state of New York.

Many of the allegations of the defendants as to the condition and capacity of the waters of the Bay of Far Rockaway are controverted by the affidavits upon which the original order to show cause was granted and those filed on behalf of the United States at the hearing of this motion.

The affidavit of Harry T. Kerr, verified March 15, 1907, shows that between his first examination and the 9th day of March, 1907, the line of piling had been completely extended across the inlet in question, and that bags of sand had been placed along the piles, in order to facilitate the deposit of sand by the ocean. Attached to Mr. Kerr's affidavit is a blue print sketch outlining the position of the inlet and the trestle and pump for the deposit of sand upon the mainland by the Banister Company.

Cornelius D. Curnen, in an affidavit verified March 2, 1907, states that Shelter Island Inlet is 200 feet wide and contains 6 feet of water at full tide; that during the past year motor boats and sail boats have been constantly using this inlet in going to and from the bay and ocean; that a large pile driver went in and out in the spring of 1906; that a large amount of sewage empties into the bay; that the bay extends over some 80 or 100 acres of land and contains fish.

Edward Roche, in an affidavit verified March 2, 1907, states that the inlet has been used by him frequently for ingress and egress by means of a launch during the past year; that the inlet is about 200 feet wide at high tide, and about 40 feet wide at low tide; and that there are at least 6 feet of water at high tide. Mr. Roche further swears that the erection of the piling has interfered with navigation; that Far Rockaway Bay has been within his knowledge a navigable body of water for vessels of pleasure and commerce for the last 40 years.

Stephen Stillwaggon, in an affidavit verified March 5, 1907, states that he has used the inlet for fishing, going in and out with a power boat of three feet draft; that he has been unable to do so since the driving of the piles by the defendant.

Elias H. Abrams makes an affidavit as to fishing and using a motor boat within the past year, and to using the inlet for ingress and egress

with the motor boat in the fishing business. Stephen Ambrose and William H. Stillwaggon make identical affidavit with Abrams.

Lawrence P. Boyle verified March 16, 1907, an affidavit stating that he found two feet or more of water March 14, 1907, at low tide, at the mouth of the inlet south of the line of the defendants' piling.

The defendants admit that the pile driver above mentioned was taken through the inlet, but allege that it had to be dragged through.

The photographs introduced in evidence by the government show various views of the locality, and the blue print survey shows that, the water being shallow, there is a considerable difference in the area covered by the bay at low and at high tide.

The general situation outlined in the affidavits of both sides to this question is similar to that existing at many other points along the south shore of Long Island. There are numerous small arms of the sea and streams having access directly to the Atlantic Ocean capable of use by pleasure craft and smaller boats for commercial purposes at high tide. Some of these waters at low tide are inaccessible to any boat except a skiff, and the tide ebbs and flows in most of them to a point far beyond where any use can be made of the outlet to the main ocean either for pleasure or business. The physical condition of these various localities, generally, brings these waters within the jurisdiction of the United States. They are geographically a part of the state of New York; but, as to some phases of the federal jurisdiction, discretion is vested by Congress in the Secretary of War and in the War Department of the United States government with relation to the use of the waters by individuals.

By chapter 907 of the Laws of 1890, Congress forbade the construction of any bridges or other works over or in the navigable waters of the United States, which would obstruct or impair the navigation or commercial use of such waters, or would alter or modify the channels of said navigable waters, without first obtaining the approval of the Secretary of War. 26 Stat. 453, 454. By section 10 of the same act, any person or corporation guilty of creating or continuing any such unlawful obstruction, or violating the provisions of the act, was declared to be guilty of a misdemeanor, and, on conviction, punished by a fine or imprisonment. This section (section 10, 26 Stat. 453) further provides that:

"The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

This law was amended and re-enacted by chapter 158, Laws 1892 (27 Stat. 88–116 [U. S. Comp. St. 1901, p. 3527]), and again by Laws 1899, c. 425 (30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]), and further amended by the Act of February 20, 1900, c. 23 (31 Stat. 31).

Jurisdiction over the navigable waters of the United States is given to the United States government by certain provisions of the Constitution, infra. The different states thereby conferred admiralty,

maritime, and interstate commerce jurisdiction upon the general government, when they ratified and adopted the Constitution as a whole, and in defining this jurisdiction many decisions have interpreted the words "navigable waters of the United States." But in these discussions upon the subject of the jurisdiction of the United States over navigable waters two entirely different lines of cases have developed. While the principles of both lines of decisions are clear, and while most of them fall clearly under one principle or the other, it is necessary, for the purposes of this motion, in considering the provisions of the law above set forth, to examine the derivation and development of each of these doctrines.

The provision of article 1, § 8, subsec. 3, of the Constitution, giving the United States jurisdiction over commerce with foreign nations and among the several states, is the basis of one of these lines of cases. Interstate and foreign commerce, as such, when conducted upon rivers, streams, or tidal water, by any kind of craft, is subject to federal regulation and control, and the limits of this jurisdiction and the tests of navigability depend on the possibility of carrying on such interstate commerce. This principle is well exemplified in the case of State of Pennsylvania v. Wheeling & Belmont Bridge Company, 59 U. S. 421, 15 L. Ed. 435. A bridge in that case, constructed over the Ohio river between the states of West Virginia and Ohio, was held to be within the control of legislation, from the power of regulating commerce among the several states conferred upon Congress by the Constitution:

"The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." State of Pennsylvania v. Wheeling & Belmont Bridge Co., supra.

Riparian rights and the interests of private individuals to the center of a stream, or to land under water, have been considered in many cases, under this general power to regulate interstate commerce, and in so doing to legislate with reference to the carrying on of such commerce by means of navigation. Various cases cited in this opinion, such as Leovy v. United States, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914, Egan v. Hart, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680, and others, depend for the test of navigability upon this possibility of interstate commerce.

In Leovy v. United States, supra, the subject is discussed at length. At page 628 of 177 U. S. and page 801 of 20 Sup. Ct. (44 L. Ed. 914), the court reviews the various definitions of "navigable waters" within the meaning of the statute above referred to.

The case of Egan v. Hart, supra, contains the following language, applicable in effect to the present situation:

"Between these two points it is nothing but a high-water outlet, going dry every summer at many places, choked with rafts and filled with sand, reefs, etc. It has no channel. In various localities it spreads out into shallow lakes and over a wide expanse of country, and is susceptible of being made navigable just as a ditch would be if it were dug deep and wide enough and kept supplied with a sufficiency of water."

In The Daniel Ball, 77 U. S. 557, 19 L. Ed. 999, it is said:

"And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The Montello, 87 U. S. 430, 22 L. Ed. 391, contains the following:

"If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river."

In the report of the Leovy Case, supra, the charge of the trial judge to the jury is reviewed in detail; the case having originated upon an indictment under the criminal provisions of the statute. The Supreme Court of the United States holds that the possibility of working from one river to another, and from that river to still others, and by means of the different waters eventually to the ocean, is not the true test of the possibility of interstate commerce, nor of what is navigable water of the United States. In the opinion the court quotes from the charge of the trial judge:

"Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is sufficient to constitute navigable water of the United States."

But with this the Supreme Court disagrees, and comments as follows:

"Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the States. * * * If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress."

The court further on in the Leovy Case cites with approval the following statement of Chief Justice Shaw of Massachusetts, in Rowe v. Granite Bridge Corporation, 21 Pick. 347:

"Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture.'"

But the Supreme Court then says:

"Nor can it be contended that the Red Pass, at the time the dam was built, was open to the Gulf. It was shown that the Gulf end of the pass had closed up, so that to get to the sea it was necessary to go out of Red Pass into Tiger Pass, Tontine Pass, and Grand Pass, which are open to the Gulf."

The court ultimately held that the acts of Congress relating to the obstruction of navigable water, above referred to, are not intended to apply to the case of a stream of the history and character disclosed in the record of that case.

It is stated in all the cases heretofore cited that the question of navigability is one of fact, and in Egan v. Hart, supra, the court plainly takes into consideration only the character of the water course

as a whole, and not the question whether navigation may be possible at the exact point, without reference to the conditions immediately above and below.

On the southern shore of Long Island the bays, inlets, and small streams communicating directly with the Atlantic Ocean necessarily possess one element of the standard of navigability, for purposes of interstate commerce, established by the various statutes and decisions. It is possible to pass from any of the sea coast states by means of the Atlantic Ocean to the entrance of these different bays and indentations. In most of them local as well as interstate commerce is actually carried on, to a greater or less degree. In some of them interstate commerce may be interrupted for a long period, or the use of the water may be almost entirely for pleasure purposes, but the possibility of access is ever present, and the question of use and capacity must be the test as to the extent of the jurisdiction of the United States under the interstate commerce provision of the Constitution.

The second line of cases arises from a different constitutional source of federal jurisdiction, under the interpretation of the words "admiralty and maritime jurisdiction." "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." Const. art. 3, § 2, subsec. 1. Section 563 of the United States Revised Statutes, subdivision 8 [U. S. Comp. St. 1901, p. 457], gives District Courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction." This was but a re-enactment of the judiciary act of September 24, 1789, c. 20, 1 Stat. 77, giving to the District Courts "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." Criminal jurisdiction is also given to the United States courts by many statutes relating to these subjects.

In the case of The Genesee Chief, 53 U. S. 443, 13 L. Ed. 1058, Chief Justice Taney distinguishes between these doctrines, and holds that Act Feb. 26, 1845, c. 20, 5 Stat. 726, extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same, would be unconstitutional if it depended upon the power of Congress to regulate commerce alone. He argues that, if such jurisdiction could be inferred from the power to regulate commerce, it would necessarily follow that Congress could establish a court of admiralty, and do away with trial by jury, "over the cars engaged in transporting passengers or merchandise from one state to another." The court says (page 453 of 53 U. S. [13 L. Ed. 1058]) that if the law, namely, that of 1845, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of the admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted. In England, admiralty jurisdiction, according to Chief Justice Taney, was always spoken of as confined to the tidal water, and he considered that definition to be sound and reasonable, because in England there was no navigable stream beyond the ebb and flow of the tide; that at the time of the adoption of the Constitution a similar definition was proper here, the old thirteen states being almost entirely limited to tide water for navigation. Courts of

admiralty then exercised their jurisdiction to the head of navigation and of tide water on the public rivers. But Chief Justice Taney further says that, with the growth of the country, it would be unjust to preserve such an artificial and arbitrary distinction, or to subject, under the Constitution of the United States, one part of a public river to the jurisdiction of a United States court, and to deny it to another part, equally public and but a few yards distant. The court therefore decides that the admiralty and maritime jurisdiction of the United States courts extends beyond the limits of the tide waters, and as this doctrine has been interpreted in further cases, such as Malony v. City of Milwaukee (D. C.) 1 Fed. 611 (relating to a collision on the Erie Canal), Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056 (declaring the Illinois & Lake Michigan Canal navigable water), The Daniel Ball, and The Montello, supra, it is evident that the term "navigable waters of the United States" applies: First, to all waters capable of sustaining or being used for interstate commerce or foreign commerce; and, second, to all waters under the admiralty and maritime jurisdiction of the United States, and over which the District Court of the United States can exercise its peculiar admiralty jurisdiction.

Thus it is apparent that bodies of water, which as a whole come under the admiralty and maritime jurisdiction of the United States, may not in their entirety stand the test of navigability established in the Leovy and other cases, supra. These bodies of water might be considered navigable water of the United States, and the jurisdiction of Congress with reference to legislation attach thereto, and yet but a portion of those waters be subject to a jurisdiction limited to a capacity for interstate commerce. It would follow that the admiralty and maritime jurisdiction is broader than the jurisdiction acquired under the interstate commerce provision. One of the most instructive cases upon this question is that of The Hazel Kirke (C. C.) 25 Fed. 601, decided by Judge Benedict, in the Eastern district of New York, affirmed by Circuit Court. This case arose out of a proceeding in admiralty to enforce a lien under section 4465 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3046], with reference to the carrying of passengers. The Hazel Kirke was a ferryboat operating in Jamaica Bay, in connection with a railroad running to points at or east of Far Rockaway. Jamaica Bay is a much larger body of water, in the near neighborhood of the Far Rockaway Bay under consideration in this case. Judge Benedict held that, although all of the places touched by the vessel in her trips about Jamaica Bay were within the state of New York, nevertheless, as Jamaica Bay is directly connected with the ocean, and as the waters of the bay are within the admiralty and maritime jurisdiction of the United States, Congress had authority to legislate with reference to a vessel on such navigable water of the United States, and to treat such a vessel and such a body of water as capable of being used in interstate commerce, and made subject to laws regulating interstate or foreign commercial transactions. The court therefore says, referring to the case of The Daniel Ball, supra:

"The decision in that case, therefore, compels a decision in this case that the waters of Jamaica Bay are under the direct control of Congress in the exercise of the power conferred by the commercial grant."

And that:

"Manifestly it is not possible for Congress to fully control and adequately protect commerce with foreign nations and among the several states, when that commerce is pursued by means of vessels navigating the public waters of the United States, without controlling the navigation of all vessels navigating such waters, not only those engaged in commerce with foreign nations, and among the several states, but those engaged in domestic commerce, and those engaged in no commerce at all, like the yachts. Accordingly, Congress has undertaken to regulate the lights to be carried by all vessels navigating such waters, and the courses to be pursued by all vessels meeting upon such waters, and these regulations are supreme and binding upon all vessels there navigating, because only by controlling in those particulars the navigation of all vessels navigating such waters can the safe navigation of vessels engaged in interstate or foreign commerce upon such waters be secured."

Under this standard the Hazel Kirke was found to be engaged in navigating public waters of the United States. It is considered that the term "navigable waters of the United States" covers every part of any body of water, tidal or otherwise, any portion of which is capable of use in the ways defined in the Hazel Kirke Case, and which are subject to the admiralty and maritime jurisdiction of the United States. It then follows logically that Congress should regulate interstate or foreign commerce thereon.

The case of In re Garnett, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631, arose upon a consideration of the doctrine of the law of limited liability as a part of the maritime law of the United States, with relation to its application to vessels engaged exclusively upon an inland river above tide water. In the opinion the court holds that the doctrine of limited liability is a part of the maritime law, and that Congress has the power to legislate within the boundaries of maritime jurisdiction on the subject of maritime law.

"As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national Legislature, and not in the state Legislatures. It is true we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national. Chief Justice Taney, in The St. Lawrence, 1 Black, 522, 526, 527; The Lottowana, 21 Wall. 558, 575, 576, 22 L. Ed. 654. But within these boundaries and limits the law itself is that which has always been received as maritime law in this country, with such amendments and modifications as Congress may from time to time have adopted."

If the entire body of admiralty and maritime law is exclusively within the jurisdiction of the United States government, and Congress has power to legislate upon all matters and subjects with respect to which legislation is necessary in order to carry out the full exercise of that jurisdiction, it seems evident that legislation covering the management of vessels, the control and establishment of harbor lights, the deepening and maintaining of channels and waterways, and eventually the regulating of obstructions to navigation, comes as certainly and directly under the administration of the admiralty and maritime judicial functions as the power to improve waterways, control the conduct and operation of railroads, and direct the management and handling

of steamboats, can be within the jurisdiction of the national government, because of the provisions of the Constitution granting to Congress of the United States authority to regulate interstate commerce. Strict construction of the latter section would mean that no supervision or legislation could be had unless the act or matter supervised was actually at that time a part of a transaction constituting interstate commerce. That this is not the true interpretation the many cases cited in this opinion plainly show, and it seems to follow as plainly that the jurisdiction of Congress in enacting the law of 1888 and its amendatory provisions can be sustained both under the provision relating to interstate commerce, and also that relating to admiralty and maritime jurisdiction, and that the limits of legislation in this regard are not confined to either of these provisions as distinguished and separate from the other. "It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power." United States v. Beavans, 16 U. S. 387, 4 L. Ed. 404.

Originally, admiralty jurisdiction extended over all matters on the sea, and as far as the tide rose and fell to low-water mark; the space between high and low water coming within the admiralty jurisdiction when covered by the ocean, and again partaking of the character of the land as the ocean receded. On the continent of Europe, under the civil law, admiralty jurisdiction has always preserved its wide scope. In England, however, the courts of common law claimed jurisdiction over matters occurring "within the realm," and by St. 13 Rich. III, c. 5, the admirals and their deputies were restricted to things done "on the sea." By St. 15 Rich. II, c. 3, admiralty jurisdiction and common-law jurisdiction were more closely defined, and ultimately all offenses were placed under certain courts, and the entire admiralty jurisdiction regulated by St. 28 Hen. VIII, c. 15, St. 4 & 5 Wm. IV, c. 36, and St. 7 & 8 Vict. c. 2. See, Queen v. Keyn, 2 Ex. Div. L. R. 66. The admiralty jurisdiction in England, therefore, at the time of the adoption of a Constitution by the various states of the American commonwealth was much narrowed in scope. "Admiralty jurisdiction, as exercised in the federal courts, is not restricted to the subjects cognizable in the English courts of admiralty at the date of the Revolution, nor is it as extensive as that exercised by the continental courts, organized under, and governed by, the principles of the civil law"—citing Bags of Linseed, 1 Black, 108, 17 L. Ed. 35; The Belfast, 74 U. S. 636, 19 L. Ed. 266. Bodies of water subject to the ebb and flow of the tide were at common law "deemed to be navigable and were held to be royal rivers, or the property of the crown. They were placed on the same footing as the sea, and regarded as public highways. This rule of the common law became a part of the fundamental law of this state by the adoption of the original Constitution of 1777." This rule "governs in cases where the rights of riparian owners to waters subjected to tidal influences are in question. To the rights of the crown the people of this state succeeded, upon their separation." Roberts v. Baumgarten et al., 110 N. Y. 380, 18 N. E. 96; also, State of Pennsylvania v. Wheeling and Belmont Bridge Co., supra.

All the powers, however, of sovereign states and of constitutional jurisdiction were acquired by and vested in the states formed out of the American colonies when their independence was recognized and their separate existence permanently established. In the adoption of the American Constitution, the states delegated this admiralty and maritime jurisdiction to the courts of the federal government, by the phrase "all admiralty and maritime jurisdiction." Article 3, § 2, supra. Also, by article 1, § 8, subsec. 18 of the Constitution, Congress was given power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." And, as above stated, by article 1, § 8, subsec. 3, Congress was empowered to "regulate commerce with foreign nations and among the several states." Upon these provisions depend the authority of Congress to improve and supervise highways and waters for the purposes of navigation, and to control the use of those waters for interstate commerce. Congress, therefore, had authority at the time of the passage of the various acts (Act Sept. 19, 1890, c. 907, 26 Stat. 452 [U. S. Comp. St. 1901, p. 3527], Act July 13, 1892, c. 158, 27 Stat. 111 [U. S. Comp. St. 1901, p. 3527], Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540], and Act Feb. 20, 1900, c. 23, 31 Stat. 31) to legislate with reference to obstructions to navigation, where that navigation came within the provisions of interstate commerce, or within the admiralty and maritime jurisdiction of the United States.

It has been frequently held that the admiralty jurisdiction of the United States attaches to all such bodies of water as the bays, indentations, and streams in which the tide ebbs and flows along the south shore of Long Island, and this admiralty jurisdiction can be lost only when the particular water loses the character of a stream capable of carrying on interstate commerce or of navigation in and out from the ocean for pleasure and business purposes. Under this construction, Far Rockaway Bay, unless it has so lost the character of navigability as to be outside of the admiralty and maritime jurisdiction of the United States courts, is subject to the provisions and regulations of the act of 1890, as amended by the acts of 1892, 1899, and 1900. The United States having jurisdiction in the matter of improving navigable channels and regulating and controlling such channels for commerce, it would seem to follow that if an inlet leads directly from the ocean to a greater or smaller body of tidal water, through which is located a channel which is capable of being navigated, this whole body of water would be under the direct control of the government in the exercise of its jurisdiction. A large portion of the water might be shoal and utterly unfit for navigation of any sort, in its natural condition; but the filling in or altering of the locality outside of low-water mark would have a material effect upon the currents and tides, and directly bear upon the maintenance and improvement or deterioration of the channel itself.

In the case at bar, the permit formerly issued by the War Department to build a bridge on trestle work, with a comparatively narrow draw, would indicate that the use of the entire bay for purposes of

navigation was not deemed necessary and that a comparatively narrow channel leading up from the inlet would serve all reasonable necessities of the persons using the bay; but it undoubtedly follows that control over this narrow channel, as before stated, includes discretion as to any artificial alteration of the entire body of water directly adjoining or affecting the narrow channel. The inlet itself, at some times much deeper, sometimes, perhaps, almost entirely filled in for a short period, is a channel of the sort which the government of the United States could improve and keep in a condition fit for such use as might seem necessary. The right to make such improvements and to control the narrow channel, the adjoining shallow bay, and the inlet affording access thereto, must therefore necessarily vest in the United States government until the navigable character or possibility has been actually lost.

As has been said before, each of the cases in which an interpretation of the statute, under present consideration, has been made, has arisen from a criminal prosecution, and the question of the jurisdiction of the United States has been made to depend upon questions of navigability, and treated as a question of fact.

Upon a motion for a preliminary injunction pending the trial of an action in a suit brought in equity, in which the sole relief asked is a permanent injunction and the removal of a structure alleged to offend against the statute, it is extremely difficult to distinguish between the issue of fact upon which the entire case depends and a prima facie case on which the application for a temporary injunction may be heard, and it is necessary to remember that the evidence taken upon the trial might materially vary from that appearing by the affidavits upon this motion, and substantially change the whole situation.

It is evident that if the water of Far Rockaway Bay has possessed the elements of navigability bringing it within the authority of the United States, and governed by the Constitution and by the acts of Congress, the character of the bay may be changed by storms, or by illegal use, until such time as the navigable capacity has been entirely lost, and until the effect of the illegal structures has deprived the United States of the possibility of restoring the navigable character of the water by the removal of the structures. It is akin to the situation that frequently arises in equity, where the test is whether the parties can be restored to their original situation. In the present case, affidavits are filed on behalf of a large proportion of the property owners and inhabitants around Far Rockaway Bay, stating that they do not consider the bay navigable water, and that they intend to fill in and improve their properties by doing away with the bay, if permitted so to do. Especially if the present line of piling across the mouth of the inlet should be allowed to stand for a sufficient period, and if no severe storm should wash away the entire beach at this point, it seems evident that Far Rockaway Bay would become merely a sewer or stagnant pool unless filled in and made dry land. If the temporary injunction is not continued, it is difficult to see how there would be any rights to litigate, if the case is not brought to a very speedy trial. Such a result would appear to be irreparable damage, especially in view of the apparent disregard for the provisions of the United States statutes by

the persons erecting and maintaining the various bridges without permits across the bay, and in the driving of the original piling.

By the provisions of the statute, the War Department, if it considers the water navigable, and if it deems a bridge a material obstruction to navigation or to the navigable capacity of this bay, may order, after a public hearing, the removal of the offending structure, or its change by the insertion of draws of some form which will meet with the approval of the Secretary of War. In the present situation, the facts that the War Department has heretofore issued permits for a bridge and for the pumping of sand, and has made the present application for an injunction, show that it considers Far Rockaway Bay to be navigable water. The issuing of the permit for a bridge erected on piles, with a draw, indicates that the Secretary of War has exercised, and might again exercise, his discretion in allowing the bay to be bridged, or to be filled in outside of the preservation of a suitable channel. With reference to the structures already erected across the bay, a public meeting, such as is provided by the statute, and a suitable examination on the part of the War Department, would probably result in a solution of this question which would do justice to all concerned.

By the affidavit of Maximilian Morgenthau, verified March 15, 1907, it appears that a second or artificial inlet has been or is being made to furnish a safe and stable or permanent outlet and inlet to the bay, some distance west of the inlet which the defendants attempted to close by the line of piling. So long as the new inlet did not affect the navigable character of any of the waters, and so long as its excavation did not cause the washing out of sand or other material into the bay, its construction would not be affected by the provisions of the statute. But if such an inlet should be created, upon its completion it might constitute navigable water, and as such pass under the jurisdiction of the government, even though created through private property. The War Department could approve of the location and construction of such an inlet, and could authorize the closing of the present inlet, if the new one, in the opinion of the Secretary of War, would more certainly answer the requirements of the situation. The very fact that such discretion is vested in the Secretary of War, and that no application has been made to him, and the impossibility of justly deciding upon the whole situation with reference to the question as to whether Far Rockaway Bay has at the present time lost all of the elements of navigable waters of the United States, illustrates the necessity of securing a continuation of conditions in their present state pending the determination of the matter.

The owners of the shore front have a right to take such steps as they may see fit upon their own land to prevent the change in location by the present inlet, or to prevent erosion along its banks or upon the beach proper. But unless the discretion of the War Department is exercised in their favor, or until a final decision can be had determining the ultimate character of the bay, the property owners should be restrained from closing the channel of the inlet itself, or from so using their property as to effect the closing of the channel by causing the deposit of sand and other material therein.

From all of the foregoing, therefore, it would seem that, without deciding at this time the issue of fact as to whether Far Rockaway Bay at the present moment has lost the character of navigable water, it seems necessary to continue the temporary injunction pending the determination of the trial.

The granting of such temporary injunction cannot carry with it the removal of the alleged illegal structure in so far as it has been already erected, nor can this action furnish relief with reference to the various bridges if changes should be desired with relation to them. The other provisions of the statute must be invoked if the War Department or any of the parties interested in the situation deem it proper to test those questions. The trial of the action should be facilitated in every way in order that as little opportunity as possible for damage by storm should result, and an order may be presented continuing the temporary injunction pending the determination of the action.

NEWTON v. GAGE et al.

NORTHERN COUNTIES INV. TRUST, Limited, v. GAGE et al.

(Circuit Court, S. D. California, S. D. August 5, 1907.)

No. 1,211.

1. COURTS—JURISDICTION OF FEDERAL COURTS—CROSS-BILL BY INTERVENER.
   The bringing in of a new party in a suit in a federal court by cross-bill or otherwise, when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, and the court is without jurisdiction to entertain a cross-bill by an intervener who could not have been made a party to the original bill, unless such intervener represents an interest already before the court or claims an interest in property of which the court holds possession.

   [Ed. Note.—Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

2. MORTGAGES—FORECLOSURE BY SUIT—CROSS-BILL.
   A junior mortgagee, in order to foreclose his own mortgage, cannot, under general rules of equity pleading and practice, by cross-bill or otherwise, make himself a party to a suit brought for foreclosure of a prior mortgage.

3. EQUITY—CROSS-BILL—BRINGING IN NEW PARTIES.
   Under the general rules of equity pleading and practice, new parties cannot be introduced into a cause by cross-bill.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 467.]

In Equity. On demurrer to cross-bill and motion to strike out cross-bill.

John G. North and Hunsaker & Britt, for complainant.
J. S. Chapman and Purington & Adair, for defendants.
M. B. Kellogg, for interveners.

WELLBORN, District Judge. This is a bill by Thomas Henry Goodwin Newton, a subject of Great Britain, against Matthew Gage and Jane Gage, citizens of California, to foreclose a mortgage on real

estate. By leave of the court, the Northern Counties Investment Trust, Limited, also a British subject, intervened and filed its cross-bill against the said defendants for the foreclosure of a junior mortgage, also making Walter Powell, likewise a subject of Great Britain, a defendant to the cross-bill. The original defendants, Matthew Gage and Jane Gage, have demurred to, and also interposed a motion to strike out, the cross-bill, and the present hearing is on said demurrer and motion. The other facts will appear further on in the opinion.

The grounds of objection to the cross-bill, raised by demurrer and also by a motion to strike out, seem to be three in number and as follows: First. That, aligning the Northern Counties Investment Trust, Limited, and Walter Powell as codefendants with Matthew Gage and wife, which alignment all parties agree is the proper one, federal jurisdiction is thereby ousted, because the resulting situation presents Newton, an alien, on one side, and the Northern Counties Investment Trust, Limited, and Powell, both aliens, on the other side of the case. Second. That the foreclosure of cross-complainant's junior mortgage is in no way a matter of defense to the foreclosure of complainant's first mortgage, but a distinct and independent cause of action, and, therefore, not the subject of a cross-bill. Third. That a cross-bill could not be filed by the Northern Counties Investment Trust, Limited, nor against Walter Powell, even if the original complainant and each of the two parties just named were citizens of different states, for the reason that both of said parties are strangers to the original bill. These objections will be noticed in the order of their statement.

First. That the bringing in of a new party, by cross-bill or otherwise, when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, is expressly held in Shields v. Barrow, 58 U. S. 130, 15 L. Ed. 158, wherein the court says:

"It is apparent that, if it were in the power of a Circuit Court of the United States to make and enforce orders like this, both the article of the Constitution respecting the judicial power, and the act of Congress conferring jurisdiction on the Circuit Courts, would be practically disregarded in a most important particular. For in all suits in equity it would only be necessary that a citizen of one state should be found on one side, and a citizen of another state on the other, to enable the court to force into the cause all other persons, either citizens or aliens. No such power exists; and it is only necessary to consider the nature of a cross-bill to see that it cannot be made an instrument for any such end. * * * When the defendants, Mrs. Shields and Bisland, had complied with the order of the court, and filed their cross-bill, as it was called, against the other indorsers and Thomas R. Shields, and they had come in, as they did, what was their relation to the cause? They surely were not plaintiffs in it. If they were defendants the court had not jurisdiction, for they, as well as the complainant, were citizens of Louisiana. In truth, they were not parties to the original bill. They were merely defendants to the cross-bill. They had no right to answer the original bill, or make defense against it, and of course no decree could be made against them upon that bill. We do not find it necessary to pursue further an examination, in detail, of the complicated maze of pleas, demurrers, answers, amendments, and interlocutory orders, which followed the filing of this so-called cross-bill. It is enough to say that the defendants to it were never lawfully before the court; that the court never obtained jurisdiction over those

of the parties who were citizens of the state of Louisiana, and amongst them was Thomas R. Shields, who, though made a party to the original bill by amendment, as a citizen of Mississippi, pleaded that he was a citizen of Louisiana, and was thereupon stricken out of the original bill, and was only a defendant to the cross-bill."

From appellant's brief in that case, on the point decided by the court in the foregoing extract from its opinion, I quote as follows:

"On what ground is the jurisdiction of the Circuit Court of the United States to determine a controversy between citizens of Louisiana to be maintained? The only authority cited by complainant's counsel is Story Eq. Pl. § 392, and authorities there cited. This authority is not at all in point. It only refers to a question of pleading in equity, relating to cross-bills, but does not touch the question of jurisdiction. * * * The device used in this case is perfectly transparent, and, if successful, converts the federal courts into courts of unlimited jurisdiction, regardless of the citizenship of the parties. It requires no argument to show that the original bill could not possibly be sustained for want of proper parties. A bill to set aside an agreement for canceling the sale of property could not be entertained without the presence of the two parties to the sale and agreement to cancel. But the court was without jurisdiction between these two parties, who were both citizens of Louisiana, and the bill should have been dismissed on its face. Instead of this, the defendants, citizens of Mississippi, having a common interest with these citizens of Louisiana, were forced, in spite of their protest, and under duress of the process of the court, to file a bill against their codefendants, not for their own benefit, but in order to help the complainant to get a judgment against themselves and against the codefendants."

The authority of Shields v. Barrow, although the opinion of the court has been subjected to criticism in another particular, has never been challenged, as far as I know, on the point now under consideration. The following extracts from defendants' brief are in line with the doctrine declared in Shields v. Barrow, and show its direct application to the case at bar, namely:

"This cross-bill relates solely to another mortgage upon a part of the same property and seeks to foreclose that mortgage. If it had brought such a suit in this court for the same purpose originally, it is obvious that the court would have no jurisdiction. Any defense which the original defendants should make to this cross-bill must necessarily be foreign to the original bill; for in any controversy existing between the Northern Counties Investment Trust, Limited, and the original defendants, is a controversy which does not concern the plaintiffs, and is not necessary to a complete decree on the original bill. If the Northern Counties Investment Trust, Limited, had been brought into this suit originally, in what capacity must it have appeared? It could not have been a coplaintiff with Newton, and must necessarily have been made a party defendant. If it had been a party defendant, the jurisdiction of the court would be ousted, and the jurisdiction of a court cannot be called into action by such a simple contrivance as a plaintiff's leaving out of his bill one who insists that it ought to have been a party defendant, then permitting that party to come in as an intervener, and then to file a cross-complaint whereby others who ought to have been parties to the original bill are brought into court, and the jurisdiction saved by this roundabout device. The maxim by which courts of equity are controlled no one denies. Their anxiety to make an end of litigation in one suit where that is possible, its reluctance to litigation by piecemeal, are all well understood principles and highly commendable. But those same principles are recognized by the state courts as fully as they are by the federal courts in equity. And this court is not inclined to draw to itself jurisdiction in cases where it does not rightfully attach by reason of, or through the application of, these principles, when there was nothing to hinder the invocation of those same principles in the state

courts and where the objection to the jurisdiction on the ground of the citizenship of the parties would not have existed."

I have examined carefully and in detail the authorities cited in complainant's brief to his contention that interventions, bringing in new parties, do not oust federal jurisdiction, no matter what be the citizenship of the parties thus introduced, and find that each one of them is an exceptional case, easily harmonized with Shields v. Barrow, supra.

In Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., 82 Fed. 124–126, 27 C. C. A. 73, the mortgaged property was in the custody of the court, as shown by the following extract from the opinion, at page 128 of 82 Fed. (27 C. C. A. 73):

"When the banks had been dismissed, the Circuit Court had jurisdiction of the subject-matter and of the parties to the suit. It also had the possession of the mortgaged property, which was then in the hands of the receiver."

This statement of the court as to the possession of the mortgaged property, which is not set forth in complainant's quotation of part of the same paragraph, distinguishes said case widely from Shields v. Barrow, and brings it within the exception above noted, that possession by the court of property in litigation carries with it jurisdiction to determine the rights of every person who claims an interest therein, and to that end brings before it all parties necessary to a full determination of the issues without regard to their citizenship. This jurisdiction does not depend upon diverse citizenship, but grows out of the judicial possession of the property and the resulting duty which such possession unavoidably imposes upon the court to afford suitable relief to persons, who, on account of its action in acquiring the property would otherwise be remediless. The grounds of this rule and its supporting authorities will be further noticed later on.

The other cases cited by complainant in this connection are either analogous in principle to Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., supra, or are cases where the interests represented by the new parties were identical with those of one or more of the original parties, and were therefore already involved in the suit.

Thus, in Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888, an action for the recovery of real estate, the tenant was the original party and the landlord was the new party, and upon this state of facts the court said:

"It is equally an error to assume that plaintiffs had not a substantial and real controversy with the defendant Oaks, and that their controversy was solely with the Zeidlers. The object and purpose of the action was to recover possession of the real estate in the visible and actual occupation of Oaks, and not otherwise in the possession of his landlord, than by force of his tenancy. The Zeidlers were not citizens of Missouri, nor residents of the district, and could not have been sued by the plaintiffs. The latter were not bound to look beyond the person who, by his occupation of the disputed premises, was holding adversely to their claim; and if the Zeidlers were permitted to defend, it was for their own interest, and not because they were either necessary or indispensable parties to the proceeding in which the plaintiffs were the actors. The controversy, so far as the Zeidlers were interested in it, was of their own seeking, and, as their rights could not be concluded by a judgment against the tenant, they were not in a position to insist that the plaintiffs should forego their legal right to proceed against the most convenient defend-

ant. The landlord could defend the possession of the tenant, as it was his right and duty to do on notice of the action, but he could do so as well in the name of the tenant as in his own. At any rate, the plaintiffs had a right to eject the defendant, who actually and unlawfully withheld from them possession of their lands; and it is not correct to say that the controversy in law is with the landlord in virtue of whose claim of title the wrongful possession is maintained. Much less can the plaintiff's right to prosecute his action in the courts of the United States, once vested, be defeated by imposing upon him an adversary against whom he cannot maintain the jurisdiction of these tribunals. * * * It was quite proper, therefore, for the Circuit Court to admit the landlord as a party, for the purpose of defending his tenant's possession, and, through that, his own title; and to this end he might not only be permitted to appear as a party to the record and codefendant, but to control the defense as dominus litis, raising and conducting such issues as his own rights and interests might dictate. And this need not arrest or interfere with the jurisdiction of the court, already established by the plaintiffs against the tenant in possession. For such proceedings should be treated as incidental to the jurisdiction thus acquired, and, auxiliary to it, as in like cases, in equity, one interested in the subject-matter, though a stranger to the litigation, may be allowed to intervene pro interesse suo. Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145."

Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329, was a creditors' bill, "filed on behalf of the complainants and all other creditors who might come in and share the costs of the litigation," and the court said:

"The right of the court to proceed to decree between the appellants and the new parties did not depend upon the difference of citizenship, because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing."

Another familiar instance of the introduction of new parties without ousting the jurisdiction of the court is that of the death of an original party and the substitution of his personal representative. In such a case federal jurisdiction remains undisturbed, no matter what be the citizenship of the new party, for the reason that the interest represented by said party was already before the court in the person of the deceased.

Hardenburgh v. Ray, 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93, like Phelps v. Oaks, supra, was ejectment, and the court held, quoting from the syllabus, that, "when the jurisdiction of a Circuit Court has fully attached against the tenant in possession in an action of ejectment, the substitution of the landlord as defendant will in no way affect that jurisdiction, although he may be a citizen of the same state with the plaintiff."

Freeman v. Howe, 65 U. S. 450–460, 16 L. Ed. 749, so far as pertinent here, is only an earlier assertion of the doctrine of Sioux City Terminal R. & W. Co. v. Trust Co. of N. A., supra, and the same is

true of Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

In this last case, the court gave a clear exposition of the rule that a court in possession of property has jurisdiction to determine all claims thereto, regardless of the citizenship of the parties, as follows:

"It has been sometimes said that this statement was obiter dictum, and not to be treated as the law of the case; but it was, in point of fact, a substantial part of the argument in support of the judgment, and, on consideration, we feel bound to confirm it in substance as logically necessary to it. For if we affirm, as that decision does, the exclusive right of the Circuit Court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners, wrongfully deprived of possession, the ordinary means of redress by suits for restitution in state courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property, and, as this may not be done by original suits, on account of the nature of the jurisdiction as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in auxiliary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant, from whose possession it has been taken, the opportunity to assert and enforce his right. And this jurisdiction is well defined by Mr. Justice Nelson, in the statement quoted, as arising out of the inherent power of every court of justice to control its own process so as to prevent and redress wrong. * * *

"No one, even in equity, is entitled to be made or to become a party to the suit unless he has an interest in its object (Calvert on Parties, 13); yet it is the common practice of the court to permit strangers to the litigation, claiming an interest in its subject-matter, to intervene on their own behalf to assert their titles.

"'When any person,' says Mr. Daniel, Chancery Practice, c. 26, § 7, p. 1057, 'claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease, or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any and what interest in the property sequestered. This inquiry is called an examination pro interesse suo; and an order for such an examination may be obtained by a party interested, as well where the property consists of goods and chattels or personalty as where it is real estate. Thus, in Martin v. Willis, 1 Fowl. Ex. Pr. 160, a person claiming title to goods seized under a sequestration, obtained an order for an examination pro interesse suo, and in the meantime that the goods might be restored to him on his giving security.'

"The same practice prevails in cases where property is put into the hands of a receiver. Daniel, Ch. Pr. c. 39, § 4, p. 1744. The grounds of this procedure are the duty of the court to prevent its process from being abused to the injury of third persons, and to protect its officers and its own custody of property in their possession, so as to defend and preserve its possession except by leave of the court.

"So the equitable powers of courts of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient, as is also their power to protect their own jurisdiction and officers in the possession of property that is in the custody of the law (Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Hagan v. Lucas, 10 Pet. 400, 9 L. Ed. 470); and when in the exercise of that power it becomes necessary to forbid to strangers the restoration of property in that situation, as happens when otherwise conflicts of jurisdiction must arise between courts of the United States and of the several states, the very circumstance appears which gives the party a title to an equitable remedy at law, and the question of citizenship, which might become material as an element of jurisdiction in a court of the United States when the proceeding is pending in it, is obviated by treating the intervention of the stranger to the action in his own interest, as what Mr.

Justice Story calls, in Clarke v. Mathewson, 12 Pet. 164, 172, 9 L. Ed. 1041, a 'dependent bill.'"

This Krippendorf Case is referred to approvingly in a later case, as follows:

"The jurisdiction of the Circuit Court did not depend upon the citizenship of the parties, but on the subject-matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control. Minnesota Co. v. St. Paul Co., 2 Wall. 609, 17 L. Ed. 886; People's Bank v. Calhoun, 102 U. S. 256, 26 L. Ed. 101; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Morgan's Co. v. Texas Central Ry. Co., 137 U. S. 171–201, 11 Sup. Ct. 61, 34 L. Ed. 625."

Central Trust Co. v. Bridges, 57 Fed. 753, 6 C. C. A. 539, so far as concerns the point now under consideration, is simply an earlier declaration of the same doctrine.

Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632, is simply in line with Phelps v. Oaks, supra, Stewart v. Dunham, supra, and Hardenberg v. Ray, supra, and, at page 736 of 68 Fed., page 638 of 15 C. C. A., the doctrine of the case is epitomized thus:

"Permitting a party to intervene in a pending suit to represent an interest involved does not oust the jurisdiction of a federal court already acquired by reason of the diverse citizenship of the original parties, of whatever state the intervenor may be a citizen. Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329; Freeman v. Howe, 24 How. 450, 16 L. Ed. 749; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888; Osborne v. Barge (C. C.) 30 Fed. 805. We think, therefore, that the jurisdictional objection founded on the citizenship of the parties is not well taken."

In Tug River Coal & Salt Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415, from which complainant quotes the first paragraph of the syllabus, there were two plaintiffs, one a citizen of New York and the other a citizen of Ohio, while the defendant was a citizen of Kentucky. After the commencement of the action the New York plaintiff changed his citizenship to Kentucky, and it was with reference to that change, set up in a plea to the jurisdiction, that the court held, as set forth in the first paragraph of the syllabus, quoted in complainant's brief, that "the citizenship which determines the jurisdiction of a federal court is that which existed at the time of commencement of the suit, and subsequent changes can neither divest nor confer jurisdiction." There were no new parties added, and yet the language quoted might well apply, in the absence of the facts with reference to which the language was used, to changes of parties. This case clearly illustrates and strongly emphasizes the fact that, in order to correctly understand a decision, it must be read in connection with the facts, upon which it was rendered, and particularly is this true of complainant's citations upon the point now under consideration. In most of these citations, the opinions of the court, unless the facts of each case are comprehended with accuracy and kept steadily in mind, are subject to serious misconstruction.

The distinction between Shields v. Barrow, supra, and Krippendorf v. Hyde, supra, and the numerous cases in line with the latter, has been indicated as follows:

"In the way attempted in the present case, there are no pleadings on behalf of the original plaintiff as against Kemp Van Ee, and could be none. The whole basis of making him a party defendant was in the allegations of Swift's answer. This practice, although prevailing in some localities, is condemned, by necessary implication, in Shields v. Barrow, 17 How. 130, 145, 15 L. Ed. 158, by Justice Bradley, in 1873; in Searles v. Railroad Co., 2 Woods 621, 625, Fed. Cas. No. 12,586; by Justice Blatchford, in 1868, in Drake v. Goodridge, 6 Blatchf. 151, Fed. Cas. No. 4,062; and in the notes to Daniell, Ch. Prac. (6th Am. Ed.) 286, 287. * * * This question of making defendants is entirely different from that of an intervention pro interesse suo, as authorized in Harrison v. Nixon, 9 Pet. 483, 540, 9 L. Ed. 201, Krippendorf v. Hyde, ubi supra, and in Morgan's L. & T., etc., Co. v. Texas Cent. R. Co., ubi supra, and in the notes to Daniell Ch. Prac. (6th Am. Ed.) 1853. There seems to be no doubt that, under the authority of these cases, Kemp Van Ee would have been entitled to an intervention by summary petition after the fund came into the registry of the court in equity, and to thus maintain his interest. This, however, would have been an essentially different proceeding from that of making parties to the main controversy, and would have been of the character of the intervention of Mr. Talbot in the case at bar. This question has no relation to the so-called 'class suits,' nor to the coming in of a cestui que trust or a stockholder, nor to cases like White v. Hall, 1 Russ. & M. 332, where new parties come into the accounting after a decree. In none of these are the issues presented by the bill substantially changed by the interposition of the new parties." Gregory v. Pike, 67 Fed. 845, 15 C. C. A. 33.

The foregoing review of complainant's citations removes any apparent lack of harmony between them and Shields v. Barrow, and, accepting all of said cases as authoritative here, the conclusion necessarily results that a new party cannot be brought into a suit, whose presence at its commencement would have defeated federal jurisdiction, unless such party represents an interest already before the court, or claims an interest in property of which the court holds possession. Nor is this conclusion at all antagonized by Lilienthal v. McCormick, 117 Fed. 96, 54 C. C. A. 475. There the cross-complainant, Bank of Woodburn, was an original defendant, and, even after the filing of the cross-bills, the citizenship of each of the defendants, under a proper alignment, was different from that of both complainants. So, whatever use may be made of that case as a precedent on other points, it certainly is not an authority to the proposition that a cross-bill may introduce a new party, although the citizenship of said party be the same as that of the complainant, for the simple reason that the last-mentioned fact was not in the case.

Furthermore, it is worthy of note that the defendants to the original bill had paid into court the sum of $1,063, and I am not sure but that this fact brings the case within the principle enunciated in the numerous cases already cited, that possession by the court of the property in litigation carries with it jurisdiction to determine all claims thereto. It is true that the court at page 96 of 117 Fed. (54 C. C. A. 475) used this language: "Consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be"; but, since there was neither a consolidation nor an intervention in that case, the words "consolidations" and "interventions" are without application. While there were cross-bills, yet, as I have already shown, the citizenship of the parties thereto was diverse to that of the complainants, and of course federal jurisdiction was not ousted. More-

over, the clause above quoted is obviously but the statement of a general principle, and its limitations are to be found in the authorities from which the principle is deduced. The three cases cited in said clause are all cases where the property in litigation was in possession of the court. Two of them, Sioux City Terminal R. & W. Co. v. Trust Co. of North America, and Morgan's Co. v. Texas Central R. Co., I have already noticed. The third, Park v. Railroad Co. (C. C.) 70 Fed. 641, is entirely in line with the other two, as shown by the following extract from the opinion, at page 642:

"Having acquired jurisdiction of the property, and having appointed receivers with the express consent of the defendant railroad, the court does not lose jurisdiction when other persons interested therein come in, and are made parties, even though some of them be citizens of the same state with those whose interests in the same property are adverse to the intervenors; for, when property is in the actual possession of a federal circuit court, this draws to it the right to decide upon conflicting claims as to its ultimate possession and control."

In Osborne & Co. v. Barge (C. C.) 30 Fed. 805, the decision was rested on the ground that, inasmuch as the alleged ownership of the intervenor went to the validity of the mortgage sought to be foreclosed, therefore the cross-bill was ancillary to the original suit, as appears from the second paragraph of the syllabus, which is as follows:

"Where a suit to foreclose a chattel mortgage is properly cognizable in a court of equity, a party who claims to be the owner of a part of the property mortgaged may intervene in the suit, although he would have a remedy by action at law, and in such case the court will have jurisdiction of the proceeding in his behalf as ancillary to the original suit."

While it does not appear that the mortgaged property had been sequestered, yet the court cites in support of its ruling Freeman v. Howe, Krippendorf v. Hyde, and Phelps v. Oaks. The first of these three cases lends little support to the decision, and I presume that it was rested upon a real or supposed analogy to the last two cases, in each of which the court had actual possession of the property. If the decision cannot be sustained on this theory, then it is in conflict with Shields v. Barrow, and cannot be accepted as an authority here. Mercantile Trust Co. v. A. & P. R. R. Co. (C. C.) 70 Fed. 518, is clearly in line with Krippendorf v. Hyde, supra, and Morgan's Co. v. Texas Central Ry. Co., supra. Indeed, the latter case is cited and quoted from in support of the court's ruling.

In order to avoid any mistake about the matter, the learned jurist who delivered the opinion, Judge Ross, carefully reiterates four or five times, as the ground of his decision, the court's possession of the mortgaged property, as appears from the following quotation:

"All of the property covered by both mortgages that is situated within this judicial district having been taken by the court into its possession by means of receivers, for the benefit of all parties concerned in it, in accordance with their respective rights, I am unable to see any valid reason why every right sought to be enforced by the United States Trust Company by the bill it seeks to bring may not be set up and enforced in the suit brought by the Mercantile Trust Company, to which it is already a party. Having the actual possession of all of the property of the Atlantic & Pacific Railroad Company situated within this judicial district that is covered by the first mortgage to the United States Trust Company, as well as by the second mortgage to the

Mercantile Trust Company, there is surely no good reason why the court may not, in the one suit, ascertain and determine how much is due on the first mortgage and how much is due on the second, and decree a sale of the mortgaged property to pay, after discharging the necessary and proper expenses of the receivership, first, the amount due upon the first mortgage, and, next, that due upon the second mortgage, with the proper judgment or judgments over against the mortgagor for any deficiency that may be found to exist. The fact that three foreign corporations, namely, the Atchison, Topeka & Santa Fé Railroad Company, the St. Louis & San Francisco Railway Company, and the Boston Safe-Deposit & Trust Company, are made parties defendant to the proposed bill, and are not parties to the suit brought by the Mercantile Trust Company, is unimportant, first, because by the bill the United States Trust Company asks leave to bring, no relief is asked against those corporations; and, second, if there was, since the rights of the United States Trust Company grow out of contracts with respect to the subject-matter already in the possession and control of the court, that possession draws to the court having it the right to decide upon every conflicting claim to its ultimate disposition and possession that may be held or asserted by either of those corporations. Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co., 137 U. S. 201, 11 Sup. Ct. 61, 34 L. Ed. 625, and cases there cited. They can be brought into the suit of the Mercantile Trust Company just as easily as they can be made parties to the suit the United States Trust Company seeks to bring. The court itself may, and always would, order them brought in if they should at any time, pending the suit, appear to be necessary parties to its proper determination. Nor is any good reason perceived why the United States Trust Company, in setting up its rights under its first mortgage in the suit of the Mercantile Trust Company, may not bring them into that suit, if it is entitled to any relief against them in connection with the mortgaged property."

The jurisdiction of a court, as I have already shown, growing out of its possession of the property in litigation to determine all conflicting claims thereto, necessarily carries with it the right to bring in every party whose presence is necessary to a full disposition of the case, without regard to citizenship, and Judge Ross was unquestionably correct, when, referring to the bringing in of new parties, under the peculiar facts before him, he said: "The court may, and always would, order them brought in if they should at any time pending the suit appear to be necessary parties to its proper determination."

I am fully satisfied that the cross-bill was improperly filed and ought not to stand, for the reason that federal jurisdiction would be thereby ousted. While this conclusion is, of itself, sufficient to dispose of the pending hearing, still, since the other two grounds of the demurrer and motion have been largely discussed in the briefs of both parties, and each is a separate and independent objection, which, if good, calls for dismissal of the cross-bill, I will present briefly the views I entertain of both grounds.

Second. Assuming, then, for the purposes of the two objections yet to be considered, and contrary to what I have just held, that the intervention of the Northern Counties Investment Trust, Limited, did not oust federal jurisdiction, and that the intervenor is properly before the court, I come next to the question whether or not the foreclosure of a junior mortgage is the proper subject of a cross-bill in a suit brought for the foreclosure of a prior mortgage. The rule, established by an overwhelming current of authorities, is that the grounds for the affirmative relief sought in a cross-bill must grow out of the transaction on which the original complainant sues.

A cross-bill is defined as follows:

"The cross-bill is a bill brought by a defendant in a suit against the complainant in the same suit, or against the other defendants in the same suit, or against both, touching the matters in question in the original bill." 1 Beach on Modern Equity Practice, § 421.

The same author says:

"A cross-bill will be dismissed with costs, where it seeks no discovery, and makes no defense which was not equally available by way of answer to the original bill, or by amendments to the answer." 1 Beach on Modern Equity Practice, § 422.

Another text-writer defines a cross-bill as follows:

"A cross-bill is a bill filed by a defendant in a suit in equity against one or more of the other parties, in order to obtain, either discovery of facts in aid of his defense, or complete relief to all parties as to the matters charged in the original bill." 1 Foster's Fed. Prac. § 169.

The expositions of cross-bill given by the courts are in line with the definitions above quoted.

The Supreme Court has said:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original, independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it." Ayres v. Carver, 58 U. S. 591–594, 15 L. Ed. 179.

Again, it has been said:

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The fact that a cross-bill fairly tends to accomplish either of these purposes is generally a sufficient ground for its interposition. It must seek equitable relief, but, subject to this qualification, a complainant who has brought a defendant into a court of equity in order to subject him to an adjudication of his rights in a certain subject-matter cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject-matter. The issues raised by the cross-bill must be so clearly connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit, but, subject to this qualification, new facts and new issues may properly be presented by a cross-bill." Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389.

To the same effect is the following extract:

"'A cross-bill,' says Mr. Justice Story (Eq. Plead. § 389), 'ex vi terminorum, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill.' And, as illustrative of cross-bills for relief, he says (§ 392): 'It also frequently happens, and particularly, if

any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills to bring every matter in dispute completely before the court to be litigated by the proper parties and upon the proper proofs.'" Morgan's Co. v. Texas Central Ry. Co., 137 U. S. 200, 11 Sup. Ct. 61, 34 L. Ed. 625.

The late Justice Miller held, quoting from the first paragraph of the syllabus:

"A cross-bill will be sustained in the federal court, where a defendant is compelled to avail himself of that mode of defense, in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same state; provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction." Schenck v. Peay, 21 Fed. Cas. 667, Case No. 12,450.

This case is cited approvingly by Justice Harlan in Jesup v. Illinois Central Ry. Co. (C. C.) 43 Fed. 483–496.

Again, the rule that a cross-bill must relate to the transactions set up in the original bill has been declared as follows:

"If it be true that Vannerson and Leverett are both citizens of Georgia, the one can have in this court no relief against the other in a cross-bill filed to an original bill against them both, which he could not have obtained by original bill here. In other words, the fact that they are both sued in one bill here does not confer any power on them to litigate their controversies inter sese in this court. Most clearly, if the plea is true, Vannerson had no standing in this court as a suitor by original bill. He prays no relief against Bates, Reed & Cooley. His cross-bill has no relation to the subject-matter of their suit, nor is this cross-bill in any sense a reply to allegations of the original bill. The Circuit Court of the United States is limited in its jurisdiction, and, when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted." Vannerson v. Leverett, 31 Fed. 377.

Again, it has been held, quoting from the syllabus:

"A controversy between codefendants to a bill in equity cannot be a matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill." Weaver v. Alter, 29 Fed. Cas. 486, Case No. 17,308.

Again, it has been said:

"A cross-bill is like an original bill, except that it must rest on what is necessary to the defense of an original bill." Brandon Mfg. Co. v. Prime, 4 Fed. Cas. 19, Case No. 1,810.

This last case, of which I shall have more to say later on, is the one in which Judge Wheeler challenges as dictum the statement of Justice Curtis in Shields v. Barrow, that "new parties cannot be introduced into a cause by a cross-bill."

Osborne & Co. v. Barge (C. C.) 30 Fed. 805, does not antagonize, but is in accord with the views I have above expressed, so far as concerns the relation, which the cause of action set up in the cross-bill must bear to that set up in the original bill. In that case, which was a suit to foreclose a chattel mortgage, the cross-complainant claimed to be the owner of a part of the property in controversy, and thus stated a defense to the foreclosure sought in the original bill, the court holding, quoting from the third paragraph of the syllabus, that "in such a case the party claiming the property need not have put

his claim into judgment before filing his cross-bill, as he already has such an interest in the property as will enable him to question the validity of the mortgage."

Lilienthal v. McCormick, supra, is not an authority on the point now under consideration, because there a dispute existed as to the amount due the original complainants and to that extent the cross-bill of the Bank of Woodburn was an attack upon the mortgage of said complainant, and thus a part of the transaction on which the original complainant sued. Referring to this point, the court, at page 95 of 117 Fed. (54 C. C. A. 475), says:

"It is true that, if no suit had been brought by the complainants, the Bank of Woodburn could have brought suit in the state court to enforce its liens and obtain full relief, but it was properly made a defendant by complainants, and having been brought into the suit in the United States court it had the right to assert its claims and seek affirmative relief by filing a cross-bill for the foreclosure of its liens and it had the right in such suit to litigate the question whether the complainants had any lien against the property for damages."

Mercantile Trust Co. v. A. & P. R. R. Co., supra, is likewise wholly inapplicable here, for the reasons given in a previous reference to that case.

A careful review of the authorities satisfies me that a junior mortgagee, in order to foreclose his own mortgage, cannot, under general rules of equity pleading and practice, by cross-bill or otherwise, make himself a party to a suit brought for foreclosure of a prior mortgage. That there may be no misconstruction of this conclusion I will add that the words "under general rules of equity pleading and practice" are used to save the exception which arises when the court has possession of the mortgaged property.

Third. The third ground which defendants urge in support of their demurrer and motion, namely, that "new parties cannot be introduced into a cause by a cross-bill," is unquestionably supported by Shields v. Barrow, supra, and it will be observed, that, in stating this ground, I have employed the precise language used by the Supreme Court in that case.

Shields v. Barrow has been referred to approvingly in Connolly v. Wells (C. C.) 33 Fed. 205–207; Ayres v. Carver, 58 U. S. 591–595, 15 L. Ed. 179; Randolph v. Robinson, 20 Fed. Cas. 262, Case No. 11,561; Adelbert College W. R. U. v. Toledo, etc., Ry. Co. (C. C.) 47 Fed. 836–846; Toler v. East Tenn. V. & G. R. Co. (C. C.) 67 Fed. 168–170; Gregory v. Pike, 67 Fed. 837–845, 15 C. C. A. 33; and Thruston v. Big Stone Gap I. Co. (C. C.) 86 Fed. 484, 485. And, in Ayres v. Carver, 58 U. S., at page 594, 15 L. Ed. 179, the Supreme Court said:

"A cross-bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. * * * The office of a cross-bill has been very fully discussed at this term by Mr. Justice Curtis in the case of Victor Shields et al., v. Barrow; and I need not, therefore, pursue it, but refer only to that opinion for the true doctrine on the subject."

Nor does the authority of Shields v. Barrow seem to have been anywhere questioned, until, after the lapse of nearly a quarter of a

century, District Judge Wheeler, sitting in the Circuit Court, refers to it as "the remark of Mr. Justice Curtis in Shields v. Barrow," and further says: "That precise question was not involved in that case, but the mere dictum of such a judge of such a court would ordinarily be followed thereafter by lower courts." Brandon Mfg. Co. v. Prime, 4 Fed. Cas. 20, Case No. 1,810. The pertinent facts in the case were that a cross-bill for affirmative relief had been filed, pursuant to a previous order of the court, and by this cross-bill new parties were brought into the case, and a final decree in favor of the original complainant was rendered against them and the defendants to the original bill, and from this decree an appeal was taken to the Supreme Court. The decree was reversed, and the cause remanded to the Circuit Court, with directions to that court to dismiss the original and cross-bills, on the ground that the Circuit Court could make no decree as between the parties originally before it so as to do complete and final justice between them without affecting the rights of absent persons, whose introduction into the court, since they were citizens of the same state as complainant, would oust the jurisdiction of the court, and, on the further ground that the cross-bill brought in new parties, contrary to the rules of equity pleading and practice, the court declaring that "new parties cannot be introduced into a cause by a cross-bill." It will be observed, that either of these grounds, if tenable, required a reversal of the decree. This brief summary of the facts shows clearly, that Justice Curtis' declaration, that "new parties cannot be introduced into a cause by a cross-bill," was not "mere dictum," but a direct ruling upon one of the controlling issues of the case.

Mercantile Trust Co. v. A. & P. R. R. Co. (C. C.) 70 Fed. 518, has already been referred to in another connection, and I shall only add here that said case is in accord with Shields v. Barrow, supra. I use this affirmative form of expression that the two cases are in accord, rather than the negative statement that they do not conflict with each other, advisedly, and for the reason that, in the latter case, the decision was rested solely upon the ground that the court had possession of the mortgaged property, from which it is fairly, if not necessarily, inferable that the decision, in the absence of that fact, would have been different, and this harmonizes the two cases.

In Shields v. Barrow, Justice Curtis, in announcing the ruling of the court that it was error to bring in new parties by a cross-bill, was discussing simply a question of general equity pleading and practice, without any regard to the exception, which must necessarily arise when the court has possession of the property in litigation, while, in Mercantile Trust Co. v. A. & P. R. R. Co., the court was dealing with this precise exceptional case, and discussing, not the office of a cross-bill, or any other matter of procedure, but the jurisdiction and duties conferred and devolved upon the court by its possession of the property in litigation. Indeed, Judge Ross, in order to reach the substance of the controversy, brought before him solely through the court's possession of the mortgaged property, was insistent to brush aside any mere consideration of pleading or practice, and, therefore, referring to three foreign corporations, who were parties to the

proposed bill but were not parties to the suit brought by the Mercantile Trust Company, he said:

"Nor is there any good reason perceived why the United States Trust Company, in setting up its rights under its first mortgage in the suit of the Mercantile Trust Company, may not bring them into that suit, if it is entitled to any relief against them in connection with the mortgaged property. Whether by a cross-bill, pure and simple, or by a bill in the nature of a cross-bill, is immaterial. In such a matter mere names are nothing. Here was a property, constituting a link in a great transcontinental railway, incumbered by two mortgages for large amounts, and in such a condition as rendered it imperative on the part of the court, at the suit of the second mortgagee, to take it into its possession, and operate it by means of receivers, in order to conserve the property, and to protect the interests of all parties concerned in it. With the property thus in the possession and control of the court, at the suit of the second mortgagee the holder of the first mortgage was made a party defendant by an amended and supplemental bill, and properly so made."

While the opinion of the court quotes Judge Wheeler's criticism of Shields v. Barrow, yet it is done without words of approval, the only comment being as follows:

"The distinction referred to in the note to section 399 of Story on Equity Pleading, above cited, and in the authorities there referred to, between a cross-bill merely defensive in its character and one which seeks affirmative relief in respect to matters connected with the subject embraced by the original bill, is a very just and proper one."

And I repeat, with reference to this statement, what I have said of others, that, read in the light of the facts then before the court, it was accurate, but its use as an authority in connection with another and wholly different state of facts, is an erroneous application.

I am of opinion that the second and third objections to the cross-bill, as well as the first one, following the order in which I have arranged them, are well taken, and the demurrer and motion will be accordingly sustained and allowed.

CLEARWATER TIMBER CO. v. SHOSHONE COUNTY, IDAHO, et al.

(Circuit Court, D. Idaho, N. D. June 29, 1907.)

No. 363.

1. TAXATION—PUBLIC LANDS SELECTED IN LIEU OF FOREST RESERVE LANDS—PASSING OF EQUITABLE TITLE.

Under the several acts relating to forest reservations which permit private owners of lands therein to transfer or relinquish the same to the government and to select other public lands in lieu thereof, no exchange is effected until approved by the Land Department. The act of March 2, 1899 (30 Stat. 993, c. 377), establishing the Mt. Rainier National Park, expressly provides for the approval of the Secretary of the Interior, but the general act of June 4, 1897 (30 Stat. 34, c. 2 [U. S. Comp. St. 1901, p. 1538]), contains no such express provision, and the approval may be made by the Commissioner of the General Land Office under paragraph 18 of the rules adopted by the department thereunder. In either case, it is contemplated that the department shall, through proper officers, consider all questions of law and fact affecting the title and validity of the conveyance of the base lands, and the character and condition of the lieu lands selected, and, until that has been done and a formal approval given, the equitable title to the lands selected does not pass from the government,

nor does the applicant acquire any right of possession thereto, and they are not subject to taxation, especially in view of the fact that the department requires the applicant to pay all taxes levied on the base lands up to the time the exchange is approved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 31, 35, 38–44.

Of equitable title to public lands, see note to Northern Pac. R. Co. v. Wright, 4 C. C. A. 196.]

2. SAME—EFFECT OF DEED TO PUBLIC LANDS.

A railroad company which owned patented lands within national forest reserves conveyed the same to the United States, and selected other public lands in lieu thereof, as permitted by statute. Thereafter it executed a deed to the lands so selected to complainant, but several years elapsed before such selections were approved by the Land Department and before the lands were even surveyed. *Held*, that the fact of its conveyance gave the county no right to tax such lands in the meantime while they remained unsurveyed public lands of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 40, 41.]

3. SAME—SUIT TO ENJOIN COLLECTION OF TAXES.

That a complainant was not the owner of lands at the time of an illegal levy of taxes thereon does not deprive it of the right to maintain a suit in equity to enjoin the enforcement of such taxes by a sale of the lands after it has become the owner.

4. SAME—PLEADING—WAIVER OF DEFECT IN ALLEGATIONS.

A complainant is not debarred from maintaining a suit to enjoin the enforcement of taxes illegally levied upon lands because its bill did not allege it to be the owner of such lands where no objection was taken to the pleading, and the proofs, taken by stipulation, establish its ownership.

5. SAME—PROPERTY SUBJECT TO TAXATION—UNSURVEYED LANDS.

Lands which have not been officially surveyed by the United States are not as a rule taxable, nor are they under the statutes of Idaho, and such a survey is not completed until it has been accepted by the Land Department.

In Equity.

James E. Babb and Stiles W. Burr, for complainant.
Walter H. Hanson, for defendants.

DIETRICH, District Judge. This suit was brought to vacate and annul certain assessments and tax sales of real property claimed by the complainant. The bill was filed January 9, 1906. The territory embracing said lands was formerly situated within the limits of Shoshone county, but afterwards, as a result of the election of 1904, the same became annexed to Nez Perce county, pursuant to an act of the Legislature of Idaho passed in the year 1904. The assessments in question were made in the years 1903 and 1904, and, the taxes thus assessed not having been paid by the plaintiff, sales for delinquency were made in the years 1904 and 1905, and certificates of such sales were issued to Shoshone county, the purchaser.

In its bill the plaintiff sets forth, in substance, the following facts: It is a corporation organized under the laws of the State of Washington, and it has complied with the laws of the state of Idaho relative to foreign corporations doing business in the latter state. It is the owner and entitled to the immediate possession of certain tracts and

parcels of land formerly situated in Shoshone county, but now situated in Nez Perce county, state of Idaho, which lands are described in different groups, the first group aggregating 16,565.76 acres, a second group aggregating 2,560 acres, a third group containing 3,523.20 acres, also a fourth group embracing 22,583.45 acres. It is alleged that all of these lands, at the dates of the assessments complained of, were vacant and unoccupied. The plaintiff is the grantee of the Northern Pacific Railway Company, which, in turn, is the successor in interest of the Northern Pacific Railroad Company, and, it is averred, all of these lands were selected by the Northern Pacific Railway Company in lieu of lands relinquished by it to the United States, the first group having been selected in lieu of lands so relinquished pursuant to an act of Congress approved March 2, 1899 (30 Stat. p. 993, c. 377), establishing the Mt. Rainier National Park, and the second group having been selected pursuant to the provisions of the general act approved June 4, 1897 (30 Stat. 34, c. 2 [U. S. Comp. St. 1901, p. 1538]), under which the Priest River Forest Reserve was established, and the third group having been selected pursuant to the provisions of said act of June 4, 1897, under which the Lewis and Clark Forest Reserve was established, and the fourth group having been selected in part under the provisions of said act of June 4, 1897, and in part under said act of March 2, 1899. All of said lands, it is averred, were selected by the Northern Pacific Railway Company during the years 1900 and 1901, while the same were unappropriated public lands of the United States, by the filing of selection lists in the United States District Land Office at Lewiston, Idaho. It is alleged that at the time of the selection the lands described in the first group were unsurveyed. It does not appear from the bill whether the lands described in the other three groups were surveyed or unsurveyed at the time the selection lists were filed. The selection lists so filed were transmitted to the office of the Commissioner of the General Land Office, and, it is averred, the lands therein described remained the property of the United States and a part of the public domain until the approval of said selections by the Secretary of the Interior and until the issuance of patents therefor, it being the duty of the officers of the Interior Department, before such selections were approved, to determine whether the lands specified in said lists, as the bases for the lands so selected, were situated within the limits of the Mt. Rainier National Park, the Priest River Forest Reserve, and the Lewis and Clark Reserve, respectively, and whether the same had been duly and properly conveyed to the United States in accordance with the provisions of said acts of Congress and whether the title to said base lands was, at the time of the conveyance thereof to the United States, vested in the Northern Pacific Railway Company, and whether the lands so selected were subject to selection under the provisions of said acts.

It is further averred, relative to the said first group of lands, that no determination of said questions of fact and no approval of said selections were made by the officers of the Department of the Interior until the 7th day of June, 1905, and that patent therefor was issued on the 12th day of June, 1905. And, as to the second group, it is averred

that the said questions of fact were determined in favor of the selector and the selection was approved April 21, 1905, and patent issued May 5, 1905. And, as to the third group, it is averred that the selection was not approved until May 2, 1905, and patent issued May 20, 1905. Thereafter, on the 12th day of September, 1905, by warranty deed, the Northern Pacific Railway Company conveyed all of the lands embraced in said three groups to the plaintiff. As to the status of the title of the fourth group, it is alleged that none of the selections or selection lists have ever been approved by the officers of the Department of the Interior, nor has any patent ever been issued. It is averred that all the lands embraced in said group are "the exclusive property of the United States and a part of the public domain of the United States"; that, if the selections of said lands so made by the Northern Pacific Railway Company are hereafter approved and patents issue therefor to the Northern Pacific Railway Company, "then your orator expects to acquire title to the same from the said Northern Pacific Railway Company," but it is averred that neither said railway company, nor the plaintiff, nor any other person, has any title, estate or interest, legal or equitable, in or to any of said lands.

After thus setting forth the history and status of the title to the various groups of land, the plaintiff proceeds to aver that in the year 1903 the officers of Shoshone county entered upon the assessment books of said county a description of all of said lands and assessed the same to the plaintiff, the taxes so assessed amounting to $7,882, and that all of said lands were valued and assessed and levied upon in one single parcel without division or apportionment. Thereafter, said taxes not having been paid and the same being delinquent, all of said lands were after advertisement offered for sale on July 12, 1904, in a single parcel, and were bid in by and struck off to the defendant, Shoshone county, for the sum of $8,607.45, and a tax certificate therefor was issued to the purchaser, and was made of public record in said county. Similar allegations are made relative to the assessment and sale of the same lands for the taxes of 1904. It is averred that the defendants claim and assert that no part of the land so sold can be redeemed from either of said sales, except upon the payment of the entire sum for which said lands were struck off to Shoshone county, together with interest, etc.

Thereupon follow a number of allegations relative to the interest claimed by Shoshone county and the interest claimed by Nez Perce county in said tax certificates, by reason of the segregation of the territory embracing these lands, from Shoshone county, and its annexation to Nez Perce county; also a number of allegations for the purpose of showing that the tax certificates, and the tax deeds which will follow in the course of time, will create a cloud upon the plaintiff's title to said lands. After service of subpœna, the defendants appeared and demurred to the bill, upon the ground that it did not state facts sufficient to entitle the complainant to the relief prayed for. This demurrer was on August 15, 1906, after argument, overruled by my predecessor, Hon. James H. Beatty. Thereafter the defendants answered, and to this answer the complainant filed a replication. The answer expressly admits substantially all of the allegations of the bill,

excepting those relating to the dates of the approval of the various selections referred to in the bill, and the averments involving mixed questions of law and fact as to the assessability of the lands in question during the years 1903 and 1904. The defendants deny that the Northern Pacific Railway Company, by deed, transferred the lands embraced in the first three groups described in the complaint on the 12th day of September, 1905, and, upon the other hand, they allege that the Northern Pacific Railway Company, by warranty deed, conveyed to the plaintiff all of the lands embraced in the four groups on the 30th day of July, 1901, which deed, it is alleged, was recorded in the office of the county recorder of Shoshone county, on page 13 of Book 20 of Deeds. Thereafter, on April 25, 1907, a written stipulation, signed by counsel for the respective parties, was filed, wherein it is agreed, in substance, that the facts as alleged in the bill of complaint are true, excepting only the allegations as to the date the selections were approved and patents were directed to be issued, and as to the dates determination was made of the questions of fact upon which the selections were based. There is also attached to the stipulation a copy of the instrument referred to in the answer as a deed from the Northern Pacific Railway Company to the plaintiff, dated July 30, 1901, and which was recorded in the office of the county recorder of Shoshone county on August 12, 1901. This instrument, after reciting that the railway company had contracted to sell and convey to the plaintiff the lands therein described, states that, in compliance with said contract, the railway company "does grant, bargain, and convey" to the plaintiff certain lands in Shoshone county, which are particularly described, and which aggregate 45,000 acres, and which are, with slight discrepancy, the same lands described in the bill of complaint. The railway company therein covenants that it, the railway company, "has not made, done, executed, or suffered any act or thing whatsoever" whereby the premises described are or shall be imperiled, charged, or incumbered, and the railway company further covenants to warrant and defend the title to said premises, "except as against any taxes and assessments levied or assessed against said land during the year 1901 and the years subsequent thereto, which the said party of the second part hereby assumes to pay." Thereafter, on May 24, 1907, by agreement of counsel for the respective parties, made in open court, an order was made that the cause be submitted on the pleadings, the stipulation referred to, divers depositions, and a large number of exhibits, most of which are transcripts of certain records and files of the United States Land Office at Lewiston, Idaho, and of the General Land Office at Washington. Practically all of this evidence relates to the history of the selection lists from the time they were filed until patents were issued, and to the official survey of the townships in which the lands in question are situated. There are also transcripts of the assessment books of the defendant county. All of the lands in question are situate in townships 38, 39, and 40 North, range 5 East, and townships 38, 39, and 40 North, range 6 East. The plats of these townships were certified by the Surveyor General of Idaho May 9, 1903, were accepted by the Commissioner of the General Land Office, Jan-

uary 15, 1904, and were filed in the local land office at Lewiston, Idaho, February 24, 1904. All of the selection lists covering the lands in question were filed prior to October 1, 1900, namely, at various dates in September, 1900. Thereafter, pursuant to the requirements of law and the regulations of the department, the railway company, in due time after said lands were surveyed and the plats thereof accepted and filed in the local land office at Lewiston, filed supplemental or amendatory lists, adjusting the original lists to the government surveys.

The record also discloses the fact that some protests were made or contests instituted and carried on against the claim of the railway company to certain of the lands selected; and also that examinations were made by examiners of the Interior Department for the purpose of determining whether or not the lands selected were vacant and unappropriated, and were, under the law, subject to approval and patent to the railway company, and whether or not the lands which the railway company offered to release could properly, under the law, be considered base lands, and whether or not the same were duly released by the proper parties in interest in accordance with law, and whether or not the lands selected were mineral in character, and other facts pertinent to the general question whether or not the railway company could of right select the lands described in the lists as lieu lands.

The exhibits, in much detail, set forth the various steps taken by the railway company and the officers of the Interior Department between the date of the filing of the original lists by the railway company and the date upon which patents finally issued, but, in my view, it is unnecessary particularly to set forth these details for the purpose of elucidating and applying the principles of law by which the rights of the parties hereto must be adjudged. The lands embraced in the first group described in the complaint, amounting to 16,565.76 acres, were, as heretofore stated, selected under the provisions of the act of March 2, 1899; also a considerable portion of the lands described in the fourth group were selected under the provisions of this act. This act provides that upon the execution and filing with the Secretary of the Interior by the Northern Pacific Railway Company of a proper deed releasing and conveying to the United States the lands which it rightfully claimed in the Mt. Rainier Forest Reserve, as created by said act, also in the Pacific Forest Reserve, whether the same were surveyed or unsurveyed, and which were situated opposite the railway company's constructed road, the railway company was authorized to select an equal quantity of nonmineral public lands to which no adverse right or claim had attached or had been initiated at the time of making the selection, such land lying within any state through which the railroad of said railroad company extended. The act further provides that in case the tract so selected should, at the time of the selection, be unsurveyed, the railroad company should, within three months after the lands were surveyed and the plats filed, file a new selection, describing the lands selected in accordance with the surveys. It is further provided that new descriptions might be given so as to make the selections conform to the surveys. It is further provided:

"That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected is situated and

the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed in due form of law, and delivered to said company, a patent of the United States conveying to it the lands so selected."

With regard to the first group of lands and selections under the provisions of this act, the proofs show a report made by examiners of the department May 3, 1905, upon certain questions, and on May 19, 1905, another examiner's report, to the effect that the tracts selected were not returned as mineral, and were not in conflict with any mining claim of record. And thereafter the Acting Commissioner of the General Land Office recommended to the Secretary of the Interior that the selections be approved, and that a patent be issued to the Northern Pacific Railway Company as the successor in interest to the Northern Pacific Railroad Company. On June 7, 1905, the selection was approved by the Secretary of the Interior, and patent issued June 12, 1905. Similar proceedings, as the proof shows, were taken relative to the lands embraced in the fourth group described in the complaint and selected under the provisions of this act; all the examinations and reports of the examiners being made in 1906, and the approvals by the Secretary of the Interior having been made and endorsed June 4, June 28, and August 28, 1906.

The other lands described in the complaint, namely, the second and third groups and a part of the fourth group, were selected under the provisions of the general act of June 4, 1897. The lists conveying these selections are No. 3,214, filed in the local land office September 28, 1900, for 9,065.72 acres, and No. 3,215, filed September 25, 1900, for 2,560 acres, and No. 3,216, filed the same day for 3,523.20 acres. As already indicated, all of the townships in which these lands are situated were at the time of the filing of these lists unsurveyed.

The rules of the department in force both at the time of tendering these lists, and at the time the plats of these townships were filed in the local land office, after the surveys had been accepted and approved, provided that the selections of unsurveyed lands must be made to conform to the survey within 30 days after notice from the local land office to the party making the selection of the receipt at the local land office of the approved plats, and, further, that no selections upon unsurveyed lands would be passed to patent until after four months following the filing of the plats in the local land office, in order that any person claiming an adverse right might thus have ample opportunity to file protest and otherwise to assert his claim to any of the land included in the selection lists. Complying with these rules, the railway company on March 21, 1904, filed in the local land office at Lewiston supplemental lists, adjusting lists 3,214, 3,215, 3,216 to the official surveys. The filing jackets in the General Land Office, covering these three selections, bear the following, among other indorsements: On jacket No. 3,214: "Approved by Commissioner June 12, 1903; approved for patent December 6, 1905." On jacket No. 3,215; "Approved by Commissioner October 16, 1902; approved for patent April 21, 1905." And on filing jacket No. 3,216: "Approved by Commissioner October 16, 1902; approved for patent May 2, 1905." The patent covering list No. 3,214 was issued December 21, 1905,

and patent covering list No. 3,215 was issued May 5, 1905, and patent covering list No. 3,216 was issued May 20, 1905. The record does not disclose the approval of any one of the three lists by the Secretary of the Interior. While it is not entirely clear from the record what was intended by the first approval of the Commissioner upon each one of the lists, it is obvious that, under the rules of the department and from the other indorsements and entries upon the filing jackets covering each list, such approval could not have been intended to be final and general in its nature, but it must have been confined to certain facts or features of the application. The record discloses the existence of contests and protests long after the first approval in each case, and the further fact that steps were being taken, during the period elapsing between the first approval and the final approval for patent, to determine and define the rights of the railway company. It also appears that on the filing of the supplemental lists, after the lands were surveyed, the original list No. 3,214 contained 88 acres in excess of the base lands. Accordingly, on March 21, 1905, the railway company tendered a deed for 80 acres, additional base lands, and $10 in cash to cover the remaining eight acres excess.

In further illustration of the fact that as late as 1905 the rights of the railway company to the lands described in lists 3,214, 3,215, and 3,216 were only inchoate, and that the exchange of the proffered base lands for the selected lieu lands had not been consummated, and that the offer of exchange by the railway company had not been accepted by the Interior Department, reference may be made to a letter of the Assistant Commissioner, dated September 11, 1905, advising the local officers at Lewiston, Idaho, that the appeal of William McBride, a claimant to some of the lands embraced in list 3,214, had been dismissed, and that "said decision, therefore, has become final, and the case is hereby closed." And, again, in a letter from the Assistant Commissioner to the local officers at Lewiston, dated February 8, 1905, the writer, referring to list 3,216, advises that the claim of James H. Estes to lands embraced in said list had been finally disposed of, and then says:

> "Turning to said lieu selection 3,216 for final examination on its merits prior to patenting same, it is ascertained that the company neglected to furnish complete proof of nonliability for taxes and certificates as to freedom from federal judgments."

And in the same letter, after discussing the laws of Montana (in which state the base lands are situated) relative to taxes and the liens of taxes and judgments, the writer directs the local officers to "call, therefore, for one certificate covering above basis land, which will, if the facts warrant, serve to extend the above certificate to about the present time." And, as to judgments in the same letter the writer requires the selector—that is, the railway company—to "furnish certificates of clerks of said courts to the effect, if the facts warrant, that there are no judgments entered nor suits pending, as shown by the records of the respective courts, against any of the grantors (that is, the Northern Pacific Railroad Company and the Northern Pacific Railway Company) herein, that could operate as a lien on the lands

since July 19, 1899, when said lands were patented to the company." And the local officers were thereupon directed to serve upon the proper parties a copy of this letter. These are merely illustrations. Others might be given. But, in view of the status of the selections, as indicated by these illustrations, how can it be successfully contended that the right of the railway company became complete or that it had fully acquired the equitable title to the lands referred to in its original lists, until the lands had been surveyed, and the plats thereof had been approved or accepted by the proper representatives of the government, and the railway company had complied with the rules and regulations of the department by filing supplemental or adjustment lists, and also by complying with the requirements as to conveyance to the United States of the title to the base lands, free from liens and incumbrances? Suppose that the railway company, after having been served with a copy of the Assistant Commissioner's letter of February 8, 1905, above referred to, and relating to list No. 3,216, had failed or refused to comply with the requirements of the Commissioner as to furnishing certificates and abstracts, could it be asserted that the company could have compelled the acceptance by the government of the exchange which it had tendered by the filing of its selection lists? It is possible, but I do not decide, that if the officers of the department should arbitrarily and without reason neglect or refuse formally to approve the proffered exchange, the selector having done all that was required of him under the law and the rules and regulations of the department, and it appearing that the base lands and the lieu lands were of the character and in the condition contemplated by the law and regulations of the department entitling the selector to make the exchange, the right of the selector should be held to be complete, and that it should, for some purposes, be regarded as the equitable owner of the selected lands without the approval of the officers of the department. But it is not contended that such conditions existed in this case. There is no claim, and, indeed, there is no evidence in the record, that either the selector or the officers of the department carelessly or willfully delayed the final approval and patent of the selections. I have, therefore, concluded to hold that under the circumstances as disclosed by the record of this case the equitable title to the lands selected under the act of March 2, 1899, did not pass to the railway company until the selections were approved by the Secretary of the Interior, and that the equitable title to the lands selected under the act of June 4, 1897, did not pass to the railway company until the selections were approved for patent by the Commissioner of the General Land Office, and that the lands were not subject to taxation prior to approval.

That as a general rule approval of a proper officer is necessary seems to be conceded by counsel for the defendants, for in his brief he uses the following language:

"But it is true, and the defendants concede it to be well settled, that, where the act of Congress has granted to a railway company certain lands in lieu of lands which may have been previously entered, within the place limits, such lieu lands selected by the railway company are not subject to taxation until the selection is approved by the Interior Department."

Counsel supplements this statement by saying that he has been unable to find that in any case decided by the courts the tax was levied under a law similar to that obtaining in this state. But I do not think that, under the facts and circumstances disclosed by the record, the case can be taken out of the general rule by any peculiarities of the statutes of Idaho relative to the assessment of property and the collection of taxes thereon. Indeed, the Idaho statutes are not radically different from those found in many, if not most, of the western states. In Wisconsin Railroad Company v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687, there was involved the construction of a congressional act similar to the act of March 2, 1899. That action, like this, was brought by the railway company against the county to enjoin the collection of taxes levied upon lands selected by the company, the selection not having been approved by the Secretary of the Interior. Perhaps nowhere is there a more comprehensive, and at the same time more guarded, statement of the principles governing the taxability of lands, the legal title to which is in the United States, than that contained in this decision. After adverting to the familiar law that a state has not the power to tax the property of the United States within its limits, and that usually the possession of the legal title by the government determines both the fact and the right of ownership, Mr. Justice Field, who delivered the opinion of the court, speaks as follows:

"There is, however, an exception to this doctrine with respect to the public domain, which is as well settled as the doctrine itself, and that is that where Congress has prescribed the conditions upon which portions of that domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property—in other words, when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property—then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation."

The grant in that case was to the state of Wisconsin, and the lands so granted were by the state conveyed to the plaintiff company in aid of the construction of a railroad in accordance with the purpose of the act. By the terms of the act, where rights had attached to any of the lands granted, lieu lands were authorized to be selected by agents of the state "subject to the approval of the Secretary of the Interior." While this language is not precisely the same as that contained in the act of March 2, 1899, the meaning is, in my judgment, substantially the same. In either case the selection must have the approval of the Secretary of the Interior. In discussing the status of the title to lands selected under the provisions of the Wisconsin act, and the taxability of the lands after they had been so selected and prior to the ap-

proval of the selection by the Secretary, Mr. Justice Field uses the following language:

"The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And, in determining whether a particular section could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification. The proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts."

Thereupon the court states that:

"It follows from these views, that the indemnity lands described in the complaint were not subject to taxation as the property of the railroad company in 1883."

In principle I am unable to distinguish this case from the case at bar, so far as the selections under the act of March 2, 1899, are concerned.

As to the selections under the act of June 4, 1897, counsel for complainant vigorously urges that, before the equitable title passes, the selections must have the approval of the Secretary of the Interior and that such approval being evidenced in the record only by the issuance of the patents, the dates upon which the patents were issued should be accepted as the dates upon which the right of the selector first accrued and upon which the lands first became taxable. As already indicated, I am unable to accept this view. The act of 1897 does not in terms designate the person or officer by whom the selections shall be approved. While it is true, as contended, that, in the absence of special provisions to the contrary, the Secretary of the Interior has general supervision of the disposition of the public lands, it does not follow that such supervision must in all cases be personally exercised. It is a matter of common knowledge that, under the general rules and regulations promulgated by the Secretary of the Interior, inferior officers perform many functions in the disposition of public lands; and it is also a familiar fact that in cases of private entries of lands under the homestead or other laws, as soon as the final proof is submitted in the local office and payment made by the entryman and final certificate

issued as evidence of the acceptance of the proof and the purchase price, the entryman is recognized as being the equitable owner of the lands so entered, with substantially complete dominion over such lands, including the right of alienation; and, after final or patent certificate is thus issued by the local officers, such lands are held to be taxable. It is likewise competent for the Secretary, under general rules, to invest the Commissioner of the General Land Office with authority to approve lieu selections made under the provisions of the act of June 4, 1897, and this, I think, the Secretary has done. Whether the approval of the Commisioner is final and absolute or not is, in my judgment, immaterial. His action may still be subject to review by the Secretary, but nevertheless upon his approval the transaction is consummated. The action of the register and receiver in accepting the proof and issuing final certificate to the entryman, under the homestead laws, may be set aside, but that fact does not alter the general rule that, when they accept final proof and receive the purchase price of the land and issue final certificate, the entryman is to be treated as the equitable owner. Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Witherspoon v. Duncan, 4 Wall. 210, 18 L. Ed. 339. Paragraph 18 of the rules adopted by the Interior Department for the administration of the forest reserves under the act of June 4, 1897, provides that all applications or selections must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with a report as to the status of the tract applied for.

Upon cross-examination, Fred Dennett, Assistant Commissioner of the General Land Office, whose deposition was taken upon behalf of the complainant in this case, stated that, as to the selections made under and by virtue of the act of June 4, 1897, the action of the Commissioner of the General Land Office is final and requires no action by the Secretary. Counsel for the plaintiff argues that in such construction of the law the witness was mistaken, in that under the general provisions of law the Secretary of the Interior has entire supervision of the disposition of public lands. But I do not understand the witness to mean that the action of the Commissioner is necessarily conclusive, or that his action is not, or could not be made, the subject of review by the Secretary of the Interior. I construe his answer to mean only that, under the rules and regulations promulgated by his superior, his approval of the selection, in the absence of an application for review to the Secretary of the Interior by an interested party, is sufficient basis for issuance of patent, and that patent is issued as a matter of course upon the Commissioner's approval. Any doubt as to the correctness of this view is, I think, dispelled by the decision of the Supreme Court in the case of Cosmos Co. v. Gray Eagle Co., 190 U. S. 301, 24 Sup. Ct. 860, 47 L. Ed. 1064, where, after quoting department rule No. 18, above referred to, the court says:

"The 'consideration' mentioned in rule 18 is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The applications are to be forwarded, not a decision by the local land office, together with a report (not

a decision) as to the status of the land. This rule makes it the duty of the local land officers to merely forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it."

Indeed, as I read this decision, it is not only conclusive that equitable title does pass to the applicant upon approval by the General Land Office, but, also, that it does not pass until such approval is given. Speaking of the contention that the act of June 4, 1897, constitutes a standing offer on the part of the government to exchange any of its vacant lands open to settlement for a similar area of land in a forest reserve, and that whenever a person relinquishes to the government a tract in a forest reserve and places his deed of record, as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, such offer of the government has thereupon been both accepted and fully complied with, and that a complete equitable title to the selected lands is thereby vested in the selector, the court says:

"But even the complete equitable title asserted by complainant must, as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the act before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself.

"We do not see how it can be successfully maintained that, without any decision by an official representing the government, and by merely filing the deed relinquishing to the government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee-simple title to the government, and also that he has selected vacant land which is open to settlement, and that, therefore, he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide? Complainant asserts that if a decision be necessary before the vesting of a complete equitable title that, in that case, the local officers are to decide that question, and, by accepting the deed and making the certificate already mentioned, they have decided it, and thereupon, at all events, the complete, equitable title accrued, even though such decision were subject to a review by the Commissioner of the General Land Office and thereafter by the Secretary.

"But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and, unless those officers had that power, they did not acquire it by assuming to exercise it. We do not say that did so assume. They received, accepted and filed the deed, the abstract of title, the nonmineral affidavit, and the selection as made by Clarke. They entered that selection upon the official records of the land office, and they certified that it was free from conflict, and that there was no adverse filing, entry, or claim thereto, but it cannot be said that they decided that the selector had complied with the provisions of the statute or that he had done all that he ought to have done in order to acquire his alleged, complete equitable title.

"Their certificate that the land was free from conflict was simply a certif-

icate as to what appeared on the books of the local office, and the same may be said of the statement that there was no adverse filing, entry, or claim thereto upon such books. No affidavit of nonoccupancy was filed, and they did not certify that the land so selected was, in fact, vacant or unoccupied, nor did they assume to certify that the selected land contained no minerals, although an affidavit to that effect was presented to them. In truth, all that these local officers did was to certify that the selector had done certain things, and that the land selected was vacant and open to settlement so far as it appeared from the books of the local land office.

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it."

In the case of the State of Minnesota v. Itaska Lumber Co. (recently decided by the Supreme Court of the state of Minnesota) 111 N. W. 276, a certified copy of which decision has been furnished me, one of the syllabi is as follows:

"During the time which elapses between the filing of an application for the location of scrip upon certain lands belonging to the United States and the approval of the application by the Commissioner of the General Land Office, the land described is not subject to taxation by the state."

And in the course of its opinion the court says:

"But, before the land can be taxed by the state as the property of the beneficial owner, the perfect equitable title must be vested and the consideration fully paid to the United States. * * * The presentation of the scrip with an application to locate it upon certain land gave the applicant the preference over other subsequent claimants of the land, but, until the application was approved and acted upon by the commissioner, the applicant acquired no interest, legal or equitable, in the land as against the United States. During the intervening time, it might have been withdrawn from entry or disposed of by the government in some other manner. Payment for the land was not made until the scrip was approved and the receipt therefor issued."

And, speaking of the contention that the title or interest of the selector should by the application of the doctrine of relation be carried back to the date of the presentation of the scrip, the court says that such doctrine is never applied except when necessary to give effect to an act or instrument, the operation of which would otherwise be defeated, and that the doctrine has no application to a case of this character.

Among other cases in harmony with the view that the equitable title does not vest in the selector, and hence that he has no title which is subject to taxation by the state, until the selection is approved by some authorized officer of the government, are the following: Decision on Demurrer in this case, Judge Beatty; Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311; Grant v. Railway

Co., 7 N. W. 113, 54 Iowa, 673; Musser v. McRae, 38 Minn. 409, 38 N. W. 103; Dickerson v. Yetzer, 6 N. W. 41, 53 Iowa, 681; Resser v. Carney, 52 Minn. 397, 54 N. W. 89; Page v. Price County, 64 Pac. 801, 25 Wash. 6; Lafeyette Lewis, 33 Land Dec. 43; William E. Moses, 33 Land Dec. 333. In this last-named case the opinion of Secretary Hitchcock is a very clear and instructive one, and in line with the decision in Cosmos Co. v. Gray Eagle Co., supra. Moses, like the railway company in this case, tendered to the local land office at Lewiston, Idaho, his application to select lands in lieu of forest reserve lands, a deed for the conveyance of which to the United States he furnished, together with his application. His application for the lieu lands having been rejected because of a defect in his title to the base lands, he requested the return of his deed and abstract. The Commissioner of the General Land Office denied his application. The Secretary, after stating that the possession of the deed by the grantor is presumptive evidence that the deed was never delivered, and the possession thereof by the grantee is presumptive evidence that it had been delivered and accepted, says:

"The owner of the land is entitled to the possession of his muniments of title. * * *

"Equitable title to land relinquished to the United States under the exchange provisions of the act of June 4, 1897, does not vest until examination and acceptance of the title by an authorized officer of the United States. [Here the Honorable Secretary quotes with approval from Cosmos Co. v. Gray Eagle Co., supra, and continues.] It is a transaction of exchange, and it is a necessary condition of title by exchange that there is 'a concurrent vestiture of title' to the things exchanged. * * *

"The deed having been delivered to officers of the United States for their inspection and acceptance and being found not acceptable, the United States has no claim to the land nor right to possession of the deed. The transaction, of which the conditional delivery was a part, having wholly failed, the deed never became operative, and the grantor is entitled to its return, that the grantee may be divested of the presumptive evidence of ownership."

In view of the doctrine thus enunciated both by the Land Department and by our Supreme Court as to the status of these lands and the title thereto during the period intervening between the date of the filing of the selection lists and the date of approval either by the Commissioner or by the Secretary of the Interior, I am unable to fully appreciate the suggestion made by counsel for the defendants that the revenue statutes of Idaho should enable the court in some way to distinguish this case and relieve defendants from the application of these general principles. It is suggested that the statutes of Idaho define improvements on public lands and possessory claims as real estate, and authorize the assessment and taxation of the same; but how does such a statute apply to the facts in this case? The revenue officers of the defendant county did not profess to assess improvements or possessory rights upon, or claims to, public lands, nor does the record show that the plaintiff had any improvements upon, or any possessory rights or claims to any of the lands in question. The lands were vacant, unoccupied, unimproved, unsurveyed public lands of the United States, which the railway company was offering to purchase as soon as the same could be surveyed and placed upon the market, by an exchange therefor of other lands which it claimed to

own. Its right, if it could be accurately called a right at all, was not so great or so tangible as that of a qualified entryman who has filed his application to enter 160 acres of land under the homestead laws and, who has placed no improvements upon the land applied for, and who has never been in the actual possession of the same. What does such an applicant acquire, by his mere application, that is subject to taxation? If he takes actual possession of the land and places improvements upon the same, he has property interests which come within the statutory definition of improvements and claims to, or possessory rights upon, public lands. But in this case the selector, not only had no improvements upon and was not in the actual possession of the lands, but it had no right to the possession. If, as stated by Mr. Justice Field in Railroad Company v. Price County, supra, the exception to the general doctrine that land to which the government holds the legal title is not subject to taxation "is founded upon the principle that he who has the right to property, and is not excluded from its enjoyment, shall not be permitted to use the legal title of the government to avoid his just share of state taxation," upon what theory can the exception be extended to embrace this case? It is not contended, and in my view could not successfully be asserted, that, when the railway company filed its selection lists and deeds and abstracts, it had the right to take possession of the selected lands, and exercise dominion over them and cut therefrom the timber. But, if it did not have the title and did not have the right of possession or the right of use, upon what theory of law or equity could it be required to pay taxes? It is interesting and pertinent in this connection to refer to the United States v. Montana Lumber Co., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604, where the Northern Pacific Railway Company, having, by the construction of its road, fully earned certain lands under the act granting to it lands along the line of its road, before said lands were surveyed, sold the timber standing thereon to the Montana Lumber Company, and the latter company, having determined to its satisfaction, by the employment of private surveyors, where said lands were located, proceeded to cut and manufacture the timber growing thereon, and the court held that, notwithstanding the lands had been earned, neither the railway company nor its grantee had any right to go upon said lands and cut therefrom the timber until they had been definitely located and identified by government surveys. Counsel for the defendants cite no decision or departmental regulation or rule by which, or in harmony with which, the railway company or the plaintiff would have been justified in taking possession of or using these lands or any part thereof prior to the approval of the selection by the proper officers.

It is suggested that the complainant has come into a court of equity asking equitable relief, and that, therefore, it should be required to do equity. The principle is, of course, correct, but just what application is sought to be made of it is not quite clear. In this connection the question is asked by counsel why should the settler who entered 160 acres of timber land in Shoshone county in the year 1901, and paid the purchase price therefor, have been subject to taxation by the state at

all times since, and the Timber Company here, or the railroad company, which selected these lands, be exempt from taxation? The distinction is obvious. As soon as the person referred to as a "settler" had entered 160 acres of land and paid the purchase price therefor, he became the owner of the equitable title, and, as soon as patent issued, of the legal title. But, whether patent issued or not, as soon as he paid the purchase price and received his final certificate or certificate of patent, he was recognized as the owner of the land, including the timber growing thereon. He had the right to take possession of the land and to use it, and to appropriate to his own use and benefit its products. In other words, his dominion over the land and its products became absolute. But, suppose that, between the time the "settler" made his application and the time certificate of patent or final certificate was issued to him, the land had been assessed, would it be contended that such assessment was either legal or equitable? During such time the "settler" had neither title to nor the right to use or exercise dominion over the land; and his case would be analogous to that of the plaintiff.

It is further suggested by counsel for the defendant that the Northern Pacific Railway Company, in releasing the base lands, released lands which were subject to taxation, and presumptively, it is stated, the lands so released were of less value than those selected in lieu thereof; but, even if we adopt such an assumption, how can it avail the defendant? It clearly appears from the letter of the Assistant Commissioner of the General Land Office, dated February 8, 1905, hereinbefore referred to, that the department was requiring the railway company to keep the taxes levied upon the base lands, paid up to the time the selections were approved in 1905, and it logically follows from the Moses decision and the Lewis decision (33 L. D., cited supra) that the base lands where title has passed to the selector, so that they are subject to taxation, continue to be the property of the selector, and hence subject to taxation in the state where they are situated, until the conveyance thereof is accepted and the proper exchange is consummated by the approval of the proper officers of the Land Department, and that, therefore, it is incumbent upon the selector, the Railway Company in this case, not only in order that the Government may accept its offer, but for its own protection if, for any reason, its offer is rejected by the government, to pay the taxes upon the base lands levied during the pendency of its application or selection. If, therefore, the lands in question in this case were, prior to the approval of the selections, subject to taxation as being the property of the railway company and the plaintiff, its grantee, then it logically follows that during the pendency of its application the selector must pay taxes both upon its own property and that of the United States, for at no given time could it be held that it was the owner both of the base and of the lieu lands. In their brief the defendants have cited Central Pacific Railway Co. v. Nevada, 162 U. S. 512, 16 Sup. Ct. 885, 40 L. Ed. 1057, and Northern Pacific Railway Company v. Meyers, 172 U. S. 588, 19 Sup. Ct. 276, 43 L. Ed. 564, as being in support of their contention, but both of these cases involve the construction and ap-

plication of an act of July 10, 1886 (24 Stat. 143, c. 764 [U. S. Comp. St. 1901, p. 1476]), by which it is expressly provided that lands granted to a railroad corporation by an act of Congress shall not be exempt from taxation on account of any lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor. This act expressly provides that it shall not apply to unsurveyed lands, and that any lands sold for taxes shall be taken by the purchaser subject to the lien of the United States for costs of surveying, etc., and all liens and mortgages in favor of the United States, and that the act shall only apply to lands situated adjacent to and coterminus with completed portions of the railroads for aid in construction of which they were granted. It is obvious that the act is not applicable to the lands in question, and it is also clear that, in the absence of such a statute, the rule would be different. Railway Co. v. Prescott, 16 Wall. 603, 21 L. Ed. 373; Railway Co. v. McShane, 22 Wall. 444, 22 L. Ed. 747; Railway Co. v. Rockne, Treasurer of Traill County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477.

It is further suggested that, inasmuch as the railway company gave and the plaintiff accepted a deed covering and attempting to convey these lands from the railway company to the plaintiff in July, 1901, the defendant county had a right to assess and tax said property. However, no theory of law in support of this suggestion is outlined or defined. The giving and the acceptance of such a deed might constitute prima facie evidence of the private ownership of the lands; but, even so, this prima facie showing is overcome by the undisputed facts relating to the title. Estoppel is not pleaded as it must be if relied upon, nor is it argued that the giving and the acceptance of the deed are sufficient to constitute estoppel. Nor does the provision of the conveyance relieving the railway company from the payment of taxes which might be levied upon the lands, expressly or impliedly, create the right or enlarge the right of the county to assess the lands. The instrument was a private contract between the railway company and the timber company, and was not made for the benefit of the county. The railway company desired, and had the right, to relieve itself from any responsibility to the timber company for any taxes which might be levied; and the timber company was willing and had the right to assume the responsibility of paying the taxes. But it cannot be presumed that they contemplated illegal assessments, or the payment of tax claims which were void. The status of the lands for assessment purposes was uncertain. No one could anticipate just when they would become subject to assessment. The action of the Land Department could not be anticipated, and naturally the parties could not certainly foretell just what rule of law the courts would apply to the facts. The parties, therefore, had the right to contract in such manner that one was relieved from and the other assumed the burden of such taxes as might be levied (legally, of course) against the property. But, as against the county, such contract could not estop the parties from questioning the legality of the tax claim.

It is suggested, but not urged, by counsel for defendants that, if

the plaintiff did not have equitable title to the lands in 1903 and 1904, it has no standing in court, for in that case it could not be injured by the assessment and sale. At the time the bill was filed, the complainant was the owner of the lands embraced in the first three groups described in the complaint. It is so alleged and admitted. The allegations relative to the fourth group of land, so far as the complainant's interest therein is concerned, are anomalous, and, had appropriate objection been made, I do not see how the bill could have been sustained so far as it relates to that group. There is no allegation that the complainant, when the bill was filed, had any interest whatever in any of the lands embraced in this group, but no specific objection was made, and, by agreement, proof was made showing that at the time of the filing of the bill the railway company had attempted to convey these lands, together with those embraced in the other three groups, by the deed referred to as having been executed in 1901, so that the complainant's interest in these lands was really the same as its interest in the other groups; and now it appears it is the absolute owner of them.

It is not sufficient to say that, if the complainant did not have legal title or equitable title to the lands at the time the taxes in question were levied, it has suffered and can suffer no injury by reason of the acts, and threatened acts, of the defendants, and that, therefore, it is not in a position to ask for equitable relief. It appears that not merely the interest of the railway company or the interest of the complainant was assessed and sold, but the lands and the entire title thereto were assessed, and, the taxes thereon having become delinquent, the lands and the entire title thereto were sold; and it further appears that, if redemption is not made within the time prescribed by the statutes of Idaho, deed will be executed conveying to the defendant county, or its assignee, the lands. It can hardly be seriously contended that the spreading of the assessment upon the assessment books of the county, the subsequent advertisement, and sale, and the placing of the certificate of sale upon the records of the county, and the threatened execution, by the tax collector, of a deed purporting to convey these lands, and the placing of such deed of record, will not create a cloud upon the title. It is obvious that when such deed is executed, and the county claims thereunder to be the absolute owner of the lands, the plaintiff can maintain an appropriate proceeding to try out the general question of title, and thus determine the validity of the tax sale. In such a proceeding substantially the indentical issues of fact and of law now presented would have to be determined. If the plaintiff should remain inactive and await the issuance of the tax deed before challenging the validity of the proceedings, would it not become subject to the possible charge of laches or the defense of estoppel? Equity favors the vigilant, and, both in reason and upon authority, I think the complainant is properly in court. Railroad Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; Railroad Co. v. McShane, 22 Wall. 444, 22 L. Ed. 747. As I have already indicated the filing jackets in the Commissioner's office covering the selections under the act of June 4, 1897, bear indorsements of an earlier and of a later

approval by the Commissioner, and, for reasons which appear to me to be conclusive, I have adopted the date of the later approval as the time when equitable title passed. But, if the earlier dates should be adopted, there would still be cogent reasons for holding the tax proceedings invalid. For the purpose of assessment in any given year, the title, value, and status of all property within the state of Idaho are to be considered and fixed as of the second Monday in January of that year, which in 1904 was January 11th. The surveys of the townships in which all of these lands are situated were not approved by the Commissioner of the General Land Office until January 15, 1904, and were filed in the local land office February 24, 1904. Apparently the rule is that unsurveyed lands are not taxable, and the survey is not completed until the same is accepted by the Land Department. This proposition has been elaborately argued by counsel for complainant, and the defendants have not controverted it. Central Pacific Ry. Co. v. Nevada, 162 U. S. 512, 524, 16 Sup. Ct. 885, 40 L. Ed. 1057; State v. Central Pacific Ry. Co., 25 Pac. 442, 21 Nev. 94; Stoneroad v. Stoneroad, 158 U. S. 240, 15 Sup. Ct. 822, 39 L. Ed. 966; United States v. Montana Lumber Co., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604; Clemmons v. Gillette (Mont.) 83 Pac. 879; Robinson v. Forest, 29 Cal. 325; Territory v. Persons, 76 Pac. 316, 12 N. M. 169; Tubbs v. Wilhoit, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887; Act March 3, 1899, c. 424, 30 Stat. 1097 [U. S. Comp. St. 1901, p. 1541]. And, indeed, the revenue statutes of Idaho impliedly negative the idea that unsurveyed lands are assessable. Section 1346 of the Political Code (Annotated) provides:

"The assessor must have prepared and platted a full, accurate, and complete plat book of his County, in which shall be platted all townships which have been officially surveyed and platted by the United States Government."

Nothing is said about unsurveyed lands.

Again, even if the selections under the act of June 4, 1897, were assessable by reason of the first approvals of the Commissioner in 1903 and 1904, the selections under the other acts not having been approved and hence not being assessable, the entire assessment, it is contended, is void, because the lands under all of the selections were grouped and assessed as a unit. In other words, it is asserted by complainant, and not controverted by defendants, that a joint and unapportioned assessment of taxable and nontaxable property is void in toto. And the proposition seems to be amply supported by authority. See California v. Railway Co., 118 U. S. 417, 6 Sup. Ct. 1144, 30 L. Ed. 125; California v. Railway Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; Trust Co. v. Territory, 62 Pac. 987, 10 N. M. 416; Title Trust Co. v. Aylsworth, 66 Pac. 276, 40 Or. 20; Hart v. Smith, 64 N. E. 661, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280; Railroad Co. v. Phillips, 82 N. W. 767, 111 Iowa, 358; Lancy v. City of Boston, 71 N. E. 302, 186 Mass. 128; Towne v. Salentine, 92 Wis. 404, 66 N. W. 395; Johnson County v. Tierney, 76 N. W. 1090, 56 Neb. 514; Howcott v. Levee Dist., 46 La. Ann. 322, 14 South. 848; Sims v. Warren, 67 Miss. 278, 7 South. 226; Jennings v. Collins, 99 Mass. 29, 96 Am. Dec. 687; East Tenn. Ry. Co. v. Morristown (Tenn. Ch. App.) 35

S. W. 771; Fisk v. Corey, 141 Pa. St. 334, 21 Atl. 594; Strode v. Washer, 17 Ore. 50, 16 Pac. 926; Howe v. People, 86 Ill. 288.

However, I do not decide what, if any, application this principle would have to the record in this case if it appeared that a part of the lands in evidence were subject to taxation. I am of the impression that I would seek hopefully for some method under the law by which the plaintiff would be required to pay a just proportion of the taxes before it received protection against that which was unjust. But, it being my view of the law that none of these lands were subject to taxation in 1903 and 1904, complainant's prayer is not beset with any equitable objections. It had and has no duty either at law or in equity to pay these taxes in whole or in part. If it was under obligation to convey to the United States a title to the base lands, absolute and free from lien or incumbrance on the date the exchange was consummated—that is, the date of approval by the proper officers of the Land Department—it had the reciprocal right to receive title to the lieu lands free from lien or incumbrance upon that date. The suggestion that the lieu lands were of greater value than the base lands, even if it were founded upon the record, cannot be entertained. The propriety of the act authorizing the exchange was for the exclusive consideration of the legislative branch of the government. Nor can I be influenced by a consideration of the vast extent of the lieu selections. The law is the same for the timber company as it is for the homesteader, and I doubt whether it would be seriously urged that there were any very strong equities in favor of the defendant, if after a homesteader in a forest reserve had made application to exchange his homestead for land outside of the reserve, and before his offer of exchange was accepted, and while he neither had title to the land applied for, nor possession of or the right to use the same, it sought to levy and to enforce the payment of a tax thereon. In principle such is the case presented by this record.

I have no disposition to assist parties in escaping a just proportion of the burden of taxation on account of technical defects in the proceedings of revenue officers in levying and enforcing the payment, of taxes; but the plaintiff's resistance is not based on such grounds. Its claim is that the property was not subject to taxation—not that the assessor and the other officers of the defendant county did not proceed regularly, but that they were without jurisdiction, and hence that the entire proceedings were void. To compel the plaintiff to pay these taxes would, in effect, be to require it to pay taxes both on the base lands and the lieu lands for the same year—a manifest injustice.

It follows that the relief prayed for must be granted.

CLEARWATER TIMBER CO. v. NEZ PERCE COUNTY.

(Circuit Court, D. Idaho, N. D. July 1, 1907.)

No. 362.

1. TAXATION—SUIT TO ENJOIN COLLECTION OF TAXES—ESTOPPEL.

The mere fact that a complainant accepted and recorded a deed purporting to convey to it lands, the legal and equitable title to which were both in fact in the United States, does not estop it to maintain a suit in equity to enjoin the collection of taxes levied on said lands by the taxing officers of the county who had actual knowledge of the condition of the title and of the claim of complainant that the land was not taxable and were not misled by such deed or record.

[Ed. Note.—Persons entitled to injunction restraining or damages for wrongful enforcement of tax, see note to Bayles v. Dunn, 54 C. C. A. 550.]

2. SAME—PROPERTY SUBJECT TO TAXATION—IDAHO STATUTE.

The Revenue Law of Idaho (Sess. Laws 1901, p. 238, § 11), provides that "all taxable property shall be assessed in the county, city, or district in which it is situated on the second Monday in January, or if not within the state on that day on the day of assessment. The assessor * * * must assess such property to the persons by whom it was owned or claimed * * * at 12 o'clock m. of the second Monday in January next preceding, or on the day of assessment as aforesaid." Section 31, page 247, requires the taxpayer to state under oath that the lists returned by him contain all of the property owned by him on the second Monday in January, if it was then within the state, and Ann. Code 1901, § 1318, provides that every tax upon real estate shall attach as a lien as of the second Monday of January of each year. *Held*, that under such statutes the status of property within the state for purposes of taxation is fixed on the second Monday in January, and that real estate exempt from taxation on the second Monday of January of any given year does not become subject to taxation during that year, even though transferred to a person in whose hands it is no longer exempt under the law.

In Equity.

James E. Babb and Stiles W. Burr, for complainant.
Daniel Needham and B. S. Crow, for defendant.

DIETRICH, District Judge. The bill of complaint in this suit was filed in this court January 9, 1906, the same date on which the bill in Clearwater Timber Co. v. Shoshone County, 155 Fed. 612, and others, in which a decision has just been rendered, was filed.

The suit was brought to enjoin the defendant county and its officers from enforcing the payment of taxes levied for the year 1905 upon the lands described in the bill against Shoshone county; the territory embracing the same having, during the latter part of 1904, by proper proceedings, been cut off from Shoshone county and annexed to Nez Perce county, so that if the lands were assessable at all during the year 1905 they were assessable in Nez Perce county. Excepting the year for which the taxes were levied, the bill states substantially the same facts as are set forth in the bill in the Shoshone County Case. The mode of assessment, however, was different; for, instead of describing and valuing all of the lands aggregating 45,000 acres, as a unit, as was done in Shoshone county, the officers of Nez Perce county divided the lands into 15 groups, and each group was taken as a unit, and valued as such, and after delinquency and adver-

tisement each group was sold as a unit and certificate of sale therefor was by the assessor and tax collector issued to Nez Perce county, the purchaser.

After the bill was filed practically the same proceedings were taken as in the Shoshone County Case. The answer does not make as many admissions as were made in the other case, and, in addition to the denials, some facts are pleaded by way of estoppel. The affirmative allegations in this regard are that in the year 1901 the Northern Pacific Railway Company executed and delivered to the plaintiff a deed purporting to convey to the plaintiff all of the lands in question, and thereafter and prior to January 1, 1905, the plaintiff caused this deed to be recorded in the office of the county recorder of Shoshone county, and thereafter the record of this deed together with other records of Shoshone county was transcribed and became a part of the records of Nez Perce county under the provisions of the act of the Legislature of the state of Idaho, cutting off a part of Shoshone county and annexing the same to Nez Perce county, that the defendant county's assessor found said deed of record, and that thereupon he assessed the land therein described to the plaintiff; and it is claimed by the defendant that the execution and delivery of said deed to the plaintiff, and the placing of the same upon record, constituted such conduct upon its part as to estop it from denying that the lands were, at the time of the recording of the deed, the property of the plaintiff, and that the conclusive presumption arises from the acceptance and the recording of said deed, that the property therein described both equitably and legally belonged to the plaintiff. It is not alleged that the defendant county or any of its officers were misled by the deed or the record thereof; or that the plaintiff otherwise represented to the defendant county or its officers that it was the owner of the property; or that, under the law, it made or delivered to the assessor and tax collector a statement of the property owned or claimed by it in Nez Perce county, containing a description of or referring to any of these lands; nor is it alleged that the defendant county and its officers were not at all times fully cognizant of the status of the title to these lands.

The case has been submitted upon substantially the same proofs, stipulations, and orders as in the suit against Shoshone county, and I must reach the same conclusion, unless the defense of estoppel which was not specifically pleaded in the other case is well founded; or unless government lands in Idaho, the title to which passes after the second Monday in January of a given year, are assessable for taxes during and for that year, it appearing that some of the selections in question were approved by the officers of the land department during the year 1905 and after the second Monday of January in that year.

As is stated in the opinion rendered in the Shoshone County Case, the first group of lands described in the complaint and selected under the act of March 2, 1899, was approved by the Secretary of the Interior on June 7, 1905. No other selection under that act was approved until the following year. The selections made under the act of June 4, 1897, were approved, one on December 6, 1905, one on April 21, 1905, and the third one on May 21, 1905.

In support of their plea of estoppel the proof offered upon behalf of the defendants is in strict accord with the allegations of fact made in the answer, and it appears therefrom that the railway company executed and delivered to the plaintiff in 1901 an instrument, substantially as alleged, and the same was placed of record in the office of the county recorder of Shoshone county and thereafter was transcribed and became a part of the records of Nez Perce county. Upon the other hand, evidence introduced upon behalf of the plaintiff discloses the fact that early in the year 1905 the plaintiff and its officers were cognizant of the actual status of the title to the lands in controversy; and, further, that in a proceeding taken in connection with a controversy between Shoshone county and Nez Perce county, relative to the adjustment of the accounts and property rights of said counties, in pursuance of the act of the Legislature annexing a portion of Shoshone county to Nez Perce county, the defendant county set forth the status of the title to these lands, and asserted that the same, during the year 1903, were the property of the United States, and were not assessable, and that the assessment and the sale thereof for delinquent taxes by Shoshone county were void and of no effect; and, indeed, it is conclusively shown that the defendant county and its officers were, in the early part of the year 1905, not only aware of the status of the title to these lands, but also knew of the contention of the plaintiff that they were not subject to taxation at that time.

It seems that in some jurisdictions the general doctrine of estoppel has been applied in cases where the taxpayer has returned to the assessor for the purpose of assessment or taxation property which does not belong to him; and that appears to be the rule adopted by the Supreme Court of Idaho, as disclosed in the case of Inland Lumber & Timber Co. v. Thompson, 11 Idaho, 508, 83 Pac. 933. In that case lands which had been selected under the act of June 4, 1897 (30 Stat. 11, c. 2), but the selection of which had not been approved, were assessed by the county assessor of Kootenai county, and the plaintiff brought an action to annul and set aside the assessment. The court denied the relief prayed for, but did not, as I construe the decision, pass upon the general question as to whether or not lands in that condition are assessable. It bases its conclusion solely upon the ground that the plaintiff had returned to the assessor as a part of its taxable property in that county the lands in question. The court states that there is a diversity of opinion, but concludes that the general trend of authority is "to hold the taxpayer estopped from denying his ownership of the property listed in his statement, unless he shows that the same was done through fraud, accident, or mistake." This Idaho case is the only one cited by counsel for the defendants in support of this defense; and complainant contends that the decision is not in harmony with the weight of authority and especially with the decisions of the federal courts. But it is unnecessary, in this case, to determine upon which side the weight of authority lies, or what the doctrine of the federal courts is. It is admitted that the estoppel which is applied against the taxpayer by the decisions announcing that view is a wide departure from and lacks some of the elements of estoppel as defined by courts of

equity in ordinary cases between private individuals, and is based upon the listing by the taxpayer of his property for taxation and the furnishing by him to the revenue officers of such list and the adoption thereof by them in performing their public duties. There may be some reason in public policy why, if a taxpayer has deliberately furnished to the proper officers a list of his property expressly for the purpose of having the same assessed and taxed, and if the revenue officers have once acted upon such representation and assessed the property, the taxpayer should not be heard to question the correctness of the list which he himself has made and furnished. But in no case called to my attention has the doctrine of estoppel been applied as against the taxpayer, upon facts such as are disclosed by this record. The plaintiff made no representation to the assessor, and did not list this property for taxation; and the assessor not only was not misled by any act on the part of the plaintiff, but well knew, at the time the property was assessed, the status of the title, and that the plaintiff contended it was not subject to assessment. There is, therefore, no analogy between this and the Inland Lumber Company Case, and I think it is clear that no estoppel, even under the rule adopted by the Supreme Court of Idaho, is here disclosed.

The remaining question is whether or not the lands, the selection of which was approved after the second Monday of January, 1905, and during the year 1905, were assessable for taxation during that year. Counsel for the defendant quotes from the decision of the Idaho Supreme Court in Inland Lumber Company v. Thompson, supra, the following language:

"Every person who has been assessed prior to the date on which the assessor delivered the assessment roll to the clerk of the board has notice that the board will order his property assessed if they discover it. Therefore, if any person whose property has not been assessed wants to know the amount for which his property is assessed, or to be heard in relation thereto, he should appear during the session convened on the fourth Monday in July and present his grievances."

And concludes from this expression that:

"It is clear from the above that under the laws of this state property is assessed at any time between the second Monday of January and the fourth Monday of July of each year, and all property discovered before the adjournment of the board must be assessed by the assessor and equalized by the board before its adjournment of the session held on the fourth Monday of July."

If counsel's contention is that the assessor, in assessing property for the year, may adopt any date between the second Monday in January and the fourth Monday of July of each year as the time for determining the title, value, and general status of the property, I am wholly unable to adopt the view; and I do not think the language of the Idaho Supreme Court, above referred to, can be properly construed as announcing such a doctrine. As I construe the statutes of Idaho relative to assessing property, all property in the state upon the second Monday of January of any given year is to be valued as of that date, and its title and status are to be determined as of that date. It is, of course, not necessary for the assessor upon that date actually to determine to

whom the property should be assessed and to fix the value thereon and to enter the assessment in the assessment book. Obviously that would be impossible. The assessor, by the statutes, is given a certain length of time to perform his duties in assessing property and entering the necessary data upon the assessment book, and that may be done, as indicated by the Supreme Court in the language above quoted, under some circumstances, as late as the fourth Monday in July. But if the assessment is actually made on the fourth Monday in July, and if the entries pertaining to the assessment are actually entered in the assessment book upon that date, the officers are not to consider the status of the property or its value upon the fourth Monday of July, but they are to give to the property such value as it had upon the second Monday of January, provided it is property which was in the state of Idaho upon that date. Section 11 of the Revenue Laws of Idaho (Sess. Laws 1901, p. 238) provides:

"All taxable property shall be assessed in the county, city or district, in which it is situated on the second Monday in January, or if not within the state on that day, on the day of assessment; the assessor must between the second Monday in January and the first day in July in each year, ascertain the names of all taxable inhabitants and all property in his county subject to taxation, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock m. of the second Monday in January next preceding, or on the day of assessment as aforesaid."

It is very clear from this language that the status of property within the state of Idaho, at 12 o'clock noon, on the second Monday in January, must be taken as the basis for the assessment of such property for that year. But if the property is brought into the state subsequent to that date and during the fiscal year, its status upon the day of its actual assessment may be taken as the basis of the assessment.

The lands in question were as much in the state of Idaho on the second Monday of January, 1905, as were any other lands, by whomsoever they may have been owned. The residence or nonresidence of the holder of the title to lands is wholly immaterial in considering their location for the purpose of assessment, and it is likewise immaterial, in considering the locus of the property that upon the second Monday of January the title to the lands in question was vested in the United States. Nor is it of any more importance that the title passed from the United States to a private person during the fiscal year, than it would be if the title passed from one private person to another. If this property was exempt from taxation upon the second Monday of January, 1905, it was exempt from taxation for the year 1905, and its subsequent transfer could not deprive it of this exemption.

Under the laws of Idaho the property of a resident widow woman of a value not in excess of $1,000 is exempt from taxation. Suppose that a widow woman with a home valued at $1,000, and having no other property, should sell and convey it during the month of June, would the property thereupon become assessable to the purchaser for the taxes for that year? If so, for the taxes for the entire year, or only for an aliquot part thereof? There is a provision in the Idaho statutes governing the assessment of transient stock for portions of

the year, but my attention has not been called to any such provision relating to real estate. If it may be assessed to the purchaser for the entire year, what becomes of the widow's exemption? Whether or not the property so purchased can be burdened with the taxes for that year is a material consideration to the purchaser, and if, upon the consummation of the purchase, he must assume the burden of paying the taxes for that year, he will necessarily pay less for the property and the guaranteed exemption will thus be rendered worthless to the widow.

Upon the other hand, suppose a corporation owns a piece of real estate upon the second Monday of January of the value of $1,000, and 10 days thereafter it sells the same to a resident widow, would any one contend that the corporation would escape any part of the tax for the entire year? Section 1318, Ann. Code 1901, of Idaho, provides that "every tax * * * upon real estate is a lien against the property assessed * * * which several liens attach as of the second Monday of January in each year." If, therefore, lands owned by the United States on the second Monday of January and thereafter conveyed to a private person can be assessed to such person for such year, it necessarily follows that the lien of the tax attaches to the lands as of a date when the title thereto is still in the United States.

Again, under the provision of section 31, Revenue Law 1901 (Sess. Laws, p. 247), in the oath attached to the return of his property, the taxpayer must state that the list contains all the property owned by him "on the second Monday in January, and now own, claim, possess, or control, and which was not within the state on that day." It is very clear that the Legislature intended that all nonmovable property should be assessed as of the second Monday of January, and that the authorization to value property or consider its status upon the day of its assessment relates only to personal property, that which is movable and may be taken from one state to another.

Some injustice or inequality necessarily results from this method of assessment; that is, by taking the value and ownership upon a certain day of the year, arbitrarily fixed by statute. In this case the plaintiff escapes the burden of any taxation for that part of the year 1905 during which it was the owner of all or a part of these lands. Other inequalities may likewise result. For instance, under abnormal conditions, and sometimes under normal conditions, the value of property changes very rapidly. The value of a tract of land, almost worthless upon the second Monday of January, may be multiplied many times before the first of July. In such cases, if the value is to be taken as of the second Monday of January, the owner escapes a fair share of taxation, based upon the average value of the land during the entire year. And, upon the other hand, a piece of property may be very valuable upon the second Monday of January, and may, shortly thereafter become almost worthless, or may be entirely destroyed by fire or some other agency, in which case the owner would be compelled to bear an undue burden of taxation. In 1 Cooley on Taxation [3d Ed.] p. 604, the learned author says:

"Assessments are made periodically, and in many of the states every year. The customary regulation is that the assessment shall be made or completed on

a certain day, or that it shall be made as of a certain day. This fixes the liability of persons and property to taxation for the year. There are some inconveniences and inequalities resulting from this, but some regulation of the kind is indispensable. A force of tax officers cannot be kept employed for the year in watching the transfers of property, the movement of persons, and the vicissitudes of business, in order to equalize the charges upon them. Periodical assessments, if they produce injustice in one case, may correct it in the next, and on the whole are likely to be fair. At any rate, they constitute the best regulation the law can establish."

The view that, if under the statutes of Idaho real estate is exempt from taxation on the second Monday of January of any given year, it does not become subject to taxation during that year, even though transferred to a person in whose hands it is no longer exempt under the law, is the only one which I am able to harmonize with the theory and scheme of taxation as disclosed by the statutes of Idaho, and it is in accord with the decisions of other courts where similar statutory provisions have been considered. Wildberger v. Shaw, 36 South. 539, 84 Miss. 442; Baltimore v. Jenkins, 53 Atl. 930, 96 Md. 192; Railway Co. v. Commonwealth (Ky.) 49 S. W. 548. Electric Co. v. New Orleans, 14 South. 231, 45 La. Ann. 1475; Martin v. Drake, 41 N. W. 942, 40 Minn. 137; King v. City of Madison, 17 Ind. 48; Long v. Culp, 14 Kan. 412; Swann & Billups v. State, 77 Ala. 545. Indeed, my attention has not been called to any case announcing a different rule.

It follows from the views expressed in the case of Clearwater Timber Co. v. Shoshone County and Others, 155 Fed. 612, and herein set forth, that the prayer of the plaintiff's complaint must be granted.

W. A. GAINES & CO. v. KAHN et al.

(Circuit Court, E. D. Missouri, E. D. June 13, 1907.)

No. 5,096.

1. TRADE-MARKS AND TRADE-NAMES—RIGHT TO TRADE-MARK—"OLD CROW" WHISKY.

The words "Old Crow" were first used to designate a whisky made according to a secret formula by one James Crow, who was employed as distiller at a distillery in Kentucky, commencing in 1835. After his death in 1855, the manufacture was continued for a time at the same distillery by one who had learned the formula from him. During the latter part of such time, the distillery was leased by complainant's predecessors in business, who employed such person as distiller, and continued to use the names "Crow" and "Old Crow" to designate their product. Later they built a distillery of their own near by, and since that time they and complainant have continued to use the same process and the same name, which has become well known in the trade as designating complainant's goods exclusively. Shortly after complainant's predecessors built their distillery, the original distillery where the Crow whisky was first made was torn down and another built in its place, which has never used the Crow formula nor the name. *Held*, that complainant was entitled to protection in the exclusive use of the name "Old Crow" as designating its goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 29–41.]

2. SAME—FRAUDULENT USE OF NAME.

The fact that defendants prior to the leasing by complainant's predecessors of the distillery where the "Old Crow" whisky was originally made put upon the market a blended whisky of their own make under the name of "P. Crow" and "J. W. Crow," for the purpose of deceiving purchasers as to its quality and origin, gave them no right to claim such names as a trade-mark, as against complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 76.]

In Equity. Suit for infringement of trade-mark.

James L. Hopkins and Daniel W. Lindsey, for complainant.
Klein & Hough, for respondents.

DYER, District Judge. The bill in this case is, in substance, as follows: The plaintiff is a Kentucky corporation, engaged in the manufacture and sale of whisky in Woodford county, Ky.; that at the time this suit was commenced Moritz Hellman and Abraham M. Hellman were copartners in the liquor business in the city of St. Louis under the firm name of A. M. Hellman & Co.; that since the original bill in this case was filed Abraham Hellman has died, and the respondent Max Kahn has been duly appointed administrator of his estate.

The complainant claims that it is the sole and exclusive owner of a certain trade-mark for whisky, consisting of the words "Old Crow," and that this mark has been used by it and its predecessors in business for about 40 years, and that this mark has been applied by it and its predecessors to packages by marking, branding, stamping, and labeling. It is further averred in the bill that the plaintiff corporation is the successor in business of W. A. Gaines & Co., copartnership, and that W. A. Gaines & Co. was the successor of Gaines, Berry & Co., a copartnership. It is further charged that in the year 1867 Gaines, Berry & Co. adopted and commercially applied the words "Old Crow" as a trade-mark for whisky distilled by them; that the name was so used by them until 1870, when they were succeeded in business by W. A. Gaines & Co., to whom the same with all other assets were transferred; that the firm of W. A. Gaines & Co. (the copartnership) continued the use in the same way of the mark until 1887, when they were succeeded by the complainant corporation; that after this succession the complainant continued to use and is now using the mark in the same way as its predecessor. It is further averred in the bill that in the year 1835 one James Crow became domiciled upon Glenn's Creek, in Woodford county, Ky., and there began the manufacture of a whisky of superior excellence and quality, which became designated about that time as "Crow" or "Old Crow"; that James Crow was continually from 1835 to the time of his death in 1855 engaged in the distillation of said whisky which was known and designated as "Crow" or "Old Crow" whisky, and that during his lifetime this whisky acquired a wide and extensive sale and reputation; that upon the death of the said James Crow there was upon the market a considerable quantity of that kind of whisky, and that it was known commercially and sold and dealt in continuously by various persons until the year 1867, when the copartnership of Gaines, Berry & Co. began the production of

whisky, using the same process and material that had theretofore been used by James Crow, and conducting the distillation of whisky upon Glenn's Creek, in Woodford county, Ky.; that from the time of the death of Crow until 1857 there was no whisky produced upon the said Glenn's Creek or elsewhere to which the said words "Crow" or "Old Crow" were applied as a trade-mark.

It is further stated in the bill that the words "Crow" or "Old Crow" had been left open for adoption, by the death of the said James Crow and the cessation of the distillation of the whisky designated by the said words, so that the same were lawfully appropriated and used by Gaines, Berry & Co. in the year 1867. It is further averred in the bill that from the time when the process of making of said whisky was first devised and put into use by Crow in 1835 down to the present time the words "Old Crow" have been applied continuously to the whisky produced by the said process, and to no other whisky whatsoever, and that the distillation and production of said whisky made by said process has always been made at Glenn's Creek, Woodford county, Ky., and in no other place in the United States, or anywhere else in the world; that the words "Old Crow" have continuously since the year 1835 down to the present time indicated to the public and particularly to all consumers of and dealers in whisky throughout the world that the whisky to which they were applied was made by the said process devised and invented by the said James Crow, and to no other whisky whatsoever; that the words "Old Crow" have continually since the year 1835 down to the present time indicated to the public and particularly to consumers of and dealers in whisky throughout the world that the whisky to which these words were applied is and was distilled at Glenn's Creek, Woodford county, Ky. It is further averred that the said whisky to which the words "Old Crow" are applied is sold at a higher price than any other whisky of equal age produced in the United States, and this by reason of its uniform excellence and the skill and care devoted by complainants to the selection of the materials used, and to the process of distillation, together with the natural advantages of the locality in which the complainant's distillery is situated. It is further averred in the bill that the complainant and its predecessors have expended large sums of money in and about the advertising of said whisky throughout the United States. It is further averred that the said mark "Old Crow" is a lawful and valid subsisting trade-mark, and that complainant has been universally recognized as the sole and exclusive owner thereof; that complainants have, by reason of the uniform excellence of the whisky distilled and sold by them under the trade-mark "Old Crow," established a large and continuously increasing trade and demand for said whisky, so distinguished by said trade-mark. It is then charged that the rights of the complainant being well known, the defendants have unlawfully disregarded the same, and have from the 1st of January, 1903, and thence continuously and from day to day until the filing of the bill of complaint herein made or caused to be made, sold or caused to be sold in the city of St. Louis, and state of Missouri, and elsewhere, a compounded liquor or liquid to which they applied the trade-mark "Old

Crow," and that this was done against the consent of the complainants and in violation of their trade-mark rights. It is further averred that, by the fraudulent acts of the defendants, they have sold a spurious compounded liquor as and for complainant's whisky, and have diverted to themselves trade to which the complainant was entitled, and which it would have otherwise received; that the whisky so sold by the respondents was purchased by the public and the consumers thereof in the false belief that it was complainant's whisky; and that, by reason of the inferior quality of the liquor so sold by respondents, the reputation of complainant's whisky has been greatly damaged. It is further claimed that the said unlawful and wrongful acts of the respondents constitute unfair competition in trade; that the said acts are now continued and are imperiling and jeopardizing the complainant's established trade and good will.

The answer of the defendants makes specific denials of each and every allegation in the complainant's bill contained, except that they admit that at the time of the filing the bill of complaint Moritz Hellman and the late Abraham M. Hellman were copartners doing business under the name and style of A. M. Hellman & Co., and that said Abraham M. Hellman is dead and Max Kahn has been appointed his administrator.

The respondents in their answer affirmatively set up and state that in 1863 the firm of I. & L. M. Hellman, a copartnership composed of Isaac and Louis M. Hellman, were the predecessors in business of Moritz Hellman, and the late Abraham M. Hellman; that they did a general wholesale liquor business in the city of St. Louis, Mo., and made and produced according to their own formula a blended whisky, which said firm of I. & L. M. Hellman & Co. designated as "Crow" or "Old Crow" whisky, and branded and stamped upon barrels, kegs, boxes, and bottles containing the said whisky the figure of a crow and the words "Crow," "Old Crow," and "Celebrated Old Crow," and "J. W. Crow's Bourbon," together with the firm name and the word "Hellman's," and continuously sold and dealt in whisky in packages so stamped, branded, and labeled, and continuously designated the said whisky to the trade by the said names and each of them, until the year 1867, when Isaac Hellman, one of the members of the firm of I. & L. M. Hellman, departed this life; that, after the death of Isaac Hellman, Louis M. Hellman acquired all the rights and property of said Isaac Hellman in the firm of I. & L. M. Hellman, including the right to make and produce whisky according to the formula of said firm and sell the same, and to use and apply to such whisky the said names of "Crow," "Old Crow," and "Celebrated Old Crow," and "J. W. Crow's Bourbon," together with the brands, labels, marks, and figures used in connection therewith.

It is claimed by the respondents that they and their predecessors are rightfully entitled to the use of the said words "Crow," "Old Crow," "Celebrated Old Crow," and "J. W. Crow's Bourbon," and the figure of a crow, as a trade-mark for and upon the whisky made and produced by them, and that this was well known to the complainant herein ever since the year 1896, and acquiesced in by the complainant since that

time. The respondents then aver that the whisky produced by the complainant and sold by it under the firm name of "Crow," "Old Crow," and represented by them to be whisky of superior excellence, is in point of fact a whisky containing a large and dangerous percentage of fusel oil, a deadly poison, and a large percentage of other dangerous and deleterious impurities, and that the same is unwholesome and impure, and that the same has not been subjected to any process of rectification, blending, or vatting for the purpose of removing such dangerous and deleterious impurities, and that in representing said whisky to be pure and of superior excellence the complainant is guilty of fraud upon the public, and especially upon purchasers and consumers of whisky.

The replication to this answer on the part of the complainant is a general denial.

Respondents to the bill in this cause have filed a cross-bill, in which they themselves are complainants and the W. A. Gaines & Co. (corporation) is made respondent. In this cross-bill the averments are along the lines marked out in their answer to the original bill in this cause. In this cross-bill complainants ask for affirmative relief against the corporation, W. A. Gaines & Co. There is an answer filed to this cross-bill by W. A. Gaines & Co., and a replication to the answer by Hellman and Kahn. The bill and cross-bill practically present the same question.

The questions for my consideration have been in a great measure passed upon by courts of competent jurisdiction in the states of Missouri and New York.

In the Missouri case the facts relied on by the complainant are substantially the same as those appearing in the record now before the court. The recital of the facts by Judge Smith of the Kansas City Court of Appeals I find to be substantially the facts disclosed in the testimony of the witnesses for the complainant here. Judge Smith, in his recital of the facts in the case before him, says:

"It is disclosed by the evidence that one James Crow, a distiller, had a secret formula for the making of whisky. He was employed in 1823 by Oscar Pepper, the owner and operator of a distillery, for whom he made whisky according to his formula until 1855. He died a year later. The whisky made by him was of excellent quality. One Mitchell, who had worked with Crow and had learned his formula, took Crow's place, and continued to make whisky at the Pepper distillery until the latter's death in 1865. After the death of Pepper one Edwards leased the distillery, and carried it on for about a year. In February, 1867, Gaines, Berry & Co. leased it and carried it on until July, 1869. In the last-named year this copartnership built and moved into a new distillery, located about three miles away from the Oscar Pepper distillery. From 1869 to 1871 the latter was not operated. In 1870 the copartnership was succeeded by that of W. A. Gaines & Co., which later in 1887 was succeeded by the plaintiff. When Gaines, Berry & Co. leased the Pepper distillery, they employed Mitchell, already referred to as Crow's pupil, as their distiller, and he remained in their employment and that of their immediate successor, W. A. Gaines & Co., until 1872, and during all that time the whisky output of the distillery of these firms was made according to the Crow formula. One Van Johnson, who worked with Mitchell for several years, succeeded Mitchell as distiller in the employment of W. A. Gaines & Co., and used the Crow formula in the production of whisky by the latter and its successor, the plaintiff, so that the Crow formula has been continuously used in the production of whisky by the several parties named for nearly three-quarters of a century. It is true that, after the expiration

of the second lease of the Pepper distillery in 1873, James E. Pepper (son of Oscar Pepper) and E. H. Taylor operated it for a year or so, and then tore it down, erecting a new distillery in its place. This last-named copartnership was succeeded in the ownership of the new distillery by Labrot & Graham, 'who have operated it ever since its acquisition by them.' It does not appear that after Gaines, Berry & Co. left the old Oscar Pepper distillery any one operating it or the new one erected in its place ever used the Crow process in the making of whisky, or that they or any of them ever applied the words 'Old Crow' to any whisky of their production. It does not appear that Oscar Pepper ever used the words 'Old Crow' to designate the whisky produced at his distillery after James Crow left his employment. From 1855 to 1865, he operated his distillery, and designated its production as 'Old Oscar Pepper' whisky. Edwards, who next operated the Oscar Pepper distillery, as previously stated, designated the whisky produced by him 'Edwards' Whisky,' and did not apply the words 'Old Crow' to it. From 1855 to 1867, when Gaines, Berry & Co. took charge of the old Oscar Pepper distillery, no one used the words 'Old Crow' or 'Crow' to designate his whisky. They began in the last-named year [1867] to apply the words 'Old Crow' to whisky of their production, and they and their successors down to the present time have continued to do so. It does not clearly appear that Oscar Pepper used the words 'Old Crow' or 'Crow' to designate the whisky produced by him while Crow was in his employment; but, if he did, it is certain that he discontinued their use after Crow left his service." Smith, P. J., in W. A. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co., 107 Mo. App. 507, 81 S. W. 648–652.

It was intimated by counsel for the defendants in this case upon the oral argument that the case above referred to should have but little weight in determining the case before this court, for the reason that that case was not properly tried for the defendants, and that it savored somewhat of collusion. I have examined the record in that case, and I am satisfied that the suspicion indulged in by counsel is not well founded.

The evidence in this case shows beyond question, as I think, that James Crow began distilling a certain kind of whisky, on Glenn's Creek, in Woodford county, Ky., in the year 1835. This whisky was made according to a formula known only at that time to Crow himself. Crow gave the name of "Crow" or "Old Crow" to the whisky made by him from 1835 to 1855, in which latter year he died. During all of that time he was the distiller for Oscar Pepper at the distillery of the latter on Glenn's Creek, in Woodford county, Ky. After the death of Crow, one Mitchell, who had worked in the same distillery with him, and who, during the time, became acquainted with Crow's formula, continued to make the same kind of whisky. The whisky was known to the trade by the name of "Crow" or "Old Crow," and was of superior quality, and was easily sold at a good price.

The evidence in this case satisfies me that in the year 1863 the defendants or their immediate predecessors were engaged in the whisky business in the city of St. Louis, and that during that year they offered a whisky of their own make for sale and called it "Crow" whisky. I am satisfied that this was done by them for the purpose of deceiving their customers as to the character of the whisky offered by them. They marked the barrels "Crow," and also used a picture of the bird on some of the packages. It was an attempt to palm off on the trade an inferior whisky, made under the name of "Crow"; they well knowing at the time the superior quality of the whisky manufactured on Glenn's Creek, in Woodford county, Ky. It was unfair competition, in

that they sought to make others believe that they were selling the genuine "Old Crow" whisky, when, in fact, they were offering an inferior production of their own.

The claim that is made by the defendants in their answer, as well as in their cross-bill, that they adopted the trade-mark of "Old Crow" long before 1867, cannot be allowed.

A case involving the same question as that here presented was before the Supreme Court of New York in Gaines v. Leslie, 54 N. Y. Supp. 421, 25 Misc. Rep. 20. In that case the court said:

"It appears that these words have been used for many years by the plaintiff, and its predecessors in business, as the mark of their brand of whisky, purporting to be the brand originally taking its name from one James Crow, a distiller, employed some 60 years ago in a distillery located near to or upon the site of the plaintiff's present 'Old Crow' distillery in the state of Kentucky. Certain evidence received without objection upon the trial would tend to show that the plaintiff has succeeded directly to the rights of the original distillers of this 'Crow' whisky, and, in any event, I think that the prima facie case, as to title, is supported by the reasonable inference to be drawn from the evidence, that, if the original distillers had a right to a trade-mark in the word 'Crow,' the right was abandoned to this plaintiff, or to its predecessors, and that their privilege to use the word became fixed, through general acceptance, in the course of succeeding years." Bischoff, J., in W. A. Gaines & Co. v. Leslie, 54 N. Y. Supp. 421–423, 25 Misc. Rep. 20.

The evidence in the record in this case abundantly supports the opinions in the Missouri and New York cases above referred to.

The defendants have shown by some evidence in the case that they used the words "P. Crow" and "J. W. Crow" on packages put up by them. Why were they so used? No one by the name of "P. Crow" or "J. W. Crow" was ever in the employ of the defendants, and no satisfactory reason is given for the employment of the name or names. The evidence, on the other hand, is overwhelming, and is practically uncontradicted, that James Crow began distilling whisky in Kentucky as far back as 1835, and so continued until his death in 1855, that during all of that time he used on the packages containing whisky made by him the words "Crow" or "Old Crow," and that from 1867 until the present time the complainant and its predecessors have used the words "Old Crow" in designating the whisky made by them.

I do not deem it necessary to pursue this matter further. The motion heretofore filed by the defendants to expunge certain exhibits filed by complainant will be overruled.

The cross-bill filed by the defendants will be dismissed, and a decree entered in favor of the complainant according to the prayer of the bill.

In re NATHANSON.

(District Court, E. D. New York. June 7, 1907.)

1. BANKRUPTCY—DISCHARGE—SPECIFICATIONS OF OBJECTION—PETITION.

An objection to a bankrupt's discharge, reciting that objector "being interested as a creditor in the estate of [the bankrupt], does hereby oppose," etc., sufficiently shows that petitioner is "a party interested" in the bankrupt's estate, within Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], providing that a discharge may be opposed by "parties in interest."

2. SAME—RIGHT TO OPPOSE—DISCHARGEABLE CLAIM—OWNERSHIP.
A creditor of a bankrupt having a claim dischargeable in bankruptcy and provable in the pending proceeding may oppose the bankrupt's discharge, though the claim is not proved.

3. SAME—SPECIFICATIONS—OBJECTIONS—REMEDY OF BANKRUPT.
If a creditor of a bankrupt opposing his discharge has a debt not provable or which the discharge would not affect, the bankrupt's remedy is by a motion to expunge the claim or strike out the specifications, rather than by an objection to the form thereof.

4. SAME—VERIFICATION.
Verification of specifications of objection to a bankrupt's discharge before a duly commissioned notary public, affirming that the matters alleged are true to deponent's knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters the deponent believes the statement to be true, no matters having been stated on information and belief, is not fatally defective, but is sufficient to entitle the creditor to amend the same so as to conform to the form of verification prescribed by Supreme Court form 3.

5. SAME—BOOKS AND RECORDS—CONCEALMENT.
A specification of objection to a bankrupt's discharge, alleging that he had wrongfully, fraudulently, willfully, knowingly, and with intent to conceal his true financial condition, and in contemplation of bankruptcy, concealed his books of account or records from which his true financial condition might have been ascertained, was sufficient.

6. SAME—FALSE OATH.
A specification of objection to a bankrupt's discharge that he willfully, etc., made a false oath in his examination before the referee, wherein he testified that he last saw his books on the desk when he left his place of business, and that they consisted of one book, well knowing the same to be untrue, was objectionable for indefiniteness as to whether the falsehood related to the existence of books, or to the witness' statement as to when or where he last saw them, or that they consisted of one book, unless the creditor intended to charge that there were, in fact, no books, and, if so, that should be made plain.

7. SAME.
Specifications of objection to a bankrupt's discharge that he falsely testified before the referee that he did not keep a ledger and an expense book were objectionable for failure to specify that he did keep a ledger and an expense book, if those were the issues sought to be raised.

8. SAME.
A specification of objection to a bankrupt's discharge, alleging that he willfully, etc., falsely testified before the referee, "I did not keep books, I kept a book," well knowing the answer to be false and untrue, was objectionable for failure to state that the bankrupt did not keep even a single book, if that was the particular in which the testimony was alleged to be untrue.

9. SAME—AMENDMENT.
Where specifications of objection to a bankrupt's discharge, alleging perjury by the bankrupt in his examination before the referee, were not sufficiently definite, they would not be wholly disregarded for such defect, but the creditor would be given an opportunity to cure the defect by amendment.

On motion to confirm the report of a special commissioner overruling amended specifications to a bankrupt's discharge. Denied.

The following are the amended specifications:

Hyman Ensler, being interested as a creditor in the estate of Jacob Nathanson, a bankrupt, does hereby oppose the granting to the said Jacob Na-

thanson of the discharge from his debts and for the grounds of such opposition does hereby file the proposed following amended specifications:

(1) That between the 1st days of July and November, 1905, the said Jacob Nathanson wrongfully, fraudulently, willfully, and knowingly concealed in contemplation of bankruptcy and in defraud of his creditors property belonging to his creditors and estate in bankruptcy, to wit, the sum of ten thousand ($10,000) dollars, which said bankrupt has reserved and retained for himself, being moneys withdrawn from his business.

(2) That the said Jacob Nathanson, bankrupt above named, wrongfully, fraudulently, willfully, and knowingly, and with intent to conceal the true financial condition and in contemplation of bankruptcy, has concealed his books of account or records from which his true financial condition might be ascertained.

(3) That the said Jacob Nathanson, the bankrupt above named, wrongfully, fraudulently, willfully, and knowingly made a false oath in his examination before Referee Robert F. Tilney on the 1st day of May, 1904, when he testified as follows (quoting from the minutes of creditors' meeting, page 27):

"Q. When did you last see your books?

"A. In November, when I went away from the place of business.

"Q. Where did you see them in your place of business?

"A. Where have I seen them?

"Q. Yes.

"A. I had them on the desk.

"Q. What did they consist of?

"A. One book."

—well knowing at the time that the aforesaid answers to the aforesaid questions were false and untrue.

(4) That the said Jacob Nathanson, the above named bankrupt, wrongfully, fraudulently, willfully, and knowingly made a false oath in his examination before Referee Robert F. Tilney on the 19th day of April, 1906, when he testified as follows (quoting from minutes of creditors' meeting, page 10):

"Q. What books did you keep, if any? Did you keep a ledger?

"A. No, sir."

—well knowing at the time that the aforesaid answer to the aforesaid question was false and untrue.

(5) That the said Jacob Nathanson, the above named bankrupt, wrongfully, fraudulently, willfully, and knowingly made a false oath in his examination before Referee Robert F. Tilney on the 19th day of April, 1906, when he testified as follows (quoting from minutes of creditors' meeting, page 10):

"Q. Did you keep a book for expenses?

"A. I did not; no, sir."

—well knowing at the time that the aforesaid answer to the aforesaid question was false and untrue.

(6) That the said Jacob Nathanson, the above named bankrupt, wrongfully, fraudulently, willfully, and knowingly made a false oath in his examination before Referee Robert F. Tilney, when he testified as follows (quoting from minutes of creditors' meeting, page 11):

"Q. What books did you keep?

"A. I did not keep books. I kept a book."

—well knowing at the time that the aforesaid answer to the aforesaid question was false and untrue.

Wherefore, said Hyman Ensler prays that the application of said bankrupt herein be denied.

Dated, New York, February 23d, 1907.

Hyman Ensler, Objecting Creditor.

Joseph S. Rosalsky,
Attorney for Objecting Creditor,
346 Broadway, New York City.

United States of America, Eastern District of New York, County of Kings—ss:

Hyman Ensler, being duly sworn, deposes and says that he is the creditor above named; that he has read the foregoing proposed amended specifications, and that the same are true of his own knowledge, except as to the matters

therein stated to be alleged on information and belief and as to those matters he believes it to be true. Hyman Ensler.
Sworn to before me this 23d day of February, 1907.
Charles Beebaring, Notary Public, N. Y. Co.
Certificate filed in Kings Co.

For former opinion, see 152 Fed. 585.

Slade & Slade, for bankrupt.
Joseph S. Rosalsky, for objecting creditor.

CHATFIELD, District Judge. One of the petitioning creditors, Hyman Ensler, filed specifications in opposition to the bankrupt's application for discharge upon the 17th day of December, 1906, consisting of six allegations upon information and belief, and a seventh allegation, which charged directly that the bankrupt had made a false oath in relation to certain books of account or records, from which his true financial condition might be ascertained. These specifications were verified according to the form of verification provided by the laws of the state of New York for a complaint in an action in the state court. Subsequently, by leave of this court (see In re Nathanson [D. C.] 152 Fed. 585), the petitioning creditor was allowed to file amended specifications, and these amended specifications contain six allegations, of which none is stated to be alleged upon information and belief. The verification of the amended specifications was in the same form as the verification of the original specifications, and is as follows:

"United States of America, Eastern District of New York, County of Kings—ss:

"Hyman Ensler, being duly sworn, deposes and says that he is the creditor above named, that he has read the foregoing proposed amended specifications, and that the same are true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true. Hyman Ensler.

"Sworn to before me this 23d day of February, 1907.
"Charles Beebaring, Notary Public, N. Y. Co.

"Certificate filed in Kings Co."

The bankrupt made a motion before the special commissioner to whom the objections had been referred to dismiss these amended specifications. The special commissioner reports that the motion should be granted.

The first ground of objection which is sustained by the special commissioner is that the objecting creditor has not shown that he has complied with form 58, as prescribed by the Supreme Court. The amended specifications contain the following:

"Hyman Ensler, being interested as a creditor in the estate of Jacob Nathanson, a bankrupt, does hereby oppose," etc.

Section 14b, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides that a discharge may be opposed by "parties in interest." Section 30 of the act conferred upon the Supreme Court the power to prescribe all necessary rules, forms and orders. Under this power form 58 was promulgated, as follows:

"———, of ———, in the county of ——— and state of ———, a party interested in the estate of said bankrupt, do hereby oppose," etc.

And this form must be complied with by a creditor desiring to oppose an application for a discharge.

The special commissioner, relying upon the cases of In re Chandler, 138 Fed. 637, 71 C. C. A. 87, and In re Servis (D. C.) 140 Fed. 222, states in the report:

"That before any notice of proper and legal specifications can be taken by the special commissioner, it must appear (a) that he is a creditor whose claim has been allowed in these bankruptcy proceedings; (b) that his claim is of such a nature that should such a discharge be granted the same will affect his claim."

In the Chandler Case the petition was held defective, in that the specifications did not show that the creditor had a claim which existed at the time of the bankruptcy proceedings, or which was provable in the proceeding. In the Servis Case the claim was one which could not be discharged in bankruptcy. It would therefore seem that these two cases are not conclusive, and the premise, that the creditor must be one whose claim has been allowed in the bankruptcy proceedings, it would seem, is broader than the statute. The creditor who has not proved his claim cannot share in any distribution, but, if he has a claim dischargeable in bankruptcy, and provable in the pending proceeding, he may oppose the discharge. In re Kuffler, 153 Fed. 667; In re Ray, Fed. Cas. No. 11,589; In re Shepard, Fed. Cas. No. 12,753; In re Chandler, 138 Fed. 637, 71 C. C. A. 87; In re Walker (D. C.) 96 Fed. 550. It is difficult to see how the requirements of the statute, as above set forth, can be met by an allegation, "———, a party interested in the estate of said ———, bankrupt," if it is not met by the allegation, "Hyman Ensler being interested as a creditor in the estate of the said Jacob Nathanson, a bankrupt." The word "party" may mean "person," or "party to the proceeding." The record of the bankruptcy proceeding shows whether Hyman Ensler is a party to the proceeding, and the record can be used upon this motion for that or any material purpose. If he is a creditor having a debt which is not provable, or which the discharge in bankruptcy would not affect, that would seem to be a matter for an affirmative motion to expunge the claim, or to strike out the specifications, rather than to object to their form.

As to the second ground on which the special commissioner has decided that the specifications are insufficient, his action was based upon the decision in the Matter of Glass (D. C.) 119 Fed. 509, which holds that verification of specifications of objection should be in the form of a verification to a creditor's petition. No. 3, Supreme Court Forms. Form 58 does not provide for a verification, and no other form contains an analogous verification, except 129, which provides for the specifications of objections to a composition. The form of verification there prescribed is:

"I, ———, the objecting creditor mentioned and described in the foregoing specification of objection, do hereby make solemn oath that the statements of fact contained therein are true, according to the best of my knowledge, information, and belief."

The use of this form is approved by Collier in his work on Bankruptcy (4th Ed., p. 639), and this form is approved in the Matter of Milgraum and Ost (D. C.) 129 Fed. 827.

The verification used by the creditor in the present proceeding, while not following exactly the language of either of the forms above referred to, was taken before an officer competent to take the oath, viz., a notary public, duly appointed, and states that the matters alleged are true of deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to these matters the deponent believes the statements to be true. As a matter of fact, there are no statements upon information and belief, and this makes the verification one based upon a statement of actual knowledge, and is therefore, so far as its reliability is concerned, equivalent to the verification under form 3. While not approving the use of a state form, and thus causing confusion and variation in pleadings, it seems that the verification to the specifications herein was sufficient to overcome the objections, and that the creditors should be allowed to reverify the pleadings in the exact language provided by the Supreme Court form No. 3.

As to the third ground stated by the special commissioner, sustaining the objection to the second and subsequent amended specifications, it would seem that the case of E. H. Godshalk Co. v. Sterling, 129 Fed. 580, 64 C. C. A. 148, is controlling, and that specification 2 is sufficient.

As to the other specifications, the decision of Judge Coxe, in the Matter of Goodale (D. C.) 109 Fed. 783, that "the facts relied upon to prove falsity" should be stated, does not mean that evidence must be set forth. The situation is similar to that in preparing an indictment upon a charge of perjury, where it must be plainly set forth upon what true statement of facts the charge of falsehood is based. This would require a statement in specification 3, setting forth whether the falsehood related to the existence of books, or to the witness' statement that he last saw them in November, or that they were on his desk, or that they consisted of one book. The specifications are too indefinite, unless the creditor intends to charge that there were no books, and, if so, that should be alleged as the truth and facts of the situation.

As to specification 4, likewise, the creditor should specify that the bankrupt did keep a ledger, if that is the issue to be raised.

Specification 5. The creditor should likewise state that the bankrupt did keep a book of expense, if that is the fact upon which the charge of falsity is based.

Specification 6. The specification should state that the bankrupt kept not even one book, if that is the particular in which the testimony is alleged to be untrue.

The amended specifications, therefore, from 2 to 6, should be made more definite and certain before the bankrupt is called upon to answer them; but, inasmuch as allegations of perjury have always been the source of great confusion and argument, and inasmuch as attorneys can hardly be held to the knowledge of criminal pleading expected from the prosecuting officers of the government, it seems to the court that the creditors should be allowed to make their specifications definite by further amendment of paragraphs 3, 4, 5, and 6.

The motion to confirm the report of the special commissioner will therefore be denied, and an order may be entered allowing the creditor

to further amend his specifications in the manner indicated, and the amended specifications will thereupon be referred to the special commissioner for hearing.

UNITED STATES v. ONE TRUNK CONTAINING FOURTEEN PIECES OF EMBROIDERY.

(District Court, E. D. New York. July 11, 1907.)

COURTS—FEDERAL COURTS—ADOPTION OF STATE PRACTICE—JUDGMENTS—VACATION OF DEFAULT JUDGMENT AFTER TERM.

An action by the United States for the forfeiture of smuggled goods is a statutory proceeding assimilated to an action in rem in admiralty, and Rev. St. § 914 [U. S. Comp. St. 1901, p. 683], providing for conformity to the state practice in civil causes other than equity or admiralty causes, does not apply to such a proceeding so as to abrogate the settled rule of the federal courts that a court has no power to set aside a default judgment after the term at which it was entered to permit a defense to be interposed, because such practice is authorized in the courts of the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 934.

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

On Motion to Set Aside Judgment Entered on Default.

William J. Youngs, U. S. Atty.
Arthur M. King, for claimant.

CHATFIELD, District Judge. On the 11th of January, 1906, acting under a search warrant issued by a United States Commissioner in this district, employés of the government seized a trunk, containing certain embroidery and other articles, upon the premises and within the possession of one George Bardwill, at the corner of Henry street and Atlantic avenue, in the borough of Brooklyn, New York City. The seizure was made on a charge that the contents of the trunk had been smuggled and imported into the United States without payment of the duty to which the goods and merchandise were subject.

The property was taken into custody by the United States marshal for the Eastern district of New York, under a monition issued out of this court under date of April 9, 1907, and a notice to claimants published, according to law, in the "Standard-Union" for 14 successive days, commencing April 10, 1907. The monition was issued upon the filing of an information by the United States attorney in said Eastern district of New York, in the office of the clerk of said court, and no claimant appearing upon the return day, viz., the 24th day of April, 1907, a decree was entered reciting the return of the marshal, the giving of notice, and the fact that no person appeared or interposed a claim to the trunk or its contents. This decree ordered a default against all persons who had not appeared and filed claims, and "further ordered, adjudged, and decreed that the said property, articles, etc., be, and the same hereby are, for the reasons and causes mentioned in the information herein, condemned as forfeited to the use of the United States." The decree further provided for a sale upon 15 days' notice according to law, at a place specified in said decree. This

sale was had, and realized the sum of $1,800, which amount was paid by the United States marshal to the clerk of the court upon the 13th day of May, 1907. The decree declaring the goods forfeited was entered upon the 24th day of April, 1907, and a writ of venditioni exponas issued upon that day. The proceeds of this sale are still in the registry of this court, and have been held because of an application made on behalf of George Bardwill, the person upon whose premises the goods were seized, to have his default in claiming the goods opened, in order that he might file a claim thereto, and for such other relief as might be just. This motion was made and argued at the May term of the court, held on the 31st day of May, 1907. The decree of forfeiture was entered at the April term of this court, and that term expired on April 30, 1907, and before any application with respect to said default had been brought to the notice of the court.

The applicant argues that the federal courts have given to a person in default his day in court, and afforded him relief from that default, even after the term had expired, during which the judgment had been entered. The petitioner claims that such relief can be given in cases falling within the old English practice by writs of error, "Coram vobis or audita querela," and that similar relief, by the New York state practice, can be had in the state courts. Section 914 of the Revised Statutes [U. S. Comp. St. 1901, p. 683], requiring the practice in the United States courts, in cases other than equity and admiralty, to conform as near as may be, to the practice in like cases in the state courts, is cited as authority for applying the rule under the New York Statutes. The English writ coram vobis was used to correct mistakes of fact or errors in process, which can be brought to the attention of the court in which they were committed by means of this writ, but cannot be relied upon where the error is in the judgment itself (Rolle's Abridgment, p. 749), or where the question relates to the power of the court and not to the mode of procedure. Bronson v. Schulten, 104 U. S. 416, 417, 26 L. Ed. 797, and cases there cited.

The writ of audita querela does not lie, where the party complaining has had a legal opportunity of defense, and has neglected it. This writ is a regular suit in equity, to which the parties may plead and take issue on the merits, and cannot, therefore, be sued against the United States. Avery v. United States, 79 U. S. 304, 20 L. Ed. 405. In that case the complainant had neglected to set up a sum of money as a set-off, which had been received by the United States prior to the bringing of an action by it against the petitioner, and it was there held that the court had no authority to open the final judgment, and that this judgment could be reviewed only by a writ of error. The power of a United States court over its own judgment is well set forth in Bronson v. Schulten, supra, and Phillips v. Negley, 117 U. S. 674, 6 Sup. Ct. 901, 29 L. Ed. 1013, and the following language from Bronson v. Schulten, as quoted in the case of Phillips v. Negley, is directly applicable:

"In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and, if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, how-

ever conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, * * * and, if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision."

In Sibbald v. United States, 37 U. S. 488, 9 L. Ed. 1167, the court said:

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes."

If an equitable defense or a good defense in law, which the defendant was prevented from availing himself of, by fraud or accident, unmixed with negligence of the defendant or his agents, exists, a bill in equity might afford relief. Hendrickson v. Hinckley, 58 U. S. 443, 15 L. Ed. 123, and other cases, cited in Phillips v. Negley, supra. In the case of United States v. Millinger (C. C.) 7 Fed. 849, a judgment entered by default in 1872 was opened in 1880; the amount of the judgment having been entered from an inadvertent omission by the plaintiff to allow credits to the defendant, which should have been deducted upon the assessment of damage. The applicant also cites the case of Brown v. Philadelphia, Wilmington & Baltimore R. Co. (C. C.) 9 Fed. 183, in which a default was opened, under the authority of section 914 of the Revised Statutes, requiring the practice in the United States courts, in cases other than equity and admiralty, to conform, as near as may be, to the practice in like cases in the state courts. In that case a statute of the state of Delaware was followed in opening a default.

The present case arises under a statutory provision for an action to enforce a forfeiture. The procedure is assimilated to that of an action in rem in admiralty, and it would seem that section 914 of the Revised Statutes of the United States would not apply, in so far as to work a modification of the general rules relating to the power of a United States Court over a judgment entered at a trial term, even if the action of forfeiture, created by statute, be a statutory action at law, and not one in equity or admiralty. Where the admiralty practice is followed, as in a case like the present, it does not seem that the practice may conform to that of the state courts sufficiently to create rights not recognized as within the powers of United States Courts, exclusive of the provisions of section 914 of the Revised Statutes. The applicant furnishes authorities under the laws of the state of New York showing the opening of defaults, after the expiration of the term at which judgment was entered. But, for the reasons above given, and under the decisions of the United States Supreme Court, the present application cannot be disposed of upon the authority of the New York state decisions. From the standpoint of the United States authorities, while the application to open the default would appeal to the discretion of the court, if it lay within its power to grant the petitioner relief, it does not seem that such discretion exists.

The decree of forfeiture and sale is in effect a final decree, in so far as the rights of any claimant to the property are concerned. It is impossible to consider that the default of the claimant was due to any clerical error, or to any inadvertence or omission on the part of any one concerned with the entry of the decree. The property in question had been seized upon the premises of the applicant, and he must be deemed to have had knowledge of the seizure. He could have immediately proceeded to recover possession of this property, or to bring an action against the persons making the seizure, if so advised. The taking of the property by the United States marshal upon monition removed the property from the possession of the officers who had made the seizure, and the Revised Statutes and the rules of the court with relation to cases of forfeiture provide the means of giving notice to all claimants. Section 5292 provides a way of relief from forfeiture arising from the laws for imposing or collecting duties, etc., but it is apparently beyond the power of this court to open the decree of April 24, 1907, in this case, at the present time, upon the grounds set forth in this application.

IARUSSI v. MISSOURI PAC. RY. CO.

(Circuit Court, N. D. Illinois, E. D. July 22, 1907.)

1. STATUTES—CONSTRUCTION—STATUTES ADOPTED FROM OTHER STATE.

Laws Kan. 1874, p. 143, c. 93, providing that a railroad company shall be liable for all damages done to any employé of it from any negligence of its agents or by any mismanagement of any employés "to any person sustaining such damage," adopted from the state of Iowa after the Supreme Court of the state had construed it as covering the case of death of an employé and creating a cause of action in favor of the administrator of deceased, was adopted with such construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 307. Construction of statutes, state laws as rules of decision in federal court, see note to Wilson v. Perrin, 11 C. C. A. 72.]

2. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANT—STATUTES MODIFYING COMMON-LAW LIABILITY.

Laws Kan. 1874, p. 143, c. 93, providing that a railroad company shall be liable for all damages done to an employé of it from any negligence of its agents or by any mismanagement of any employés, while restricted to hazards peculiar to railroading, applies to the case of a track repairer injured while being taken from his work in a caboose, and while still in the company's employé, by collision of that and another train of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 501.]

3. SAME—RES IPSA LOQUITUR.

A railroad company being liable under Laws Kan. 1874, p. 143, c. 93, for injury to an employé from negligence of a fellow servant, and under the common law for negligence of a vice principal, the rule of res ipsa loquitur applies to the case of injury to an employé from collision of two trains of the company, and raises a presumption of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 880.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—NOTICE OF CLAIM—NECESSITY.

Laws Kan. 1903, p. 599, c. 393, amending Laws 1874, p. 143, c. 93, to provide that a railroad company shall be liable for damages done to any

employé of it from any negligence of its agents or by any mismanagement of any employés to any person sustaining such damage, provided that notice of the injury be given "by or on behalf of such person injured" to the company, within 90 days from the accident, does not apply to a case of death, where the action is by the administrator.

5. SAME.

Even if the provision of the statute as to notice were otherwise applicable to the case of death of an employé, it will not be so held in the case of an employé killed 53 days after the act was passed, but 65 days before it went into effect.

Rosenthal, Kurz & Hirschl, for plaintiff.

Frank F. Reed, Clarence A. Williams, and Robert J. Folonie, for defendant.

SANBORN, District Judge. On the 26th of April, 1903, a number of Italian laborers were taken out on a train by the defendant company on its railway in Kansas for the purpose of repairing a part of its track. After the work was completed, the laborers were placed in a caboose for the purpose of taking them back to the point of departure. The train started and ran some miles, stopped at a station, and waited some time, and then went on toward its destination, and, while the train was in motion, a freight train collided with the train in question by a head-on collision, as a result of which some of the workmen were killed, including the plaintiff's intestate. This action is brought under the statute of Kansas to recover damages for the death of the workman through the alleged negligence of the company. The evidence did not show how it happened that the collision occurred, or whose fault or negligence it was. The plaintiff rested its case solely upon the fact of the happening of the collision, relying upon the rule of res ipsa loquitur. The declaration counts both upon the common-law liability and the liability under the statute of Kansas which is quoted below. The defendant contends that the rule of res ipsa loquitur cannot apply, and that, at all events, the action is barred by an amendment to the Kansas statute in respect to liability to co-employés requiring notice to be given to the defendant of the time and place of the injury within 90 days after its occurrence. A motion to direct a verdict for the defendant was made, but the case was submitted to the jury, and a verdict rendered subject to the opinion of the court upon the questions of law involved. The jury rendered their verdict in favor of the plaintiff, and a motion is now made by the defendant to direct the entry of a verdict for the defendant pursuant to the submission of the case to the jury subject to the opinion of the court.

Section 5319, Gen. St. Kan. 1905, provides:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years."

The damages are limited to $10,000.

In 1874 the Legislature of Kansas adopted from the state of Iowa a statute which reads as follows:

"Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or any employees to any person sustaining such damage." Laws 1874, p. 143, c. 93.

On March 4, 1903, the Kansas Legislature amended the act of 1874 to read as follows:

"Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage; provided, that notice in writing of the injury so sustained, stating the time and place thereof shall have been given by or on behalf of such person injured to such railroad company within ninety days after the occurrence of the accident." Laws 1903, p. 599, c. 393.

This amendment took effect July 1, 1903.

It will be noticed on looking at these statutes that railroad companies are made liable for damages done to any employé by the negligence of co-employés to any person sustaining such damage. It will also be noticed that the amendment providing for notice requires such notice to be given by or on behalf of such person injured. On first examining the statute of 1874, I was in doubt whether it could be construed to apply to a case where an injury resulted in death. The words "to any person sustaining such damage" would seem to include an administrator of the person killed, so as to bring the case within the Kansas act above quoted concerning death by wrongful act, and I find that the Supreme Court of Iowa in 1871, before the statute was adopted by the Legislature of Kansas, construed the Iowa statute to cover the case of death and to create a cause of action in favor of the administrator. The language of the act, "to any person sustaining such damages," was held to mean any party who under the law was entitled to a recovery. Philo v. Illinois Central R. Co., 33 Iowa, 47, approved in Major v. B., C. R. & N. R. Co., 115 Iowa, 309, 88 N. W. 815 (A. D. 1902). The act of 1874 was assumed to apply to a case where an employé was killed in Missouri Pac. R. Co. v. Haley, Adm'r, 25 Kan. 35. Such construction of the Iowa court was adopted with the statute, and is as much a part of it as though plainly expressed therein. Union Trust Co. v. Thomason, 25 Kan. 1. It therefore seems entirely clear that this case is within the act of 1874 if the plaintiff's intestate was injured through a hazard peculiar to the railroad business. The question of the validity of the act of 1874 arose in Iowa and also in Kansas, and was sustained in both states, on the ground that it must be restricted to hazards peculiar to railroading, otherwise it would not afford equal protection of the laws. The highest courts of both states so held, and this ruling was sustained by the Supreme Court of the United States. Missouri Pacific Railroad v. Mackey, 33 Kan. 298, 6 Pac. 291; Id., 127 U. S. 205, 18 Sup. Ct. 1161, 32 L. Ed. 107; Bucklew v. Central Iowa Railroad, 64 Iowa, 603, 21 N. W. 103.

The next question which arises, therefore, is whether the plaintiff's intestate was exposed at the time of his injury to a hazard peculiar

to the business of using and operating a railroad. The proper test is held to be whether the duty of the employé requires him to perform service which exposes him to such peculiar hazard. The workman here in question was required to work as a track repairer. It was necessary that he be conveyed to and from his work. This the railroad company undertook to do. Many cases have been ruled, both in Kansas and Iowa, to the effect that persons working on or about the track are within the statute, and are while so working exposed to hazards peculiar to the railroad business. Union Trust Co. v. Thomason, 25 Kan. 1; Railway Co. v. Harris, 33 Kan. 416, 6 Pac. 571; Railroad Co. v. Brassfield, 51 Kan. 167, 32 Pac. 814. The above cases relate to sectionmen. The act applies, also, to one loading rails on a car. Railroad v. Koehler, 37 Kan. 463, 15 Pac. 567. Also to a bridge carpenter. Railroad v. Pontius, 52 Kan. 264, 34 Pac. 739. And a track repairer was held also to be within the act. Railroad v. Vincent, 56 Kan. 344, 43 Pac. 251. A laborer injured by the fall of a bank while shoveling earth on a car is within the statute as to the hazard pertaining to railroads. Deppe v. C., R. I. & P. R. Co., 36 Iowa, 52. The act also applies to a section hand. Frandsen v. C., R. I. & P. R. Co., 36 Iowa, 372. Inasmuch as it was absolutely necessary that the deceased should be carried to and from his work, and as he continued to be an employé of the company while being so carried, it seems entirely clear that while going and returning he was still subject to the same hazard peculiar to the operation of the railroad as he was while actually performing the work of repairing the track. That he still continued to be a servant while being carried from his work, and not a passenger, see Kansas Pacific R. R. Co. v. Salmon, 11 Kan. 83–91; McQueen v. Central Branch, etc., R. R. Co., 30 Kan. 689, 1 Pac. 139; Vick v. N. Y. Central, etc., R. R. Co., 95 N. Y. 267, 47 Am. Rep. 36; Higgins v. Hannibal & St. Joe R. R. Co., 36 Mo. 418–433; Russell v. Railroad Co., 17 N. Y. 134; St. Louis, etc., R. R. Co. v. Waggoner, 90 Ill. App. 556; Gillshannon v. Stony Brook R. R. Co., 10 Cush. (Mass.) 228; Wright v. Railroad Co., 122 N. C. 852, 29 S. E. 100; Manville v. Railroad Co., 2 Ohio Dec. (reprint) 359, 2 Western Law Monthly, 495; Ionnone v. N. Y., etc., R. R. Co., 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 79 Am. St. Rep. 812; Chattanooga v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 886.

It follows from what has been said that the rule of res ipsa loquitur applies to this case. This would not be so in the absence of the act of 1874, because it could not be told whether the deceased was injured by the negligence of a co-employé or by the fault of the company through some independent officer in the relation of a vice principal. But, inasmuch as the plaintiff was a servant, and the company is made liable by the act of 1874 for the negligence of a fellow servant and by the common law for the negligence of a vice principal, it follows that any negligence on the part of the company makes it responsible, and that the mere fact of the happening of the accident raises a presumption of negligence which places the burden upon the defendant to rebut. Goss v. Northern P. R. Co. (Or.) 87 Pac. 150; N. C. R. Co. v. Cotton, 140 Ill. 494, 495, 496, 29 N. E. 899; C. T. Co. v. Holtzenkamp, 78 N. E. 529, 74 Ohio St. 379, 6 L. R. A. (N. S.)

800; Rose v. Stephens (C. C.) 11 Fed. 438; Choctaw, O. & G. R. Co. v. Doughty, 91 S. W. 768, 77 Ark. 1; Stewart v. R. & A. Co., 53 S. E. 881, 141 N. C. 253; Armour v. Golkowsky, 202 Ill. 149, 66 N. E. 1037; Goddard v. Enzler, 123 Ill. App. 119; Union Trust Co. v. Thomason, 25 Kan. 1; Sullivan v. Rowe (Mass.) 80 N. E. 459.

The further question arises as to the effect of the amendment to the act of 1874 by the statute of 1903, above quoted. It is urged on the part of the defendant that, as the plaintiff's intestate was killed April 26, 1903, the statute of March 4, 1903, requiring 90 days' notice, and which took effect July 1, 1903, left to the administrator, widow, and next of kin of the plaintiff's intestate 25 days after July 1, 1903, in which to give the notice, and that a reasonable time was thus left in which notice might have been given. It is said that the liability being wholly statutory, the Legislature may entirely take it away or impose such conditions as it may see fit, and that the object in postponing the taking effect of the statute was for the purpose of allowing such notice to be given without injury to existing rights or causes of action or those which might arise about the time of the passage of the act. These questions are close and interesting; but, in view of the language of the amendment, it is not necessary to consider them. The provision as to notice requires it to be given by or on behalf of the person injured. Remembering that the person injured in this case had no cause of action, being instantly killed by the collision, and no cause of action existed in his favor, but only a statutory claim in favor of his administrator for the benefit of the widow or next of kin, it seems plain that the language of the statute was not intended to apply to the case of death. How could notice be given by the person killed, or on his behalf? It is true this construction seems to be a narrow one, and that if the section amended applies to the case of death, as it is here held to do, the provision as to notice should likewise be extended to the case of death, and the words "by or on behalf of such person injured" ought to include the case of an administrator or widow or next of kin giving the notice. But the plain force of the language limits its meaning to the case of an injured person. By no ordinary rule of construction can a notice given by or on behalf of an administrator, widow, or a child be regarded as a notice given by or on behalf of the intestate, husband, or ancestor. This question does not seem to have arisen in Kansas. Examination of the reports of that state in the official series and the Pacific Reporter fails to disclose any discussion of this question, and, in view of the fact of the very short time remaining after July 1, 1903, in which notice within the 90-day period could have been given, I think it should be held that the statute was not intended to apply to a case of death, at least to a case of this kind where so short a time remained in which the notice could be given.

The motion of the defendant should be overruled, and judgment be entered for the plaintiff upon the verdict.

In re LUBY.

(District Court, S. D. Ohio, E. D. April 20, 1907.)

No. 1,490.

1. BANKRUPTCY—EXEMPTIONS—ALLOWANCE IN CASH.
   When a bankrupt's exemption allowed by the state law for the benefit of the family will be defeated unless its allowance be in cash out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds.

2. SAME—OHIO STATUTE—PROPERTY IN LIQUORS.
   The wife of an absconding bankrupt, who was not the owner of a homestead, but entitled under the law of Ohio to hold as exempt in lieu thereof real or personal property to the value of $500, and in case the property was incumbered by lien to claim and receive such sum out of the proceeds of its sale, is entitled to claim a homestead exemption of $500 out of the proceeds of the bankrupt's property, when sold by his trustee, where such property consisted of liquors which the wife could not dispose of without being subjected to the payment of taxes under the internal revenue law and the law of the state regulating the sale of liquors, which would render the exemption, if taken in property, of no practical value; and in such case the wife is entitled to the full amount of the exemption from such proceeds, although the property was sold for less than its appraised value.

In Bankruptcy. On review of decision of referee.

This case has been certified by the referee for decision as to the extent of the wife's right to an allowance in lieu of a homestead out of the proceeds arising from the sale of personal property. Edward Luby, his place of residence being unknown and incapable of ascertainment, was served by publication and duly adjudged an involuntary bankrupt. Neither he nor his wife being the owner of a homestead, and he having neglected and refused to demand an allowance in lieu thereof, his wife rightfully demanded in writing of the trustee in bankruptcy, before a sale was made of the bankrupt's property, that he set off to her, in lieu of a homestead, specified personal property to the amount of $500 in value. Subsequently she waived in writing the setting apart to her by the trustee of such personal property and assigned as a reason for so doing that the personal property, except glassware of the appraised value of $97.50, consisted entirely of wines, whiskies, and other intoxicating liquors of the kind which are described and meant to be included in section 4364–9 et seq., of the Revised Statutes of Ohio of 1906, commonly known as the "Dow Law," and which requires a trafficker in spirituous, vinous, malt, or other intoxicating liquors to pay an assessment upon his business of $1,000 per year. She also stated, as a further reason for waiving the setting apart of articles in kind to her, that she is not engaged in the business of trafficking in such liquors and could not dispose of the same to advantage or without great expense to her, and that the liquors would be of no value to her unless converted into money, and asked to be allowed the sum of $500 in cash out of the proceeds arising from the sale of the bankrupt's personal property. The assessment under the Dow law, with any increase thereof and penalty thereon, is made a lien as of the 4th day of May of each year on the real property on which the business of the trafficker in such liquors is conducted, and is payable, as other taxes, semiannually on or before the 1st days of June and December of each year, and if any person engage in such business in any year after the 4th day of May the assessment is proportionate in amount to the remainder of the assessment year, except that in no case is it less than $200, and is payable on the date of the commencement of such business. If any trafficker in the liquor business fail and neglect to pay the amount of the assessment due from him within the legally specified time, the county treasurer shall forthwith make such amount due, with all penalties thereon and 4 per cent. collection fees and costs, by distress and sale as on execution of any goods and chattels of such person. He shall

call at once at such person's place of business, and, if refusal to pay the amount due is made, he shall levy on the goods and chattels of such person, wherever found in the county, or on the bar fixtures and furniture, liquors, leasehold, and other goods and chattels used in carrying on such business, which levy shall take precedence over any and all liens, mortgage conveyances, and incumbrances, on such goods and chattels used in carrying on such business, and any claim of property by any third person to such goods and chattels, and none of such parties shall be exempt from such levy so made by the treasurer. If the amount realized from a sale of such property be insufficient to satisfy the amount due, the residue shall be placed by the county auditor on the tax duplicate against the real estate on which such business is carried on, to be collected as other taxes and assessments, by action brought in the court of common pleas under the provisions of section 1104, Rev. St. Ohio, 1906. The phrase, "trafficking in intoxicating liquors," as used in the Dow law, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes, but does not include the manufacture of intoxicating liquors from raw material, or the sale thereof at the manufactory by the manufacturer of the same in quantities of one gallon or more at any one time. It is conceded that Mrs. Luby was permitted, in lieu of a homestead, to hold exempt from levy and sale real or personal property, to be selected by her, her agent or attorney, at any time before sale, not to exceed $500 in value, in addition to the amount of chattel property otherwise by law exempted. The bankrupt's stock of liquors sold for 37.062 per cent. of the appraised value. The referee held that Mrs. Luby was entitled, according to the law of Ohio, to her exemption in lieu of a homestead, but only to 37.062 per cent. of $500, to wit, $185.31. She thereupon excepted, and filed her petition for review, and the case is here for decision.

Clarence S. Vandenbark, for claimant.
John J. Adams, for the trustee.

SATER, District Judge (after stating the facts as above). If liquors had been set off to Mrs. Luby as her allowance in lieu of a homestead, she could not sell them at retail or wholesale without paying the special tax exacted by the internal revenue law and also the assessment imposed by the Dow law. This assessment is a tax (State v. Rouch, 47 Ohio St. 477, 25 N. E. 59), and would in any event be $200, and it might be much more. As she owns no real estate, she would, if she sold the liquors, also have to find a landlord who would be willing to have his property subjected to the lien imposed by the Dow law, because the assessment provided by that law, until paid, rests as a lien on the real property in which the trafficker in liquor transacts his business. She would, in all probability, be required to pay an increased rental, whether she sold the liquors on the premises occupied by her as a residence or on premises other than those so occupied. If she should engage in the liquor business to realize on her property, and should default in the payment required by the Dow law, her property would be subject to seizure and sale for the assessment and penalties, free from any exemption on her part. Thus the property exempt from sale and execution under the homestead act for the protection of the family would lose its freedom from levy and sale as against the assessment under the Dow law the instant she defaulted in the payment of her assessment as a trafficker in spirituous liquors. It is quite improbable, if she retailed the liquors, that she would be able to sell them all, unless to some degree she replenished her stock

from time to time to meet the demands of trade. If, having the liquors on hand, she formed an intent of retailing them, and carried out that intent by one or more acts, she would be either a retail or a wholesale dealer, according to the manner and extent of her sales. United States v. Bonham (D. C.) 31 Fed. 808; United States v. Rennecke (D. C.) 28 Fed. 847. It is true that in United States v. Feigelstock, 14 Blatchf. 321, Fed. Cas. No. 15,084, it was held that a single sale or transaction in respect to a lot of spirits taken for debt affords no ground to infer that it was in the prosecution of a business requiring the payment of a license as a wholesale liquor dealer; and in Ledbetter v. United States, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162, Mr. Justice Brown said, in a case arising under the internal revenue law, that "while it has been sometimes held that proof of selling to one person was at least prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the vendor"—citing United States v. Jackson, 1 Hughes, 531, Fed. Cas. No. 15,455, and United States v. Feigelstock, supra. See, also, Rahter v Lancaster First Natl. Bank, 92 Pa. 393. If Mrs. Luby were compelled to take liquors for her allowance in lieu of a homestead, and should by chance be able to dispose of them all at one sale and in one transaction, she would doubtless, on account of the exceptional nature of the transaction, be exempt from payment of the Dow law assessment and the internal revenue tax; but it is not shown that she could dispose of all the liquors in a single sale or transaction. Such an opportunity might or might not present itself. There is no assurance that it would do so, and if she were compelled to await such an opportunity, even though it might eventually offer itself, she might have to retain the goods in an unproductive and nonusable condition for an indefinite period.

Under the Ohio rule, a person not the owner of a homestead, but lawfully entitled to hold in lieu thereof, exempt from levy and sale, real or personal property to an amount not exceeding $500 in value, may, by making a proper demand, if such property be incumbered by a lien, receive out of the proceeds arising from a sale of the property, $500 in cash, or so much thereof as remains after the satisfaction of the lien and costs. Loveland on Bankr. (3d Ed.) 523, 524, announces that:

> "If the property of the bankrupt is incumbered by liens, the court may order the property sold. The bankrupt will then be entitled to claim exemptions out of the fund arising from the sale of the equity of redemption, or to select property to the value allowed by the state law."

The text is sustained by In re May (decided by Judge Swing under the Ohio law) Fed. Cas. No. 9,326, 2 Bull. 152. In short, when the exemption will be defeated unless its allowance be in cash out of the proceeds of a sale, it will, if practicable, be ordered paid out of such proceeds. Under the circumstances of this case, the purpose of the exemption law would be substantially, and perhaps wholly, defeated, unless the allowance in lieu of a homestead be made in cash, because,

had the liquors been set off to Mrs. Luby, whenever she offered them for sale at retail or wholesale, by operation of law an assessment and a tax would be imposed, payment of which would absorb the whole or a large part, at least, of such chattel property, unless, perchance, she should dispose of it in a single transaction. A lien on real or personal property absorbs the value of the property subject to it, to the extent required to satisfy such lien. The assessment imposed by the Dow law and the special tax exacted by the internal revenue law would also absorb the value of property to the extent necessary to their payment. If, for the protection of the family, an allowance of $500 in lieu of a homestead may be allowed in cash out of the proceeds of a sale on account of an antecedent lien, it ought, in view of the liberal policy of the homestead law, to be allowed also in a case in which the property set aside to the claimant in lieu of a homestead cannot be made available as an asset without the attaching by operation of law of an assessment and a tax which will to a large extent, and perhaps wholly, absorb it. If property subject to a lien were set apart in lieu of a homestead, it would be liable to the satisfaction of the antecedent debt. If liquors had been set apart to Mrs. Luby in lieu of a homestead, and she should proceed to dispose of them, their value would be diminished by the amount of the Dow law assessment and a special tax under the internal revenue law, unless, by good fortune, the sale should be so made as to render available the possible defense suggested by the Ledbetter Case, supra.

No property had been set off to Mrs. Luby when she waived her claim to it in kind and asked for $500 in cash out of the proceeds of a sale of her husband's property; nor does In re Woodard (D. C.) 95 Fed. 955, apply, for in that case the property had been set off to the claimant, who thereupon entered into an agreement that it might be sold in the interest of her husband's estate, along with the residue of his property. In the case at bar the waiver of the selection of goods and the election to take cash out of the proceeds of a sale were concurrent. Mrs. Luby's action was in effect an amendment of her claim. Under proper circumstances amendments have been allowed, even though they withdrew from the creditors, in cash or otherwise, the whole or nearly the whole of the cash or property allowed by law to an exemption claimant, and also to correct mistakes of commission or due to ignorance of the technical requirements of the law, concerning which counsel fail to enlighten the claimant, although advised of the facts. In re Falconer, 110 Fed. 111, 49 C. C. A. 50; In re White (D. C.) 128 Fed. 513; In re Kaufmann (D. C.) 142 Fed. 898. In Sears v. Hanks, 14 Ohio St. 298, 84 Am. Dec. 378, it was held that:

"The humane policy of the homestead act seeks not the protection of the debtor; but its object is to protect his family from the inhumanity which would deprive its dependent members of a home. * * * And, in aid of this wise and humane policy, the whole act should receive as liberal a construction, as can be fairly given it."

In Hill v. Myers, 46 Ohio St. 183, 19 N. E. 593, it was said that:

"The homestead laws have an object perfectly well understood, in the promotion of which courts may well employ the most liberal and humane rules of interpretation"—citing Freeman on Co-Tenancy & Partition, § 54.

In view of the beneficent purpose of the homestead law, courts are averse to deprive claimants of its humane provisions, where the conditions imposed are such that the setting off of property in kind will be unavailing, or practically so. It was not known, when Mrs. Luby amended her claim, that the rights of others would be affected injuriously. If the property had sold at its appraised value, no complaint could legitimately have arisen. Had it realized more than its appraised value, the creditors would have been benefited. Unfortunately, the property sold at a small percentage of its appraisement; but, under the circumstances of this case, Mrs. Luby ought not, in my judgment, on that account to lose the exemption which the law allows. The case and its facts are unusual.

I am of the opinion that Mrs. Luby is entitled to $500 in cash in lieu of a homestead, and the referee is directed to proceed with the distribution of the bankrupt's estate in accordance with the foregoing.

Ex parte PIERCE.

(Circuit Court, E. D. Missouri, E. D. May 15, 1907.)

No. 5,446.

1. INDICTMENT—RULES OF CONSTRUCTION—DESCRIPTION OF OFFENSE.
   In the construction of indictments refinement and technicality must yield to substantial things, and the criterion for judging the sufficiency of an indictment is whether the words employed make the charge clear to the "common understanding."
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 266, 310.]

2. SAME.
   Reasonable implications from facts clearly charged may be indulged in ascertaining the true meaning of an indictment.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 310.]

3. EXTRADITION—INTERSTATE—INDICTMENT CHARGING OFFENSE.
   An indictment which avers that defendant, as president of a corporation, in an affidavit made pursuant to the requirement of a state statute, swore that his company was not at the time a party to any agreement with any other company to fix the price or limit the production of any article of manufacture, and that such affidavit was false, in that the company was at the time a party to such a contract with another corporation named relating to a certain article of manufacture, is sufficient to charge the substance of the offense of false swearing under the Texas statute, and to advise the defendant of the offense charged, and constitutes a sufficient foundation for extradition proceedings for the return of defendant from another state.

4. SAME.
   If an indictment states the substance of an offense, however inartificially, or however involved with immaterial or incompetent matters, it is sufficient to sustain extradition proceedings to secure the return of the accused from another state; all other defects or deficiencies in the indictment being matters to be adjudicated by the trial court.

Habeas Corpus.

John D. Johnson and H. S. Priest, for petitioner.
Barclay & Fauntleroy, for state of Texas and respondent.

ADAMS, Circuit Judge. Petitioner seeks to be discharged from an arrest made under a warrant issued by the Governor of Missouri, pursuant to a requisition made by the Governor of Texas, based upon an indictment charging him with the crime of false swearing as denounced by the statutes of Texas. The Constitution and statutes of the United States, which authorize and regulate the proceedings in extradition (article 4, § 2, of the Constituion and section 5278, Rev. St. [U. S. Comp. St. 1901, p. 3597]), make two fundamental facts essential to extradition: (1) The person sought to be extradited must have been charged by some court of competent jurisdiction in the demanding state with some offense; (2) he must have fled from that state, and been found in another. No complaint is here made of the regularity of the proceedings to secure the warrant of arrest, and no claim is made that the petitioner did not, within the meaning of the law, flee; that is, depart from the state of Texas after the time he is alleged to have committed the offense in question. The sole ground for the petitioner's resistance to the warrant of arrest is that it does not appear that he has been charged with the commission of any offense in Texas, and to this question alone attention need be given. On November 1, 1906, he was indicted by the grand jury of Travis county for the offense of false swearing, indictable under the laws of the state of Texas. The indictment charged him with having made on May 31, 1900, an affidavit wherein he swore among many other things, which for the sake of perspicacity will be omitted, that the Waters-Pierce Oil Company, a corporation of Missouri, organized on May 29, 1900, of which he was president, was not then, on May 31, 1900, "a party to * * * any agreement * * * or understanding with any other corporation, * * * to regulate or fix the price of any article of manufacture, * * * and was not then" a party to "* * * any agreement, * * * to fix or limit the amount of supply or quantity of any article of manufacture. * * *"

The indictment falsifies the affidavit in two respects, among others. It charges, in substance, that on the 31st day of May, 1900, as well as at other times, the Waters-Pierce Oil Company was a party to an agreement with the Standard Oil Company of New Jersey, among others, to regulate and fix the price of petroleum, and to fix and limit the amount of supply and quantity thereof, and that petroleum was an article of manufacture. The charge so made is found in a maze of words in connection with other charges that the corporation was in a "pool," "trust," "combination," "confederation," to fix the price and limit the product of manufacture, and for other purposes. The indictment also charges that the Waters-Pierce Oil Company had been a member of such "pool," "trust," "combination," "confederation," etc., for four months prior to the date of its incorporation. Whatever strictures may be passed upon those features of the indictment falsifying the affidavit as to matters and things alleged to have occurred before the incorporation of the company, or whatever arguments may be drawn from the fact that the affidavit and indictment referred to "pools," "trusts," "combinations," and "confederations," etc., without setting forth the facts which constitute them, or without otherwise defining them, we are by force of the

unequivocal language of the indictment brought to consider whether the charge that the petitioner made a false affidavit, to the effect that on the day he made it his company was not a party to any agreement with any other company or person to fix the price or limit the product of petroleum, states an offense of false swearing within the purview of the Texas statute. Section 752 et seq., Code Cr. Proc. Tex. 1895.

Whatever may have been the high degree of certainty required in framing indictments at common law, it is now well settled that refinement and technicality must yield to substantial things. The criterion for judging the sufficiency of indictments is whether the words employed make the charge clear to the "common understanding." Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. "The object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up whereby the government may be entrapped into making allegations which it would be impossible to prove." Evans v. United States, 153 U. S. 584, 591, 14 Sup. Ct. 934, 937, 38 L. Ed. 830. "Few indictments * * * are so skillfully drawn as to be beyond the hypercriticism of astute counsel, few which might not be made more definite by additional allegations; but the true test is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." Cochran v. United States, 157 U. S. 286, 290, 15 Sup. Ct. 628, 630, 39 L. Ed. 704. Reasonable implications from facts clearly charged may be indulged in ascertaining the true meaning of an indictment. Rosen v. United States, 161 U. S. 30, 33, 16 Sup. Ct. 434, 40 L. Ed. 606; Clement v. United States, 7 C. C. A. 243, 149 Fed. 305. Such are the more recent expressions of the Supreme Court of the United States on this question. They amount to this: That while every precaution must be taken to fairly and fully apprise the accused of the nature and cause of the accusation against him, so as to enable him to make his defense and plead the judgment which may be rendered in the case for his protection against another charge for the same offense, and thereby protect him to the full in his constitutional right to a fair and impartial trial, no impracticable or useless standards of technicality or refinement, which tend to defeat justice or embarrass its administration, should be adopted. Such is also the statutory law of Texas:

"An indictment for any offense against the penal laws of this state shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant." Article 448, Code Cr. Proc. Tex. 1895.

And in Texas an indictment may be amended by leave of court in all matters of form. Articles 587, 588, Code Cr. Proc. Tex. 1895.

In the light of the foregoing controlling and reasonable rules, it would seem that if a president of a corporation, whose duty it was as its chief executive officer to know what kind of agreements his company had

made, should, pursuant to a law requiring him to do so, make an affidavit that his company was not on a given day a party to an agreement with any other company to fix the price or limit the production of an article of manufacture, the affiant could hardly say, when charged with false swearing in that particular, that he could not understand the nature of the charge, that its meaning was not apparent to common understanding, that it was only the expression of an opinion without knowledge of its meaning, when taken in connection with the law governing the same. There might be force in the argument of petitioner's counsel that the charge is based on a mere expression of opinion, and not on facts, if affiant had sworn as to the meaning or legal significance of some existing agreement or contract; but such is not the case. He swore to the fact his company had no agreement whatsoever with any other corporations or persons fixing the price or limiting the product of a manufactured article. It is not apparent how that single fact could be amplified by any statement of the terms of an agreement, when the existence itself of any such agreement is denied in toto. The indictment in the particulars just discussed in my opinion states the substance of an offense within the meaning of the extradition laws of the United States. It is true it employs some useless verbiage, is intricate and involved in its attempt at comprehensiveness, states and must stand on the somewhat improbable assertion that the company, whose corporate existence antedated the affidavit only by two days, did all the iniquity charged against it within that time. But none of these considerations can be entertained or their effect adjudicated in this proceeding by habeas corpus. Let it once be conceded or determined that the substance of an offense is stated in the indictment, however inartificially it may be done, or however involved with immaterial or incompetent matters it may be, all other questions affecting the proceedings or the merits of the case must be relegated to the consideration and final adjudication of the courts of the demanding state. Those courts are conclusively presumed to administer the law of the land, and will discharge their duty with fairness and impartiality to the petitioner, as well as to the state. Such is the firmly settled rule from which this court cannot depart. Ex parte Reggel, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 29 L. Ed. 250; Pearce v. Texas, 155 U. S. 311, 313, 15 Sup. Ct. 116, 39 L. Ed. 164; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406; Benson v. Henkel, 198 U. S. 1, 11, 25 Sup. Ct. 569, 49 L. Ed. 919; Hyde v. Shine, 199 U. S. 62, 83, 25 Sup. Ct. 760, 50 L. Ed. 90; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148; Davis' Case, 122 Mass. 324; Ex parte Pearce, 32 Tex. Cr. R. 301, 23 S. W. 15.

Testing the indictment in another way, the same result follows. The charges contained in it include two at least which show the substantial elements of the offense of false swearing, and within the rule laid down in Stewart v. United States, 119 Fed. 93, 55 C. C. A. 641, and in Re Green (C. C.) 52 Fed. 106, specially relied upon by petitioner's counsel, it cannot be said that the indictment is essentially and fundamentally defective. If the petitioner, without any motion to quash, or other attack upon the indictment, had entered a plea of not guilty, gone to

trial, and suffered a conviction, it could not be successfully contended that a motion in arrest interposing for the first time an objection to the sufficiency of the indictment would have been sustained (statute of jeofail; section 464 Code Cr. Proc. Tex. 1895), or that such judgment of conviction would have been absolutely void. There is too much substance in the indictment, notwithstanding much surplusage, to justify such a conclusion. If the indictment would not have been void on a motion in arrest, it must be held good as against the present collateral attack.

It is argued that, because the indictment was not found within three years after the commission of the offense, prosecution for it is barred by the statute of limitations, which is three years. Article 218, Code Cr. Proc. Tex. 1895. That argument is without merit. The statute constitutes a defense to be availed of at the option of an accused person, and one which may or may not be good. It may turn out to be true that the petitioner has been absent from the state of Texas during a part of the time since 1900. If so, the duration of such absence would not be included in the period of limitation. Article 221, Code Cr. Proc. Tex. 1895.

After a careful consideration of the able argument of counsel for both sides, the conclusion is irresistible that the substance of an offense is found in the indictment, and that jurisdiction rests alone with the courts of the demanding state to pass upon any question which may arise in its consideration and trial.

The prisoner must be remanded, and it is so ordered.

STATIONARY ENGINEER PUB. CO. v. COMERFORD.

(Circuit Court, E. D. New York. May 31, 1907.)

1. COURTS—INJUNCTION—BILL—VERIFICATION—OFFICERS.

Rev. St. § 1778 [U. S. Comp. St. 1901, p. 1211], provides that in all cases in which under the laws of the United States oaths or acknowledgments may be taken before any justice of the peace, they may be also taken by or before any notary public or any of the commissioners of the Circuit Courts, and when certified under the hand and official seal of such notary or commissioners will have the same force as if taken before a justice of the peace. *Held*, that a bill for an injunction in a federal court, verified before a commissioner of deeds of the city of New York, was improperly verified.

2. SAME—PRELIMINARY INJUNCTION—VIOLATION OF CONTRACT.

Where a contract between plaintiff and a trade union for the publication of a trade paper for five years provided that a new contract might be made at the expiration of the original on like terms, and that complainant should have the first right to obtain such contract, provided complainant should have carried out the terms of the agreement to the satisfaction of the association, which thereafter refused to renew the contract, claiming dissatisfaction, complainant was not entitled to a preliminary injunction restraining the association from contracting with another and from refusing to renew the contract because it had satisfactorily performed the old contract, and that the union's refusal to renew was not in good faith, but a mere subterfuge on the part of certain officers in control having a personal animosity against complainant.

Joseph J. Hood, for complainant.
Frank A. Acer (Dennis F. O'Brien, of counsel), for defendant.

CHATFIELD, District Judge. The complainant is a corporation of the state of New Jersey, which for the last five years has been performing a contract made on or about the 31st day of May, 1902, with an organization, the International Union of Steam Engineers, of which the defendant is president. This contract was for the publication of a trade journal for the defendant, and contained numerous details defining the obligations upon both parties. The contract was to expire upon the 31st day of May, 1907, and contained an option, set forth in folio 17, as follows:

"It is further mutually agreed by and between the parties hereto, that a new contract may be made upon the expiration of this agreement upon like terms and conditions as herein contained or upon terms and conditions to be mutually agreed upon and that the said party of the first part shall have first right to obtain said contract, provided that said party of the first part shall have carried out the terms of this agreement to the satisfaction of the party of the second part."

It is shown by the affidavits that this contract was entered into by five trustees, on the part of the union, which is an unincorporated association of individuals, with a principal office in the state of Illinois. This association comprises citizens of more than 35 states of the United States and some of the provinces of Canada, who meet in annual convention once in each year. The last convention was held at Milwaukee, Wis., on September 10, 1906. The association conducts its affairs through a general executive board, which has powers, when the association is not in convention, given to it by the constitution and by-laws of the association. At the conventions prior to the one held in 1906, during the existence of the contract above referred to, resolutions were adopted approving of the manner in which the complainant was performing this contract, and explaining the details of such performance. At the convention in 1906, the trustees, through whom the original contract had been made, and who appear to have taken a large part in the actions of the prior conventions, did not seem to be in control, and that convention neither approved of the contract nor of its extension under the so-called "option," but directed its executive committee to make arrangements for the publishing of the official journal under its own direction, and authorized the said executive board to make the necessary arrangements to carry out this purpose.

The complainant, alleging that it will be damaged in a large amount, and that it has no remedy at law, asks that the defendant be directed to make and deliver a new contract, according to the alleged option, and that the defendant be restrained from publishing, or causing to be published, any book, pamphlet, or magazine as the official journal of said union, and from performing the various acts connected with said publication. The complainant also asks for damages, and upon the complaint and an affidavit, verified by Orrin R. Young, as president of the complainant corporation, dated March 23, 1907, obtained an order to show cause why an injunction pendente lite should not issue, restraining the defendant, as president, etc., during the pendency

of the action, from doing the acts against which an injunction was prayed for in the complaint. Upon these papers an order to show cause was granted upon March 26, 1907, returnable March 29, 1907, forbidding the defendant, or any of the officers, members, employés, and agents of the union, from doing any of the acts named, until the further order of the court. Upon the return day of the motion a long adjournment was had, in order that the defendant might have an opportunity to prepare for argument, and subsequent time was given for the submission of affidavits and for other purposes, until the time approximated that of the termination of the original contract.

As finally submitted, the defendant asks to have the motion for an injunction pendente lite denied, substantially upon three grounds: First. That the original bill of complaint and the affidavit upon which the order to show cause was granted were not verified before an officer authorized to take an oath by the provisions of any United States statute, or by the practice of the United States courts in equity cases. Second. That the action is in reality against the various members of the union, many of whom were citizens of New Jersey, and that there is no diversity of citizenship, and hence no jurisdiction in the federal court. Third. That the contract originally entered into did not contain any binding option; that the union had a right to, and did, reject the proposition to continue the contract for another period of five years; and that the complainant has no right to an enforcement of the option, it being alleged that if it has suffered any actionable damages it can be protected by an action at law.

Under the circumstances it is extremely difficult to determine, from the standpoint of attempting to preserve the interests and rights of the parties, whether a temporary injunction should issue. The complainant will apparently suffer much monetary loss if the contract is taken away from it and another paper is published from the 1st of June, 1907. On the other hand, if the complainant does not make out a prima facie case of breach of contract, and an apparent irreparable injury with no remedy at law, it does not seem proper to give it an injunction pendente lite upon affidavits. The real situation, as far as can be gathered from the affidavits, would seem to indicate that, even if the complainant did perform its contract to the expressed satisfaction of the union for the greater portion of the period for which the contract was to run, yet in the last year those officers and members friendly to the contract have ceased to be in control, and that the union, at least so far as its official representatives can now speak for it, is hostile to a renewal of the contract, and expresses dissatisfaction therewith. It is charged that this dissatisfaction is not well founded, and is merely enmity or personal bias, and that the complainant can show upon a trial that it has performed its contract to the reasonable satisfaction of the union, and in such a manner that it is entitled to an opportunity to make a further contract, under the words—

"that the said party of the first part shall have first right to obtain said contract, provided that said party of the first part shall have carried out the terms of this agreement to the satisfaction of the party of the second part."

It is impossible upon affidavits, and upon a motion for a preliminary injunction, to finally determine whether this alleged option carried with

it any right whatever, or whether upon the trial the complainant can show unwarranted and unreasonable action by the union, to the extent of an arbitrary expression of dissatisfaction, which if the complainant has a right to first consider the proposition for a new contract, would not be within its power.

It is possible under the first ground of objection, viz., that the pleadings and affidavits are not properly verified, to arrive at the same conclusion. The complaint and the affidavit referred to were verified before a commissioner of deeds of the city of New York, and while the complainant, by the obtaining of a subpœna and the filing of a complaint, which need not necessarily be verified, may have properly started its suit, and while the verification, if necessary, could be filed upon a motion to amend, nevertheless, for the purpose of an injunction, the complaint must be considered as an affidavit, and neither it nor the affidavit of Young, above referred to, can be recognized in the United States courts unless verified by an officer authorized to take an oath. Section 1778, Rev. St. [U. S. Comp. St. 1901, p. 1211], is as follows:

"In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any state or territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any state, district, or territory, or any of the commissioners of the Circuit Courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace."

By section 917, Rev. St. [U. S. Comp. St. 1901, p. 684], power to regulate practice in equity is given to the Supreme Court, but no provision seems to have been made requiring the verification of a bill of complaint, nor allowing the taking of an oath before any officers other than those provided for in section 1778. For this reason the pleadings and papers upon which the motion is made are insufficient.

As to the second ground, that the real parties defendant in this action are the members of the union, it seems needless to consider the question at the present time. The complainant, depending upon section 1919 of the Code of Civil Procedure of New York, which provides that an action may be maintained against the president or treasurer of an unincorporated association, consisting of seven or more individuals, upon any cause of action, for or upon which the plaintiff may obtain such an action against all of the associates, has sued Matt Comerford, as general president of the International Union of Steam Engineers. The action being in equity, and all the parties affected being, possibly, proper parties thereto, it is difficult to determine whether the provisions of the New York Code can apply, and whether this action can be maintained so as to control the entire union through its president. But that question can be left until the defendant has answered or pleaded in the suit, and should not be disposed of upon this preliminary motion.

As to the third ground, it is apparent from the discussion already had that, upon affidavits and such superficial examination as can be given upon a motion for a temporary injunction, it is impossible to

decide the issue which may be raised, as to whether the complainant has any relief because of the alleged unwarranted and unjustifiable breach with reference to giving the complainant an extension of the contract now expiring. The complainant charges that the dissatisfaction expressed is merely a subterfuge on the part of a faction now in control of the defendant. But, nevertheless, it seems to be the lawfully expressed action of the union, in convention assembled, and until a trial is had and evidence taken no decision can be made. Upon the record the alleged option would seem to give the union the right to decide whether the contract has been fulfilled to its satisfaction. So far as is shown by the affidavits, the union has made such a decision, and expressed its dissatisfaction, and the defendant, as president of this union, presumptively is bound to carry into effect and to obey the orders of the convention of the union, at which he was chosen an official for the period covering the time under consideration.

The complainant may be able to prove its case, and as to the merits, or as to the possible issue that can be raised, no decision can now be made. It is sufficient to say that the complainant does not make out a case upon which injunctive relief should be granted pending the trial of the action. At the most the complainant, if it has an enforceable option, and its contract rights have been violated, would seem to be entitled to damages for the breach of its contract. It is debatable whether it can put itself in such a position as to show that it is entitled to enforce specific performance and to restrain the union from refusing to make a new contract with it. A court of equity could hardly accomplish by an injunction the agreement of the parties upon the terms of a contract, or the compelling of any act the terms of which are to be arranged in the future, and based upon the satisfaction of the parties with respect to a matter about which they have already disagreed.

The granting of an injunction pendente lite is in the discretion of the court, and such an extraordinary remedy cannot be given upon the state of facts here shown.

In re DAVIS.

(District Court, E. D. New York. July 16, 1907.)

1. CHATTEL MORTGAGES—RIGHTS OF CREDITORS—DISPOSITION OF PROCEEDS OF PROPERTY.

A chattel mortgage on a stock of goods, though valid when made, there being no evidence that the mortgagor was then insolvent, or that it was given to hinder, delay, or defraud creditors, or to create a preference, is invalid as to subsequent creditors; it appearing the mortgagor was allowed to sell from the stock, without accounting for the proceeds, and it not appearing that the part so sold did not equal the mortgage debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 412.]

2. SAME.

Though the lien of a chattel mortgage is lost as to a stock of goods, as against subsequent creditors of the mortgagor, because the mortgagee allowed the mortgagor to sell therefrom, without accounting for the pro-

ceeds, it is not on this account lost as to teams also covered by the mortgage and which the mortgagor retained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 376.]

3. BANKRUPTCY—EXPENSES OF RECEIVER—KEEPING MORTGAGED PROPERTY.

Where the mortgagee having a valid lien attempted to foreclose his chattel mortgage on horses of a bankrupt, but was prevented from doing so by the possession of the receiver, only such part of the expenses of keeping the horses as would necessarily have been incurred by him during foreclosure will be chargeable to the mortgagee, and the balance will be paid out of the bankrupt estate.

Thomas J. Ritch, for trustee.
Elmer P. Smith, for mortgagee.

CHATFIELD, District Judge. A petition in bankruptcy was filed herein upon November 22, 1906. At that time the bankrupt had in his possession a stock of groceries, which has since been sold, under an order of this court, and the proceeds held to await a determination as to the validity of a chattel mortgage given by the bankrupt, upon the 25th day of January, 1906, for $500, covering "2 horses, 4 wagons, 2 sleighs, 4 sets of harness, and all the stock and fixtures now in my store at Port Jefferson, L. I., N. Y." This mortgage was duly filed on February 5, 1906. The $500 for which the mortgage was given was made up of a loan to the bankrupt, amounting to $200, made previous to the execution of the mortgage, and to secure the mortgagee for indorsing a note of $300, made by the bankrupt, which the mortgagee was called upon to pay, and did pay, on the 1st of December, 1906. The trustee in bankruptcy, who now holds the proceeds from the sale, and the mortgagee, have submitted the question as to the validity of the mortgagee's lien, upon an agreed statement of facts. The horses, wagons, sleighs, harness, and fixtures sold for the sum of $418.89. The stock in trade sold for the sum of $500. It is admitted in the statement of facts that portions of said stock in trade, amounting to not less than $200, remained in the store until after the sale by the trustee in bankruptcy, and that the sum of $130 was expended by the receiver for the feeding and care of the horses. No evidence is presented, and no facts shown, to indicate that the bankrupt was insolvent at the time of making of the chattel mortgage, or that the execution and delivery of this mortgage was with intent to hinder, delay, or defraud creditors or to create a preference.

On these facts it would appear that the mortgage was valid at the time of its delivery. In the case of Brackett v. Harvey, 91 N. Y. 214, a chattel mortgage was held to be invalidated by an oral agreement to sell the mortgaged property, and to use the proceeds for the benefit of the mortgagor, either in carrying on business or replenishing a stock of goods. This depended on the doctrine that such an agreement would work to the fraud of subsequent creditors who had a right to suppose that the proceeds of whatever sales had been made had been applied to the payment of the chattel mortgage upon the original stock of goods. On the other hand, the case of Brackett v. Harvey, supra (as also the cases cited upon page 221 of the opinion in that case), held that a chattel mortgage was not void per se, because of the

provision allowing the mortgagor to sell the mortgaged property to pay the proceeds to the mortgagee, to be applied to a reduction of the debt. In the case at bar, the original stock of goods, to the amount of $200, being still in the possession of the mortgagor, the mortgage at the time of the filing of the petition in bankruptcy would have been a valid lien to that extent, if it had been shown that the property originally covered by the mortgage, but previously sold, had not been sufficient to extinguish more than $300, with interest, of the original debt. But no such testimony is presented. The facts show that the mortgagor was allowed to keep the mortgaged property in his possession, and to sell it, and no accounting of the proceeds is made. This would seem, so far as the stock of goods is concerned, to bring the case within the doctrine of Brackett v. Harvey, supra, and to show an understanding or oral agreement, which must be presumed would work to the fraud of creditors subsequent to the mortgagee. It would seem, therefore, that the chattel mortgage, in so far as the stock of groceries is concerned, is invalid.

As to the horses, wagons, etc., no such question arises. The mortgage covered these articles specifically. They were retained by the mortgagor, and were in his possession at the time of filing the petition in bankruptcy, and the mortgagee must be presumed to have retained his lien upon them, even if, as a matter of law, he had lost it as to his other securities. In re Reynolds (D. C.) 153 Fed. 295. The mortgagee was therefore entitled to the possession of the horses and other articles, and to have them sold upon a foreclosure of the chattel mortgage. The proceeds of the sale of these goods, amounting to $418.89, takes the place of the articles, as of the date of the filing of the petition.

As to the expense of the receiver for the care of these horses, amounting to $130, the question is somewhat more difficult. It is evident that, if the mortgagee had a valid lien, the withholding of the property by the receiver, supposedly for the benefit of the creditors, cannot be made to work a loss to the mortgagee. It is considered that the horses should have been viewed in the light of perishable property and disposed of at the most advantageous moment. In the meantime their keep was a legitimate expense of the receiver, payable out of the estate. It does not seem that the entire resulting loss can be charged to the mortgagee, who objected seasonably to the possession of the receiver, and who demanded immediate surrender of the horses to him.

It appears from the record in this proceeding that the mortgagee attempted to foreclose his chattel mortgage, and was prevented from so doing by the possession of the goods in the hands of the receiver. If the receiver could have obtained a revenue from the use of the horses, this revenue might have been used as a set-off; but, inasmuch as nothing of the kind occurred, the mortgagee could only be charged with such portion of the expense, for the care of the horses, as would necessarily have been incurred by him during the process of foreclosing his mortgage. Assuming that this could have been done within the period of 30 days, and that the receiver had the horses in his possession for three months, it is considered that $40 should be deducted to cover the mortgagee's share in the cost of the maintenance of the horses, and

that the balance, viz., $90 should be paid by the trustee of the estate to the bankrupt.

The claim of the mortgagee, therefore, to the extent of $418.89, less $40, making a total of $378.89, is allowed, and the balance of the mortgagee's claim under the chattel mortgage is disallowed.

An order may be entered accordingly.

In re McKANE.

(District Court, E. D. New York. July 30, 1907.)

1. BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE—TRANSFER OF PROPERTY WITH INTENT TO DEFRAUD CREDITORS.

A conveyance by a bankrupt of real estate in New York, which is required to be recorded by Rev. St. N. Y. pt. 2, c. 3, tit. 5, § 1, as amended by Laws 1896, c. 572, p. 652, may be made the basis of an objection to the bankrupt's discharge, under Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, § 14b (4) [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], if made with intent to hinder, delay, or defraud his creditors, although made more than four months prior to his bankruptcy, if it was recorded within that time.

2. SAME—FINDINGS OF FACT BY SPECIAL COMMISSIONER.

A finding by a special commissioner, to whom was referred a bankrupt's application for discharge and objections thereto, that a transfer of property by the bankrupt was not in fact made with intent to hinder, delay, or defraud creditors, should be followed, unless there is no evidence to support it.

In Bankruptcy. On application for discharge.

For former opinion, see 152 Fed. 733.

Frederick W. Sparks, for creditor.

Lyman W. Redington, for bankrupt.

CHATFIELD, District Judge. The bankrupt, James McKane, has applied for a discharge, to which objections have been filed. The specifications of those objections have been referred to a special commissioner, to hear and report his opinion thereon. This special commissioner has reported his opinion to be "that the specifications have not been sustained and that the bankrupt's discharge should be granted." The specifications alleged that the bankrupt was not entitled to a discharge, on the ground that at some time subsequent to the first day of the four months immediately preceding the filing of the petition, which was upon November 29, 1905, the bankrupt, with intent to hinder, delay, and defraud his creditors, transferred two pieces of real estate, and within the same period, transferred certain personal property, concealed certain property from his trustee, did not keep books of account, and made a false oath as to his property. Upon all of these specifications the special commissioner has found in favor of the bankrupt, and upon the motion to confirm the special commissioner's report exception is principally taken to the finding upon the allegation that subsequent to the first day of the four months prior to the filing of his petition the bankrupt had transferred real property.

This objection is based upon the provisions of the bankruptcy law.

Section 4, subd. "b," par. 4, (Act February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), provides that the application for the discharge of a bankrupt shall not be granted where it appears that the bankrupt has "at any time subsequent to the first day of the four months immediately preceding the filing of the petition transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property with intent to hinder, delay, or defraud his creditors." Section 3, subd. "b" (Bankr. Act July 1, 1898, c. 541, 30 St. 546 [U. S. Comp. St. 1901, p. 3422]), in defining acts of bankruptcy which have occurred within four months prior to the filing of the petition, uses the following language:

"Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

Section 60 says:

"(a) Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

"(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."

Section 67, par. "e," is as follows:

"All conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration."

Attention is called by the opposing creditor to the fact that section 241, c. 547, p. 607, Laws of 1896, known as the "Real Property Law," of New York, provides as follows:

"A conveyance of real property, within the state, on being duly acknowledged by the person executing the same * * * may be recorded in the office of the clerk of the county where said real property is situated."

And chapter 572, p. 652, Laws of 1896, amending section 1, tit. 5, c. 3, pt. 2 (1st Ed.) of the Revised Statutes, is as follows:

"Every conveyance of real estate within this state shall be recorded in the office of the clerk of the county where said real estate shall be situated. * * *"

By chapter 83, p. 77, of the Laws of 1852, the register of Kings county takes the place of and has entire charge of the matter of recording deeds, in lieu of the county clerk. The objecting creditor claims that the transfers objected to by him are such as must be re-

corded, under the laws of New York, in order to have them valid as against the creditors, and that they were recorded within the period within which the transfer of property, with intent to hinder or defraud creditors, is declared void under the bankruptcy law.

The point seems to be well taken that the bankruptcy law contemplates making a transfer, recorded within the period of four months prior to the act of bankruptcy, such a transfer as may be attacked by creditors. A transfer of property, of such a character that it may be held fraudulent, can be vacated both as against the bankrupt and as against the grantee, and, if the grantee does not record the instrument, his delay in so doing gives to the creditors of the bankrupt an opportunity to show the character of the transaction. In a fraudulent transaction, the grantee is presumed to be a party to the fraud, and does not occupy the position of an innocent holder for value. If, therefore, an instrument has been made by a bankrupt and recorded within the statutory period, it is a question of fact whether it was done with intent to defraud, hinder, or delay his creditors, or to give a preference to any one of them. A transfer made with this intent in view can be set aside, if recorded within the prescribed period. The special commissioner has held in the present case that the actual transfer, as shown by the evidence, occurred long prior to the date of record. He has decided the issue of fact in favor of the bankrupt, holding that the transfers were not with intent to hinder, delay, or defraud creditors, and his decision of this issue of fact should be followed, unless there is no evidence shown supporting the bankrupt's contention.

The report will be confirmed.

FIRESTONE TIRE & RUBBER CO. v. VEHICLE EQUIPMENT CO.

(Circuit Court, E. D. New York. August 6, 1907.)

COURTS—JURISDICTION OF FEDERAL COURT—DISTRICT OF SUIT AGAINST CORPORATION.

Where a state contains more than one federal judicial district, a corporation of the state, for the purpose of bringing suit or being sued in a federal court, is, at least prima facie, a resident and inhabitant of the district in which it has its principal office, as designated in its certificate or articles of incorporation in accordance with the requirement of the state law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 814.

Jurisdiction over corporations, see note to St. Louis, I. M. & S. Ry. Co. v. Newcom, 6 C. C. A. 174.]

On Motion to Set Aside Service of Summons and Complaint.

McElheny & Bennett, for plaintiff.
Griggs, Baldwin & Pierce, for defendant.

CHATFIELD, District Judge. The Vehicle Equipment Company is a corporation organized under the laws of the state of New York, and its original certificate of incorporation fixes Waverly, in the county of Tioga, and state of New York, as the location of its principal office. On the 27th day of March, 1906, a petition in bankruptcy was filed

against the defendant in the Eastern district of New York, in which district the Vehicle Equipment Company had its manufacturing plant and what might be called its office for the transaction of general business. The petition in bankruptcy recited that the defendant had, for the greater portion of six months next preceding the date of filing of the petition, its principal place of business in the borough of Queens, city of New York, and state of New York, and was engaged in the manufacture and sale of electric automobiles and vehicles. The alleged bankrupt, upon the 6th day of April, 1906, filed a consent that the company be adjudicated a bankrupt, which consent was in the form of a resolution, which authorized the counsel of the company to admit the allegations of the petition and consent to an immediate adjudication in bankruptcy. Subsequently the property of the bankrupt was sold, and in the petition drawn in behalf of the receiver for approval of the sale a recital was made that the Vehicle Equipment Company was a business corporation, located and having its principal business office in the borough of Queens, city of New York, etc. An offer of composition was prepared, and a petition presented to the court, which contained the same recitals as in the petition for sale.

The plaintiff in this action is a corporation organized under the laws of the state of West Virginia, and a resident and citizen of that state. Under these circumstances it was possible to serve the defendant in either the Northern district of New York, where it has an office at the village of Waverly, or in the Eastern district of New York, where the bankruptcy proceedings were pending. The plaintiff started this action, and obtained the issuance of a summons, in the United States Circuit Court for this (the Eastern) district, upon the 25th day of April, 1907. At that time the property of the defendant was in the hands of the trustee in this district. Subsequent to the service of the process in this action, the property in the hands of the trustee, upon the confirmation of the composition, was returned to the bankrupt corporation, and there is nothing in the papers to show whether the corporation is at present doing business or where it is located.

The present action is one for the recovery of money for goods sold and delivered and services rendered, and the only ground of jurisdiction in the United States Circuit Court would seem to be diversity of citizenship. For the purposes of a bankruptcy proceeding the Eastern district of New York was apparently a proper district in which to file a petition in bankruptcy. The provisions of the statute give jurisdiction to the District Courts of the United States to "adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their (the courts') respective territorial jurisdictions for the preceding six months, or the greater portion thereof." The judiciary acts of 1887 and 1888 provide that "no civil suit shall be brought * * * against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," except that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or defendant." Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508].

It was held in the cases of Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, and Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, that a corporation incorporated in but one state of the United States cannot be compelled to answer in another state, where it has its usual place of business, if the sole ground of jurisdiction be diversity of citizenship. In the case of Galveston, Harrisburg & San Antonio Railway Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, the Supreme Court of the United States considers at length the meaning of the word "inhabitant," as set forth in the law of 1888 and in section 740 of the Revised Statutes [U. S. Comp. St. 1901, p. 587]:

"When a state contains more than one district, every suit not of a local nature, in the Circuit or District Courts thereof, against a single defendant, inhabitant of such state, must be brought in the district where he resides."

The court quotes from the opinion of Judge Story in the case of Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134, and also from the case of Shaw v. Quincy Mining Co., supra, to the effect that the word "inhabitant" is equivalent to the word "citizen," and is used to avoid the incongruity of speaking of citizens of anything less than a state, when the word "inhabitant" would apply to a citizen of any district in a state which was divided into more than one district. At page 504 of 151 U. S., page 404 of 14 Sup. Ct. (38 L. Ed. 248), the court says:

"In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its corporate business is transacted, even though it may transact its most important business in another place."

And again:

"If the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done."

In this case the decision was by a divided court, but in the dissenting opinion it is also stated that, as between citizens of different states, the statutes of the state giving the corporation a residence for its principal office control the jurisdiction for the purpose of bringing suit. The case at bar is extreme, in the sense that the office maintained by the defendant corporation at Waverly, N. Y., was purely for organization and residence purposes. Personal taxes were paid by the corporation at Waverly; but no business, in the ordinary sense of the term, was transacted there. Nothing is offered to show that the office at Waverly has ever been given up, and, on the contrary, the opposing affidavits state that the corporation has no general office, other than its principal business office, designated to be located at Waverly, Tioga county, in the Northern district of New York.

The plaintiff contends that such designation is conclusive only as against the corporation and not in its favor, that the corporation can abandon the place designated and locate its actual existence elsewhere, and that the averments in the bankruptcy papers estop it from deny-

ing that it has done so. But it is needless to consider or determine that question here. The corporation claims that it is a resident, for the purposes of litigation, of the Northern district of New York, and until it is proven to the contrary, or until the corporation attempts to deny the jurisdiction of the United States courts in the Northern district of New York, where by statute it is located, it is considered that the Northern district is the district in which this suit should have been instituted.

The motion, therefore, to set aside the service of summons and complaint, must be granted.

UNITED STATES v. GRANER.

(Circuit Court, E. D. New York. July 2, 1907.)

1. BAIL—RECOGNIZANCE—ORAL MODIFICATION.
   A recognizance conditioned absolutely that the defendant appear cannot be modified by an oral agreement of the government's representative with the surety that the defendant need not appear unless he be indicted for a certain offense.

2. SAME—CONDITIONS AND LIABILITY.
   Under a recognizance conditioned that defendant, held on a charge of having deserted the mails, appear at a certain time and answer all such matters as shall be objected against him, the surety is liable for the nonappearance of defendant, though he be not indicted for deserting the mail, but for stealing the mail, and the government could therefore have arrested him at any time, instead of relying on the bond.

William J. Youngs, U. S. Atty.
J. Baldwin Hand, for defendant.

CHATFIELD, District Judge. This is an application for judgment upon a writ of scire facias filed on behalf of the United States, the answer to said writ filed by Ferdinand A. Graner as surety, and a replication on behalf of the said United States. The facts are briefly as follows: One William F. Pike was held upon the 10th day of December, 1906, to await the action of the grand jury in the Eastern District of New York upon a charge of having deserted the United States mails, in the charge of said Pike as postal clerk in the Post Office Department of the United States government. Upon said 10th day of December, 1906, the said William F. Pike executed a recognizance, in the sum of $1,000, with the respondent Ferdinand A. Graner as the surety, conditioned for the appearance of the said Pike in the Circuit Court of the United States for the Eastern District of New York on the first Wednesday of January, 1907. The records of the court show that on the return day of said recognizance the said Pike did not appear. Upon the 5th day of February, 1907, the recognizance was declared forfeited, and upon the 22d day of March, 1907, a writ of scire facias issued, to which the respondent, Ferdinand A. Graner, was required to plead within twelve days. This writ was duly served upon the surety, and he has filed, as above stated, an answer, to which the government has replied. The surety in his answer alleges that the said surety was not obliged to procure Pike before the court, and that it was not nec-

essary for said Pike to appear unless an indictment was found against Pike on the charge of deserting the mail, which charge had been heard before the Commissioner; that the respondent was informed by the representative of the government that Pike need not appear unless such an indictment were filed, and that an agreement existed between the government and the surety to that effect. The surety, therefore, denies that he was required by said bond, or otherwise, to produce said Pike on the first Wednesday of January, 1907, and alleges that the government could have arrested said Pike, but that it did not do so, relying upon said bond. The surety and respondent further alleges that he has been unable to discover the whereabouts of the said Pike, who proceeded to default upon learning that he was indicted for the larceny of registered letters, and not upon the charge of deserting the mail.

The undertaking, which was filed upon the 10th day of December, 1906, is conditioned as follows:

"Now, therefore, the condition of this recognizance is such that if the said William F. Pike, the defendant aforesaid, shall personally appear at the next Circuit Court of the United States of America for the Eastern District of New York, to be holden at the United States courtrooms, in the borough of Brooklyn, city of New York, on the first Wednesday of January, in the year of our Lord one thousand nine hundred seven, at 10 o'clock in the forenoon of that day, or as soon thereafter as the said court shall be opened, and shall then and there answer all such matters and things as shall be objected against him, and abide the order of the said court and not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and virtue."

This is a bond filed in the United States court, and, so far as the application of the respondent and surety is concerned, comprises the contract which existed between the government and the defendant and the surety. Any oral agreement or understanding which the surety may have had cannot modify the terms of this undertaking. The construction of the bond and the meaning of its obligation does not raise any issue of fact, and, as a matter of law, the obligation has matured, so that there is nothing upon which the defendant or the respondent has a right to trial by jury. An indictment having been found and filed for the offense of stealing the mail, the government could have arrested the defendant at any time without reference to the bond which had been given upon another charge, or it could wait until the defendant was produced under that bond, and he could then be required to plead to the other charge. The fact that the defendant is wanted on a different charge than that which was considered before the Commissioner is no answer to the failure of the defendant to appear upon the return day of the recognizance, and does not relieve the surety from his obligation to produce him. In fact, if no indictment had been found at all, the defendant was still bound to appear, and the surety was bound to cause his appearance, and thus comply with the terms of his obligation, in order to be relieved from the condition therein contained. The surety cannot be discharged from his obligation until the court directs an exoneration from the terms of the bond. People v. Gillman, 125 N. Y. 372, 26 N. E. 469. If the conditions of the bond have been changed without the consent of the surety, that may

relieve him from his obligation, but no such case exists here. Reese v. United States, 76 U. S. 13, 19 L. Ed. 541.

It has further been held that the subsequent production of a defendant, who has failed to appear according to the terms of his bond, will not of itself relieve the surety from the effect thereof, unless the forfeiture is relieved by the court, under the provisions of section 1020, Rev. St. [U. S. Comp. St. 1901, p. 719]. U. S. v. McGlashen (C. C.) 66 Fed. 537. When the bond becomes due, the conditions making it a valid indebtedness, which can be enforced by a writ of scire facias, are fulfilled, if the defendant is not produced at the time specified in the bond. U. S. v. Evans (C. C.) 2 Fed. 147.

It has further been settled that a proceeding can be had to enforce against a surety a recognizance or bail bond, even if the information or indictment which has been filed should be subsequently found defective or dismissed upon demurrer, if the defendant fail to appear and the bond is forfeited because of such nonappearance. Hardy v. U. S., 71 Fed. 158, 18 C. C. A. 22; U. S. v. Stien, 13 Blatchf. 127, Fed. Cas. No. 16,403; Reese v. U. S., supra.

The motion of the government, therefore, for judgment upon the pleadings must be granted, and the demand of the surety for trial by jury denied. An order for judgment may be entered accordingly.

DOHERTY v. LYNETT.

(Circuit Court, M. D. Pennsylvania. September 10, 1907.)

No. 39, October Term, 1905.

1. LIMITATION OF ACTIONS—PLEADING—STATUTE.
   The defense of the statute of limitations cannot be made by demurrer.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670, 671.]

2. LIBEL—PUBLICATION LIBELOUS PER SE—CHARGING WANT OF INTEGRITY.
   An article published by defendant, which as set out in plaintiff's statement directly charged plaintiff with having betrayed his trust as a delegate of a branch of a fraternal order in favor of a rival branch, from which he accepted money to that end, was libelous per se, and an averment of special damages was not necessary.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 95.]

At Law. On demurrer to plaintiff's statement.

R. A. Zimmerman, for plaintiff.
Cornelius Comegys, for defendant.

ARCHBALD, District Judge. Under the statute of limitations in Pennsylvania, an action for libel must be begun within a year; and as the date of publication here is given as March 7, 1904, while suit was not brought until August 24, 1905, the plaintiff is thus apparently barred, if the statute is pleaded, unless he can show something to obviate it. But it is hornbook law that advantage cannot be taken of the running of the statute by demurrer, but must be set up by plea,

if for no other reason than that otherwise the plaintiff would have to anticipate the defense and insert in his declaration the facts on which he relied to avoid it, confusing the issues. Barclay v. Barclay, 206 Pa. 307, 55 Atl. 985. Of course, where time enters into the right of action it is different, as where action is given by statute and it is in the same connection provided that it shall be brought within a specified time. But that is not the case here.

The only other question on this demurrer is whether a prima facie cause of action is stated. The publication complained of has to do with certain alleged internal troubles in the fraternity known as the "Ancient Order of Hibernians," by reason of which the Board of Erin branch decided not to parade on St. Patrick's day, three years ago. This, according to the article, was the sequel of what had occurred at the International Conclave of the order at Belfast, Ireland, in 1902, where the plaintiff, as it is charged, was guilty of treachery to those whom he was supposed to represent there. Discussing this, at the Board of Erin meeting, where the question of engaging in the parade came up, it is said that a statement was read by Mr. O'Donnell in which the plaintiff, who was a delegate to the Conclave from the Board of Erin branch, was declared to have betrayed that organization and attempted to sell it out to its rival, the Ancient Order of Hibernians of America, in consequence of which the plaintiff was subsequently expelled from the Board. Enlarging upon the subject, the article proceeds to state that:

"Francis Hughes, a delegate, said that Doherty's treachery * * * had been discovered by means of letters, and by an investigation made by two other delegates, and that money had been paid by the rival order."

By this, according to the averment of the declaration, the plaintiff is charged with being guilty of treachery to the Ancient Order of Hibernians of Erin, of which he was a member, betraying the organization while representing it as a delegate, and attempting to sell it out to a rival by whom he was paid money, being thus guilty of taking a bribe, as it is said, and, his treachery being discovered, being expelled.

The declaration or statement where this is set forth is very inartistically drawn, there being practically nothing by way of colloquium or innuendo to explain the article or apply it to the case in hand. Nor is there anything in it to support the suggestion that the crime of accepting a bribe is charged. Taking money as the reward for dishonorable action is not necessarily a criminal offense, however much it may reflect on the party's probity. But, aside from this, it is distinctly and unequivocally declared that the plaintiff was recreant to the trust confided in him as a representative of the fraternal order to which he belonged, betraying its interests in favor of a rival, from whom he accepted money to that end, with the result that, having been discovered, he was expelled. That this was calculated to hold him up to public odium and the reprehension of all honest men there can be no doubt. It certainly was a serious reflection on his integrity, tending to deprive him of the confidence and respect which he would otherwise be entitled to enjoy. It was thus libelous per se. 25 Cyc. 256;

Wood v. Boyle, 177 Pa. 620, 35 Atl. 853, 55 Am. St. Rep. 747. And the law thereupon presumes damages, so that special damages did not have to be laid.

The demurrer is overruled, with leave to the defendant to plead issuably within five days.

COYNE v. SOUTHERN PAC. CO.

(Circuit Court, D. Utah. May 20, 1907.)

No. 910.

1. ACTION—STATUTORY RIGHTS OF ACTION—CONDITIONS IMPOSED BY STATUTE CREATING RIGHT.

   When it is sought to enforce a statutory right in another jurisdiction, any restriction or limitation upon such right imposed by the statute which created it must also be given effect.

2. COURTS—ACTION UNDER FOREIGN STATUTE—PERSONAL INJURY—NEVADA STATUTE.

   Act Nev. March 23, 1905 (Laws 1905, p. 249, c. 142), which gives a right of action for a personal injury caused by the wrongful act or negligence of another, but which provides that such liability "shall exist only in so far as the same shall be ascertained and adjudged by a state or federal court of competent jurisdiction in this state in an action brought for that purpose by the person injured," supersedes the common law applicable to the subject in the state, and an action to recover for a personal injury received in Nevada, through the alleged negligence of the defendant, cannot be maintained except in a state or federal court in that state.

   [Ed. Note.—Jurisdiction as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

At Law. On demurrer to complaint.

Maginnis & Corn and J. H. De Vine, for plaintiff.
Williams, Smith & Willis, for defendant.

MARSHALL, District Judge. This action to recover damages for personal injuries negligently inflicted was instituted by a citizen of Utah on account of an injury received by him on August 31, 1906, in the state of Nevada. A statute of Nevada, adopted March 23, 1905 (Laws 1905, p. 249, c. 142), provides:

"Section 1. Whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury shall be liable to the person injured for damages; and where the person causing such injury is employed by another person or corporation so responsible for his conduct, such person or corporation so responsible shall be liable to the person injured for damages.

"Sec. 2. Such liability, however, where not discharged by agreement and settlement shall exist only in so far as the same shall be ascertained and adjudged by a state or federal court of competent jurisdiction in this state in an action brought for that purpose by the person injured.

"Sec. 3. This act shall take effect and be in force from and after its passage.

"Sec. 4. All acts and parts of acts and laws in conflict with this act are hereby repealed."

The question presented by demurrer is whether this action can be maintained in Utah. The first section of the act quoted is declaratory of the common law theretofore existing in Nevada. The second section clearly limits the right. The statute as a whole supersedes the common law applicable to the subject. By a completeness of statement it covers the entire field, and was intended as a revision of the law. By section 4, not only conflicting statutes, but inconsistent laws, are repealed. Thereafter the plaintiff's right was no less an exclusively statutory right because the same facts would have created a right under prior common law principles. Commonwealth v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Commonwealth v. Cooley, 10 Pick. (Mass.) 37; Gorham v. Luckett, 6 B. Mon. (Ky.) 146; Gwinner v. Lehigh, etc., R. R. Co., 55 Pa. 126. Viewed as a statutory right, it must be admitted that the state creating the right can attach to it any valid condition, so that, when the right is sought to be vindicated in another state or in a foreign country, the condition must also be applied. Hamilton v. R. R. Co., 39 Kan. 56, 18 Pac. 57; Slater v. Mexican Nat. R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; Minor's Conflict of Laws, § 202. "As the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. [U. S.] 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." Slater v. Mexican Nat. R. R. Co., supra. In Nonce v. Richmond & D. R. Co. (C. C.) 33 Fed. at page 435, it is said:

"A cause of action arising under a statute may be made local by the express terms of the statute; and, if the provisions of such law are not complied with, the right thus conferred may be extinguished, and cannot be enforced in the court of another state."

At common law such an action as this was transitory, and a suit for trespass to real property local; but this common-law distinction is not removed from legislative control, and, when the place of trial is attached to the right as a condition, I know of no authority to recognize the right and ignore the condition, unless it is violative of some superior law. As the statute in question does not discriminate against federal courts, there is no basis for questioning its validity.

The demurrer will be sustained, and the action dismissed.

In re PHOTO ELECTROTYPE ENGRAVING CO.

In re VREDENBURGH'S CLAIM.

(District Court, S. D. New York. July 10, 1907.)

BANKRUPTCY—CLAIMS—PREFERENCES—WAGES—STATUTES—AMENDMENT.

Bankr. Act July 1, 1898, c. 541, § 64b, par. 4, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], giving priority of payment to "wages due to workmen, clerks, or servants" earned within three months before the commencement of the proceedings, was amended by Act Cong. June 15, 1906, which took effect on its passage, so as to include traveling or city salesmen. *Held*

that, where a salesman was not entitled to a preference for wages under the original act at the time when the bankruptcy petition was filed or the adjudication entered, he could not obtain it by virtue of the subsequent amendment.

David Stewart Edgar, for claimant.
Kellogg & Rose, for trustee.

CHATFIELD, District Judge. The bankrupt herein is a corporation. A claim was filed by one Harry J. Vredenburgh, an employé of the bankrupt, under section 64b, par. 4, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), as amended by the laws of June 15, 1906, for the sum of $130, being part of the salary alleged to be due him for the three months immediately preceding the filing of the petition in bankruptcy. This employé had been receiving a salary of $40 per week, according to the pay rolls and books of the bankrupt concern, and claimed an additional $10 a week, under an arrangement with the president of the company, which arrangement was alleged to have been made about one year and three months before the filing of the petition. The claim for a portion of the alleged salary as a preferred debt was referred to one of the referees in bankruptcy, as special master, and the special master has reported that the arrangement for the additional salary had been made by the president, was binding upon the bankrupt, and that the testimony supported the claim; but that the objection of the trustee, on the ground that the amendment of June 15, 1906, could not be retroactive, inasmuch as this amendment did not go into effect until after the services claimed had been rendered, is not well taken.

Section 64b, par. 4, of the bankruptcy law, as originally passed in 1898, gave priority of payment to "wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant." By the amendment of June 15, 1906, the words "traveling or city salesman" were inserted, and the referee, finding that the claimant herein was a clerk and city salesman, allowed the claim for $130, on the ground that the wages debt was provable to that extent at the time the claim was filed with the referee in bankruptcy.

Section 19 of the amendatory act of July 1, 1903 (chapter 487, 32 Stat. 801 [U. S. Comp. St. Supp. 1905, p. 683]), contained a provision that the amendatory act should not apply to bankruptcy cases pending when the act took effect. In the amendment of June 15, 1906, no such provision was inserted, and the act took effect when it became a law. The amendatory act is remedial, in the sense that it affords additional relief to all cases coming within its scope; but it is also declaratory and jurisdictional, in that it creates certain rights affecting the amounts to be paid preferred creditors and the balance left for other creditors. And the question to be determined on this motion is whether, upon the filing of a petition in bankruptcy, the rights of the various creditors are fixed according to the provisions of the law in effect at the date of adjudication; or whether the rights of these creditors do not exist until they have been passed upon and allowed, or disallowed, by the referee. Section 64b, par. 4, provided for the

payment of certain wages earned within three months before the date of the commencement of proceedings. At the time of the filing of the petition, which was the commencement of this proceeding, the law fixed the status of every creditor, in so far as his rights to be considered preferred or general were concerned. As between the various creditors, their claims were thus determined, and while the share of any creditor might be enlarged, by the disallowance of claims, it is considered that his claim would not be changed. All subsequent matters are to be determined in the light of the situation as it existed at the time the petition was filed, or at adjudication, if that does not immediately follow. The amendment of 1906, if allowed to alter the rights of creditors in this proceeding, would take away property which the creditors were entitled to by the provisions of law existing at the time when this estate came under the administration of the bankruptcy court. Such an effect would be retroactive, even if these rights had not become vested, in the sense of having been liquidated or adjudicated.

Under this view, the claim for $130 was invalid at the time of the filing of the petition in bankruptcy, upon the findings of fact as reported by the special master, and it seems that Congress would have no power to deprive any of the other creditors of their rights in the property by taking some of the bankrupt estate from them, and giving it to others, by means of legislation.

In so far as the special master's report finds the contract with Vredenburgh to be valid, upon the evidence, the report will be confirmed; but, as to the finding that Vredenburgh is entitled to a preference for $130, the exception will be sustained, and the report and order of the special master amended to that extent.

In re ELDRED.

(District Court, E. D. New York. June 7, 1907.)

BANKRUPTCY—FINAL DIVIDEND—FINAL REPORT—TIME.

Bankr. Act 1898, § 57, subd. "n," c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], declares that claims shall not be proved against a bankrupt after a year from the adjudication, except in the case of litigation, when 90 days additional may be added, and, in the case of infancy or insanity, such persons being entitled to six months additional within which to file claims. Section 65b provides that the first dividend shall be declared within 30 days after adjudication if there are funds sufficient to do so, and that the final dividend shall not be declared within 3 months after the first dividend shall be declared; and subdivision "c" provides that creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by proof or allowance of claims subsequent to the date such dividends are declared and paid. *Held* that, where a bankrupt's estate is ready for final dividend, it may be closed at any time after four months from the adjudication, on notice to all persons scheduled or appearing in any way in the proceedings as creditors.

See 152 Fed. 491.

Henry W. Sykes, for trustee.

CHATFIELD, District Judge. In this estate a dividend of 5 per cent. was declared, on October 26, 1906; on January 9, 1907, a second dividend of 5 per cent. was declared; and on April 25, 1907, the trustee filed a final report, showing a balance of $1,268.12. The trustee applied to the referee to have the account settled and a final dividend declared at that time, which application the referee denied, and from that denial an appeal to this court has been taken, requesting that a final meeting of creditors be called and a final dividend declared. The referee based his decision upon the fact that one year from the date of adjudication had not elapsed, and that within that year any creditor could file and prove his claim and be entitled to a share of the final dividend.

By section 57, Bankr. Act July 1, 1898, subd. "n," c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444], it is provided that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," except in the case of litigation, when 90 days additional may possibly be added; and in the case of infancy or insanity, a creditor laboring under these disabilities, without notice, may have six months longer within which to file a claim. Section 65b provides that the first dividend shall be declared within 30 days after the adjudication, if the funds are sufficient to do so; that dividends subsequent to the first shall be declared as often as the amount equals 10 per cent. or more, and upon closing the estate, "provided, that the first dividend shall not include more than fifty per centum," etc., "and provided further, that the final dividend shall not be declared within three months after the first dividend shall be declared." Subdivision "c" is as follows:

"The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declaration of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends."

This question was passed upon in the case of In re Stein (D. C.) 94 Fed. 124, in which it was held that if the estate seemed to have been finally administered a final dividend could be declared and the trustee's report approved within the year after adjudication. This case has been followed in the Southern District of New York, in Re Bell Piano Company, Bankrupt (opinion filed February 5, 1907) 155 Fed. 272. In this opinion the court says:

"To say that the final dividend shall not be declared within three months after the first dividend is declared does in my judgment say by implication that a final dividend may be declared on the expiration of three months from the time of the first dividend."

As the prior provisions of the act have made it necessary to declare a first dividend within 30 days after adjudication, if there are funds sufficient to do so, and as the statute has provided that creditors who are not diligent are permitted only to share in the estate that remains and not to interfere with the funds already divided, it would appear that the court has the power to make a final dividend and to approve of a final report at any time after four months have elapsed subsequent

to adjudication, if the other conditions are present showing the estate to be apparently ready for the final accounting. Such an application should, however, be only upon an order to show cause, or other sufficient notice to all persons scheduled or appearing in any way in the proceedings as creditors, giving them an opportunity not only to know of the dividend, but notifying them that their claims should be proven, or their rights lost.

The order of the referee in this proceeding is modified to this extent, and the matter is sent back to him for action in accordance with this opinion, if he finds that the trustee has completed his duties, with the exception of the final report and distribution, and if the proceedings before the referee have been closed, so far as concerns the interests of all parties who have appeared.

In re SMITH.

(District Court, E. D. New York. June 18, 1907.)

BANKRUPTCY—PROCEEDINGS—WITHDRAWAL—RIGHT TO DISCHARGE.

Bankr. Act July 1, 1898, § 14b, subd. 5, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provides that a bankrupt may obtain a discharge unless he has been granted a discharge in bankruptcy within six years. By section 14a, the bankrupt may apply for a discharge within 12 months after adjudication, or, if unavoidably prevented from filing it within such time, it may be filed within but not after the next 6 months. *Held*, that where a bankrupt having been discharged in voluntary proceedings on January 17, 1902, filed another voluntary petition on January 11, 1907, he would not be permitted to withdraw the same over the protest of his creditors because he could not obtain a discharge within 12 months after adjudication, he being entitled to apply for a discharge within the succeeding 6 months.

Peter Schmuck, for bankrupt.

Adolph M. Schwarz, Strasbourger, Weil, Eschwege & Schallek, and Arthur Garfield Hays, for creditors.

CHATFIELD, District Judge. The bankrupt has asked leave to withdraw these proceedings, which were instituted by the filing of a voluntary petition in bankruptcy, upon the 11th day of January, 1907. From that date until the present time the matter has followed the usual course, but the first meeting of creditors has been adjourned for a considerable period because of the illness of the attorney for the bankrupt. His death has necessitated the employment of another attorney. It now appears that upon the 17th day of January, 1902, in a former voluntary proceeding, the bankrupt herein was granted a discharge. The present attorney for the bankrupt, having learned of this, advised the bankrupt that he could not obtain a discharge within six years after the granting of the former discharge. The bankrupt, upon the advice of this attorney, now asks leave to withdraw the proceedings. Objection is made on the part of the creditors, in that the estate has been brought into court by the filing of the present petition, and that the rights which they might have had by filing an involuntary petition, or

upon attacking transactions occurring within four months before the voluntary petition, would be lost if this proceeding should be dismissed, and the creditors left to the remedies which they would have at the present time, and which they have not previously exercised by reason of the pendency of this voluntary proceeding.

By section 14b of Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], provision is made for the discharge of a bankrupt unless he has—

"(5) In voluntary proceedings been granted a discharge in bankruptcy within six years."

By the provisions of section 14a, the bankrupt may, within 12 months subsequent to adjudication, file an application for a discharge, and—

"if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

Many statutes of limitation are prevented from running by certain acts upon the part of the bankrupt, or by certain matters made express exceptions by the provisions of the act creating the limitation; but in the bankruptcy statute the period of four months prior to the filing of the petition, within which certain transactions may become preferences, is not extended by exceptions or reservations, and in a situation like that shown on the present motion the position of the creditors would be materially injured if the time intervening since January 11, 1907, should be lost by the dismissal or withdrawal of the present proceedings. The bankrupt must wait until January 17, 1908, before applying for his discharge, and (the 12 months after adjudication apparently expiring upon the 11th day of January, 1908) the bankrupt will be within the provisions of the statute giving him permission to apply for an extension of his time to apply for a discharge, inasmuch as he is unable by the force of the statute to apply for such discharge within the statutory 12 months period. In this way the rights of the creditors will be entirely preserved, and yet the bankrupt will not be deprived of the benefit of a discharge. The necessary delay is the result of his own act, and to leave the bankruptcy proceedings undisturbed would seem to be the only method of doing equity as well as complying with the provisions of the bankruptcy statute. The language of the court in the case of In re Little, 137 Fed. 521, 70 C. C. A. 105, well sustains and explains the reasoning by which this conclusion is reached. The opinion contains the following:

"The expression 'within six years,' as we think, measures the time between the first and second discharge, and not between the first discharge and the filing of the second petition in bankruptcy. * * * The fundamental principle of the bankruptcy law is to take into legal custody the property of the bankrupt, and to distribute it ratably among creditors, protecting the latter from frauds and unjust preferences, and to relieve the honest bankrupt from his load of obligation. The latter may or may not result, but that in no way interferes with the right of the court, either by voluntary or involuntary proceedings, to take over and distribute among creditors the estate of the bankrupt. The fact that one has been discharged from his debts within six years cannot possibly be an objection to the institution of involuntary proceedings by creditors. That would leave them at the mercy of the debtor, and tend to the perpetration of the very frauds denounced by the bankruptcy

act. Why, then, should the debtor be debarred from doing that voluntarily which the creditors might compel, namely, the turning over of his estate for equitable distribution among his creditors?"

The motion to withdraw the petition will be denied.

In re NATIONAL LOCK & METAL CO.

(District Court, E. D. New York. July 16, 1907.)

BANKRUPTCY — CLAIMS — VALIDITY—PROCEEDINGS IN STATE COURT—APPEAL—STAY.

Code N. Y. Civ. Proc. § 1351, provides for an appeal within 30 days without security, but declares that the appeal does not stay the execution of the judgment or order appealed from, in the absence of a stay directed by the judge. *Held*, that where, in a suit in the state court against a bankrupt's trustee to enforce the lien of a chattel mortgage on the proceeds of certain of the bankrupt's property, it was determined that the mortgage was void, from which judgment the creditor appealed, but failed to procure a stay, and an execution against him for costs was returned unsatisfied, the appeal was ineffective to prevent the trustee from assuming possession of the fund and disbursing the same free from the lien of the mortgage.

Morris H. Hayman, for Schleestein.
Michael Kirtland, for trustee.

CHATFIELD, District Judge. On September 9, 1904, an involuntary petition in bankruptcy was filed against the National Lock & Metal Company, and in November of that year a trustee was appointed. The trustee took possession of certain property, upon which one Schleestein claimed a chattel mortgage for the sum of $7,500, filed September 3, 1904. Subsequently such proceedings were had that this court made an order, dated December 8, 1904, directing the personal property to be sold, and the proceeds, viz., $6,300, be deposited in a trust company, in the joint names of Schleestein and the trustee, to stand in lieu of the personal property described in the chattel mortgage, and to be held subject to any lien which might be found to exist in favor of Schleestein under said mortgage.

An action was begun in the Supreme Court of New York, involving the validity of this chattel mortgage, and upon May 3, 1907, a judgment was entered adjudging and decreeing the chattel mortgage fraudulent and void, and granting costs in favor of the trustee in bankruptcy, who was a party to the said suit. The trustee now asks for an order directing the payment of the sum on deposit, with accrued interest, to him, free and clear of any lien thereon. The mortgagee, Schleestein, has appealed to the Appellate Division of the Supreme Court from the judgment of May 3, 1907, but has given no security to stay proceedings under that judgment. Execution has been levied for the costs awarded, and this execution has been returned unsatisfied; but no application for any stay has been made, under the provisions of section 1351 of the Code of Civil Procedure of the state of New York, which provides as follows:

"An appeal, authorized by this title, must be taken, within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof. Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, the appeal does not stay the execution of the judgment or order appealed from; unless the court, in or from which the appeal is taken, or a judge thereof, makes an order, directing such a stay. Such an order may be made, and may, from time to time, be modified upon such terms, as to security or otherwise, as justice requires. * * *"

The appellant might have applied to the state court for a stay, upon such terms as the court might consider sufficient; and it is suggested that, inasmuch as the fund is in a reasonably secure place, the difference between the rate of interest paid by the trust company, and 6 per cent., the legal rate, might be the only loss for which security would be required. In the case of Steinback v. Diepenbrock, 5 App. Div. 208, 39 N. Y. Supp. 137, the appellant was allowed a stay, upon giving security to cover the difference between the legal rate of interest on a judgment, and the amount, viz., 2 per cent., accruing to a fund on deposit with the chamberlain of the city of New York. But on the present motion no such question arises. The money on deposit in the Franklin Trust Company was placed there to be held in lieu of the property claimed under the chattel mortgage. As far as the legal effect of the proceedings already had is concerned, this fund is in the same situation as if the property itself were in the possession of the trustee. No stay has been secured, and, the chattel mortgage having been held to be invalid, the trustee is under no obligation to await the outcome of any further proceedings.

The Code provided for a method by which, if the appellant desired to prosecute his appeal, he might have kept matters in statu quo. This he has not seen fit to do. The execution for costs has not been satisfied, but no undertaking is necessary to secure the payment of these costs, inasmuch as there has been no attempt to prevent the issuance of execution thereon. The fact that the execution has not been satisfied of itself indicates that, if the trustee should secure a further judgment upon the appeal, he would be unable to satisfy this out of the property of the appellant, and this fact furnishes an additional reason why the bankruptcy court should not, in effect, grant a stay, when the trustee is not protected from additional expense and loss.

There appears to be no reason why the trustee should not be allowed to proceed to administer the estate, unless in the state courts the appellant can protect the trustee or obtain a stay on such terms as to prevent loss.

The motion for the payment of the fund to the trustee, free and clear of any lien, and for the execution of such papers as may be necessary to accomplish that result, will be granted.

In re STROBEL.

(District Court, E. D. New York. July 16, 1907.)

BANKRUPTCY—REFEREES—QUALIFICATIONS—INTEREST.

Bankr. Act July 1, 1898, c. 541, § 39b, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3436], providing that referees in bankruptcy shall not act in cases in which they are directly or indirectly interested, does not disqualify a referee, where the only interest he has in the matter submitted to him is the compensation he may receive by way of fees.

Albert C. Aubery, for bankrupt.
Benjamin F. Edsall, for trustee.
Frank Trenholm, for Bachrach.

CHATFIELD, District Judge. An involuntary petition in bankruptcy was filed August 17, 1905, and a receiver appointed, who turned over to one Bachrach, a creditor, certain property which, in the receiver's opinion, belonged to said Bachrach. Subsequently, a trustee was elected, who objected to the delivery of these goods by the receiver. Upon a motion by the creditor to have the action of the receiver confirmed, and that he be permitted to retain the property, a bond was given, in the sum of $3,500, to take the place of the property, pending a reference to the referee in bankruptcy. Upon the 11th day of June, 1906, the referee, as special commissioner, reported that the act of the receiver, in so far as it related to the delivery of these goods to the creditor, should not be confirmed. An order was entered confirming the report of the referee, upon August 2, 1906. On the 19th of November, 1906, a further reference to the referee in bankruptcy, as special commissioner, was ordered, to ascertain and inquire as to the value of the property wrongfully obtained by this creditor, in the place of which the bond had been given. The special commissioner, upon the 3d day of May, 1907, filed a report, in which he fixed the value of this property at $3,015.76. Upon a motion to confirm this report, the creditor makes objection and asks that the preceding orders of the referee and all action thereunder be set aside, and that the entire matter be sent to a new special commissioner, on the ground that the referee in bankruptcy, who had acted as special commissioner upon the two preceding references above referred to, was interested in the questions referred to him, in so far as he, as referee, might receive additional fees from any property turned over to the trustee, and on the further ground that the trustee was also the clerk of this same referee. The creditor, in addition to these fundamental objections, objects to the confirmation of the referee's report upon the merits, in that the special commissioner disregarded certain testimony offered by him as to the price which he actually received for the sale of certain of the articles included in the property mentioned.

Taking up the last objection first, it appears from the record that the property, among other things, consisted of watch cases, certain refuse containing gold filings, and various materials and articles of gold. The referee has found that the testimony offered by the creditor as to the sale made by him through the United States assay office, of the

actual quantity of gold contained in certain material submitted, is indefinite; that it is not proven that the gold assayed covered all of the articles taken; and that, much of the material being manufactured into the form of watch cases, etc., its value was not represented merely by the amount of gold included therein. Certain questions as to the market value of 8, 12, and 16 carat gold are also involved; but upon all of these questions of fact the report of the referee is apparently correct, and there seems to be no reason for disturbing his determination thereon.

As to the objection to the appointment of the referee in bankruptcy as special commissioner, the United States Circuit Court of Appeals in this Circuit (In re Abbey Press, 134 Fed. 51, 67 C. C. A. 161) holds that the bankruptcy act and general orders, taken together, give the referee authority to pass upon questions involving a claim for property which it is sought to bring into the bankrupt's estate. In that case the court was passing upon the powers of the referee, rather than upon a referee acting as special commissioner. But the situation is exactly parallel, and the reasoning in that case seems to apply directly. The court said:

"The only pertinent statutory limitation upon the powers of referees in this connection is that they 'shall not act in cases in which they are directly or indirectly interested.' Act July 1, 1898, c. 541, § 39b, 30 Stat. 556 [U. S. Comp. St. 1901, p. 3436]. This provision cannot apply to the compensation by way of commissions or sums paid as dividends, etc., because, if so applied, the effect would be to disqualify the referee from acting in any case. The referee's commission is upon the amount paid creditors, not necessarily upon the amount collected, which might be largely disbursed in making the collection. Referees, in the performance of their duties, must be constantly deciding matters which will affect the amount paid to creditors. The amount of allowance of attorneys and appraisers, the decision of applications by third parties for property in the custody of the trustee, but claimed to belong to them, must always affect their commissions. If the statute were held unconstitutional on this ground, such ruling would terminate substantially all of the present procedure thereunder."

In so far as the creditor may be seeming to urge any conceivable constitutional objection, his objection would apply as well to the provisions of the bankruptcy law itself, in defining the powers and duties of a referee in bankruptcy, and it does not seem to this court that there is any sufficient ground urged for questioning the constitutionality of either the bankruptcy law or the employment of a referee in bankruptcy as a special commissioner, with relation to an issue in the proceeding in which he is acting as referee.

It is explained by the affidavits upon this motion that the trustee is not the clerk of the referee, and never has been in his employ, and that objection therefore does not seem to be based upon fact.

The objections to the report of the referee will be overruled, and the report confirmed, but without costs.

In re STARK.

(District Court, E. D. New York. March 2, 1907.)

1. BANKRUPTCY—EXAMINATION OF BANKRUPT—REFEREES—JURISDICTION—EMPLOYMENT OF STENOGRAPHER—STATUTES—APPLICATION.
Bankr. Act July 1, 1898, § 38, subd. 5, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], authorizing referees in bankruptcy, on the application of the trustee during the examination of the bankrupt or other proceedings, to employ stenographers at the expense of the estate at a compensation not to exceed 10 cents per folio for reporting and transcribing the proceedings, does not apply to hearings on the examination of the bankrupt before a special commissioner.

2. SAME—DEFENSE—EXAMINATION—APPROVAL OF BILL.
Where the testimony of an alleged bankrupt was taken before a special commissioner, at the request of a receiver, by a public law stenographer, who charged 20 cents a folio for the testimony, the bill could only be allowed and paid out of the bankrupt's estate after its approval by the receiver and proof that all the examination was necessary and resulted in benefit to the estate.

Samuel Sperling, for petitioning creditor.
Charles Pechner, for bankrupt.

CHATFIELD, District Judge. Application has been made for the approval of a stenographer's bill for testimony taken upon an examination of the bankrupt before a special commissioner, at the request of the receiver. The stenographer is a public law stenographer, who has charged 20 cents per folio for the testimony, and the question is raised whether this rate can be paid out of the bankrupt estate, or whether all testimony in bankruptcy proceedings, whether before a referee or special commissioner, is to be limited to 10 cents per folio.

The authority for the latter proposition arises from the provisions of section 38, subd. 5, of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435], which is as follows:

"Sec. 38. Jurisdiction of Referees—Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to * * *.

"(5) Upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."

It does not seem to the court that the provisions of section 38, subd. 5, apply to hearings before a special commissioner. The meaning of this section would seem to be that a referee in bankruptcy may make use of the services of a stenographer when the trustee considers that the testimony should be taken, and that in such case the rate is fixed, but this rate has nothing to do with the employment of a stenographer on isolated and unusual occasions, where, at the request of the creditors or of the receiver, a special hearing is had before a special commissioner.

The bankruptcy law gives the court power to appoint special masters or commissioners to hold hearings in certain special cases enumerated in section 21a. If the hearing is not a statutory hearing before a referee in bankruptcy, the provisions of section 38, as to the

employment of a stenographer by the referee in bankruptcy, would not apply. It is not within the contemplation of the law, upon a motion to discover assets and to consider special questions, that an exhaustive examination of all the issues of the bankruptcy be covered before the appointment of a trustee. Many questions should be left for hearings before the referee, and such examination should not be prolonged at the expense of the estate. The receiver or creditor applying for the examination will be compelled to approve of the stenographer's bill, and to certify that all of the examination was necessary. The bills can then be passed upon in settling the receiver's accounts, and close scrutiny should be given, with a view to preventing the unnecessary prolongation of such examination.

The court will not pass upon the amount of this bill until the receiver applies for leave to pay the same, but the rate per folio should be a matter for consideration by the receiver before the hearing begins, if he wishes to use a stenographer. If no assets should be discovered and no advantage gained, the receiver will be held responsible for any needless expense.

In re GOLDSTEIN.

(District Court, S. D. New York. July 15, 1907.)

BANKRUPTCY—EXAMINATION OF BANKRUPT—PRESERVATION OF TESTIMONY—DEFENSE.

Where a trustee in bankruptcy had no funds in his hands, and the bankrupt claimed to be without means, the bankrupt could not compel the trustee to pay for a stenographer's minutes, referee's fees, and disbursements in taking the testimony, which the bankrupt desired to introduce in opposition to that offered by the trustee, in a proceeding to compel the bankrupt to turn over property; it being within the discretion of the referee to determine how the bankrupt's testimony should be taken and preserved in order that he might not be in contempt, solely because of his inability through poverty to perpetuate the testimony.

Aaron J. Levy, for bankrupt.
Lyon & Smith, for trustee.

CHATFIELD, District Judge. In this proceeding in bankruptcy, the trustee made a motion before the referee to compel the bankrupt to turn over certain property. The trustee has no funds in his hands, and the bankrupt claims to be absolutely without means. The trustee introduced the evidence he desired, in support of his motion, and the bankrupt offered testimony in opposition thereto. The bankrupt and his attorney not furnishing indemnity for the expense of taking his testimony, the trustee, inasmuch as there were no funds in the estate, refused to assume any responsibility, and the referee ruled that the bankrupt "was not entitled to take further testimony, unless he or his attorney advanced the money or agreed to hold themselves responsible therefor." This is certified by the referee, and the bankrupt now makes a motion for an order directing the trustee to pay for stenographer's minutes and the referee's fees and disbursements.

Inasmuch as the trustee has no funds in his possession, the motion

cannot be granted. The trustee has incurred the responsibility of taking testimony in his own behalf, and the bankrupt has the right to offer testimony in opposition thereto; but it lies within the discretion of the referee to determine whether this testimony shall be heard orally, taken in longhand, or written out in the form of stenographer's minutes. If the bankrupt desires the testimony to be perpetuated, the obligation would seem to be on him to provide the means therefor, and, inasmuch as the motion is one to compel him to turn over property, the referee is the proper party to judge whether he is so penniless that the testimony should be taken in longhand or heard orally. If there were money in the estate, the referee might exercise his discretion and direct the trustee to become responsible therefor. The case of In re Hammer (decided in the Southern district of New York July 1, 1907), approving of a referee's ruling that a hearing will be closed unless the bankrupt furnishes indemnity for the expense of transcribing testimony, applies in so far as it shows that the discretion rests with the referee in the matter.

The motion to direct the trustee to pay for the minutes will be denied, and the matter referred back to the referee to determine whether the bankrupt has shown himself unable to comply with the order, and, if so, to determine what opportunity should be given the bankrupt in the way of taking of oral testimony, in order that he may not be put in a position where he would seem to be in contempt of court, solely because of a default which he may not be able to prevent.

Section 39, subd. 9 (Act July 1, 1898, c. 541, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3436]), would seem to prescribe the duty of the referee in the matter.

THE MARY S. BRADSHAW.

(District Court, E. D. New York. July 15, 1907.)

CUSTOMS AND USAGES—SHIPPING—DEMURRAGE—CHARTER PARTY.

Where a charter party provides for lay days for loading in specific terms, the contract cannot be affected by any custom of the port.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, § 34.]

In Admiralty. Suit for demurrage.

Hyland & Zabriskie, for libelant.

Williams, Folsom & Strouse, for claimant.

CHATFIELD, District Judge. The libelant claims demurrage for the detention of the schooner Mary S. Bradshaw at Bermuda Hundreds, Va., whither she had proceeded under charter party to receive a cargo of lumber. The charter party contained the following provision:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched) commencing 24 hours from the time the vessel is ready to receive or discharge cargo 30 M feet per day, Sundays and legal holidays excepted to be allowed for loading, and New York Maritime Association rules for discharging. And that for each and every days detention by

default of the said party of the second part, or agent, thirty-seven dollars per day, day by day, shall be paid by said party of the second part or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside."

This charter party was signed on behalf of the claimant, as follows: "B. W. Lear, Ellington & Guy, per Telegraphic Attorney, Andrew J. Bailey."

It appears from the evidence that, after correspondence, Mr. Bailey was directed by the claimant to enter into the agreement and charter the vessel on behalf of Ellington & Guy, who were desiring to ship a cargo. The Bradshaw reported at Bermuda Hundreds, on Friday, July 27, 1906, at 7 a. m. On August 6th she was transferred to a more convenient berth at the northern end of the same wharf, some cargo placed on board upon the 7th, and on the morning of the 8th the loading was actually begun. The loading was completed on Friday, August 17th, at 9 a. m., and upon the evidence the libelant is entitled to recover, under the terms of the charter party, which was executed by authority, and formed the contract under which the parties were acting.

The evidence offered relating to a custom prevailing at Bermuda Hundreds, with reference to the assignment of a wharf, could not vary the written contract as entered into by the parties. Carbon Slate Co. v. Ennis, 114 Fed. 260, 52 C. C. A. 146. Both parties may be assumed to have had knowledge of this custom. Yet, if the charterer desired to use the port of Bermuda Hundreds for loading, he should have seen to it that the charter contained a provision protecting him from any delay caused by the enforcement of harbor customs. The owner of the Bradshaw, making the charter, had a right to assume that the charterer could carry out his contract without reference to the custom.

According to the customary method of computation, nine days demurrage, amounting to $333, was incurred, for which the libelant may have a decree, together with interest and costs.

THE J. S. WARDEN.

(District Court, E. D. New York. June 27, 1907.)

1. MARITIME LIENS—EVIDENCE TO ESTABLISH.
   Evidence of an account stated between a claimant and the owner of a vessel for supplies furnished has no tendency to establish a maritime lien on the vessel.

2. SAME—SUPPLIES—NEW JERSEY STATUTE.
   A claim for a lien for supplies furnished a vessel in her home port in New Jersey, under 2 Gen. St. N. J. p. 1966, § 46, sustained on evidence that they were furnished and charged to the vessel.

   [Ed. Note.—Created by state laws, see note to The Electron, 21 C. C. A. 21.]

In Admiralty.

S. Howell Jones, for libelant.

Wing, Putnam & Burlingham, for claimant.

CHATFIELD, District Judge. The libelant has brought an action in admiralty against the steamer J. S. Warden for coal and kindling wood furnished to said boat within the state of New Jersey during the months of July and August, 1905. The alleged reasonable value of these supplies is $1,333.10, upon which $200 has been paid by the claimant.

The libelant claims a lien under the laws of the state of New Jersey, and also a maritime lien on the ground that credit was furnished directly to the vessel. The claimant denies the various allegations, and alleges that it became the purchaser for value of the steamboat J. S. Warden during the month of August, 1905, and that it has paid for all coal and wood received on board since the 9th of August in that year; that Newark, N. J., where the supplies were furnished, was the home port of the Warden, and that no lien exists either under the state laws or as a maritime lien in admiralty. The matter was referred to a United States commissioner in this district, who has taken the proof and reported that, owing to a clerical error, the amount of the claim should be $1,033.10, which, with interest from September 1, 1905, to the date of the report, amounting to $86.43, makes a total of $1,119.53, for which the commissioner reports that he finds a valid lien against the vessel. Exceptions have been filed to the commissioner's report, based upon the objections made to the receipt of evidence, and upon the defense that no lien existed. The evidence taken before the commissioner shows that the libelant attempted to prove the reasonable value of certain goods, which he offered evidence to show were charged to the steamer Warden. The claimant objected to the introduction of this testimony, and the testimony was received apparently subject to further connection. The libelant also attempted to prove an account stated, as against the claimant, and payments on account by checks, which checks were not honored, but were offered as admissions of liability.

It is difficult to see how a maritime lien could be established by proving an account stated. The account could not be rendered to the boat, and this evidence would seem to be competent merely for the purpose of estopping the claimant from disputing the quantity and the value fixed upon the supplies by the libelant.

There is sufficient testimony to substantiate the finding by the commissioner, as against the claimant, for the reasonable value of the supplies. The testimony as a whole raises the presumption that the supplies were furnished and charged to the vessel. No motion to strike out the testimony was made by the claimant, based upon a failure to further connect the deliveries with the boat, and no testimony was offered by the claimant to contradict any of the claims of the libelant.

So far as the testimony shows, the port of Newark was the home port of the vessel, and the case is thereby not affected by the decision filed upon the 30th day of January, 1907, by the Circuit Court of Appeals, Second Circuit, in the case of Consolidation Coal Company v. The Steam Yacht Golden Rod, 151 Fed. 6.

The exceptions to the commissioner's report will therefore be overruled, and a decree may be entered for the libelant for the amount found by the commissioner, with interest from the date of the report.

In re GRIGNARD LITHOGRAPHIC CO.

(District Court, E. D. New York. July 30, 1907.)

BANKRUPTCY—CLAIMS AGAINST TRUSTEE—RENT.

Where the receiver and trustee continue to occupy premises leased by the bankrupt without agreement as to rent, the landlord is entitled to rent on a quantum meruit, but cannot recover for power which was not used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 352.]

In Bankruptcy.

Henry Staton, for petitioner.
James S. Lehmaier, for trustee.

CHATFIELD, District Judge. On the 14th of June, 1906, a receiver was appointed of the assets of the Grignard Lithographic Company, against which a petition had been filed in bankruptcy; and this receiver was elected trustee, and immediately qualified, upon July 17, 1906. Certain machinery which had been purchased by the bankrupt company from the Trow Directory Company, and certain other assets, were in a loft occupied by the Grignard Lithographic Company, upon the second floor of the Trow Directory Company building. The Trow Directory Company claimed the title to the machinery and plant, including the greater portion of the assets upon the property mentioned, under a conditional bill of sale, which it appears had not been filed prior to the appointment of the receiver, and about the validity of which there may have been question. The bill of sale was for the sum of $12,311, and upon June 14, 1906, $7,331 had been paid, leaving a balance of $4,980. The trustee, by a sale of the property not claimed under the conditional bill of sale, realized about $2,000, and now has in his possession as funds of the bankrupt estate $1,044.21. The premises in which the property was located were occupied by the receiver and trustee from June 14, 1906, until November 28, 1906, substantially 5½ months. The rental which was paid by the company before the bankruptcy was $133 a month, and this rental value had been agreed upon because of certain business relations between the Trow Directory Company and the bankrupt, which did lithographic business for the Trow Directory Company. The Trow Directory Company has now demanded the sum of $1,650 for the rent and occupation of the premises, upon the affidavit of a real estate agent that floor space in said building is worth from 25 to 30 cents per square foot per annum, and that electric power is worth $125 to $150 per horse power. The premises in question comprise 8,675 square feet, as shown by the affidavit of Robert W. Smith, verified July 16, 1907.

During the pendency of the receivership, and before the premises were delivered by the trustee to the Trow Directory Company, considerable dispute and litigation arose from the claim made by the Trow Directory Company to the machinery covered by the conditional bill of sale. Without considering the merits of the previous contentions of the respective parties, it is apparent that the receiver and trustee,

under the authority of the court, occupied the premises and disputed the title to the machinery in question with the Trow Directory Company until a time when, it appearing to be impossible to effect a sale, the property was turned back to the Trow Directory Company for the balance due upon the bill of sale. In the meantime the receiver had been occupying the premises, perhaps unwillingly, but yet because of his best judgment, as directed by the court, that there was nothing else to do. The fact that he did not wish to occupy the property, and did everything that he could to avoid doing so, does not alter the situation that, by the exigencies of legal methods of proceeding on the part of the trustee, he continued as a tenant of the premises. The lease, however, was ended, so far as being an obligation against the estate is concerned, by the bankruptcy proceedings, and under the circumstances the equities do not show that upon a quantum meruit the possibility of the Trow Directory Company receiving compensation for power, if it had obtained a new tenant, should be taken as any portion of the value of the premises to the estate. The claim of the Trow Directory Company should be for use and occupation, and not for damages.

Taking the real estate expert's value of 25 cents a square foot per annum for the floor space, the amount of rent for 5½ months would be $994.01, and to this extent the claim of the Trow Directory Company will be allowed, and the trustee directed to pay this amount from the funds in his possession, if sufficient for the purpose after meeting prior obligations.

ATLANTIC TRUST CO. v. OSGOOD.

(Circuit Court, S. D. New York. July 22, 1907.)

1. REFERENCE—REPORT—REVIEW ON MOTION IN TRIAL COURT.
   The practice of moving for new trials in causes in federal courts heard by referee has practically fallen into disuse since the creation of the Circuit Courts of Appeals, and, while the right to make such motions remains, the court, in considering the same, will not retry the case, nor consider any question which may be brought before the Circuit Court of Appeals by writ of error, nor will it substitute its conclusions on conflicting proofs for those of the referee.
2. SAME—ADMISSION OF IMPROPER EVIDENCE.
   The admission of improper evidence on a trial before the court without a jury, or before a referee, is of no moment, and not ground for a new trial, unless such evidence was necessary to support the finding of facts.

Simpson, Thacher & Bartlett, for plaintiff.
Harmon & Mathewson, for defendant.

LACOMBE, Circuit Judge. The practice of moving for new trial in causes heard by referee has practically fallen into disuse, because, since the creation of the Circuit Courts of Appeal, it has generally become unnecessary. Nevertheless the phraseology of the rule has not been altered, and technically the right to make such motion remains. Upon such a motion the court will not retry the case (Kilduff v. Roeblings' Sons Co. [C. C.] 150 Fed. 240), nor will it consider any question which may be brought before the Court of Appeals by writ of er-

ror, nor will it substitute its conclusions on conflicting proofs for those of the referee who saw and heard the witnesses; but there are some points which it may consider and pass upon. In illustration: Defendant's brief contends that there are facts important to be found, sustained by uncontroverted proof, which the referee refuses to find. Such a matter may legitimately be considered. On the other hand, it is suggested that some evidence was "improperly admitted." The admission of improper evidence on a trial before the court without a jury, or before a referee, is a matter of no moment. The only important question is whether it was necessary to rely on such evidence for finding of facts. This practice is rarely followed now, and entails such delay in final disposition of the cause that security as on appeal should be given for the full amount.

Forty days given to make up case and exceptions as prayed. Stay in the meanwhile. Five days after entry of order to file security. If not filed within five days, stay will be vacated.

In re FANNING.

(District Court, E. D. New York. June 18, 1907.)

BANKRUPTCY—DISCHARGE—DENIAL—GROUNDS.

Where a bankrupt did not willfully conceal testimony preventing his creditors from obtaining property, the fact that he apparently gave evasive and disrespectful answers to questions concerning the same was not ground for denying his discharge.

George F. Stackpole, for bankrupt.
Richard T. Greene, for creditor.

CHATFIELD, District Judge. This is a motion for the confirmation of the special commissioner's report upon a reference to him on objections to the application by the bankrupt for a discharge.

The special commissioner has sufficiently set forth the facts in his report, and has correctly stated and interpreted the law. The bankrupt apparently gave evasive and disrespectful answers, but there is nothing to show that he willfully concealed testimony, preventing the creditors from obtaining the property, and it does not seem that his conduct was such as to merit punishment by refusing to grant him a discharge, inasmuch as the referee apparently did not consider the conduct of the bankrupt when a witness to be worthy of any discipline. The purpose of the penalties of the bankruptcy statute is to prevent bankrupts from concealing their property and defrauding their creditors. Ordinary questions of contumacy or contempt of court can be disposed of directly, and of themselves are not to be corrected by the withholding of a discharge.

The special commissioner's report will be confirmed in all respects, and the application for a discharge granted.

In re KRAUSE.

(District Court, S. D. New York. July 15, 1907.)

BANKRUPTCY—RECEIVERSHIP—EXPENSES.

Where the proceedings of a receiver in bankruptcy were beneficial to the estate, and the items of expense seemed reasonable and necessary at the time they were incurred, the receiver and his attorneys having acted according to their best judgment and on sufficient cause at the time, such expenses would be allowed, though it thereafter appeared that the receivership had cost more than the necessities justified.

Henry L. Slobodin, for creditors.
James, Schell & Elkus, for receiver and trustee.

CHATFIELD, District Judge. This motion comes up upon the report of a special commissioner, allowing the receiver and his attorneys certain sums for their services in involuntary bankruptcy proceedings. The estate was small, but much of the property now in the hands of the trustee seems to have been obtained through the efforts of the receiver and his attorneys. A number of claimants for wages objected to the expenses of the receiver, and to the allowances given him and his attorneys, for the reason that the sum which will be left, applicable to the payment of wages claims, is not sufficient to pay the whole of those claims, and that the receivership has been too expensive.

It certainly appears, in the light of present circumstances, that this receivership has cost more than the necessities, viewed from the point of results, would justify, but, as found by the referee, the items of expense appear to have seemed reasonable and necessary at the time they were incurred, and it does not seem that the receiver and his attorneys can be blamed or held responsible, inasmuch as they apparently acted according to their best judgment and upon sufficient cause at the time. The amount allowed them for their services is not excessive, and while the hardship to the claimants, who are wage earners, would have had an effect upon the situation, if it could have been viewed from the present standpoint, nevertheless it seems that, if the receiver and his attorneys had not acted as they did, the wage earners would receive even less than they will under the present circumstances.

The report of the special commissioner will therefore be confirmed in all respects.

In re BURKE.

(District Court, E. D. New York. June 18, 1907.)

BANKRUPTCY—SUPPLEMENTARY PROCEEDINGS—STAY.

Where bankruptcy proceedings intervened pending supplementary proceedings against the bankrupt, which were thereupon stayed, and the claim of the creditor conducting the proceedings was one provable in bankruptcy proceedings, and from which the bankrupt might obtain a discharge, he was entitled to have any further examination either of himself or third persons conducted in the bankruptcy proceedings, and hence the creditor could not obtain a vacation of the stay on the ground that the supplementary proceedings could be carried to a termination in the state court with less expense.

Frank M. Franklin, for bankrupt.
Adolph B. Rosenfield, for creditor.

CHATFIELD, District Judge. In this proceeding a creditor, one Solomon B. Davega, has appeared and conducted the examination of some witnesses before the referee, on a judgment obtained in the Municipal Court of the city of New York, for the sum of $336.90. An order was obtained for the examination in supplementary proceedings of the judgment debtor, who is the bankrupt here, and this examination was stayed by an order of this court made and entered on the 29th day of March, 1907. The present application is to vacate this stay, and to allow the supplementary examination in the state court to proceed. The reasons stated for this application are that considerable money has already been spent, without results satisfactory to the creditor in the bankruptcy proceeding; that the witnesses before the referee have not appeared; and that the examination in the state court can be conducted without the expense alleged to be incident to an examination before the referee in bankruptcy.

Assuming that these statements are true, the bankrupt nevertheless has a right to have proceedings in a state court action, brought upon a claim provable and dischargeable in bankruptcy, stayed, and to have the matter disposed of in the bankruptcy proceedings. If petitioning creditors should discover assets, the trustee would be in duty bound to take possession or to follow up these assets, and the order of the state court, in the usual form, providing for the payment of the judgment to the sheriff, could not be carried out. Further proceedings would be necessary in order to have the trustee put in a position where the estate would benefit by the examination.

Under these circumstances, the motion should be denied, and the stay continued, but without prejudice to any application for the examination of the bankrupt or third parties in the bankruptcy proceedings.

In re A. C. WILCOX & CO.

(District Court, S. D. New York. July 15, 1907.)

BANKRUPTCY—CLAIMS—PARTIAL ALLOWANCE—LACHES.

Where, after a partial allowance by a referee of a creditor's claim to recover money deposited with the bankrupt prior to the filing of the petition, no substantial injury to the estate ensued by the creditor's delay in taking up the referee's report and acting thereon, which was ultimately filed by the attorney for the trustee, the claimant did not lose his right to the amount allowed, because of his laches, at least to the extent of the fund in the hands of the trustee in excess of the cost of administration.

Frank L. Tyson, for petitioner.
James F. Egan, for trustee.

CHATFIELD, District Judge. In this proceeding the trustee in bankruptcy has declared and paid one dividend, and has in his hands sufficient to pay a second dividend, which has been withheld pending a motion by one Carroll D. Parry to recover $715.61, deposited with the bankrupt prior to the filing of the petition. This motion was referred to the referee in bankruptcy as special commissioner, and he has reported that the claim of Mr. Parry should be allowed, and the sum deposited repaid to the extent of $286.38; that Mr. Parry should be compensated for his expenses for the fees of the special commissioner and the charges of the stenographer, but allows him no costs. The report of the special commissioner was dated February 7, 1907, and the claimant neglected to take up the report or to act thereon. This delay on his part has caused delay in the declaration and distribution of a further dividend. The attorney for the trustee has finally filed the referee's report, and now objects to the confirmation thereof, on the ground that the claimant, by his laches, has lost any right to the amount allowed.

It does not seem to the court that any substantial injury to the estate has ensued from the delay on the part of the claimant. The report of the special commissioner allowed him but a part of his claim, and to have taken up the report would have meant an acquiescence in this disallowance. By the present motion, however, the claimant accepts the special commissioner's findings with respect to the tracing of the various sums.

There would seem to be sufficient funds in the estate, over and above necessary expenses, to pay the sum allowed, and the motion will be granted to pay that amount, together with the special commissioner's fees and the stenographer's charges, out of the estate, to the extent of the fund which the trustee may now have, over and above the cost of administration. If by his laches the claimant has allowed the estate to be distributed, so that after payment of expenses there will be insufficient to cover this claim, the amount which he can receive must be reduced accordingly.

CHRISTIAN v. FIRST NAT. BANK OF DEADWOOD, S. D., et al.

(Circuit Court of Appeals, Eighth Circuit. June 10, 1907.)

No. 2,394.

1. CONTRACTS—EQUITABLE INTERPRETATION.
When a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]

2. SAME—INTERPRETATION WHEN ONE PARTY RESPONSIBLE FOR TERMS EMPLOYED.
If there be doubt as to the true meaning of a written contract, and one of the parties be responsible for the terms employed, it is both just and reasonable that it should be construed most strongly against that party.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 736.]

3. BAILMENT—DUTIES OF BAILEE WITHOUT REWARD NOT LIGHTLY EXTENDED BY INFERENCE.
Courts are indisposed to extend, by inference, the perils of an unprofitable trust; and so it is that every bailee without reward is regarded as having assumed the least responsibility consistent with his actual undertaking.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 37–41.]

4. ESCROWS—DUTIES OF DEPOSITARY—CONVERSION.
Three certificates of stock in a mining company, indorsed in blank and representing shares held by several co-owners, were deposited by them in a bank under an option contract of sale (fully set forth in the opinion), containing provisions for the delivery of the stock to the purchaser upon payment of the purchase price, and for the surrender of the stock to the depositors in the event of default in the payment of the purchase price. The purchaser made default, and one of the depositors then called upon the bank to make a distribution or division of the shares represented by the certificates among the depositors according to their respective interests, and to procure from the mining company and deliver to the demandant a separate certificate for his interest. The bank did not comply with the demand, and thereupon the demandant sued it for conversion. *Held*, upon full consideration of the terms of the contract and of the rules of interpretation before stated, that it did not impose upon the bank the duty of distributing or dividing the stock among the several co-owners, or of procuring for and delivering to each a separate certificate for the shares to which he might be entitled, as between himself and his co-owners, and that therefore the bank's failure to comply with the demand did not constitute a conversion of the demandant's interest in the stock.

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

Carle Whitehead (Robert C. Hayes and William B. Shattuc, on the brief), for plaintiff in error.

Norman T. Mason (Eben W. Martin, on the brief), for defendants in error.

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

VAN DEVANTER, Circuit Judge. This was an action of trover against the First National Bank of Deadwood, S. D., and the Oro Hondo Gold Mining Company for the alleged conversion of a large

number of shares of the capital stock of the mining company claimed by the plaintiff, Thomas Christian. At the trial, which was to a jury, the evidence, without any conflict, established these facts: The plaintiff and 11 other co-owners of less than the entire number of shares, represented by three stock certificates issued by the mining company, deposited the certificates with the defendant bank for the purposes and upon the terms named in the following agreement:

(1) This envelope contains two million, one hundred and twenty thousand (2,120.000) shares of the capital stock of the Oro Hondo Mining Company, evidenced by certificates as follows, to wit: Certificate No. 19, for five hundred and five thousand (505,000) shares, certificate No. 20 for seven hundred and fifty-seven thousand five hundred (757,500) shares, certificate No. 21, for seven hundred and fifty-seven thousand five hundred (757,500) shares, of the par value of one dollar per share; which said certificates of stock are issued to George M. Nix, and by him assigned in blank.

(2) One million, nine hundred ninety-eight thousand eight hundred and eighty (1,998,880) shares of said stock belong to the parties named below, signing this escrow, and are placed by the undersigned in escrow with the First National Bank of Deadwood, South Dakota, upon the following terms and conditions:

(3) All of said stock may be purchased by said George M. Nix for the sum of ninety-nine thousand nine hundred and forty-four ($99.944.00) dollars, less a commission of ten (10%) per cent. to be paid to said George M. Nix as payments are made upon this escrow.

(4) On or before the 1st day of April, 1903, the said George M. Nix or his assigns must pay all of the parties signing this escrow, except himself, or deposit to their order in the First National Bank of Deadwood, South Dakota, the sum of twenty-two thousand, four hundred eighty-seven and forty one-hundredths ($22,487.40) dollars, and shall then have the privilege of withdrawing twenty-five (25%) per cent. of said stock so deposited belonging to the signers of this escrow, four hundred ninety-nine thousand seven hundred (499,700) shares, or certificate No. 19, for five hundred and five thousand (505,000) shares.

(5) Within six months from said 1st day of April, 1903, the said George M. Nix or his assigns must pay thirty-seven and a half (37½%) per cent. of eighty-nine thousand, nine hundred forty-nine and sixty one-hundredths ($89,949.60) dollars, or thirty-three thousand and seven hundred thirty-one and ten one-hundredths ($33,731.10) dollars, and may then withdraw seven hundred forty-nine thousand and five hundred and fifty (749,550) shares of said stock, or certificate No. 20 for seven hundred fifty-seven thousand five hundred (757,500) shares deposited in escrow.

(6) Within one year from the said 1st day of April, 1903, said George M. Nix or his assigns, must pay thirty-seven and a half (37½%) per cent. of said eighty-nine thousand, nine hundred forty-nine and sixty one-hundredths ($89,949.60) dollars, or thirty-three thousand seven hundred thirty-one and ten one-hundredths ($33,731.10) dollars, and may then withdraw the balance, to wit: Seven hundred forty-nine thousand, five hundred and fifty (749,550) shares of said stock so deposited in escrow, or the third certificate, No. 21, for seven hundred fifty-seven thousand, five hundred (757,500) shares of stock.

(7) It is understood that the extra one hundred twenty-one thousand one hundred and twenty (121,120) shares of stock deposited in escrow are the property of George M. Nix, the certificates having erroneously been made out for a larger amount of stock than the agreement with the signers of this escrow calls for, by reason of a mistake in the acreage of the ground.

(8) In case said George M. Nix or his assigns does not carry out the conditions of this escrow in reference to work to be done on said ground, as specified in the contract with said signers of the escrow, made on the 18th day of March, 1902, or payments provided for herein shall not be made, then all rights under this escrow shall cease and determine, and said parties depositing said stock may withdraw the same from said First National Bank of Deadwood, and shall be the owners thereof as shown by the schedule marked

'Exhibit A' hereto free of any option upon the same by the said George M. Nix, or his assigns.

(9) In case any payments shall be made by said George M. Nix or his assigns to the undersigned parties and the future payments provided for herein shall not be made, then all rights of said George M. Nix or his assigns to any future delivery of stock shall cease and the undersigned parties may withdraw said stock from said bank as above provided.

(10) Time is of the essence of this contract.

(11) All moneys deposited with said bank as above provided shall be paid over by the said bank to the several parties entitled thereto as shown by the schedule marked 'Exhibit A' hereto attached and made a part of this agreement.

(12) In case any of said payments shall not be made, the stock shall be delivered to the parties named in said Exhibit A and be the property of said parties; twenty shares of stock to be delivered for each dollar to be paid the said parties.

Dated Deadwood, South Dakota, this 16th day of January, 1903..

Exhibit A.

Each payment as it shall be made shall be by said bank apportioned and paid over to the following named parties or deposited to the credit of said parties in the following amount to wit:

Name of Persons to Whom Payments are to be Made.	1st Payment Less 10%. $22,487 40	2d Payment Less 10%. $33,731 10	3d Payment Less 10%. $33,731 10	Total.
Susie B. Moore	$ 770 60	$ 1,155 87	$ 1,155 87	$ 3,082 34
Pat J. O'Brien	770 60	1,155 87	1,155 87	3,082 34
Thomas Burke	770 60	1,155 87	1,155 87	3,082 34
James Cusick	7,419 95	11,129 94	11,129 95	29,679 84
Thomas Christian	6,804 12	10,206 19	10,206 19	27.216 50
B. F. Atkins	910 25	1,365 39	1,365 19	3,640 85
Charles Hegberg	455 10	682 76	682 77	1,820 63
Ed A. Dryer	2,518 00	3,777 01	3,777 01	10,072 01
Frank Abt	498 60	747 90	747 90	1,994 40
R. H. Purcell	498 60	747 90	747 90	1,994 40
A. D. Wilson	615 83	923 75	923 76	2,463 34
Charles J. Swanstrom	455 15	682 75	682 75	1,820 65
George M. Nix	2,498 60	3,747 81	3,747 77	9,994 18

The agreement was signed by the plaintiff and the other co-owners of the shares intended to be sold, but was not signed by Nix, the bank, or the mining company.

In this connection it may be observed that there are several mistakes in the agreement, which, though confusing at first, are obviated when the entire instrument is considered. The number of shares represented by the three certificates is inaccurately stated as 2,120,000, but is shown to have been actually 2,020,000. The number of shares owned by the plaintiff and his co-depositors is stated as 1,998,880 and also as 1,998,-800; the former being correct. Nix is spoken of as owning 121,120 shares, but the true number appears to have been 21,120. In Exhibit A, Nix is named as if he were one of those among whom the specific payments of $22,487.40, $33,731.10, and $33,731.10 provided for in paragraphs 4, 5, and 6 were to be divided; but a computation of the amounts there apportioned to the plaintiff and his co-depositors shows that the whole of these payments would be exhausted before reaching Nix's name. As these specific payments were unquestionably the net purchase price of the shares of the plaintiff and his co-depositors, after deducting the commission allowed to Nix by paragraph 3, and as the

last line of Exhibit A must be regarded as a mere statement of Nix's commission, the rule stated in paragraphs 8, 9, and 12 for measuring the interests of the plaintiff and his co-depositors in such of the stock as might not be sold is not well expressed, unless it was intended that Nix should have a commission or interest in such shares as he might fail to purchase, which is both improbable and contrary to the provisions of paragraphs 3, 8, and 9. It was doubtless meant that the plaintiff and his co-depositors should own 20 shares of the stock not sold for each dollar of the gross purchase price not paid or earned as a commission.

Pursuant to paragraph 4, Nix paid the first installment of $22,487.40, being 25 per cent. of the gross purchase price, less a corresponding proportion of his commission, and withdrew from the bank certificate No. 19 for 505,000 shares. The time for paying the second installment was then extended to January 1, 1904, when Nix made default and so lost all rights to further avail himself of the option. Thereupon the plaintiff, acting independently of his co-depositors, made a demand of the bank, which, as interpreted by his counsel, called upon the bank to surrender the original certificates, Nos. 20 and 21, to the mining company, to cause new certificates to be issued in such manner as would permit the remaining shares to be divided among their owners according to their respective interests, and then to deliver to the plaintiff a separate certificate for his portion. The demand was not complied with; and, if the bank was obligated to thus divide the remaining shares among the several co-owners and to deliver to each a separate certificate for his portion, the circumstances surrounding the demand were such that the bank was guilty of a conversion of the plaintiff's portion, otherwise compliance with the demand was rightly refused, and there was no evidence of a conversion. As respects the mining company, there was an entire absence of evidence of any act of commission or omission on its part violative of or inconsistent with the rights of the plaintiff.

At the conclusion of the evidence, the court ruled that the terms of the agreement were not such as to obligate the bank, upon Nix's default, to divide the remaining shares among the several co-owners, and to deliver to each a separate certificate for his portion, but merely required it to return the original certificates, Nos. 20 and 21, to the plaintiff and his co-depositors, from whom they were received, and that the plaintiff, acting independently of his co-depositors, was not entitled to the possession of them. Under the court's instruction, the jury then returned a verdict for the defendants, and, judgment having been rendered thereon, the plaintiff sued out the present writ of error.

As Nix, who owned some of the shares represented by the certificates, assented to the terms of the agreement by accepting some of its benefits, and as the bank also assented thereto by accepting the duties of depositary thereunder. the decisive question presented for our consideration is: Did the agreement, rightly interpreted, require the bank, upon the default of Nix, to divide the shares represented by the two remaining certificates among the several co-owners according to their respective interests and to procure for and deliver to each a certificate representing his portion? If it did, it not only enjoined upon the de-

positary duties which were unusual, but also attached to its office responsibilities which were disproportionate to any advantages which could reasonably have been expected to accrue to it therefrom. There was no express arrangement for its compensation, and not only did paragraph 11 and Exhibit A expressly require it to promptly pay over to the plaintiff and his co-depositors "all moneys" received by it in payment for their stock, but paragraphs 4, 5, and 6 left it altogether uncertain whether any of the moneys would even pass through its hands, should Nix avail himself of his option to purchase. As is said by Schouler, in his work on Bailments ([3d Ed.] §§ 58, 63), "the courts are indisposed to extend, by inference, the perils of an unprofitable trust," and "every bailee without reward ought to be given the least trouble consistent with his actual undertaking." This is in keeping with the rule that, when a contract is fairly open to two constructions, it is legitimate to adopt the one which equity would favor. Washington, etc., Co. v. Coeur d'Alene, etc., Co., 160 U. S. 77, 101, 16 Sup. Ct. 239, 40 L. Ed. 355.

The circumstances surrounding the making of the agreement were these: The certificates had been issued in the name of Nix and had been by him assigned in blank. They were in the possession of the plaintiff and his co-depositors, who were giving Nix an option to purchase their shares. To protect each party against any intervening act of the other, as also for their mutual convenience, it was deemed proper to place the certificates in the custody of a depositary to abide the action of Nix under the option contract. The certificates were not formally assigned to the bank, and it was not even nominally made the owner of the shares. The original conditions therefore could be restored, if Nix made default, by a mere redelivery of the certificates to those from whom they were received. The bank was in no better position to divide the shares and obtain new certificates than were the owners. Indeed, its place of business was at Deadwood, S. D., and the mining company was a Colorado corporation, whose principal offices, including that for the transfer of stock, were presumably in the latter state. Thus the situation at the time suggests no reason why the bank should have been charged with dividing the shares and obtaining new certificates, in the event of Nix's default.

The language of the agreement is that of the plaintiff and his co-depositors, and, if there be any doubt as to its true meaning, it is both just and reasonable that it should be construed most strongly against them. Noonan v. Bradley, 9 Wall. (U. S.) 394, 407, 19 L. Ed. 757; Texas & Pacific Ry. Co. v. Reiss, 183 U. S. 621, 626, 22 Sup. Ct. 253, 46 L. Ed. 358; Osborne v. Stringham, 4 S. D. 593, 57 N. W. 776.

Of course, effect must be given to the intention of the parties, and, if that is made plain and certain by the agreement, every part of it being duly considered, the considerations and rules of interpretation to which we have referred are without application.

Turning to the agreement, we find that, in respect of moneys deposited with the bank in payment for the stock of the plaintiff and his co-depositors, it is directed with much particularity, in paragraph 11 and Exhibit A, that they shall be "by said bank apportioned"

among and paid over to the "several" parties entitled thereto; the amount to be paid to each being precisely stated. But, in respect of the disposition of the certificates to be made by the bank, in the event of Nix's default, it is said, in paragraph 8, "said parties depositing said stock may withdraw the same from said First National Bank of Deadwood, and shall be the owners thereof as shown by the schedule marked 'Exhibt A' hereto." And in paragraph 9: "The undersigned parties may withdraw said stock from said bank as above provided." These paragraphs, it will be observed, do not charge the bank with the division of the shares among the several parties entitled to them, but plainly contemplate that it shall merely permit the depositors to withdraw what they deposited with it, the certificates. Thus a distinction is reasonably and clearly drawn between the moneys, which would be readily capable of division by the bank, and the certificates, which could not be divided without the assistance of the mining company, over which the bank had no control. And that it was intended that the bank should not be troubled with making any change in the certificates is further indicated by the fact that no provision was made for segregating the shares of Nix, named in paragraph 7, from the others during the life of his option, and also by paragraph 4, which authorized the bank to surrender certificate No. 19 for 505,000 shares upon the payment of the purchase price of 499,700 shares, and by paragraph 5, which authorized it to surrender certificate No. 20 for 757,500 shares upon the payment of the purchase price of 749,550 shares. Without any doubt or uncertainty, the several paragraphs and provisions which we have mentioned, unless modified by another, contemplated that the bank should deliver to Nix or redeliver to the depositors, as the one or the other might become entitled thereto, the identical certificates deposited with it.

We are thus brought to paragraph 12, upon which the plaintiff chiefly relies, which reads:

"In case any of said payments shall not be made, the stock shall be delivered to the parties named in said Exhibit A and be the property of said parties; twenty shares of stock to be delivered for each dollar to be paid the said parties."

It is difficult to harmonize this paragraph with other provisions of the agreement. The parties named in Exhibit A are not identical with those authorized by paragraphs 8 and 9 to withdraw the stock from the bank, upon the default of Nix, for he is not one of the latter, and yet is named in Exhibit A. Again, while other paragraphs show unmistakably that he was not to have any right to any of the stock of the plaintiff and his co-depositors, save as he should pay for it, this paragraph, if given full effect as it is written, would entitle him, in the present situation, to 149,911.60, or possibly 149,916, shares of their stock without pay.

It is apparent, we think, that resort must be had to interpretation to remove the doubt and uncertainty cast upon the meaning of the agreement by this paragraph. While the reference to Exhibit A seemingly includes Nix among those to whom the stock was to be delivered, what follows equally indicates that he is not included, for

it says "twenty shares of stock to be delivered for each dollar to be paid the said parties." He had no interest in the stock to be sold and was not one of those to be paid. Although entitled to a commission of 10 per cent. on the gross purchase price, in the event and to the extent that he availed himself of the option to purchase, he was plainly not entitled to any commission or payment in respect of stock not sold. The reference to Exhibit A must therefore be understood as not including him, and therefore as directing a delivery to the other parties named in the exhibit, who are identical with those designated in paragraphs 8 and 9 as the "parties depositing the said stock" and "the undersigned parties." This view is also strengthened by the fact that the measure so prescribed for determining the interest of the depositors in the stock not sold—that is, 20 shares for each dollar to be paid—is the precise rate at which the gross purchase price was fixed, for by paragraphs 2 and 3 the depositors agreed to sell to Nix their 1,998,880 shares for $99,944.

Unlike the provisions relating to the disposition of moneys paid into the bank, this paragraph does not in terms direct an apportionment among the depositors, but only the delivery of the stock to "the parties named in said Exhibit A"—meaning the depositors. It does not say that the stock shall be delivered to them severally, or that 20 shares shall be delivered to each for each dollar to be paid to him, but simply refers to them in a collective way as do paragraphs 8 and 9. But, as there would necessarily be more than enough stock to fill the measure of 20 shares for each dollar to be paid to the depositors, and as the excess would necessarily be all or part of the 21,120 shares owned by Nix as stated in paragraph 7, it is urged that it could not have been intended that his shares should be delivered to the depositors or become their property, and therefore that it must have been intended that the bank should divide the stock and procure for and deliver to the several owners new certificates representing the shares to which they would be respectively entitled. There is some color for the contention, but we think it is not sound. Of course, it was not intended that the depositors should become the owners of Nix's shares any more than that he should become the owner of theirs without pay; but it does not follow that the original certificates representing the shares of both were not to be redelivered to the depositors from whom they were received. He had assented to the inclusion of his shares in these certificates, had indorsed upon the latter an assignment in blank, and had intrusted them to the possession and keeping of the depositors before they were delivered by the latter to the bank. He also assented to the terms of the agreement, although it contained no provision for the delivery to him of his shares save as he might by making the prescribed payments become entitled to the original certificates. In these circumstances, it is quite reasonable to believe that he was content to look to the depositors, to whom alone the agreement directs a redelivery, for a segregation of his stock in the event that through his default the certificates should be returned to them. Had there been a purpose to impose upon the bank the unusual duty of dividing the stock and procuring for and delivering

to the several owners new certificates for the shares to which they would be respectively entitled, it doubtless would have been plainly stated; but, as such an intention is not expressed, or even necessarily implied, we think the considerations and rules of interpretation before mentioned require that whatever doubt or uncertainty may exist in that regard should be resolved in favor of the bank, and that it must be held that no such duty was imposed.

Our conclusion is that the plaintiff was not entitled to demand that the bank divide the remaining stock among the several co-owners, or that it deliver to him alone the remaining certificates, and that therefore no conversion was shown, and a verdict against him was rightly directed.

The judgment is accordingly affirmed.

BELL v. NORTH AMERICAN COAL & COKE CO.

(Circuit Court of Appeals, Sixth Circuit. June 18, 1907. On Rehearing, October 15, 1907.)

No. 1,636.

1. WASTE—NATURE OF REMEDY—EQUITY.

Equity has jurisdiction of a suit to restrain waste by the cutting and removal of valuable timber, and incidentally for an accounting for waste already committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waste, § 16.]

2. ADVERSE POSSESSION—POSSESSION BY TENANT—EXTENT.

When a tenant is placed in possession of a definite part of a larger tract of land, the possession will not avail the landlord beyond the part so claimed and held; but, if one claiming under an assurance of title defining boundaries place a tenant in possession without limiting him to any definite part, the tenant's possession will extend to the landlord's boundaries, although the land actually occupied is but a small part of the whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 585.]

3. SAME—TENNESSEE STATUTE.

Under Shannon's Code Tenn. § 4456, possession of land under assurance of title, if continued for seven years, operates not only to bar an action on a superior title, but to devest that title and vest it in the adverse holder; but, on the other hand, possession without color of title continued for seven years gives a mere right to defend against the title so long as the possession is actual and continuous, under section 4458, which provides that no person shall have any action for any lands, but within seven years after the right of action has accrued, and such right is lost the moment the possession is abandoned. Hence, under such statute as construed by the Supreme Court of the state, where one in possession of land without color of title attorned to another who had made entry from the state of a definite tract, including his own, and agreed to hold possession of the whole for his landlord, the effect was an abandonment of his own possession, and from that time his possession was that of his landlord and referable to the entry, and extended to the whole tract, although there was no extension of his actual inclosure.

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

On Rehearing.

4. PUBLIC LANDS—ENTRY OF STATE LANDS—TENNESSEE STATUTE.

The provision of Acts Tenn. 1824, c. 22, § 6, making unlawful an entry of state land on which another resided or which was occupied by him,

unless he was given 30 days' notice, was intended solely for the protection of the occupier, by enabling him to exercise his prior right to enter the land; and an entry made without giving such notice to an occupier of part of the land is void only as to such part. The notice might, moreover, be waived by an occupier, and was so waived in a case where for a valuable consideration he agreed to attorn to the entryman and hold possession for him until the grant was secured.

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

John F. McNutt, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill to restrain trespass and quiet title to a large tract of mountain land lying in Cumberland county, Tenn. The complainant asserted title and possession of the lands included in several grants issued originally to Thomas B. Eastland, under whom by mesne conveyances the complainant claimed. These grants were from the state of Tennessee, and bore date of 1836. The bill averred that the defendant, Bell, claimed the lands included within grants Nos. 12,758, 12,769, 12,770, and 12,771, being junior grants, within the boundaries of senior grants to Eastland. It was averred that the defendant was trespassing by cutting valuable timber and removing same to the irreparable injury of the lands. It also charged that the defendant was insolvent. The answer disclaimed any title or interest in the lands claimed by complainant outside the limits of grant No. 12,771, issued May 26, 1874, to defendant, containing, by survey, 1,077 acres. It denied that the complainant had any possession of the lands inside said grant, denied that he was now or had been cutting timber from said land "for a long time," and denied insolvency. The answer asserted an actual adverse possession of the lands within said grant beginning at date of its survey made in March, 1872, and pleaded and relied upon the Tennessee statute of limitations of seven years. The court below found that jurisdiction existed because of the repeated trespasses of the defendant, and that the title of the complainant was the superior title to the lands included within the grant to defendant of 1874, except as to a parcel of 100 acres inside of said grant, designated as the "Bolin Survey," which said 100 acres had been held adversely for more than seven years under color of title by said Bolin or those who held under him.

There was evidence showing that the defendant had cut and removed valuable timber from the lands included within his junior grant. The extent of this cutting does not appear, but sufficient is shown to justify the assumption of jurisdiction for the purpose of enjoining trespass and an accounting. The case on its facts falls within Peck v. Ayers & Lord Tie Co., 116 Fed. 273, 53 C. C. A. 551.

Complainant's title, being under the elder grants, must prevail, unless, through adverse possession under his junior grant, the latter has become the better. Beyond the possession called the "Bolin possession" neither party has had any such open, notorious, and continuous adverse possession within the interlap of the conflicting grants as will

affect the results. The case must turn here, as it did below, upon the extent, character, and effect of the Bolin possession. The facts, as we find them, which bear upon this possession, are these: Under an entry made March 14, 1872, by one Jackson, assignor of Bell, the latter made a survey preliminary to applying for a grant. Upon this survey, dated March 18, 1872, a grant duly issued to Bell, dated May 26, 1874, for 1,077 acres, more or less, being the grant under which Bell claims title. This grant overlaps parts of two of complainant's Eastland grants. When Bell made this survey he found one Samuel Bolin living within the lines of his survey. Bolin had a house and barn, an orchard of grown apple trees, and about 15 or 20 acres in cultivation. The precise beginning of Bolin's occupation is not shown, but enough appears to show that Bolin had lived upon his occupation, claiming and holding it for himself for as much as 10 to 15 years. The evidence seems to establish that his original possession was taken under a parol arrangement with one Brown, who claimed to own lands in the vicinity. It turned out, however, that, if this was so, Bolin did not plant himself upon any land claimed or owned by Brown, and it is certain he had no deed or other instrument from Brown or any one else which would constitute color of title under the Tennessee statute of limitations. When Bell found Bolin within the Jackson entry and within the lines of his survey, he made an arrangement with him by which he attorned to Bell and agreed to hold for Bell the entire body of land described by the Bell survey and perfect Bell's title for him. Bell, upon his part, agreed that when, through such possession, his title should be made good, he would for a nominal consideration convey to Bolin 100 acres, which should include his occupation. That Bolin might know the lines of the 100 acres, it was then run out and a certificate of survey, made and signed by him as surveyor, given to Bolin. Bolin's possession covered lands within each of the two adjacent grants of complainant which constitute its superior legal title. The learned circuit judge seemed to doubt the scope of the agreement between Bell and Bolin, but we find from the direct testimony of Bell and the subsequent admissions of Bolin, now dead, that the distinct understanding of both parties was, as we have stated it above, and that from that time, the date being fixed by date of the survey in March, 1872, Bolin held and claimed to be holding the Bell grant for Bell, and that when Bell's title should be made good he was to have a deed to 100 acres. When a tenant is placed in possession of a definite part of a larger tract of land, the possession will not avail the landlord beyond the part so claimed and held. If, however, one claiming under assurance of title defining boundaries, place a tenant in possession without limiting him to any definite part, the tenant's possession will extend to the landlord's boundaries, although the land actually occupied will be but a small part of the whole. Treece v. American Ass'n, 122 Fed. 598, 58 C. C. A. 266; Ross v. Cobb, 9 Yerg. (Tenn.) 463; Massengill v. Boyles, 11 Humph. (Tenn.) 113; and Elliott v. Pearl, 10 Pet. 443, 9 L. Ed. 475. But it is said that before Bolin attorned to Bell he had for more than seven years been in the open, continuous, and adverse possession of some 10 to 20 acres

of this land, and that he did not after agreeing to hold for and under Bell extend his actual possession beyond his original occupation, and that for this reason his subsequent possession as Bell's tenant did not inure to Bell's benefit beyond the inclosures. The argument is that Bolin had already acquired a defensive right of possession to the land actually inclosed by virtue of the second section of the Tennessee act of 1819, now section 4458, Shannon's Tenn. Code, which provides that:

"No person, or anyone claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

A possession without color of title, though continued for seven years, does not vest title, but is a mere right to defend against the title so long as the possession is actual and continuous, and it is lost the moment possession is abandoned. Marr v. Gilliam, 1 Cold. (Tenn.) 490, 510; Crutsinger v. Catron, 10 Humph. (Tenn.) 24. On the other hand, possession under assurance of title defining the metes and bounds extends the possession to the bounds, and, if continued for seven years, operates not only to bar an action by the superior title, but to divest that title and vest it in the adverse holder. Shannon's Tenn. Code, § 4456; Bleidorn v. Pilot Mountain C. & M. Co., 89 Tenn. 166, 15 S. W. 737; Tenn. & Pacific Ry. v. Mabry, 85 Tenn. 47, 1 S. W. 511. It is well settled by the Tennessee decisions that, if one go into possession under color of title and hold for seven years, and thereafter acquire an assurance of title to a larger tract which includes the smaller, a possession continued within the bounds of the smaller parcel, without an extension outside of its limits, will not be a possession under the new grant or other assurance of title. In such case a continual possession will be referable to the original assurance of title only. The reason is that, so long as the adverse possessor confines himself to the limits of the smaller parcel to which he has acquired title by adverse possession under color, there would be no actual invasion of the title and right of the superior title to the lands outside of that parcel, but a possession consistent with the adverse possessor's legal rights. Smith v. Lee, 1 Cold. (Tenn.) 549, 552–3; Peck v. Houston, 5 Lea, 227; Coal Creek Co. v. Ross, 12 Lea, 1, 9; Bon Air Coal Co. v. Parks, 94 Tenn. 263, 29 S. W. 130. But this principle is not applicable when the original adverse possession of the smaller parcel was not under an assurance of title defining metes and bounds. Bolin did not become vested with any title by reason of his occupation before Bell's grant issued. He had at most a mere naked possessory right which would be lost by abandonment. When, therefore, he ceased to claim for himself and attorned to Bell, and there was no reason why he should not do so, however great his folly in building up a title for another when he might have ripened a title for himself by taking out a grant or obtaining some assurance purporting to convey title, Bolin's possession became thereafter the possession of Bell, and, from the date of Bell's subsequent grant, a possession of the entire grant, although there was no extension of his actual inclosure. This distinction, whether a good one or a bad one, is clearly the law of Tennessee, and was made and enforced in the case of Bon Air Coal Co. v. Parks,

cited above. In that case, as in this, the defendant, Parks, went originally into possession of a part of the land in litigation, not under color of title, but as a mere trespasser, and inclosed and cultivated some 40 or 50 acres for more than seven years. He then made an entry of 1,175 acres, which include this original occupation and remained in possession under this entry, without extending his actual possession, for another period of more than seven years, when he obtained a grant. A possession under an entry, although not an assurance of title, will, if sufficiently definite to point out the land intended to be appropriated, be protected under the second section of the act of 1819 (Shannon's Code, § 4458), to the extent of its calls. Ramsey v. Monroe, 3 Sneed (Tenn.) 329.

As the defendant in the Bon Air Case had not had possession long enough under his grant to avail him unless he could connect his possession under his entry, the question arose whether he had had any possession under that entry outside of his actual possession which would avail him as a defense. For the complainant it was contended, there as here, that defendant had never extended his possession beyond his original inclosures, and that when he took out his entry, which included his original inclosures, he had acquired a right of possession and could not have been ejected by the owner of the title. But it was held that, as the prior possession had not been under color of title or any document defining the limits of his possession, his subsequent possession would be referable to his entry and be a possession coextensive with the limits defined by that entry, and the case distinguished from the cases relied upon to prevent such a result by the fact that in each of them the prior possession had been under color of title. This case is indistinguishable in principle from the one at bar, and must be controlled by it.

The result is that the decree of the court below must be reversed, with direction to dismiss the bill.

On Rehearing.

This case comes on now upon a petition to rehear. Acts Tenn. 1824, c. 22, § 6, provides as follows:

"Be it enacted, that, hereafter, it shall not be lawful for any person to enter any land, in any of the entry-takers' offices, established by the act to which this is a supplement, on which land another resides, or cultivated by another, until such person shall have given, in writing, at least thirty days' previous notice, to the person residing on, or cultivating, said land, of his intention to enter the same; and any entry made, or grant obtained, contrary to the provisions of this section, shall be utterly void in law and equity."

It is now insisted that no notice was given to Bolin as occupier in possession at the date of the entry and survey upon which Bell's grant issued, as required by the act quoted above, and for this reason Bell's grant is null and void. The whole purpose of the act of 1824 was to apprise the occupier of an intention of entering the land, that he might avail himself of his right to secure it to himself by making first entry. Wilson v. Hudson's Lessee, 8 Yerg. (Tenn.) 398, 410. Neither does the object or the purpose of the act require that the grant shall be held void to any greater extent than the actual occupa-

tion existing at the time of the entry. It is therefore well settled that an occupier without color of title is protected by the act of 1824 only to the extent of the land actually occupied and inclosed, and that the grant is perfectly valid outside of such occupancy. Den v. Nixon, 10 Yerg. (Tenn.) 518; Horn v. Childress, Meigs (Tenn.) 102; Smith v. Lee, 1 Cold. (Tenn.) 549; Peck v. Houston, 5 Lea (Tenn.) 227, 230. Nevertheless, if the Bell grant is void to the extent of Bolin's actual occupancy, he must fail in his defense, for he has had no actual occupation outside of the Bolin occupancy. There is no evidence of a written notice to Bolin of intent to enter the land included in Bolin's inclosure; but there is abundant evidence that Bolin knew that Bell was making a survey with a view to either exclude his inclosed land from an entry made or to be made for Jackson, and that with this knowledge that he made an agreement with Bell by which his occupancy was to be included in the entry grant, and by which he was to remain in possession and hold the entire grant for Bell. The requirement of the act of 1824, as well as of subsequent acts upon the same subject, that one proposing to make an entry of public lands shall give 30 days' written notice of his intent to any person in actual occupation, being exclusively for the benefit of the occupier, may be waived by him. Wilson v. Hudson and Horn v. Childress, both cited above. The facts disclosed by this transcript make a plain case of waiver of written notice.

The evidence does not make it clear whether Bolin's attornment to Bell was made before or after the Jackson entry. The Bell grant recites the Jackson entry as having been made March 14, 1872, and the survey as made March 18, 1872. But it is plain a survey was made prior to Jackson's entry, for the land entered is described precisely as in the grant. Counsel for the North American Coal Company, in their original brief, took the position that the entry was not in fact made until after a survey by Bell. This they concluded from a correspondence of the description in the entry with that in the survey and from the fact that the survey of 100 acres for Bolin made by Bell describes this 100 acres as being within an earlier entry made by Armstrong Martin, and does not mention or refer to any entry made by Jackson. In this conclusion we concur. The certificate of survey given by Bell to Bolin is not dated, and we infer that prior to the actual date of Jackson's entry Bell made his survey for an entry to be made by Jackson, and at the same time ran out 100 acres for Bolin, which included Bolin's occupancy. Subsequently Jackson's entry was made, and then a certificate of survey from the lines previously run was filed, in order to comply with the statute and procure a grant. We therefore conclude that prior to Jackson's entry Bolin was apprised that Bell's purpose in making a survey was to enter the lands surveyed in Jackson's name. Bell testified that his purpose was to exclude from Jackson's proposed entry all lands which he should find actually occupied by a settler. That he would have excluded Bolin's occupancy, but for the agreement he made with him, there is no reason to doubt. That agreement was conditional upon his obtaining an assignment from Jackson of the entry to be made in his name, that Bolin should remain upon and hold under Bell until Bell's title should become

the best title, and that also Bolin would pay him a small agreed sum as his proportion of the expense of the survey. Bolin from the time of that agreement held continuously for Bell for a period of more than seven years after date of Bell's grant and before suit brought. This agreement induced Bell to include Bolin's occupancy with the entry and grant under which he claims, and also induced him to go on and obtain an assignment from Jackson of his entry, and to obtain a grant, and finally to convey to Bolin's heirs 65 acres, including Bolin's occupancy, after Bolin's possession had, as he supposed, ripened his title under his junior grant. That he conveyed only 65 acres, instead of 100 acres, to Bolin's heirs, is of no consequence to the defendant in error here. He justifies his breach of good faith by claiming that Bolin did not pay him the whole of the little sum that he owed as his proportion of the cost of the survey of the 100 acres. He may not be clear of liability to Bolin's heirs for his failure to convey the remainder of the 100 acres he agreed to convey. But that may be set on one side as of no moment in this case; Bolin's heirs not being before the court. This agreement made by Bolin with the knowledge of the purpose of Bell to procure a grant which would include his occupancy operates as an estoppel, and in law was a waiver of the written notice required under the act of 1824. If thereby Bolin estopped himself to rely upon want of notice as a defense against Bell's subsequently acquired title, it is plain that third persons can stand in no better position.

Upon another ground the result would be the same. The agreement between Bell and Bolin, in substance and legal effect, was a sale of his occupant right upon a sufficient consideration, and operated to extinguish it or pass it to Bell, we need not say which. That it was in parol was of no fatal consequence. In Tennessee a parol sale of lands is merely voidable, and not void. Third parties will not be allowed to object to a parol contract which the parties between themselves consider operative and valid. Brakefield v. Anderson, 3 Pickle 87 Tenn. 206, 211–212, 10 S. W. 360; King v. Coleman, 98 Tenn. 561, 571, 572, 40 S. W. 1082. This question as to the act of 1824 was not made in the court below, nor was it mentioned in the opinion of Judge Clark, nor in the opinion heretofore handed down by this court; but it might have been made, and we have, therefore, given it consideration, with the result that we find Bolin's right as occupier was waived at the time of the survey and the agreement subsequently carried out by the parties.

The other grounds presented for a rehearing are a mere reargument of the points already decided.

Petition will be dismissed.

A. SANTAELLA & CO. v. OTTO F. LANGE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 17, 1907. On Rehearing, September 3, 1907.)

No. 2,364.

1. CONTRACTS—CONSIDERATION—MUTUALITY.

There is want of mutuality, necessary for a valid contract, where plaintiff, the manufacturer of a certain cigar, offered to sell in the future to defendant, a cigar dealer, as many of such brand as he might desire for his wants, and to continue to do so during the life of the brand, as long as defendant cared to sell them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 344.

Mutuality in, see note to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543.]

2. APPEAL—RECORD—QUESTIONS RAISED.

The question of want of mutuality in the contract on which a counterclaim is predicated is properly raised by the record; plaintiff having at the close of the evidence moved for an instructed verdict on the ground that defendant showed a failure of consideration on the part of plaintiff for the contract, and the overruling of the motion having been assigned as error, and such assignment insisted on in the brief.

3. SAME—REVIEW—RULES OF COURT.

The provision of Circuit Court of Appeals rule No. 11, that the court, at its option, may notice plain errors not assigned, reserves to the court, in the interest of justice, the right, resting in public duty, to take cognizance of palpable errors on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2968–2982.]

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

George W. Kiesel and D. J. Lenehan (L. G. Hurd, on the brief), for plaintiff in error.

Nathan E. Utt (Alphons Matthews and John P. Frantzen, on the brief), for defendants in error.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the plaintiff), an Illinois corporation, with its principal place of business in Chicago, sued the defendants in error (hereinafter designated the defendants), a copartnership, doing business at Dubuque, in two counts. The first count is predicated of a promissory note, executed by the defendants to the plaintiff February 23, 1903, for $1,200, due in three months thereafter. The second count is based upon an open account for cigars sold by plaintiff to the defendants between the 6th day of March and the 5th day of May, 1903, amounting to $4,415. The answer, in effect, admitted the debts as alleged, and then set up a counterclaim for damages in the sum of $30,000, resulting from an alleged breach of contract in the failure and refusal of the plaintiff to ship to the defendants cigars as required. On

trial to a jury, at the close of the evidence, the plaintiff moved for a directed verdict, which was refused. The jury returned a verdict for the defendants in the sum of $3,262.25, which, including the admitted sums owing to the plaintiff, amounted to $9,087.75.

As counsel for the plaintiff insisted in argument here only upon the error assigned in the refusal of the court to direct a verdict, it is made necessary to disclose the case made on behalf of the defendants. The alleged contract was not in writing, and its character is to be found in the allegations of the counterclaim and the testimony of Otto F. Lange, representing the defendants in making the alleged contract. The answer, after some preliminary statements by way of inducement leading up to the contract, disclosed that the plaintiff was engaged in the manufacture and sale of a cigar known as the "Optimo" brand, which it was anxious to exploit in certain territory in Iowa and vicinity, and wished the defendants, as experienced dealers in cigars, to undertake this exploitation in the interest of both concerns. The answer states that the same was "to be furnished at the times and in the quantities, sizes, shapes, and qualities as might be thereafter ordered by the defendants, all of the said cigars to be sold and furnished subject to a discount of two per cent. if settled for thirty days from the date of shipment or invoice, such settlement to be made by cash or notes of the said defendants, bearing five per cent. interest and running thirty, sixty or ninety days at the option of the said defendants, and would continue to manufacture, and supply exclusively such 'Optimo' cigars to said defendants, at such prices, on such terms, and in such sizes, shapes, and quantities as ordered by the defendants, in the territory named, and such other territory as might thereafter be given to them, so long as the trade therein would continue." It is further averred that the plaintiff failed and neglected to furnish, as ordered, said Optimo cigars in the sizes, qualities, shapes, and quantities as demanded and as was necessary for the trade in said territory.

The testimony of said Otto F. Lange was to the effect that by request of one Glaspell, traveling salesman representing the plaintiff, they met in Dubuque, Iowa, about the 13th of August, 1900; that Glaspell wanted the defendants to buy from the plaintiff said brand of cigars known as the "Optimo," which he thought the defendants could build up a trade and create a large market therefor. His version of the agreement was as follows:

"The terms were 60 days net, without discount, or 2 per cent. discount if paid in 10 days, but that he would give me 30 days from date of bill in which to take the 2 per cent. discount if I wanted to take it. He said that the goods were made in Tampa, Fla., but that they were shipped from Chicago. If our business grew so that they shipped in case lots from Tampa, that the date of the bill should be the date of the arrival of the goods."

This was followed by some other details as to the mode of settlement. Further on he testified:

"I said to Glaspell I would accept the contract. * * * Glaspell said they would stop others from selling the cigars in the territory given me. He would sell me as many as I desired for my wants, and continue during the life of the brand, as long as I cared to sell them. * * * My orders were to be filled the same day they were received, if they had the goods."

While there are some variances between the versions of the contract in the testimony between said Lange and Glaspell, for the purposes of this case, it is not necessary to rest it upon other testimony than that of Lange.

Orders thereafter were sent in by defendants for cigars as needed in their business, and were generally satisfactorily complied with by the plaintiff. Some complaint in January, 1902, and perhaps later, on the part of the defendants was made that some orders had not been promptly filled; but after explanation by plaintiff the business relations were continued. Shipments of cigars were only made as and when ordered by the defendants. In December, 1902, and the forepart of 1903 the orders were sent in most frequently. On the 7th day of May, 1903, the defendants telegraphed to the plaintiff to "Cancel all our orders." The plaintiff immediately answered by letter as follows:

"Your telegram of to-day is at hand, and in compliance with same we have wired our factory to cancel all of your orders."

And in a postscript said that it (the plaintiff) had received check for $1,000, which was placed as a credit on the note of $2,000, due May 2, 1903, and requested the defendants to send check for the balance not later than Monday. The defendants followed up said telegram of May 7th with a letter giving in explanation of the direction to cancel all orders that "we have lost track of what we have ordered." In the letter they requested shipment of certain specific cigars. This letter evidently having been received on the 9th of May, 1903, the plaintiff wrote the defendants that it was very much surprised at the telegram of the 7th of May, "as you canceled all your orders and we wired our factory to that effect." In this letter the plaintiff inclosed the defendants a statement of account, stating that they owed the plaintiff bills amounting to about $3,500, reminding the defendants of the necessity in its business of having prompt payments made, alleging that in the past they had been quite lenient, that "we find that you seem to take your own time and do your business with us all your own way, leaving us nothing but to ship you goods as fast as you want them, and you pay for them when you get good and ready, and make deductions when you feel like it." Thereafter considerable correspondence took place between the parties respecting the payment of past accounts and notes, resulting in the refusal of the plaintiff to fill any more orders from the defendants until the past arrears were paid, and under a new arrangement. As much of this correspondence ensued after the controversy arose, it contains much of self-serving statements, which are not important to a proper decision of the case.

The controlling question for determination is: Did the defendants have an enforceable contract with the plaintiff? It must be conceded that, if the defendants had such a contract, it was essential to its validity that it should have been mutually obligatory upon both parties. If the defendants could compel the plaintiff to ship cigars, the plaintiff ought to be in a position to compel the defendants to take. Were the defendants under any obligation to send in orders within any particular time, or for any specified quantity or quality

of cigars? The allegations of the counterclaim and the version given of the agreement in the testimony of Otto F. Lange answer these questions. It was entirely at the option of the defendants, dependent upon the conditions of their business and trade, as to whether they would send in any orders at all. From any cause, such as depression in business, or other more desirable arrangements, or a desire to get out of that line of trade, the defendants were at liberty to cease at any time to send orders to the plaintiff, without liability for breach of contract. As shown by the entire dealing between the parties, both unquestionably understood that the plaintiff could only ship cigars as and when ordered by the defendants. So, notwithstanding that prior to the 7th day of May, 1903, the defendants had sent in a large number of orders, which had not then been met by shipments, and although the plaintiff had placed them with the factory at Tampa, both parties acted upon the understanding of the contract, that the plaintiff could not ship save as and when the defendants might direct. It would be a work of supererogation to review the authorities touching the law applicable to such situation, as Judge Sanborn, speaking for this court, in Cold Blast Transp. Co. v. Kansas City Bolt & Nut Company, 114 Fed. 77, 52 C. C. A. 25, 29, 57 L. R. A. 696, laid down the following postulates as expressing the correct rule of law:

"The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Minnesota Lumber Co. v. Whitebreast Coal Co., 43 N. E. 774, 160 Ill. 85, 31 L. R. A. 529; Parker v. Pettit, 43 N. J. Law, 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned. Bailey v. Austrian, 19 Minn. 535 (Gil. 465); Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Railway Co. v. Bagley, 60 Kan. 424, 433, 56 Pac. 759; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1; Railway Co. v. Mitchell, 38 Tex. 85, 95; Ashcroft v. Butterworth, 136 Mass. 511, 514; Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465; Thayer v. Burchard, 99 Mass. 508, 520; Hoffman v. Maffioli, 80 N. W. 1032, 1035, 104 Wis. 630, 47 L. R. A. 427; Railroad Co. v. Jones, 53 Ill. App. 431, 437; Rafolovitz v. Tobacco Co. (Sup.) 25 N. Y. Supp. 1036, 73 Hun, 87."

The case at bar does not come within the rule in respect of a contract obligating the vendor to furnish all the goods required by

the vendee in an established business during a limited time, as in the case of a merchant who contracts with a manufacturer to furnish all the goods of a particular quality the acceptor requires, with the implication that he binds himself to take during a specified period all the articles required for the given business; or as in the case of a contractor who has accepted a proposition from a manufacturer or vendor to furnish all the material required in the construction of a particular work. But this case comes clearly within the rule that an accepted offer to sell or deliver, or to buy at specified prices, during a limited time, in such quantities as the buyer may need or desire in his business, without any specification as to the quantity or amount, is without consideration, for the palpable reason that the buyer placed himself under no obligation to need or desire any quantity at any given time or during any given period. The defendants were at liberty to send in orders ad libitum, or not to send in any orders at all. The one was completely left at the will or caprice of the other. The plaintiff could at no time manufacture any quantity or quality of cigars depending upon a contract requiring the defendants within a given period to take them, as it was wholly at the pleasure of defendants in sending in any orders.

The case of Bailey et al. v. Austrian, 19 Minn. 535 (Gil. 465), appositely presents the law of this case. The facts sought to be established there were that on a given date the plaintiffs, being engaged in a general foundry business at St. Paul, the defendant promised to supply them with all the Lake Superior pig iron wanted by them in their said business until December thereafter, at specified prices, and the defendant claimed that the plaintiffs promised to purchase of defendant all of said iron which they might want in their business during the time above mentioned. After stating the general rule laid down in 1 Parsons on Contracts, 449, and note Z, the court said:

"Upon the foregoing state of facts, the engagement of plaintiffs was to purchase all of said pig iron which they might want in their said business during the time specified; but they do not engage to want any quantity whatever. They do not even engage to continue their business. If they see fit to discontinue it on the very day on which the supposed agreement is entered into, they are at entire liberty to do so at their own option, and, whatever might have been defendant's expectation, he is without remedy. In other words, there is no absolute engagement on plaintiffs' part to 'want,' and, of course, no absolute engagement to purchase any iron of defendant. Without such absolute engagement on plaintiffs' part, there is no absolute mutuality of engagement, so that defendant has the right at once to hold plaintiffs to a positive agreement."

The contract described by the defendants is not enforceable against the plaintiff, as it is wanting in the essential of mutuality. The request by plaintiff for an instructed verdict should have been given.

It is finally urged, however, against an instructed verdict that it was properly refused because it appears from the counterclaim that the plaintiff owed the defendants some $22.10 for advertising, expressage, and a cigar sign. There was no issue made by the plaintiff at the trial concerning these small items; and in entering judgment for the plaintiff on the note and account it would be but a matter of computation of the amount due thereon after deducting the undis-

puted item of $22.10, which the court should have directed as a mere clerical act, and entered judgment for the plaintiff for the balance due on the note and account.

It results that the judgment of the circuit court must be reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

On Petition for Rehearing.

The petition for rehearing assumes that the opinion of the court, holding that the contract on which the counterclaim is predicated is not enforceable for want of mutuality, should be withdrawn for the reason that such question does not properly arise on the record, and was not, therefore, argued by counsel for the defendant in error. This criticism is not well founded, either in fact or law. At the close of all the evidence the plaintiff in error moved the court for an instructed verdict in its favor. Among the grounds stated in support of the motion is the following:

"Because the plaintiff [i. e., the proponent of the counterclaim] has affirmatively shown a failure of consideration on the part of the defendant for the contract sued upon."

"Plaintiff in error assigns as error the action of the court in overruling the motion made by plaintiff in error at close of all the evidence in the case that the jury be instructed to find a verdict in its favor."

In the closing paragraph of the brief of the plaintiff in error it is urged that:

"In our judgment the whole case was determinable upon the motion to direct the verdict. Because that motion was overruled and the court by its instructions determined as a matter of law in its interpretation of the contract that defendant in error might recover damages on its counterclaim, we confidently believe the question involved in this case should finally be determined in this court, and the judgment of the court below reversed."

The lack of mutuality in the reciprocal obligations of the alleged contractors negatives the existence of a valid consideration for the promise of one of the parties. Forsooth counsel for the plaintiff in error may have laid especial stress in his argument upon some proposition of law which he conceived to be important and controlling did not warrant the court in disregarding other errors reasonably within the terms of an exception or an assignment of errors.

That counsel does not fully recognize and urge a principle of law in argument which is embraced within the pleadings or presented in the record cannot preclude the court from giving due consideration and application to a rule of law which is determinative of the controversy. Indeed, an appellate court would fail to heed the wholesome maxim, "Interest reipublicæ ut sit finis litium," should it fail to take notice, when reasonably presented, of a settled principle of law the application of which ends the litigation. Rule 11 of this court (150 Fed. xxvii) respecting the assignment of errors, declares that "the court, at its option, may notice plain errors not assigned." This proviso was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty, to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action. "Where parties

have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises before the submission to the jury, and it is the province and duty of the court to determine it." Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522-527, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181.

In support of the motion for rehearing counsel have extensively gone into a review of the case in the attempt to show that the opinion of the court improperly held that the contract in question was unilateral, placing much stress upon the contention that the testimony of Mr. Lange tended to show that a part of his undertaking under the arrangement between the parties was that he should, by his experience and labor, extend the field for the sale of the cigars to be furnished by the plaintiff in error, thereby creating a larger market for them, and that he performed in this respect his undertaking. Let it be so conceded. But how does this obviate the stubborn fact that whether or not he would maintain that field and demand, occupy or abandon it, or cease, ad libitum, to send in any orders, or betake himself to some other field of operation and employment, were wholly optional on the part of the defendant in error? The plaintiff in error, on such election by its purchaser, was without remedy. It could not compel the proposed purchaser to want any cigars. It could not ship a box of cigars, except as ordered by the purchaser. As shown in the opinion, both parties so recognized the situation and acted upon it when the defendant in error directed that the orders already in be not filled. That such a contract is one-sided, wanting in that mutuality essential to its enforcement, is settled in this jurisdiction.

The petition for rehearing is denied.

CITY OF LOUISVILLE v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. July 24, 1907.)

No. 1,657.

1. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

When the jurisdiction of a federal court depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may arise.

[Ed. Note.—Jurisdiction in cases involving federal questions, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.]

2. CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—UNAUTHORIZED ACTION BY MUNICIPALITY.

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it impairs the obligation of a contract or deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill

alleges that no power had been granted to the municipality by the Constitution or Legislature of the state to pass such ordinance; the prohibition of the federal constitution being against state action only.

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

The following is the opinion of Evans, District Judge, of the Circuit Court:

This case has been argued upon defendant's demurrer to the bill of complaint and upon complainant's motion for a temporary injunction, and it is important at the threshold to ascertain what is the real scope of the bill, for, when we have done that, the questions raised at the argument will require little discussion. A careful consideration of it has led me to the conclusion that the bill, after showing the nature and extent of complainant's business in Louisville and the rights it claims under its articles of incorporation, in substance and effect avers that defendant has enacted a certain ordinance whereby it undertook to fix the maximum rates which complainant might charge its patrons in the city; that the city had no lawful power to fix other than reasonable rates; that the rates fixed by the ordinance were unreasonably low; that the enforcement of the ordinance would, for that reason, practically confiscate the plaintiff's property; and that thus it would be deprived thereof by the city without due process of law, and in violation of the fourteenth amendment to the Constitution of the United States. This is the fundamental ground for the relief asked, whatever argumentative details may be urged in the pleading.

1. The judiciary act gives the Circuit Courts jurisdiction of actions which arise under the Constitution or laws of the United States, and it is obvious that the relief sought in this instance is based upon a claim made under the Constitution of the United States. There could scarcely be found a plain, adequate, and complete remedy at law against the city. Indeed, it is difficult to conceive of any form of action at law which would be available to the complainant for remedying the alleged wrong it complains of. There does not therefore seem to be any reasonable doubt either of the jurisdiction of the court or of the proposition that, if the averments of the bill be true, it states a ground for equitable relief. The cases of Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 458, 10 Sup. Ct. 462, 33 L. Ed. 970, Reagan v. Trust Co., 154 U. S. 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014, Railway Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, Covington, etc., Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, and Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, seem to leave no room for doubt upon either of the two propositions just indicated. Neither of those propositions, however, could be maintained if the sole claim made by the bill was that the Constitution and laws of Kentucky did not give the defendant the power to pass the ordinance complained of. If that were all, no question would arise under the Constitution or laws of the United States, and the action would not be based upon any federal question. Mayor, etc., v. Holst, 132 Fed. 901, 65 C. C. A. 449; New Orleans v. Benjamin, 153 U. S. 424, 14 Sup. Ct. 905, 38 L. Ed. 764; Hamilton Gas, etc., Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. But we think the bill, fairly considered, does not admit of that construction. It is clearly founded upon the claim that the rates fixed would deprive the complainant of the benefits of its property and turn those benefits over to others, thus confiscating it without due process of law, and thus basing complainant's right of action upon the Constitution of the United States, and not upon the law or the Constitution of Kentucky.

But it is insisted that, as the bill avers that the ordinance is void because the city council had no legislative or constitutional power to enact the ordinance, no cause of action is stated, and authorities are referred to, among them the opinion of Judge Grosscup in People, etc., Co. v. City of Chicago (C. C.) 114 Fed. 388. If the averments referred to were the entire claim of the complainant, there might be some force in the contention; but it is by no means all. As already indicated, the fundamental claim is that the city cannot confiscate the complainant's property by taking the benefits thereof from the

complainant without due process of law; that the city can only fix reasonable rates under the contract between it and complainant; and that without authority it has passed the ordinance which is claimed to be void. The mere fact that the ordinance is void or invalid or unauthorized would be no ground for denying the relief. On the contrary, it is because the ordinance is asserted to be invalid and to be violative of the federal Constitution that the relief prayed for is asked. If the order be valid and authorized, then the city had the right to enact it, and that would end the matter. In the case last referred to Judge Grosscup said: "My jurisdiction of the case does not extend to that question [namely, the interpretation of the state statutes], unless its decision one way or the other is a necessary predicate of the constitutional question involved." In that case it was not such a necessary predicate, but here it is, because the very question to be determined is whether the passing and enforcing of the ordinance would deprive the complainant of a constitutional right. The cases of Hamilton Gas, etc., Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963, and Savannah, Thunderbolt, etc., Ry. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097, especially the former are much in point upon the jurisdictional question.

Assuming the averments of the bill to be true, a case for equitable relief is shown, and the demurrer will be overruled.

2. We come now to the motion for a temporary injunction pendente lite. A case like this usually cannot be determined upon demurrer, for the court would hardly feel authorized to conclude at that stage that the rates are in fact unreasonable and confiscatory. All that it will now decide is that, as the sworn averments of the bill stand undenied, they should be regarded, for the purposes of the motion, as prima facie true. This being so, it is a fair exercise of discretion to preserve the present status by enjoining the enforcement of the ordinance until the issue can be made up and steps taken fully to ascertain all the facts that should have a bearing upon the matter to be determined. The propriety of such a course will become apparent when we consider the rule which should govern such cases. That rule, we think, is fairly and very accurately stated in the recent work on the Law of Railroad Rate Regulation by Nagel, section 312 of which is as follows:

"The reasonableness of the schedule as a whole depends as has been seen, upon whether it yields a fair return to the carrier. This is largely a mathematical question. The carrier is entitled, first, to pay all expenses, which would include both the actual expenses of operation and also certain annual charges that must be paid before any real profit can be realized. He is entitled furthermore to gain a fair profit on his capital invested. The determination of the actual amount of the capital invested may be a matter of some difficulty. Once determined, the rate of profit upon that amount of capital is a question which will be determined, generally speaking, by the ordinary business profit of the time and place. A schedule of rates will be reasonable from the point of view of the carrier if it yields him a net profit equal to that which would be realized, as a business question, from any other business where the capital and the risk were the same."

True, in terms, this relates to carriers, but there can be no difference in the applicable principle. This rule must guide us in the further progress of the case, and it will demand a very full investigation of all the facts.

It was insisted at the argument with great earnestness that the bill only covers an attempt to enjoin prosecutions for crimes, and authorities were read in that connection. Upon the general proposition, of course, there can be no doubt so far as federal jurisprudence is concerned. Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, was most relied upon; but, while it states the general doctrine, a careful reading of the opinion will show that it was based solely upon the ground that the suit was substantially an action against the state of Alabama, and for that reason could not be maintained. The other provisions in the judgment directed were incidental to the main proposition. There was nothing said in that case in conflict with the doctrines laid down in the opinion in the cases to which we first referred, and all of which were referred to in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 888, 43 L. Ed. 197. Another case cited was Camden, etc., Co. v. Catlettsburg (C. C.) 129 Fed. 422; but the second of the syllabi to it correctly shows that

the distinction there taken was that, while you might not enjoin prosecutions already begun, there was no difficulty about enjoining certain forms of effort to begin prosecutions in cases like this. While a criminal action already begun may not be enjoined, yet if the city of Louisville, its officers, employés, agents, or others, should seek to enforce an ordinance held, prima facie, to be void, we see no reason why all of them or any of them may not be enjoined from attempting to do so by instituting prosecutions for its enforcement, especially where there are as many as 10,500 patrons, as it appears there are here, and where as to each one of them a prosecution might possibly be begun, thus making it most oppressive. This phase of the matter was discussed in L. & N. R. R. Co. v. McChord (C. C.) 103 Fed. 226.

It is also urged that, as the ordinance has actually been passed, no remedy is available to the complainant as against the city. The action of the city in the premises could not be enjoined before it was complete. In the precisely analogous case of McChord v. L. & N. R. R., 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289, the Supreme Court held that merely threatening to fix rates could not be enjoined, but that parties must wait until rates are fixed, and then apply for an injunction against carrying the schedules into effect, if they wished to test the question. It would be most remarkable if the city could pass a void and oppressive ordinance, and then lie back and say: "We have acted. Make the most of it. We are out of reach." The very measure which the city enacted is the thing the complainant seeks to invalidate. The action of the city alone gave that measure vitality and force. Its power alone can enforce it. In order to prevent its enforcement the city must be reached. So that, we think for the present the city, its officers, agents, employés, and all other persons who may have knowledge of the injunction, should be restrained, and all such may become amenable to the process of the court if they attempt to enforce the ordinance until the question of its validity is finally passed upon. All the injunction can do is to preserve the present status. It is by no means a final determination of the questions involved.

We see no reason why a temporary injunction pendente lite in the form indicated should not be granted, and the motion therefor is sustained.

A. E. Richards and A. B. Bensinger, for appellant.
Wm. L. Granbery and D. W. Fairleigh, for appellee

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a bill filed in the Circuit Court to restrain the enforcement of a municipal ordinance regulating charges for telephone service in the city of Louisville, on the ground that the ordinance was violative of the obligation of a contract between the complainant and the city, and also on the ground that the rates prescribed were unreasonable, unjust, and confiscatory, and, if enforced, would deprive complainants of their property without compensation and without that due process of law guaranteed by the fourteenth amendment. An injunction pendente lite was allowed upon the averments of the bill, and from this order the city of Louisville has appealed under the seventh section of the Court of Appeals act, as amended by Act April 14, 1906, c. 1627, 34 Stat. 116. The propriety of the preliminary injunction must turn here upon the question of the jurisdiction of the Circuit Court. There was no jurisdiction by reason of diversity of citizenship; the complainant being a business corporation created under the laws of Kentucky, and the defendant a municipal corporation of the same state. Jurisdiction was invoked upon the contention that this is a suit arising under the Constitution or laws of the United States. That the bill does aver that the ordinance impairs the obligation of a contract and is also an attempt

to deprive complainant of its property without due process of law is plain enough. But the constitutional prohibitions which are invoked run against the state, and the state alone, while the bill of the complainant in plain words negatives state action by averring that "no power to regulate the rates charged by your orator or other telephone companies" has been granted "by the Constitution or the Legislature of the state of Kentucky, or in any other way," and that the enactment of said ordinance was and is beyond the power of the common council of said city, and the said "ordinance void and an assumption of power and authority upon the part of the said common council unwarranted and unfounded."

If this be true, there was no state authority behind the action of the Louisville common council, and no ground to claim that constitutional prohibitions have been violated which are pointed at state aggression only. A municipal ordinance may be the exercise of a delegated legislative power conferred upon it as one of the political subdivisions of the state; but, to be given the effect and force of a law of the state, it must have been enacted in the exercise of some legislative power conferred by the state in the premises. Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed. 760; New Orleans Water Works v. La. Sugar Co., 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 266, 13 Sup. Ct. 90, 36 L. Ed. 963; Iron Mountain R. R. Co. v. Memphis, 96 Fed. 113, 126, 37 C. C. A. 410; St. Paul Gas Co. v. St. Paul, 181 U. S. 142, 148, 21 Sup. Ct. 575, 45 L. Ed. 788; Barney v. City of New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737; Manhattan Railway v. City of New York (C. C.) 18 Fed. 195; Kiernan v. Multnomah County (C. C.) 95 Fed. 849; and Savannah, etc., Ry. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097.

In Hamilton Gaslight Co. v. Hamilton, cited above, Justice Harlan said:

"A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. Murray v. Charleston, 96 U. S. 432, 440, 24 L. Ed. 760; Williams v. Bruffy, 96 U. S. 176, 183, 24 L. Ed. 716; Lehigh Water Co. v. Easton, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed. 1059; N. O. Waterworks v. Louisiana Sugar Co., 125 U. S. 18, 31, 38, 8 Sup. Ct. 741, 31 L. Ed. 607. A suit to prevent the enforcement of such an ordinance would not therefore be one arising under the Constitution of the United States."

If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service, then the establishment of rates under this power would be the establishment of rates by the state itself. Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. But this is just what the bill charges has not been done, thereby depriving the Circuit Court of every foundation for its jurisdiction as a suit arising under the Constitution or laws of the United States. Counsel now say that the averment that no power has been delegated by the state to the city of Louisville to regulate the rates to be charged for telephone service to

be rendered in the city is a mistaken averment of law, and should be ignored in consequence of a prior statement of the bill, in which it is said that "the common council of the city of Louisville assumed and claimed to have been given the authority by the Legislature of the commonwealth of Kentucky, to regulate the charges and rates to be charged by telephone companies," and had upon such assumption passed the ordinance complained of. Counsel says this shows that the city council acted under color of authority and should save the jurisdiction. But these averments are not inconsistent, and do not bring the case within Savannah, etc., Ry. Co. v. Savannah, cited above, where there were inconsistent and contradictory averments as to the authority for the tax assessment in question. That the common council "assumed" and "claimed" to have the power to do what it did do is self-evident. The enactment of the ordinance is in itself, and from any point of view, an assumption and claim of right to do what it did. This averment is therefore far from an averment that the common council was exercising a power of regulation conferred by the state. To make it clear that it had no general regulating power over such companies, and that it was acting outside of any such delegated regulating power, the clause relied upon now as asserting that the city council did act by authority of the state was followed by the distinct averment, above referred to, that the council acted wholly without any authority from the state. This makes an issue under the law of the state. If the fact be that no provision of the state Constitution, or of state law, or of the municipal charter, delegates the state power in respect to the regulation of the charges of telephone companies rendering services within the city of Louisville, the ordinance is void as ultra vires, and its enactment did not violate any prohibition of the Constitution of the United States, because not enacted in pursuance of any state authority.

When jurisdiction depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may or may not arise. New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; McCain v. Des Moines, 174 U. S. 168, 181, 19 Sup. Ct. 644, 43 L. Ed. 936; Western Union Tel. Co. v. Ann Arbor R. R. Co., 178 U. S. 239, 244, 20 Sup. Ct. 867, 44 L. Ed. 1052; Manhattan R. R. Co. v. City of New York (C. C.) 18 Fed. 195; Levy v. Shreveport (C. C.) 28 Fed. 209.

The most that can be made of the averments of this bill is that it presents questions arising under the Constitution and laws of the state. The remedy in such cases is in the courts of the state. If it shall turn out that the common council did have general power to regulate the charges of telephone companies rendering services within the city of Louisville, and that it has illegally exercised that power, either because it has thereby impaired the obligation of a contract, or by imposing rates which are unjust and confiscatory, a federal question may arise. But it is not enough to found jurisdiction upon that such a question may arise when the bill expressly avers that the action of the common council is not imputable to the state by charging that no such power had been delegated by the state.

The conclusion is that the court below erred in allowing an injunction, because it was without jurisdiction to entertain the bill at all.

Remanded, with direction to dissolve the injunction and dismiss the bill.

AMERICAN LAVA CO. et al. v. STEWARD et al.

(Circuit Court of Appeals, Sixth Circuit. July 24, 1907.)

No. 1,642.

1. PATENTS—VALIDITY—SUFFICIENCY OF DESCRIPTION.

Where the essence of an invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 133–143.]

2. SAME—AMENDMENT OF APPLICATION.

An amendment to an application for a patent made to introduce a new theory of the invention, and which contains new claims covering a process based on such theory, neither of which were mentioned in the original application, if permissible as within the invention, should be verified by the oath of the inventor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 152.

Amendment of application, see note to Cleveland Foundry Co. v. Detroit Vapor Stove Co., 68 C. C. A. 239.]

3. SAME—MECHANICAL AND PROCESS CLAIMS.

While it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised to make a claim for a process which his patented device is capable of carrying out, to entitle him to do so, the process must be one capable of being carried out by other means, otherwise the claim is merely for a function of the machine; and, unless such other means are known or are within the reach of ordinary skill or judgment, the patentee is bound to point them out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 141.]

4. SAME—ANTICIPATION—ACETYLENE GAS BURNERS.

The Dolan patent, No. 589,342, for an acetylene gas burner, and the process embodied therein, claims 1, 2, and 3 are void (1) for anticipation, especially by the French patent to Bullier of April 20, 1895; and, additions thereto (2), for indefiniteness of description; and (3) because they were new claims based on a new theory of the principle of the invention added by an amendment to the application made in the Patent Office which was not verified.

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

Charles Neave, for appellants.

Louis C. Reagener, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This appeal brings before us the questions of the validity and of the infringement of letters patent No. 589,342, granted to E. J. Dolan August 31, 1897, for improvements in

tips for acetylene gas burners, on an application filed February 18, 1897, which patent the complainants, the appellees here, claim to own by assignment. The claims of the patent here involved are those numbered 1, 2, and 3. There are two others, numbered 4 and 5. The first and second claims are for the process of "burning acetylene gas." The third is for the apparatus employed. The defenses were that these claims were invalid because of anticipation of the invention, and that the defendant did not infringe. The court below, while admitting the case to be "close," decreed in favor of the complainants. The doubt seems to have been upon the validity of the patent in respect to the claims involved. The appellant rests its contention that the claims are invalid upon several grounds. It will be convenient to consider first the third claim, which is for the burner, and then the other two, which relate to the process. In the specification the patentee, reciting that a difficulty had been experienced in burning acetylene and other gases rich in carbon from the accumulation of deposits at the orifice of the burner whereby the passage was clogged and the flame distorted, proceeds to state that he proposes the use of two independent gas jets, mounted and inclined toward each other, so that the jets of gas with the air which has been drawn into the gas tubes through openings in the sides thereof, by the swift upward movement of the gas, shall be made to clash together at the point of combustion, and produce a broad, flat flame. The structure of the members of the burner which he proposes to use so mounted and inclined can be best explained by reproducing figure 1, which is a central longitudinal section thereof and figure 2, which is a modification.

FIG. 1.

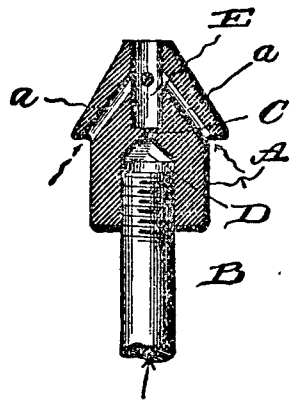
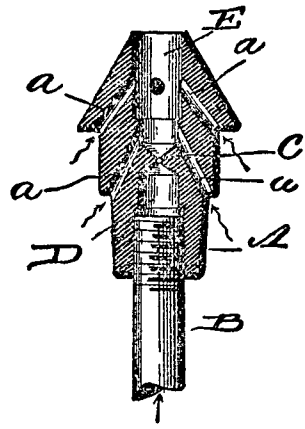


FIG. 2.



A is the body of the "tip," or burner, secured to the gaspipe, B. C is a constriction of the passageway for the gas leading from the chamber, D, into the chamber, E, at the upper end of which is the ex-

tremity of the tip. This constriction, C, is located at or near the longitudinal center of the burner. The letters, a a, represent inclined air ducts leading from the open into the gas chamber, E. We shall have occasion to refer to some further particulars of the specifications later on. Of this construction he says:

"The operation of this device seems to be that the gas under pressure escaping in a cylindrical jet through the opening, C, draws in on all sides an envelope of air through the opening, a. This is due to the fact that the chamber, E, is larger than the outlet, C, and to the fact that the air inlets, a a, substantially surround the issuing gas-jet. The result of this arrangement seems to be to so cool the outside of the flame as to prevent any deposit of carbon at the point of egress."

The third claim is this:

"3. The combination in an acetylene-burner of the block, A, having the minute opening, C, the cylindrical opening, E, opening without obstruction to the atmosphere, and the air-passages a, substantially as described."

The grounds on which it is insisted that the patent is void in respect of this claim are, first, that it was anticipated by prior patents; second, that the description is too indefinite to distinguish it from the prior art; and, third, that the specifications were altered in essential particulars by amendment while the application was pending in the office, so as to bring in entirely new matter which is now relied on, and that the new matter was not verified by the oath of the applicant. We think that these objections are well taken. In respect to the first, the proof makes it clear that for some time prior to Dolan's supposed invention several acetylene gas burners had been invented and patented, some in this country, and some abroad, which contained the substance of all that Dolan described in his patent. By this we do not mean to say that the theory which he puts forward in respect to the mode of operation of the means he suggests had been definitely stated, but that burners had been devised and patented which embodied the means described by him, and that they were adapted to accomplish the same result. The French patent to Bullier of April 20, 1895, and his first and second certificates of addition, dated June 29, 1895, and June 12, 1896, respectively, furnish the most complete anticipation; but, before referring to the invention there disclosed, we will notice some other patents, to find what ideas and forms had been suggested by them for the construction of gas burners. A common and well-known type of such burners was the Bunsen burner, which consisted of a cylindrical chamber into which the gas was pressed through a small aperture at the bottom in a fine jet. Small openings were made in the sides of the cylinder through which air was drawn by the upward rush of the gas through the cylinder to supply the oxygen required for combustion. The theory of this operation was that the gas and air were commingled before reaching the place of combustion at the upper end of the chamber. Duplex burners—that is, burners in which two streams of gas and air combined are made to impinge upon one another at the place of combustion—were also old. In a French patent granted to M. Letang in 1896, for

a burner of acetylene gas for lighting, the inventor states his purpose to provide means for preventing the heating of the outlet and its clogging by deposits resulting therefrom. One of the means by which he proposed to do this was to cool the gas outlets by means of a current of air introduced through a circular slot in the chamber above the constricted tube from which the gas jet ascends to the upper orifice. Dolan says he does this to "cool the outside of the flame." Letang, with apparently more correctness, says he thereby "cools the gas outlet opening." We pause here to note that if the tendency of the circular column of gas when drawing in air upon its surface is to encircle itself in an envelope of air, and that they pass out of the burner in that relation, as is contended in behalf of the Dolan patent, it would seem as though Letang's device was adapted to perform that function. If his chamber was long, the columns of gas and air would not preserve their integrity of shape so well, but it would be a difference in degree only, and could be improved by making the chamber shorter, or locating the air slot nearer the orifice. This is a subject to be referred to later.

A patent to Bullwiller was granted by the United States on April 19, 1898, on an application filed January 25, 1897, for "improvements in burners for acetylene gas," which had been patented in Switzerland November 28, 1896. This invention was intended for the same purpose; that is, to obviate the formation of deposits about the orifice of the burner. His plan was to locate what he calls a "hood" above the orifice of the body of the burner, with an opening through it above the orifice of the body of the burner, and yet so near it that the jet of gas would go through it without interruption, and the air would be taken in through the circular opening between the top of the body of the burner and the hood, and the combustion take place on the outer surface of the hood. In this way the air would form an envelope for the gas jet, if Dolan's theory is correct, by the same mode of operation. In order to fulfill the theory of Dolan's patent, his air ducts should be close to the orifice over which combustion takes place. But Bullwiller's hood is integral with the body of the burner, and is essentially a part of it. The whole is properly styled a burner and the improvement is of a "burner." The principle or mode of operation of it seems to be the same as Dolan's if the theory of Dolan's patent is well founded. Figure 3 shows one of his forms.

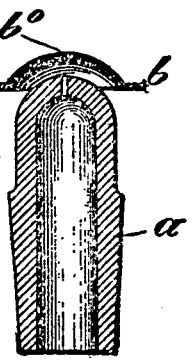


Fig. 3.

Bullier's patent of 1895 and his additions of that and the following year were for "a species of tip for lighting by acetylene and other gases rich in carbon." It is well to note that in Dolan's and Bullier's patents, as well as in other patents, the words "tip" and "burner" are used to designate the same thing, and

not the orifice thereof. Figures 3 and 5 of Bullier's original patent and Figure 1 of his addition of June 12, 1896, are here shown.

Fig. 1

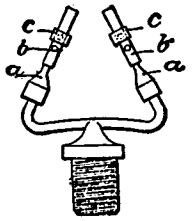


Fig. 3.

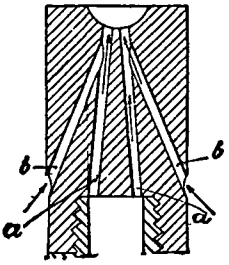
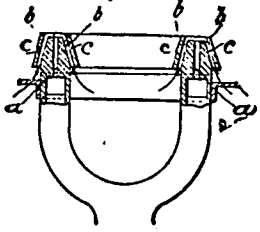


Fig. 5.



In all of the figures a a are the channels for the gas jets, and b b the air ducts. In figure 1 of the addition, at a point between a and b, the constriction of the pipe leading into the chamber is shown as in Dolan's and in other burners. In his original patent he says:

"This invention relates to a species of tip made up of one or more central conduits for the supply of the gas and of lateral conduits which form air flues, in such manner as to bring about the complete combustion of gases rich in carbon, and notably, acetylene. * * * For definiteness, I have represented, in Figs. 1 to 4 of the drawing, a tip called the Manchester tip, having two orifices a for the exit of the gas and giving a flat flame. Into these orifices open two or a greater number of air conduits, b, formed obliquely with respect to the axis of the tip, in such manner that the current of gas draws in a certain quantity of air which, mixing with the gas, determines the complete combustion of this gas, at the same time augmenting considerably its illuminating power."

Then, to apply his system to Argand burners he says:

"In the application of this system to a tip having a circular slot giving a cylindrical flame, I arrange around the tip a circular ring c as shown in Figs. 5 and 6 of the drawing. This ring, of any suitable material, is mounted in any suitable manner provided that it leaves between it and the tip, for the passage of air, two spaces b concentric to the gas escape slot a; instead of having two slots b which form the spaces of which I have just spoken, I could also arrange series of holes which would subserve the same function."

And he says that his air channels are inclined "so that the current of gas draws in the air." And, as may have been noticed, he says these conduits for air opening into the gas duct may be "two or a greater number." Referring to figures 3 and 5, it is seen that in the former the air comes into the gas duct very near the orifice of the burner, and in figure 5 that the air is drawn in, in a circular form around the column of gas just below the edge of the orifice, and thus (if, as we said before, the valuable feature of Dolan's burner consists in its protecting the orifice from deposits) it is as complete an anticipation of Dolan's device as it is possible to imagine. But Bullier adds that, instead of the circular slots, he "could also arrange

series of holes which would subserve the same function"—that is, a series of air ducts leading from the outside into the gas jet—and thus equipped the burner would be a fac simile of Dolan's; for, although he does not state precisely where in the length of the burner he would put the holes, so neither does Dolan. Bullier states that he inclines the air ducts toward the gas channel, a device apparently to facilitate the draft of air. In the specifications of Dolan's patent he uses the same form of construction. It seems manifest that Bullier might have formulated the third claim of Dolan's patent upon his (Bullier's) description of his own invention, if the French law had required the claims to be formulated. The complainants recognize this in France, for there they manufacture and sell these same burners under a license obtained from the owners of the Bullier patent.

This leads us to the second ground of objection which the appellant urges against the validity of the Dolan patent, which is the lack of definite specifications. The third claim which we are now considering is a combination of the body of the burner, the constricted opening C, the chamber, E, and the air passages, but it makes no requirement in respect of the longitudinal location of the air ducts on the chamber. Nor do the specifications help out the uncertainty. They only require that the air passages shall lead into the chamber above the constriction of the channel. If his had been the first of such burners, perhaps this would have been sufficient, provided the letting in the air near the bottom of the chamber would have answered his purpose. But in the then state of the art he was bound to differentiate his structure from those which preceded him; and especially is this so where the whole merit of his invention depends upon some peculiarity in the elements he employs. We think it may be affirmed as a rule resting upon the fundamental principles of patent law that, where the essence of the invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. In two recent cases we have discussed this subject so fully that we do not think it now necessary to do more than to refer to what we have already held, and the authorities then cited on which, as well as upon what we have regarded as sound reason, our opinion is based. Germer Stove Co. v. Art Stove Co., 150 Fed. 141, 80 C. C. A. 9; Bullock Electric Co. v. General Electric Co., 149 Fed. 409, 79 C. C. A. 229.

3. Was the amendment of the application in the Patent Office on May 18, 1897, whereby a new theory of the invention was introduced without a new verification, and in the circumstances shown by the record, authorized by law? In considering this question, it is to be borne in mind that the principal merit of the invention is claimed to be in the location of the air ducts, whereby it is said the gas jet acquires an envelope of air wherein it passes to the place of combustion. In Dolan's original application, filed February 18, 1896, nothing is said of any such purpose, and nothing is prescribed in the specifications or claims to indicate that the burner was to be constructed with a view to the obtaining of any such result. And all of the claims were for the apparatus, and none for a process. There was nothing what-

ever either in the form of the burner or in the theory of its operation to differentiate it from the former art. In April, 1897, a new attorney was employed, who seems to have been more astute than the applicant. At all events, the theory was then conceived that the introduction of the air by a series of ducts around the gas jet would envelope the jet, and that both would pass in that form to the place of combustion whereby the contact of the gas with the orifice of the burner would be prevented. This new conception was not a conception of Dolan's. If there was invention in it, it was not his. His original application made no mention of it, and he made no communication of it to the attorney. He was sworn as a witness, and he characterized the idea as a "lawyer's trick for building up a theory of some kind, which at the time I didn't know anything about. There may be an envelope of air, and there may be a mixture. The whole matter is theoretical to my mind." Thereupon all the specifications and claims were erased and new ones incorporated, the first two claims for the process. The changes made in the application were manifestly to develop the newly conceived theory of the mode of operation, and to add claims for the process. If this was to be accomplished and the theory were to be embodied in practical means, the specifications should have been made to distinctly point out such means, as we have already pointed out. But in that regard the former specifications were retained. If the application as amended were to be construed as embodying such an invention as is now claimed, it was another and different invention from that for which the patent was originally sought, and, if an amendment having that consequence was permissible, it should have been verified by the oath of the inventor. Railway Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053; Eagleton Mfg. Co. v. West, etc., Mfg. Co., 111 U. S. 490, 4 Sup. Ct. 593, 28 L. Ed. 493; Kennedy v. Hazelton, 128 U. S. 667, 9 Sup. Ct. 202, 32 L. Ed. 576; Michigan Central R. Co. v. Consolidated Car Heat Co., 67 Fed. 121, 31 U. S. App. 462, 14 C. C. A. 232; Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 Fed. 853, 68 C. C. A. 233, the last two being cases decided by this court. The case of Eagleton Mfg. Co. v. West, etc., Mfg. Co., supra, was strikingly like the case at bar in all the material facts which were made the basis of decision. Eagleton, the patentee, died soon after making his application. It was prosecuted by his administrators, by their attorneys. The amendment was made by them, but was not sworn to. The invention and application were assigned by the administrators to the Eagleton Company and the patent issued to it. In the present case Dolan 16 days after making his application assigned his entire interest to one Napheys, and it went through two more assignments before the amendment was filed. It is true that in the Eagleton Case the application had been a long time pending when the amendment was made, but that fact was not made the basis of the decision.

Whether in point of fact this theory of the mode of operation, namely, that the jet is enveloped by the air drawn in through the openings in the burner, is well founded or not, is a question upon which the experts whose testimony is in the record are at variance. That

theory is supported by witnesses for the appellee, while those for the appellant hold that the gas and air are commingled in the chamber, and there prepared for combustion. The contention of the appellee seems plausible, and we are in some doubt. The provision of such a chamber was probably intended for the purpose of commingling the gas and air to promote combustion, but it is possible that, in fact, the columns of gas and air retain to some extent a separate identity until after they leave the burner. However, we have in this discussion given the appellee "the benefit of the doubt."

We lay no stress upon the kind of material of which the burners are composed. That was a mere matter of choice and judgment for the artisan. This third claim does not specify what it shall be, and the specification in that regard states that it "is preferably made of lava or other material of a like character adapted to the purpose." Any suitable material meets the requirement.

The first and second claims are for a process or processes. They seem to us to be nothing else than claims for the function of the apparatus described. No doubt it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised, to make a claim for a process which his patented device is capable of carrying out. But to entitle him to do this the process must be one capable of being carried out by other means than by the operation of his patented machine, and, unless such other means are known or within the reach of ordinary skill and judgment, the patentee is bound to point them out; for, unless the public are informed by what other means the process can be carried on, the process is to them nothing else than the operation of the machine—in other words, the exercise of its functions. In the present case no other means or way of practicing the process are suggested by the patentee than the particular device on which his claim for the apparatus rests. And it is impossible for us to see how the process which is the subject of these claims could be worked by any other means than the particular means described by the apparatus. Certainly it is not explained how else it could be done. Moreover, if the apparatus is not new, its functions are not new. See the observations of Mr. Justice Brown in Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, and the cases there cited by him; and Wessel v. United Mattress Mach. Co., 139 Fed. 11, 71 C. C. A. 423, and American Crayon Co. v. Sexton, 139 Fed. 564, 71 C. C. A. 548, two recent decisions of this court. Besides, the operation of the earlier burners disclosed the practice of the process the patentee proposes to make the subject of his patent. And in this connection it seems proper to repeat that the application for the patent which Dolan verified by his oath did not allege that he had invented a new process.

We are referred to a decision made by the Circuit Court of Appeals for the Second Circuit in Kirchberger v. American Acetylene Burner Co., 128 Fed. 599, 64 C. C. A. 107, in which the Dolan patent was sustained. But with great respect we are not satisfied with the reasoning in the opinion delivered in that case. Some material facts are

therein assumed which were not, according to our understanding, sustained by the record, if it was the same as it is here. For instance, it is said at page 604 of 128 Fed., and page 112 of 64 C. C. A., referring to the Bullier burner:

"This burner is in many respects strikingly like that in the present suit. There are, however, these radical differences in construction: The air passages in the Bullier burner are located at such a distance below the head as to afford an opportunity for, if not to necessarily cause, a thorough mixing of the air and gas, while in the patent in suit the small chamber and orifice are so located at the uppermost end of the burner as to apparently prevent such mixing."

Now, as we have pointed out, Dolan did not state that his air ducts were at the uppermost end of his burner. He stated only that they came in between the constriction, C, at the lower end of the chamber and the orifice. And this was the very form of Bullier's burner shown in figure 1 of his addition of June 12, 1896, above set forth. Neither Bullier or Dolan states the length of his burner nor the distance of the air openings from the orifice. Neither states the size of his burners, but, whatever that might be, the location of the air openings on the chamber as shown by the respective drawings of Dolan and in Bullier's Addition, figure 1, is about the middle of the length of the chamber in each case, and these drawings are the only means we have of knowing where each would put them. From these it would appear, and especially from Bullier's figure 3 in his original patent, that the air ducts came in nearer to the orifice than do Dolan's, and in Bullier's figure 5 the circular air duct comes in just below the sides of the orifice, with the result of shielding the orifice from deposits as we have before shown. And the whole matter may be summed up in this: That from all that appears the mixing of the gas and air was as likely to occur in Dolan's as in Bullier's and so of the forming of an envelope for the protection of the orifice. The opinion of the Circuit Court of Appeals for the Second Circuit does not deal with the necessity of a definite statement of the locality of the air ducts on the chamber to differentiate his burner from earlier structures. In dealing with the subject of the amendment of the application, that court apparently held that because it did not appear that other inventors whose rights would be prejudiced had entered the field, and because the original drawings sufficiently show and suggest the claims finally made, the amendment was not invalid. As to the first reason, while it is true that in the case cited (Railroad Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053) Mr. Justice Bradley referred to the fact that other inventors might be prejudiced by the amendment as a reason for denying its validity, yet that is not assigned as the only reason. It was held by this court in Michigan Central R. Co. v. Consolidated Car Heating Co., supra, that an amendment which brought in the substance of the invention without the verification required by the statute was unauthorized and invalid. We regret to differ from the opinion of the Circuit Court of Appeals for the Second Circuit, but we could not agree without surrendering our own judgment.

Our conclusion is that the decree should be reversed, and the bill dismissed, with costs in the court below and in this court.

AMERICAN LAVA CO. et al. v. KIRSCHBERGER et al.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1907.)

No. 1,649.

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

Charles Neave, for appellants.
Louis C. Raegener, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal by the defendant below from an order granting a preliminary injunction in a suit for the infringement of the Dolan patent, No. 589,342.

The suit is one coming from the same court as did case No. 1,642, American Lava Co. v. Steward (just decided) 155 Fed. 731, and the order appealed from was doubtless based upon the holding in that case that the Dolan patent was valid. The two causes were heard together in this court. The conclusion which we have announced in the other case is decisive of this, and the order appealed from will be reversed, with a direction to dismiss the bill with the costs of both courts.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC & MFG. CO.

(Circuit Court, D. New Jersey. August 12, 1907.)

1. PATENTS—INFRINGEMENT—ARMATURES.
The Morrow patent, No. 504,401, for an armature for dynamo electric machines, claim 2, which covers an armature core comprising layers of segmental laminæ dovetailed to an internal supporting shell, the function of the dovetail connection being to lock the laminæ to the spider for driving purposes, and also to do so in such manner that they cannot be driven from the spider by centrifugal force, was not anticipated as to the latter feature, and discloses patentable novelty; also *held* infringed.

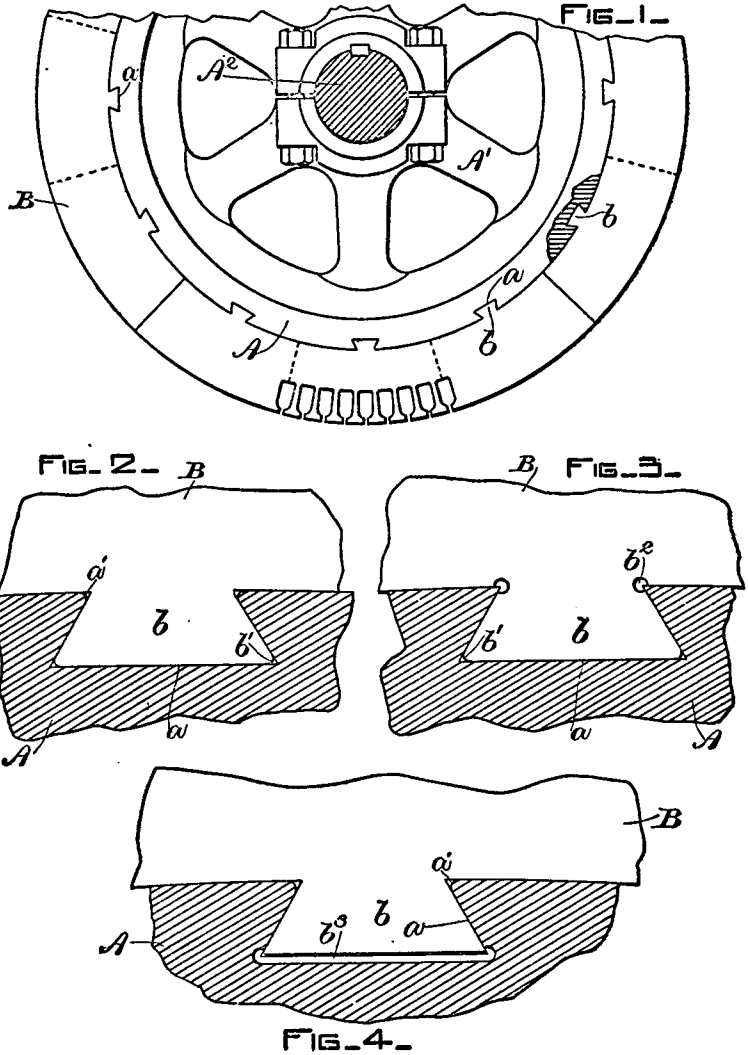
2. SAME—ANTICIPATION.
The Reist patent, No. 559,910, for an armature for a dynamo electric machine, is void for anticipation as to all three of its claims. Claim 2, if possibly novel, *held* not infringed.

In Equity. On final hearing.

W. K. Richardson and A. D. Salinger, for complainant.
Thomas F. Sheridan and Clifton V. Edwards, for defendant.

LANNING, District Judge. The complainant is the owner of the Morrow patent, No. 504,401, and of the Reist patent, No. 559,910, each for an armature for dynamo electric machines. They are capable of conjoint use. Each patent was issued to the complainant as assignee of the inventor. The defendant is charged with their infringement, and the defense set up as to each patent is invalidity of the patent and noninfringement.

The Morrow patent was applied for May 13, 1893, and granted to the complainant, as Morrow's assignee, September 5, 1893. The figures accompanying the patent are as follows:



In the specification of the patent Morrow says:

"My invention relates to the construction of armatures; its object being to provide efficient and economical means for building up a laminated core and securing it to its support or carrier. In carrying out my invention I provide an internal cylindrical supporting shell, preferably carried by the usual armature spiders keyed to a shaft, and on the outer surface of said supporting shell longitudinal grooves are cut, into which corresponding projections on the inner surface of an annular armature core are adapted to fit, preferably making a dovetail or undercut joint. The core itself is composed of segmental laminæ of such proportions that a predetermined number of

them make one layer of the core; and in adjacent layers the segments are so arranged as to break joints. The said segments are provided at their inner edges with projections adapted to fit the grooves on the supporting shell, and registering with each other when the core is assembled. * * * Referring to Fig. 1, the cylindrical supporting shell A, is carried on spiders, A^1, keyed to a shaft, A^2, in the ordinary manner. At regular intervals along the outer surface of said supporting shell, A, are longitudinal undercut grooves, a, into which fit the dovetail projections, b, on the laminæ, B. In making up an armature, the spiders and supporting shell are first assembled, and the laminæ of sheet iron punched out in the shape indicated in Fig. 1 are slipped over the surface of the said shell, with the projections, a, in the grooves, b. After one layer is in place, another, breaking joints with the first, is put on, and so on, until the armature is completed. The dotted lines in Fig. 1 indicate the edges of the laminæ in successive layers, showing the manner of breaking joints. It is obviously unnecessary to have the dovetail projections exactly fit the grooves, as shown in Fig. 1, and this is, moreover, manifestly undesirable, since much more care is thereby rendered necessary both in punching the laminæ and in finishing the grooves. Slight modifications are therefore shown in Figs. 2, 3, and 4. In Fig. 2 the outer corners of projection, b, are rounded as shown at b^1, while the outer edges of the groove, a, are rounded as shown at a^1. A firm connection is thus afforded between the parts by the fit of the beveled edges of the groove and projection, while the necessity of a perfect fit at the acute angles, which would be difficult of attainment, is obviated. In Fig. 3, instead of rounding the edges of the groove, a, the laminæ are punched so as to have a recess, b^2, at the inner acute angles of the dovetail projections. In all of these arrangements, however, the projection, b, extends to the bottom of the groove, a, necessitating a careful milling thereof, as well as a smooth edge on said projection, in order to render the parts readily assembled. It is therefore preferable to chamber the groove, as shown at b^3 in Fig. 4. * * * I am aware of patent No. 493,337, granted to Horace F. Parshall March 14, 1893, and therefore do not claim broadly an annular core supported by and dovetailed to an internal cylindrical support, but confine myself to a core made up of segmental laminæ punched with internal dovetail projections. It is obviously of material advantage to make the laminæ segmental, rather than annular, since the material from which they are punched can in this way be cut much less to waste, while by so assembling consecutive layers as to break joints, as above set forth, a practically solid structure is obtained. A further improvement consists in the modifications in the shape of the dovetail connections, as described, which render the parts much more readily assembled. By making the core with internal dovetail projections integral therewith, a greater depth of free iron for the traverse of magnetism is obtained."

The patent has three claims, but the second claim only is alleged to be infringed. That claim is as follows:

"An armature core comprising layers of segmental laminæ dovetailed to an internal supporting shell, in which the segments in consecutive layers break joints, substantially as described."

Morrow was not the first to use segmental laminæ in building up armature cores. Nor was he the first to use connecting projections and grooves between the spider and the laminæ of an armature core. The British patent, No. 238, issued July 6, 1889, to Gibbs & Fesquet; the Geisenhoner patent, No. 414,900, dated November 12, 1889; the British patent, No. 19,011, issued October 18, 1890, to Hopkinson; the British patent, No. 4,858, issued February 7, 1891, to Kapp; the Lundell patent No. 461,795, dated October 20, 1891; and the Smith patent, No. 492,344, dated February 21, 1893—all describe segmental laminæ so assembled as to break joints. In all of these patents of the prior art, however, except possibly Hopkinson and Smith, the segmental laminæ are fastened to the frame of the armature by bolts running

transversely through the laminæ and parallel with the shaft of the spider or armature. In Hopkinson, the method of fastening the laminæ to the frame of the armature is not described, unless it be in the language of the specification, which declares that:

"The friction between the plates is sufficient to keep them in place just as well as if they were entire rings."

In Smith's patent the inner peripheries of the laminæ are welded together, thus obviating the necessity of bolts. In none of the above-mentioned patents are there any dovetail connections between the spider and the armature.

In British patent No. 4,302, issued to Crompton March 3, 1884, and in United States patent No. 387,343, issued to Crompton August 7, 1888, the laminæ are complete annuli, and are provided on their inner peripheries with dovetail grooves, into which are fitted the dovetail ends of the arms of the spider. The arms, however, at their inner ends, fit into the hub that surrounds the shaft in such fashion that the hub may be withdrawn, leaving the arms attached to and held in the laminæ by reason of their dovetail connections with the laminæ. In the specification of each of these Crompton patents it is said:

"This withdrawal of the central hub or hubs (as the case may be) greatly facilitates the winding of the armature coils onto the core. It also facilitates the insulation of the wires, and afterwards permits of easier access to the internal surface of the ring-core than has hitherto been the case, and thus lessens the cost of repairs or renewals of the coils."

And in the Parshall patent, No. 493,337, dated March 14, 1893, the laminæ are complete annuli. The inner periphery of each of the annuli contains a series of notches or grooves, which the patent declares are "preferably of a dovetail or undercut shape." The specification further says:

"The notches are similarly arranged in all the disks, so that when the disks are assembled the notches will register and form grooves running lengthwise of the core."

Longitudinal dovetail grooves are also cut in the outer surface of the spider. When the laminæ are assembled on the spider and properly arranged, the dovetail grooves in the spider and those in the laminæ are opposite to each other, and into them keys are fitted, though the specification says the keys "may be cast integral with the shell," or spider. The keys are made somewhat smaller than the grooves, and are fastened in the grooves by Babbitt metal or similar material poured therein. The patentee says:

"It is preferable to dovetail the grooves and keys, though any suitable shape may be given to them."

This reference to the prior art is sufficient to present for intelligent consideration the question as to whether the Morrow patent contains any patentable novelty. It is conceded by the complainant that there was nothing novel in Morrow's use of segmental laminæ. It is also contended by the defendant that there was nothing novel in Morrow's use of the dovetail connections between the spider and the laminæ. But it will be observed that the functions of the dovetail grooves of the two Crompton patents are, first, to receive the ends of the spider arms for a driving purpose, and, second, to hold the arms in place when

the hub is removed. In the Parshall patent the function of the dovetail grooves is only to receive the keys, by which the laminæ are locked to the spider, for a driving purpose. But when we turn to the Morrow patent we find that the functions of the dovetail connections between the spider and the laminæ are, first, to lock the laminæ to the spider for a driving purpose, and, second, to do so in such manner that they cannot possibly be driven from the spider by centrifugal force. In no patent of the prior art did the dovetail connection ever perform a function like the second one of the Morrow patent. I think, therefore, the Morrow patent was not anticipated by any of the patents of the prior art.

But it appears in the proofs that the complainant shipped certain dynamo electric machines to Mexico on April 27, 1893, and also certain other dynamo electric machines to Providence, R. I., not later than May 1, 1893. This proof was stipulated into the case by the parties. Drawings of these machines, made as early as July, 1892, are in evidence, and the defendant's counsel contend that they show anticipation of the complainant's patent, the application for which was not filed until May 13, 1893. A comparison of the drawings of these machines with the drawings of the Morrow patent does disclose what appear to be striking similarities. But there is no testimony to explain the drawings thus stipulated into the case, and I feel sure I would be wholly unwarranted in concluding, in the absence of such testimony, that the drawings, which are quite intricate, show anticipation. The burden of proof as to anticipation is on the defendant, and must be established by preponderating and satisfying evidence. It has not been so established.

As to infringement of the Morrow patent: The functions of the dovetail connections in the Morrow construction and in the defendant's device, are, first, to furnish such connections between the laminæ and the spider that the laminæ will be forced to rotate with the spider, that is, to furnish a driving power, and, second, to hold the laminæ to the spider against the centrifugal force exerted by rapid rotation. The defendant insists that there are these differences between the two constructions: That in the defendant's construction there is no complete cylinder cast integrally with the arms of the spider, as in the Morrow construction, and that the dovetail connections are between the ends of the spider arms and the laminæ, and not, as in the Morrow construction, between the outer surface of a cylinder and the laminæ; and that in the defendant's construction the dovetail projections are on the ends of the spider arms and the dovetail grooves in the laminæ, while in the Morrow construction the dovetail projections are on the laminæ and the dovetail grooves in the surface of the cylinder. But, in my opinion, there is no material difference between the complete cylinder of the Morrow construction and the spider arms of the defendant's construction, the outer ends of which spread out laterally far enough to carry on the end of each arm several dovetail projections, though not far enough to form a complete cylinder. Nor do I think there is any material difference between the two constructions, in that in the Morrow construction the projections are on the laminæ, while in the defendant's construction the grooves are on the laminæ. In fact, the defendant's laminæ have alternate dovetail projections and grooves, just

as the Morrow construction has. The projections on the laminæ of the Morrow construction are narrower, and on the laminæ of the defendant's construction wider, than the grooves. The functions of the dovetail connections in the two constructions, however, as already observed, are precisely the same. The defendant must therefore be held to have infringed the second claim of the Morrow patent.

The figures of the Reist patent are as follows:

Fig. 1.

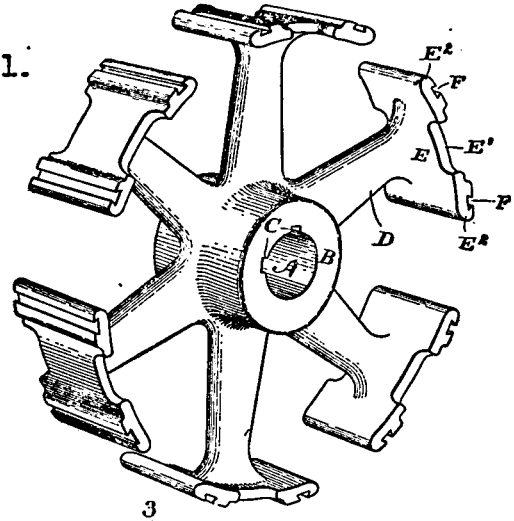


Fig. 2.

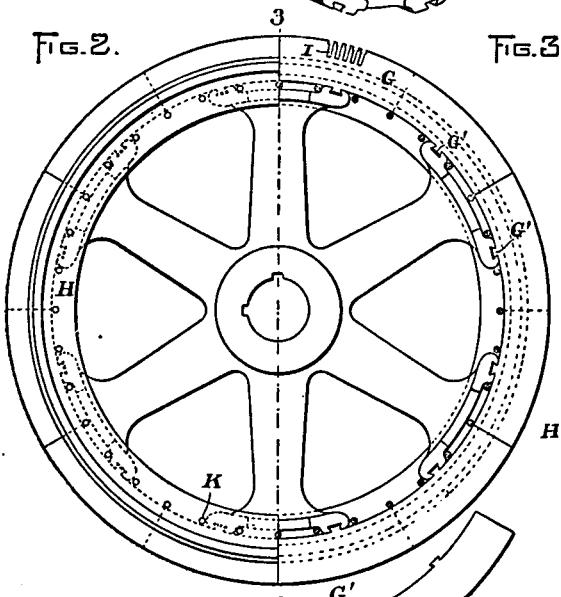


Fig. 3.

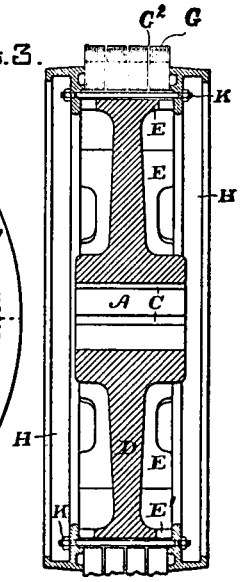
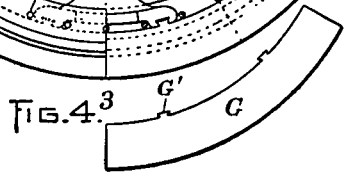


Fig. 4.



In his specification Reist says:

"My invention relates to dynamo electric armatures, and has for its object to provide a construction by which such armatures may be thoroughly ventilated, and also to so arrange the construction of the supporting structure or 'spider,' as it is commonly called, that it may be cast or otherwise formed in a single piece without strains and without distortion. My invention further consists in the details of the construction by which I accomplish the purposes herein pointed out. In armature spiders, as commonly constructed heretofore, a number of radiating arms have been combined with a central body or hub and a rim connecting the arms. Where such structures have been cast in a single piece of large diameter, the rim and the portions adjacent thereto would cool first and take a permanent set, the arms would then cool, and later the hub, which is the largest mass of metal, would cool. The result of this has been that strains were set up in the parts of the structure, mainly in the rim and in the arms, so that in some cases it would be distorted; and it has even been known to split, either in cooling or in the process of manufacture, when the outer skin would be turned off. This could be remedied by annealing, but this is an expensive and tedious process. I have therefore devised the construction herein set out. The arms, being unconnected at the outer ends, except by the laminæ of the armature, as pointed out herein, are free to move under strain set up in casting, and the position of the connecting means between the laminæ and the arms might be adjusted in the course of manufacture to conform to any trifling inequalities."

In describing the figures of the patent he says:

"D is one of the arms of the spider. * * * The arm, D, is expanded at its outer end into a head or face, E. The face of this head is cut away at E^1, and two enlargements, E^2, E^2, are shown, in each of which is a dovetail groove or mortise, F, serving to hold the laminæ of the armature in place. * * * These laminæ are of the usual form except that they are provided with projecting tongues, G^1, G^1, of dovetail shape in the case illustrated, by means of which the arms of the spider are connected. The laminæ are also provided with the usual slots, I, for the coils of the armature. A sectional casting, H, is also used, and may be either made in several sections, or may be a split ring, according to the size of the armature. Bolts, K, K, passing through the rings, hold the laminæ together. As best shown in Fig. 3, ventilating spaces, G^2, are left between the several groups of the laminæ; this being a well-known construction."

Figure 4 is referred to as showing "one of the laminæ," with its projecting tongues, G^1. Figure 2 is also referred to for the purpose of showing, by the dotted and full lines, the manner in which the laminæ break joints. The construction thus described, says the inventor, "is exceedingly efficient, in that any inequalities occurring from heating in the armature are taken up without causing undue strain, and the parts are free to move within reasonable limits, as will be readily apparent."

The claims are three in number, each of which, the complainant charges, is infringed by the defendant's device. They are as follows:

"1. In combination, an armature-spider having a central boss or hub, separate arms radiating therefrom, the arms being provided upon their outer ends with dovetail grooves, and laminæ having dovetail projections fitting in the grooves, thus connecting the arms.

"2. In combination, an armature-spider having a central boss or hub and separate radiating arms, the arms having dovetail grooves upon their outer ends, laminæ arranged in groups and having dovetail projections fitting in the grooves, and clamping-rings for holding the laminæ in position.

"3. As a new article of manufacture, an armature-spider for a dynamo-electric machine, comprising a central boss or hub, separate arms radiating therefrom, the arms having expanded faces, and dovetail grooves in the expanded faces."

The defendant insists that all of these claims were anticipated in the prior art. The file wrapper shows that the application for the patent contained six claims. Of these, claims 1 and 4 were as follows:

"1. In combination, an armature-spider having a central boss or hub, and arms radiating therefrom, with laminæ connecting the ends of the arms together."

"4. As a new article of manufacture, an armature-spider for a dynamo-electric machine, consisting of a central boss or hub, separate arms radiating therefrom, and means for attaching the armature laminæ directly to the outer ends of the arms."

These two claims were rejected, because they contained nothing patentable over Fitch, No. 293,441, Orton, No. 309,735, Keith, No. 353,310, Thomson, No. 400,973, and Collins, No. 451,894.

Claim 6 was as follows:

"6. As a new article of manufacture, a sheet metal lamina for the armature of a dynamo electric machine, comprising a body portion conforming to the curves in the armature, and projecting dovetail lugs or tongues for securing the lamina in place."

This claim was rejected upon the Morrow patent, now in suit.

After the rejection of claims 1, 4, and 6 of the application, a substitute for claim 4 was filed, differing from that claim only in making the clause "separate arms radiating therefrom" read "separate arms radiating therefrom having expanded faces." The substituted claim was also rejected, upon Lundell's two patents, No. 461,795, and No. 487,755. Reist submitted to the action of the Patent Office and authorized all of the rejected claims to be canceled. Claims 2, 3, and 5 of the application were the only ones allowed, and they became claims 1, 2, and 3 of the patent, which the defendant now insists are also anticipated.

A comparison of the original claims, 1, 4, and 6 with the patents upon which those claims were rejected makes it clear, I think, that their rejection by the Patent Office was based on the conclusion that they were too broad. This conclusion, I also think, was correct. The patents upon which the rejection was made disclosed combinations which exactly fitted the broad and general descriptions of the rejected claims. That the patentee was himself convinced of this is shown by the fact that he authorized the cancellation of the claims. Bearing in mind the rule of the patent law that a claim allowed by the Patent Office cannot be so construed as to be the equivalent of a canceled claim, as well as the rule that a claim anticipated by an older invention is void, we find that, if the combination described in claim 1 of the patent possesses any novel feature whatever, it is only in the fact that the arms have at their outer ends "dovetail grooves," and the laminæ "dovetail projections fitting in the grooves." But I have held, in an opinion just filed in Westinghouse Electric & Manufacturing Company v. Prudential Insurance Company of America, 155 Fed. 749, that there is no material difference between an armature spider which has a central hub with arms radiating therefrom connected at their outer ends by a rim or cylinder and an armature-spider which has a central hub with arms radiating therefrom not connected at their ends by a rim or cylinder. The Morrow patent, one of the two patents now in suit, discloses an armature-spider which has (1) a central hub; (2) arms radiating therefrom connected

at their outer ends by a rim or cylinder; (3) dovetail grooves in the outer surface of the cylinder; and (4) laminæ having dovetail projections fitting in the grooves. The Reist patent discloses an armature-spider which has (1) a central hub; (2) arms radiating therefrom having at their outer ends expanded faces, but not sufficiently expanded to form a complete rim or cylinder; (3) dovetail grooves in the outer surfaces of the expanded faces; and (4) laminæ having dovetail projections fitting in the grooves. I can find no substantial difference between the combination disclosed by, though it is not claimed in, the Morrow patent, and the combination described in claim 1 of the Reist patent. Claim 1 of Reist is anticipated by Morrow.

What has been said of claim 1 disposes also of claim 3. It differs from the spider disclosed by the Morrow patent only in the fact that the outer ends of the arms are not sufficiently expanded to form a complete rim or cylinder.

Claim 2 requires further consideration. It is for a combination, the elements of which are (1) a central hub; (2) separate radiating arms; (3) dovetail grooves on the outer ends of the arms; (4) laminæ arranged in groups; (5) dovetail projections on the laminæ fitting in the grooves; and (6) clamping rings for holding the laminæ in position. By arranging the laminæ in groups, provision is made for the ventilating spaces, G^2, referred to in the specification. The separate radiating arms (that is, arms the outer ends of which are not connected by a continuous rim or cylinder) and the ventilating spaces between the groups of laminæ secure one of the objects of the combination stated in the specification, which is "a construction by which such armatures may be thoroughly ventilated." If we consider the third and fifth elements of the combination—dovetail grooves on the outer ends of the arms and dovetail projections on the laminæ fitting in the grooves—as the equivalent of dovetail grooves on the laminæ with dovetail projections on the outer ends of the arms, as I think we should do, the six elements of the combination are all old. I am convinced that the combination is a very useful one; but, after careful consideration, I have reached the conclusion that it does not set forth any patentable novelty. Its language is so general that it can be read upon either of the prior Crompton patents. Each of these patents describes an armature-spider which has (1) a central hub; (2) separate radiating arms; (3) dovetail grooves in the laminæ (which are the equivalent of dovetail grooves in the outer ends of the arms of the claim now under consideration); (4) laminæ arranged in groups; (5) dovetail projections on the outer ends of the arms fitting in the grooves in the laminæ (which are the equivalent of dovetail projections on the laminæ of the claim under consideration); and (6) clamping rings (or "washers," as they are called by Crompton) to hold the laminæ in position. I have therefore been obliged to conclude that claim 2 of Reist is anticipated by Crompton.

If I am in error in holding claim 2 of the Reist patent to be invalid, still the complainant has failed, I think, to show infringement of that claim. It is a combination claim. An infringing device must embody all the elements of the claim. I find nothing in the record explaining

how the defendant's laminæ are held in position. If the defendant uses a clamping ring, the complainant has not shown that fact.

The final conclusion reached is that the complainant is entitled to a decree adjudging the defendant an infringer of claim 2 of the Morrow patent, but not of the Reist patent.

WESTINGHOUSE ELECTRIC & MFG. CO. v. PRUDENTIAL INS. CO. OF AMERICA.

(Circuit Court, D. New Jersey. August 12, 1907.)

PATENTS—NOVELTY AND INFRINGEMENT—FASTENING MEANS FOR CORE PLATES.

The Nolan patent, No. 582.481, for fastening means for core plates of electrical machines, consisting of a ring for holding the laminæ of an armature in place, describes a useful device; but, in view of the previous common use of rings for a similar purpose in other structures, claims 1 and 3 are void for lack of patentable novelty. Claims 2 and 4 include as an additional element a shoulder bearing against the ring to retain it in position, and were not anticipated, and disclose invention; also *held* infringed.

In Equity. On final hearing.

William K. Richardson and A. D. Salinger, for complainant.
Thomas F. Sheridan and Clifton V. Edwards, for defendant.

LANNING, District Judge. The question presented by this case is whether the defendant has infringed complainant's patent No. 582,481, dated May 11, 1897. The patent was issued to the complainant as assignee of Edwin E. Nolan. It is entitled "Fastening Means for Core-Plates of Electrical Machines." In his specification Nolan says:

"My invention relates to electric generators and motors, and has particular reference to means for fastening the laminæ of the cores of such machines in position. The object of my invention is to provide a simple, inexpensive, and efficient means for fastening the laminæ of the cores of electrical machines together, and to the casting constituting the support of the same, and one which may be readily inserted and as readily removed when it is desired to dismember the machine for any purpose."

The claims are four in number, and the charge is that each of them is infringed. They are as follows:

"1. A core for electrical machines, comprising a casting having a cylindrical surface and provided with a circumferential flange at or near one end and a circumferential groove at or near the other end, an annular plate adjacent to said groove, laminæ clamped between the flange and the annular plate, and a fastening-ring located partially in said groove and bearing against the outer side of said annular plate.

"2. A core for electrical machines, comprising a casting having a cylindrical surface and provided with a circumferential flange at or near one end and a circumferential groove at or near the other end, an annular plate provided with a shoulder on its outer side, laminæ clamped between the flange and the annular plate, and a fastening-ring located partially in said groove and bearing against the shoulder on said plate.

"3. A core for electrical machines, comprising a casting having a cylindrical surface and provided with a circumferential flange at or near one end and a circumferential shoulder of less diameter at or near the opposite end, an an-

nular plate adjacent to said shoulder, laminæ between said annular plate and the flange on the casting, and a spring-ring interposed between said annular plate and said shoulder.

"4. A core for electrical machines, comprising a casting having a cylindrical surface and provided with a flange adjacent to one end and with a shoulder adjacent to the opposite end, an annular plate provided with a shoulder, laminæ between said annular plate and the flange on the casting, and a spring-ring interposed between the shoulder on the annular plate and the shoulder on the casting."

The figures annexed to the patent are as follows:

Fig. 1.

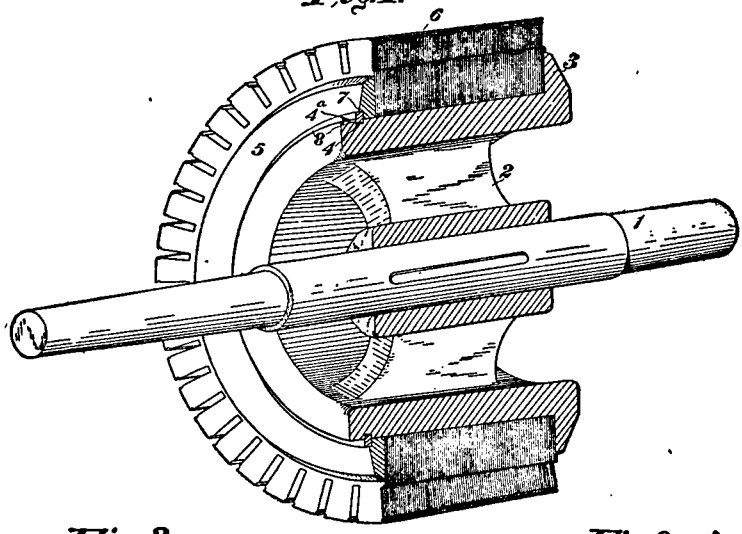


Fig. 2.

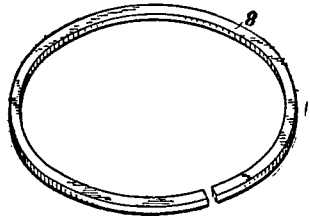
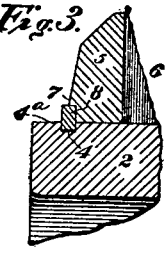


Fig. 3.



The parts referred to in the first claim are the casting having a cylindrical surface, 2; the circumferential flange, 3; the circumferential groove, 4; the annular plate, 5; the laminæ, 6; and the fastening-ring, 8. The parts referred to in the second claim are the casting having a cylindrical surface, 2; the circumferential flange, 3; the circumferential groove, 4; the annular plate, 5; the shoulder, 7, on the outer side of the annular plate; the laminæ, 6; and the fastening-ring, 8. The parts referred to in the third claim are the casting having a cylindrical surface, 2; the circumferential flange, 3; the circumferential shoulder, 4a; the annular plate, 5; the laminæ, 6; and the spring-

ring, 8. The parts referred to in the fourth claim are the casting having a cylindrical surface, 2; the flange, 3; the shoulder, 4a; the annular plate, 5; the shoulder, 7, with which the annular plate is provided; the laminæ, 6; and the spring-ring, 8.

In the specification Nolan further says:

"In order to assemble the parts in the position shown in Fig. 1, the laminæ constituting the outer portion of the core are first built up upon the casting, 2, and the annular plate, 5, is then placed in position and pressed inward against the plates by any suitable mechanism to a point slightly beyond that shown in the drawings. The ring, 8, is then sprung into place in groove, 4, when the plate, 5, is released and springs outward against the said ring. The parts are thus rigidly clamped in position, and by reason of the shoulder, 7, there is no possibility of the fastening-ring, 8, being thrown out of its normal position by centrifugal force due to rotation of the armature. It will be readily seen that, if it is desired to separate the parts of the core, it will be merely necessary to subject the plate, 5, and laminæ, 6, to sufficient pressure to permit the ring, 8, to pass the shoulder, 7, when it may be sprung out of the groove, 4."

The distinguishing feature between the patent in suit and the defendant's device is that in the patent in suit the casting, 2, is provided with a cylindrical surface, while in the defendant's device the casting is provided with three arms having curved ends, and not a continuous cylindrical surface. This difference, however, is clearly an immaterial one. Indeed, Prof. Kennelly, one of the experts who testified for the defendant, himself says:

"The blue print of the Bullock construction [the defendant's device] shows a spider of three arms provided with one integral flange, D, and one movable flange, A. This spider is not a cylinder, but may be regarded as the equivalent of a cylinder. It may be called a cylindrical spider. On the cylindrical spider are mounted a number of core-plates, assembled and fastened between the flanges. The movable end-flange is clamped by a lock-ring resting in a groove, or in a series of three grooves, one on each arm of the spider. If the spider were a true cylinder, this groove would be a cylindrical groove. The defendant's Bullock construction, as represented in the blue print, is the ordinary construction of the prior art, of a fixed flange and a movable flange, with a clamping device of the calendering-rolls of the prior art, viz., the lock-rings of the Perkins, Granger, and Ingram patents. The structure of the Bullock armature blue print differs from the structure of the figures in the Nolan patent in suit in certain details. For example, the Bullock lock-ring has square cross-section. The Nolan lock-ring has rectangular cross-section, being relatively tall and narrow. The Bullock groove has a width about twice as great as the width of the lock-ring; whereas, the Nolan groove in the cylinder is but little wider than the lock-ring. The recess in the outer side of the movable flange has a depth of about one-sixth of the width of the lock-ring in the Bullock construction, and about half the width of the lock-ring in the Nolan construction. The Bullock supporter is a spider of three arms; whereas, the Nolan supporter is a spider of three arms covered by a cylinder. All of these differences I regard as immaterial, and as matters of mere detail."

The record of the case shows that from 1882 down to 1897, when the patent in suit was granted, three different methods had been employed for holding in their places the laminæ of an armature. The first may be designated as the "pin method," the second as the "shaft-nut method" and the third as the "bolt method." The method described in the patent in suit may be called the "spring-ring method." The pin method, illustrated by the Weston patent, No. 401,669, applied for Septem-

ber 22, 1882, in the very early stage of the art, is unsatisfactory, because the laminæ, which are held in position by pins driven into a wooden hub surrounding the shaft, are likely to be displaced by the jarring and rapid rotation of the armature. The shaft-nut method is one by which the laminæ are held in position by a nut screwed on the shaft. This method is ill-adapted to very large armatures, in which the laminæ are not seated on the shaft, but, as in the patent in suit, on the outer surface of a spider rigidly mounted on the shaft. By the bolt method the laminæ are held in place by bolts running parallel with the shaft through the laminæ. This method has a disadvantage in the fact that the bolts must be placed so near to the shaft or to the outer surface of the spider as to be out of the magnetic circuit, or, if they be within the magnetic circuit, must be insulated. Another disadvantage, is that, as the bolts in large machines are necessarily many in number (there is an illustration in the record of a machine having 40 or 50 of them), there is difficulty in threading the laminæ on the bolts. A disadvantage common to both the shaft-nut method and the bolt method is that the nuts are likely to loosen, so that the laminæ are not held firmly in their positions. It is possible that the use of the spring-ring method is not always practicable; but, where it is, its advantages over the other methods in use are obvious. The spring-ring fitted in a groove, and held in position in the manner described in the patent in suit, cannot recede from its position. It is not necessary to insulate it. It is applicable to large machines. It is easily placed in position, and easily removed, so as to permit, with slight expense, the assembling and removal of the laminæ. The device of the patent in suit is therefore a useful one; but the question is: does it rise to the dignity of invention?

The evidence shows that a large armature sometimes revolves with a speed, at its surface, of one mile or more per minute. In such an armature the centrifugal force is so great that it is desirable to have the spring-ring, where it is used, held firmly in the groove. Claims 1 and 3 omit any reference to a shoulder on the outer side of the annular plate, and they are fully satisfied by annular plates resting against the inner surface of the spring-ring, without any shoulder on the annular plates for holding the spring-ring in its groove. While nothing in the prior art relating to electrical machines has been referred to which clearly shows the use of a spring-ring for holding the laminæ in position, the use of such a ring for holding together the parts of a machine has long been well known in other mechanical arts. An illustration of such use is to be found in the Granger patent, No. 407,858, issued in 1889. That was a patent for a cloth-calendering roll. The roll, consisting of corn husks and cotton, is built up on a shaft and solidified by hydraulic pressure. At each end of the roll is a metallic head-piece, and the roll, thus constructed, is locked in its position by a split-ring, adjacent to the outer part of each of the head-pieces and fitted in an annular groove on the shaft. The Perkins patent, No. 355,026, granted in 1886, is for a paper-calendering roll. It describes a roll mounted on a shaft, with a metallic head-piece at each end. The head-pieces, with the intervening roll, are held in position by two split-rings, located in annular grooves on the shaft just outside of the head-pieces. There

is also a German publication of Ganz & Co., referred to in the record, which appeared in 1892. A drawing accompanies the publication, and shows a small armature with the laminæ seated directly on the shaft and clamped between two end plates. It also shows that the plate at one end of the laminæ is held in position by a device the nature of which is not explained in the publication, but which, it is clear, is not a nut. It seems to me to illustrate a split-ring. I think the use of a split-ring for holding the parts of a machine in position in the manner described in claims 1 and 3 of the patent in suit, was, at the date of issuing the patent, an old and very well-known use. Whether such a ring be used for keeping in their proper positions materials mounted on a shaft for the construction of a cloth-calendering roll or a paper-calendering roll, or a core for an electrical machine, it has but the one function. In my judgment, therefore, claims 1 and 3 are invalid for want of patentable novelty.

But claims 2 and 4 each contain an additional element, namely, the shoulder on the outer side of the annular plate. This shoulder extends over the split-ring, and its function is to keep the ring from being thrown out of its groove by the centrifugal force of the rapidly revolving core. Nothing like this device is disclosed in any prior patent to which reference has been made. The Westinghouse patent, No. 582,494, granted on the same day as the patent in suit, shows a groove in the outer surface of the casting, and also a groove in the inner periphery of the annular plate. When the annular plate is placed on the casting against the laminæ and pressed to its position, the two grooves are opposite to each other. Into these grooves molten Babbitt metal or other fusible metal is poured, through openings provided for the purpose, where it quickly solidifies and forms a ring holding the annular plate in its position. The Lusk patent, No. 508,177, the Weisell patent, No. 527,569, and the Harris & Browning patent, No. 61,620, are for improvements in nut-locks. Notwithstanding the insistment of counsel for defendant that these patents disclose anticipations of claims 2 and 4 of the patent in suit, I think they fall far short of it. They might, perhaps, be regarded as anticipations of claims 1 and 3; but they embody no device for overcoming the effect of centrifugal force. The devices described in them simply prevent the loosening of nuts on bolts and shafts.

In my opinion the complainant's patent is good as to claims 2 and 4, and invalid as to claims 1 and 3. I think, also, the defendant's device is an infringing one as to claims 2 and 4.

There will be a decree in accordance with these views.

DIAMOND STONE SAWING MACH. CO. OF NEW YORK v. BROWN et al.

(Circuit Court, E. D. New York. August 16, 1907.)

1. PATENTS—MEASURE OF DAMAGES FOR INFRINGEMENT—LICENSE FEE.

An agreement between the owner of a patent and 12 licensees, fixing a uniform license fee to be paid by each for the use of the patented machine, together with the exaction of the same fee from subsequent licensees, is sufficient to establish a general acquiescence in the reasonable-

ness of such fee and to make it a proper measure of the damages recoverable for a subsequent infringement by a stranger to such licenses; but it can be accepted only as fixing the market value of the use of the machine from and after the time when the first agreement was made, and any recovery for infringement prior to that time must be based on other evidence.

2. SAME—INTEREST.

Damages for infringement of a patent can be considered as liquidated, where an established license fee renders such damages easily determinable, but an infringer is liable for interest on such damages only from the date when he incurred the obligation to pay damages, and not from the date when the license fee became payable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 581.]

In Equity. Suit for infringement of a patent. On exceptions to report of special master.

Man & Protheroe (James G. K. Lee, of counsel), Sols., for complainant.

Mastick & Jones (Chas. S. Jones, of counsel), Sols., for defendants.

CHATFIELD, District Judge. The complainant is the owner of a patent which, after considerable litigation, was upheld by a decree of this court (Diamond Stone Sawing Machine Co. v. Brown et al. [C. C.] 130 Fed. 896), and the matter of damages for infringement referred to a special master. The special master has reported that, upon November 1, 1901, the complainant established a license fee, amounting to $360 per year for each machine, payable quarterly, the first quarter becoming due for the first payment under this license upon the 10th of December, 1901, and that this license fee should be taken as the basis of estimating the damage to the complainant by the infringement by the defendants of the complainant's patent. The master reports that no evidence has been offered of any profits accruing to or received by the defendants from the use of the said patent, and that the defendants herein abandoned the use of the infringing mechanism upon the 27th day of January, 1902. The master has therefore found the total amount of damages to the complainant, for the use of two machines from November 1, 1901, to January 27, 1902, at the rate of $360 per year for each machine, to be the sum of $180, upon which amount he allows interest from December 10, 1901, to the date of the report.

The complainant has excepted to the master's finding upon the ground that, the license fee of $360 per year being found by the master as a proper measure of damages, such damages should have been computed for the entire period during which the defendant infringed, or from a date six years prior to the beginning of the action. The defendants have excepted to the master's report upon the ground that the license fee of $360 was, as a matter of fact, the basis of settlement for infringement by other parties, and that such a settlement is not admissible in evidence, either as a license fee for future use alone or as any measure of damages for infringements by a party other than the one agreeing upon the amount specified as a basis of settlement.

The testimony shows that on behalf of 12 licensees a license rate of $300 per year was offered to the complainant on or about the 10th of October, 1901, and that after consideration and negotiations the amount

of $360 per annum, payable quarterly, was fixed upon as a license fee. It further appears in the testimony that the questions of infringement and of license were kept entirely apart during the negotiations, and the master has found as a question of fact that the payment of $360 was fixed upon as a license rate, and not as a basis of settlement for prior infringements.

The case of Westcott v. Rude (C. C.) 19 Fed. 832, upon appeal Rude v. Westcott, 130 U. S. 152, 9 Sup. Ct. 463, 32 L. Ed. 888, settles beyond argument the doctrine that a so-called license fee or royalty, agreed upon as a basis of settlement for past infringement, cannot be used as an estimate of damage in a suit against other infringing parties. The opinion in the Supreme Court also holds that a license (page 165 of 130 U. S., and page 468 of 9 Sup. Ct. [32 L. Ed. 888]) "must be common—that is, of frequent occurrence—to establish such a market price for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated. In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of, it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention, and it must be uniform at the places where the licenses are issued." Upon the finding of the master, which seems to be supported by the evidence, that the royalty received by the complainant was a license, and not a settlement for prior infringements, the conditions laid down in Rude v. Westcott by the Supreme Court seem to be fulfilled, and the amount of this royalty is, therefore, not only competent as a measure of damages against the defendants herein (who are strangers to the license creating this royalty), but also its exaction from the various parties desiring to use the complainant's patents, subsequent to the date of fixing the amount of royalty, establishes such a uniform custom as to justify the finding of the master that this royalty can be taken as a measure of damages in this action.

As to the period for which damages should be allowed, the report of the master is apparently correct. No evidence is offered to show what the value of the license (what might be called the market price of such a license) would have been prior to the fixing of the royalty upon the 1st of November, 1901; and, while it may be inferred that the rate agreed upon was as reasonable for one period as another, nevertheless, in the absence of testimony, the market value of a privilege can be estimated only from the price which is charged, and without additional proof can apply only to the period for which it is charged. Thus the master has no evidence on which to base any finding as to the market value of a license by the complainant before the 1st day of November, 1901. The testimony and the licenses themselves which have been introduced in evidence show that the various licenses were not executed and delivered upon the first day of the period for which damages have been allowed, viz., November 1, 1901; but the negotiations leading up to the fixing of the price of a license, and a determination of what that price should be, preceded the date of the first license, which was November 1, 1901, and therefore the master's finding that

the license fee was established upon that date seems to the court to be correct.

The master reports that the license fee became liquidated damages, on which interest is allowable, as soon as the license fee was established, and that such interest should run from December 10, 1901, the date at which the first quarterly payment of the license fee on licenses issued prior to that date was made payable. The court cannot see how damages in an action of this nature can be considered liquidated, except upon the theory that, a market price or license value having been established, interest should be allowed upon that market price from the time when this value becomes fixed and easily determinable. It having been decided that the value of this license is $360 a year, and that upon the 27th day of January, 1902, the defendants had incurred an obligation to pay damages according to this market value, amounting to $180, it seems that the complainant should be entitled to interest only from that date, and to this extent the report of the master will be modified.

Except as indicated, the exceptions of both complainant and defendants to the master's report will be overruled, and the complainant may have a decree for the sum of $180, with interest from January 27, 1902.

SOUTHERN RY. CO. v. McNEILL et al.

(Circuit Court, E. D. North Carolina. August 25, 1907.)

1. CARRIERS—REGULATION OF RATES—STATUTES—IMPLIED REPEAL.
   Laws N. C. 1907, p. 252, c. 217, regulating passenger and freight rates within the state, contains no provision repealing laws in existence at the time so far as the freight rates are concerned and with reference to passenger rates, but only contains section 6, which repeals Revisal 1905, § 2618, requiring all railroad companies to furnish first and second class passenger accommodations. *Held*, that all laws in existence at the time of the passage of the act of 1907, and not inconsistent therewith, were still in force, under the rule that a statute will not be construed as impliedly repealing a prior one on the same subject, unless there is an irreconcilable repugnancy, or the new law is intended to supersede the prior one and comprise in itself a complete system of legislation.

2. SAME.
   Revisal N. C. 1905, § 2567, subsec. 9, conferring on railroad companies the right to make passenger rates within a maximum of five cents a mile, repealed by implication section 1099, subd. 1, which imposed on the North Carolina Railroad Commission the duty of making passenger rates.

3. SAME.
   Revisal N. C. 1905, § 2567, subsec. 9, giving railroads the right to make passenger rates within a limit of five cents a mile, was repealed by Laws 1907, p. 675, c. 469, § 7, extending and enlarging the powers of the Corporation Commission.

4. CARRIERS—STATUTORY REGULATION.
   Laws N. C. 1907, p. 252, c. 217, to prevent unjust discrimination in freight and passenger rates, and to fix the maximum charges therefor, and Act March 11, 1907, to extend and enlarge the power of the Corporation Commission, are not self-executing.

5. STATUTES—CONSTRUCTION—REPEALED ACTS.
It is proper to consider a repealed statute in arriving at a particular construction of existing acts.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 299, 302-306.]

6. CARRIERS—REGULATION—RATES—INJUNCTION—PARTIES.
The North Carolina Railroad Commission being required by Revisal 1905, § 1106, to make railroad rates subject only to the limitation contained in Laws N. C. 1907, p. 252, c. 217, the members of such commission were proper parties to a suit to restrain enforcement of such chapter because of unconstitutionality.

7. COURTS—FEDERAL COURTS—JURISDICTION—ACTION AGAINST STATE—ACTIONS AGAINST STATE OFFICERS.
The North Carolina Corporation Commission and the Attorney General being specially charged by Revisal N. C. 1905, §§ 1066, 1113, 5380, and Laws 1907, p. 251, c. 217, § 2, with the enforcement of such chapter, a suit against the Attorney General and the members of the commission to restrain the enforcement of the chapter, and other similar laws, because of alleged unconstitutionality, was not a suit against the state within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not extend to any suit against one of the United States by citizens of another state, or by citizens or subjects of a foreign state.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 840, 844½.]

8. ATTORNEY GENERAL—DUTIES—CARRIERS—STATUTORY REGULATION.
Revisal N. C. 1905, § 1113, provides that the Corporation Commission, whenever in its judgment any corporation has violated a law, shall first give notice of such violation to the offending corporation, and, in the event of a failure of the corporation to comply with the law, shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient. *Held*, that such provision is mandatory, and imposes a duty on the Attorney General when called on to prosecute any suit or action which may be deemed necessary to secure the enforcement of the railroad rate laws of the state.

9. WORDS AND PHRASES—"SPECIALLY CHARGED."
The words, "specially charged," when used in connection with a state officer's duty to enforce a statute, are not limited to a case where the officer is expressly commanded by the statute to bring suits for penalties or prosecute offenses under the act, but include every case where the officer is charged by his general duties as a law officer of the state to enforce the statute.

10. WITNESSES—CREDIBILITY—MATTERS OF OPINION.
Where a prior affidavit of a witness contained facts based only on an estimate, not intended to be treated as matters of fact, such affidavit, though containing statements inconsistent with the witness' subsequent testimony, did not affect his credibility.

11. CONSTITUTIONAL LAW—UNCONSTITUTIONAL STATUTE—POWER OF FEDERAL COURTS.
The federal courts have power to declare an act of the state or federal Legislature invalid when shown to be repugnant to the Constitution.

12. CARRIERS—RATES—REGULATION—INJUNCTION.
Revisal N. C. 1905, § 1082, providing that no judge shall grant an injunction restraining order or other process staying or affecting during the pendency of any appeal, the enforcement of any determination of the Corporation Commission fixing rates or fares without requiring as a condition precedent the execution of certain bonds, etc., indicates that the Legislature intended not to interfere with the remedy by injunction in cases where it appeared that the rates fixed were confiscatory, etc.

13. SAME—PROFITS.
While a railroad is not entitled to earn a profit on every mile of its road nor on every article carried by it, it is nevertheless entitled to earn a reasonable profit on its entire intrastate business.

14. SAME—RAILROADS—MAXIMUM RATE LAW—PRELIMINARY INJUNCTION—CONTINUANCE—IRREPARABLE INJURY—MULTIPLICITY OF SUITS.
In a suit to restrain enforcement of Laws N. C. 1907, p. 252, c. 217 et seq., fixing maximum passenger rates, and providing for the establishment of freight rates for railroads within the state by the North Carolina Railroad Commission, on the ground that the rates fixed and provided for were unreasonably low and confiscatory, and that the act was unconstitutional as depriving complainant of its property without due process of law, a prima facie case was made by undisputed evidence, on the hearing of a motion to continue a temporary injunction restraining enforcement of the act pending the hearing on the merits, that the act provided for the establishment of rates which were confiscatory and would not render complainant a reasonable return on its investment, and that, if complainant failed to comply with the act pending the suit, it would be subjected to innumerable suits for heavy penalties. *Held* that the court was authorized to continue the injunction to preserve the status quo and prevent irreparable injury, and to avoid a multiplicity of suits.

In Equity.

Alfred P. Thom, Walker D. Hines, W. B. Rodman and Alex. P. Humphrey, for complainant.

Jas. E. Shepherd, Fred A. Woodward, Victor S. Bryant and Walter E. Daniels, for defendants.

PRITCHARD, Circuit Judge. The bill alleges that the complainant is a corporation originally created under the laws of Virginia. Under its charter, and under authority from other states, it is authorized to own, lease, control, and operate railroads not only in Virginia, but in other states of the Union; that under this power it has acquired and is operating a continuous line of railroad over 6,000 miles in length, extending through the states of Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Tennessee, and by trackage rights this system is connected with another system owned by complainant and lying in the state of Kentucky, Indiana, and Illinois. The complainant as a common carrier of freight and passengers is and has been since its organization engaged in both intra and interstate commerce over its line of road. The defendants admit the authority of the complainant to own and operate roads in North Carolina, but deny that the state of North Carolina has surrendered or given up its right to supervise, regulate, and control the complainant's line of railroad in North Carolina, and specially claims that the state has the power to fix and prescribe rates, both freight and passenger, and has the power to make rules and regulations governing the amount of freight, the furnishing of cars, and the power to prescribe penalties for any violation thereof, controlled only by the fourteenth amendment of the Constitution of the United States.

The General Assembly of North Carolina at its session of 1907 passed two laws regulating rates, the subject-matter of this controversy: (1) The passenger rate act (Pub. Laws 1907, p. 250, c. 216), which provides (section 1) for maximum passenger rate of 2¼ cents per mile,

except as to children 12 years of age or under, and as to these half price; and provides that the Corporation Commission may exempt all independently owned and operated lines of less than 60 miles in length, and certain newly constructed lines; (section 2) that wherever a road is owned, controlled, or operated, by lease or any other agreement, by any other road, the rate for the road so owned shall be determined by the rate prescribed by the act for the road owning or operating the other. The Corporation Commission is required to publish the rates prescribed by the act prior to June 1, 1907. Section 3 requires interchangeable books to be kept on sale at such stations as the Corporation Commission may designate, and requires railroads to honor mileage books issued by other roads. Section 4 provides a penalty of $500 against any railroad company violating any of the provisions of the act, and, makes a servant of the company guilty of a misdemeanor. The freight rate act (Pub. Laws 1907, p. 252, c. 217) provides (section 1) that the Corporation Commission shall not, in fixing the maximum freight rates, permit common carriers to receive a greater toll for shipment over connecting lines than the sum of the present locals, less 25 per centum, and provides that, when the freight rates on any road is not so high as the present tariff, the Commission may permit the same to be increased to the present standard. The Commission is authorized to reduce any tariff of rates when, in their opinion, such reduction shall be just, but has no power to increase any tariff of rates either by classification or otherwise. Section 2 provides penalties for rebating or discrimination. Section 3: If any shipper shall make a written application for a car or cars for use in shipment of freight, if the railroad company shall fail to furnish the said cars within four days the company shall be penalized in the sum of $5 per day, until the said cars are furnished. Section 4 provides certain penalties for failure to transport freight within a reasonable time. Section 5 directs the Corporation Commission to prepare and publish the tariff of rates, charges, and tolls authorized to be charged and collected under this act.

The complainant alleges that at the same session of the General Assembly there was passed certain other laws regulating the business of complainant, and that the effect of said laws would be to greatly increase the cost of conducting its business, and make the charge more burdensome than heretofore. Said acts are referred to by their title as follows:

(1) "An act to provide for the assessment of real estate of railroad companies in stock law territory for local benefit," ratified March 8, 1907. Pub. Laws 1907, p. 668, c. 459.

(2) "An act to prescribe the hours of service of employees for railroad companies engaged in the operation of trains," ratified March 8, 1907. Pub. Laws 1907, p. 665, c. 456.

(3) "An act to authorize the Corporation Commission to require railroads to erect and maintain union depots in towns of 2,000 inhabitants," ratified March 11, 1907. Pub. Laws 1907, p. 672, c. 465.

(4) "An act to extend and enlarge the power of the Corporation Commission," ratified March 11, 1907. Pub. Laws 1907, p. 675, c. 469.

Complainant contends: That it has property in North Carolina devoted to the business of carriage, freight and passenger, of the assessed value for taxation of $26,134,865, and that of this amount $7,213,222.74

is devoted to the intrastate commerce of North Carolina. That the property of complainant, like all other property in North Carolina, is worth more commercially than its assessed tax valuation. That the bonded indebtedness of the complainant applicable to its North Carolina property, is $24,623,078.29. The annual interest charge on said indebtedness is $714,103.08. In addition to its annual interest charge, complainant is compelled to pay for rentals and trackage in North Carolina $481,189.99. That the part of said interest, rental, and trackage charges devoted to intrastate business in North Carolina is $329,900.89 per annum, and this does not consider any question of stock or dividends on stock. The defendants in their answer admit the passage of the laws referred to, and admit the tax valuation of the property, deny any knowledge of the validity of the bonded indebtedness or the amount thereof, but allege that it is in excess of the value of the property, and allege that the complainant's stock is watered, and that the amount of bonded indebtedness and the amount of stock are merely items and elements in ascertaining the value of the property, and in ascertaining what is a just, fair, and reasonable compensation in fixing the rates.

The complainant contends that the effect of the act in respect to freight rates, and of the act in respect to passenger rates, whether taken separately or together, would, if enforced, as will appear from the figures stated in the bill, be to deprive the complainant of its property without due process of law. The complainant contends that under the laws of North Carolina the Corporation Commission is charged with the duty of making just and reasonable rates for the transportation both of freight and passengers; that it is charged with the duty of making full investigation of every element which enters into and constitutes one of the things required to be considered in fixing such rate; that prior to March 2, 1907, the Corporation Commission, after full investigation as required by law, made and established a passenger rate for complainant's lines of 3¼ cents per mile for first-class fare and 2¾ cents per mile for second-class fare, and established the present standard tariff of freight rates, and provided that, where there was a haul over two connecting lines, the rate charged by such common carriers should be the sum of the locals, less 15 per cent. Complainant contends that these rates are in the main reasonable and just, and that the same were fixed by the body charged under the law with that duty, and, wherever they are unreasonable and unjust, they are too low, and should be increased.

The complainant contends that its existing rate fabric is upon the whole property adjusted, not only in its relation to intrastate tariff, but in its relation between its interstate rates and its intrastate rates in North Carolina and in other states. It admits that there may be cited a few instances needing correction, but alleges that they are negligible, and not to be considered in this matter; that the present rates do not yield more than a just and reasonable return upon the value of the property used in the service; and that the rate charged is not higher than a just and reasonable compensation for the service rendered, whether considered on the basis of a fair return of the money invested or in respect to the service rendered. The complainant contends that

the effect of the act in respect to passenger rates and the act in respect to freight rates, whether taken separately or together, if enforced, would be to so reduce the return to complainant for the service rendered that it would deprive complainant of its property without just compensation, without due process of law, and deny to it the equal protection of the laws, and would interfere with interstate commerce. Complainant contends, if the rates mentioned are put into effect and enforced, they would reduce the revenue of complainant upon its intrastate business about $300,000 per annum; that the effect of this reduction would be to leave to the complainant only about $29,000 net earnings from its intrastate business, assuming that the costs of operation did not increase; and that the number of passengers and tonnage remained relatively the same. Complainant contends that this would be true not allowing anything for the interest on the bonded indebtedness, or for the payment of trackage or rentals, that it could not pay the interest on its bonds, much less pay any dividends, and that this return would be only .39 of 1 per cent. on the assessed valuation of complainant's property devoted to intrastate business. The complainant contends, further, that owing to the increased and increasing cost of operating expenses, occasioned in part by the legislation of the state of North Carolina, and in part by the general increasing price of commodities, that this small balance would be wiped out and a deficit would be left, even though complainant should continue to use, as it has done in the past, the utmost economy in the management of its property.

The complainant contends that section 3 of the act in respect to freight rates, which requires complainant, at any time, upon the written application of any shipper, to within four days furnish such shipper with car or cars as demanded, and, the complainant fails to furnish such cars, it shall be liable for a penalty of $5 per day, until said cars are furnished, is unconstitutional and void, for that the requirements are peremptory, and no exception is made on account of the inability of the carrier to comply with such request, although its cars may be in other states, may be actually engaged in interstate commerce, or may be prevented by an accident, congestion of tariff, or other causes beyond the control of the complainant, and is such a regulation as cannot, under the law, be made, and is a regulation depriving the complainant of the right to use its cars in fair and just proportion according to the demands made upon it, both for interstate and intrastate business; that said section is unconstitutional and void, for that it undertakes to classify the said roads in the state without any just and reasonable basis for such classification, and denies the equal protection of the laws in violation of the fourteenth amendment. The complainant contends that the said acts in respect to both freight and passenger rates by a system of enormous fines and penalties, therein sought to be imposed, closed the doors of the courts to complainant, and makes the terms upon which complainant may enter the courts so unequal as compared with other suitors, that it denies to complainant the equal protection of the laws and due process of law, in violation of the fourteenth amendment.

Complainant contends that section 3 of the act, in respect to passenger rates, requiring the complainant to keep on sale mileage books,

which shall be good in the hands of the person named therein on all the roads in the state on which the fare is the same, or less than the fare on the road of the company selling such books, and requires the complainant to redeem such mileage books, or mileage sold by another company, in payment of transportation, is unconstitutional and void, for that the regulations are so unreasonable and unjust as to deprive the complainant of the right to use its property in the conduct of its business, and such laws are not within the power of the General Assembly to enact, but impose unjust and unreasonable burdens on complainant, and deprive it of its property without due process of law. Complainant contends that the classification of railroads as attempted both in the freight rate act and passenger rate act is unjust, unreasonable, and unlawful, as having no just and proper basis on which to make such classification, and is in violation of the fourteenth amendment of the Constitution of the United States.

Complainant contends that under the said acts the corporation was, as to the act in respect to freight rates before the said act went into effect, required to prepare and publish the tariff of rates authorized by the said act, and, as to the act in respect to passenger rates, the Corporation Commission was required by said act and the laws of North Carolina to prepare a just and reasonable rate for the said railroads in North Carolina as prescribed in said act, and was required on or before June 1st to publish said rate so fixed, and the said Commission was further required to designate the places at which mileage books should be kept on sale, and that the commission was under the laws of North Carolina specially charged with the duty of enforcing the said two acts, and of the enforcement of the laws relating to common carriers, and was charged with the duty of regulating said common carriers, and had full control and supervision over such common carriers, and that the Attorney General and the Assistant Attorney General were specially charged with the duty of enforcing the laws of North Carolina, including the said two acts as against the complainant.

The complainant contends that it has the right, under the Constitution, whenever the circumstances may justify it, to increase its rates, either of passenger or of freights, when by the increased price of commodities of all kinds, including labor, the cost of operation becomes such as to make the then existing rate so low as to be confiscatory, and that it has the right, as an incident of property, and that the act of the Legislature in so far as it tends to deprive the complainant of its rights is in conflict with the fourteenth amendment of the Constitution, and is therefore void. The complainant contends that it had a right to come into a court of chancery and make defendants those representatives of the state who were specially charged, by law, with the performance of the duty of enforcing these acts, and have the validity and reasonableness and justness of the rates inquired into, and to have inquired into by a court of chancery the effect of such law upon complainant's property, and to have such property protected pending the litigation.

The defendants admit prior to March 2, 1907, the Corporation Commission, in the exercise of the power conferred upon it by law, had

established a passenger tariff of 3¼ cents per mile for first-class fare and 2¾ cents per mile for second-class fare, and had established the present standard tariff of freight rates for intrastate tariff, and had provided for a reduction of 15 per centum from the sum of the locals on a joint haul. The defendants contend, however, that a reduction of the rates heretofore established, as provided for in these acts, would not be unreasonable and unjust, and say:

(1) That, while the maximum rates fixed by the Commission prior to the acts of March 2, 1907, were for passenger tariff 3¼ cents per mile for first-class fare and 2¾ cents per mile for second-class fare, yet complainant habitually sold mileage books at 2½ cents per mile. (2) That not only did complainant sell mileage books, good over its lines, at 2½ cents per mile, but that during the summer season—that is, between June 1st and October 31st of each year—it sold season tickets from points in eastern and central Carolina to points in western Carolina at the rate of 2 cents per mile. (3) That complainant sold tickets to ministers of the gospel at about 2 cents per mile. (4) That the average of all tickets sold in North Carolina for intrastate travel was during the year ending June 30, 1904, 2.39 cents per mile, and during the year 1905 2.386 cents per mile, and during the year 1906 2.508 cents per mile, and that the average over complainant's entire system for the year 1906 was only 2.41 cents per mile. (5) That complainant, in violation of the laws of the state, carried many influential people free, and that this was done to get their business or to influence them. (6) That the complainant pays exorbitant and extravagant salaries, and paid out last year large sums in settlement with persons injured on its system, or while in its employment, and large sums for lost or damaged goods, and large sums for clearing of wrecks, and large sums for advertising its business. The defendants allege that if complainant would stop selling tickets and transporting persons at less than 2¼ cents, and charge all persons 2¼ cents, the act in respect to passenger rates would not reduce the revenue of complainant as much as complainant claims.

Defendants contend that the figures given in the bill in reference to complainant's earnings are correct. They allege that the complainant was required by law to make report to the Corporation Commission, both as to its earnings and operating expenses, that such reports were made and based on such reports, and, after hearing, the General Assembly of North Carolina passed the two acts in question, and that, if the figures given in the said reports be taken as true, the complainant would be able to lose all that it claims that it would lose under the said acts, and would have a sufficient net revenue left to pay 5½ per cent. per annum upon the assessed value of that part of its property devoted to intrastate business. Defendants contend that the complainant not only earns a large revenue on its intrastate business, but considering both its intrastate and interstate business and its entire operating expenses on that part of its line lying in North Carolina, its net earnings are about 10 per cent. of the assessed value of its property.

The defendants contend that the General Assembly abolished two classes of fares, and that the result of such act would be a great sav-

ing in the operating expenses of complainant, and that the growth of the country and the greatly increased travel which would be stimulated by the reduction of rates will increase complainant's revenue without sensibly increasing its expenses. The defendants contend that, even in its reports made to the Corporation Commission, the complainant has incorrectly stated its operating expenses in making the partition between the cost of intrastate and interstate business, and, if the true rule was adopted—that is, the cost of doing intrastate and interstate business distributed proportionately—that the rates for complainant's lines would be greatly reduced below that named in the acts.

Defendants contend that the acts in question are self-executing; that none of the defendants have any special duty imposed upon them, or either of them, in reference to said acts, or either of them, and that this is a suit against the state of North Carolina, and forbidden by the eleventh amendment of the Constitution of the United States; that the laws are unconstitutional and positive in their provisions, and are self-executing, and that this suit cannot be maintained.

In considering the motion to continue the restraining order heretofore granted until the final hearing of the cause, the court is called upon to determine, first, as to whether it has jurisdiction of the parties, as well as the subject-matter of the controversy involved in this proceeding.

It is insisted by counsel for defendants that this is a suit against the state within the meaning of the eleventh amendment of the Constitution of the United States, and that, therefore, this court is without jurisdiction. Counsel cite in support of this contention the case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535. Complainant contends that this is not a suit against the state of North Carolina. As to the Corporation Commissioners, complainant contends, in the first place, that they are charged with the duty of making the rates, both passenger and freight, for the railroad companies in North Carolina, and, even if this is not true, that they have essential duties to perform in connection with the putting into effect of the freight and passenger acts of 1907.

Complainant refers to the following statutes as applicable to the connection of the Commissioners with the rates in question:

Revisal 1905, c. 61, "Railroads," subhead 4, "Corporate Powers." Section 2567:

"General Powers. Every railroad corporation shall have power: * * * (7) Right to carry persons and property. To take and convey persons and property on its railroad by the power or force of steam, electricity or animals, or by any mechanical power, and to receive compensation therefor. * * * (9) Regulation of time and manner of transportation. To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any passenger and his ordinary baggage shall not exceed five cents per mile."

Section 2618:

"First and Second Class Accommodations. All railroad companies shall furnish first and second class passenger accommodations."

Chapter 20, "Corporation Commission," subhead 3, "Powers." Section 1066:

"General Powers. The Corporation Commission shall have such general control and supervision of all railroad, street railway, steamboat, canal, express and sleeping car companies or corporations and of all companies or corporations engaged in the carrying of freight or passengers, of all telegraph and telephone companies, of all public and private banks, and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies."

Subhead 7, "Jurisdiction." Section 1099:

"Freight and Passenger Rates. The Commission shall make reasonable and just rates:

"(1) Of freight, passenger and express tariffs for railroads, street railways, steamboats, canal and express companies or corporations, and all other transportation companies or corporations engaged in the carriage of freight, express or passengers.

"(2) For the through transportation of freight, express or passengers.

"(3) Of charges for the transportation of packages by any express company or corporation.

"(4) Of charges for the use of railroad cars carrying freight or passengers.

"(5) And rules and regulations as to contracts entered into by any railroad company or corporation to carry over its line or any part thereof the car or cars of any other company or corporation.

"(6) And shall make, require or approve what is known as 'milling-in-transit' rates on grain; or lumber to be dressed and shipped over the line of the railroad company on which such freight originated.

"(7) And, conjointly with such railroad companies, shall have authority to make special rates for the purpose of developing all manufacturing, mining, milling and internal improvements in the state.

"Nothing in this chapter shall prohibit railroad or steamboat companies from making special passenger rates with excursion or other parties, also rates on such freights as are necessary for the comfort of such parties, subject to the approval of the Commission."

Subhead 8, "Rates."

Section 1104:

"How fixed. In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person or corporation subject to the provisions of this chapter the Commission shall take into consideration if proved, or may require proof of, the value of the property for such carrier, person or corporation used for the public in the consideration of such rate or charge or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon and the present compared with the original cost of construction of all of its property within the state; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person or corporation and all other facts that will enable them to determine what are reasonable and just rates, charges and tariffs."

Section 1106:

"Revision of Rates. The Commission shall from time to time, and as often as circumstances may require, change and revise or cause to be changed and revised any schedules of rates fixed by the Commission, or allowed to be charged by any carrier of freight, passengers, or express, or by any telegraph or telephone company."

Section 1109:

"Published. All carriers shall, whenever required by the Commission, file with it a schedule of their rates of charges for freight and passengers, and

the Commission is authorized and required to publish the rates, or a summary thereof, in some convenient form for the information of the public, and quarterly thereafter the changes made in such schedules if they deem it advisable."

Section 1112:

"Schedule of Rates, Evidence. The schedule containing rates fixed by the commission shall, in suits brought against any company wherein is involved the charges of any company for the transportation of any passenger or freight or cars or unjust discrimination in relation thereto, be taken in all courts as prima facie evidence that the rates therein fixed are just and reasonable rates of charges for the transportation of passengers and freights and cars upon the railroads. All such schedules shall be received and held in all suits as prima facie evidence, the schedules of the commission without further proof than the production of the schedules desired to be used as evidence, with a certificate of the clerk of the commission that the same is a true copy of the schedule prepared or approved by it for the railroad company or the corporation therein named."

Subhead 4, "Appeals."

Section 1078:

"Rates Vacated Pending Appeal, How. The rates of freight and fare fixed by the Commission shall be and remain the established rates and shall be so observed and regarded by corporations appealing until the same shall be changed, reversed or modified by the judgment of the superior court, unless the railroad company shall within fifteen days file with said Commission a justified undertaking, in a sum to be fixed by the Commission, conditioned to pay the state of North Carolina the difference between the aggregate freights charged or received and those fixed by said Commission and to make a report of freight charged or received, every three months during the pendency of such appeal; and whenever such difference in freight equals or exceeds the penalty of such undertaking the Commission may require another to be executed and filed with them. From the time the undertaking first mentioned is filed the judgment appealed from shall be vacated; but a failure for ten days to file any additional undertaking required by the Commission shall eo instanti revive such judgment. Out of the funds paid into the state treasury under this section there shall be refunded to shippers the overpaid freight ascertained by the final determination of the appeal on the recommendation of the commission, if application therefor is made within one year from such final determination."

Subhead 5, "Injunction."

Section 1082:

"When granted. Bond. No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal the enforcement of any determination of the Corporation Commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the Corporation Commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the Corporation Commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the Corporation Commission; and in the event the determination of the Corporation Commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freight collected and those fixed by the final determination of the matter appealed."

Subhead 6, "Penalties."
Section 1086:

"For Violating Rules. If any railroad company doing business in this state by its agents or employees shall be guilty of a violation of the rules and regulations provided and prescribed by the Commission, and if after due notice of such violation given to the principal officers thereof, if residing in the state, or, if not, to the manager or superintendent or secretary or treasurer if residing in the state, or if not then to any local agent thereof, ample and full recompense for the wrong or injury done thereby to any person or corporation as may be directed by the Commission shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of five hundred dollars."

Section 1087:

"Refusing to obey orders of Commission. Any railroad or other corporation which violates any of the provisions of this chapter or refuses to conform to or obey any rule, order or regulation of the Corporation Commission shall, in addition to the other penalties prescribed in this chapter, forfeit and pay the sum of five hundred dollars for each offense, to be recovered in an action to be instituted in the superior court of Wake county, in the name of the state of North Carolina on the relation of the Corporation Commission; and each day such company continues to violate any provision of this chapter or continues to refuse to obey or perform any rule, order or regulation prescribed by the Corporation Commission shall be a separate offense."

Section 1092:

"An action for the recovery of any penalty under this chapter shall be instituted in the county in which the penalty has been incurred, and shall be instituted in the name of the state of North Carolina on the relation of the Corporation Commission against the company incurring such penalty; or whenever such action is upon the complaint of any injured person or corporation, it shall be instituted in the name of the state of North Carolina on the relation of the Corporation Commission upon the complaint of such injured person or corporation against the company incurring such penalty. Such action shall be instituted and prosecuted by the Attorney General or the Solicitor of the judicial district in which such penalty has been incurred, and the judge before whom the same is tried shall determine the amount of compensation to be allowed the Attorney General or such solicitor prosecuting said action for his services, and such compensation so determined shall be taxed as a part of the cost. The procedure in such actions, the right of appeal and the rules regulating appeals shall be the same as are now provided by law in other civil actions."

The freight rate act contains no clause repealing prior laws. The passenger rate act contains no repealing clause except section 6, which expressly repeals section 2618 of the Revisal of 1905 (which provides for first and second class passenger accommodations). This section also repeals "all laws and clauses of laws in conflict with this act." In other words, it is insisted by complainant that at the date of the passage of the act in question the laws of North Carolina contained ample provision for the control and supervision of railroads by the Corporation Commission, and that such Commission was fully empowered to inquire into and determine what rates should be charged by the various railroad companies operating their lines in the state; that the act of 1907, in so far as the freight rate act is concerned, contains no provision repealing laws that were in existence at that time; that the passenger rate act only contains a clause repealing section 6, which expressly repeals section 2618 of the Revisal of 1905; that under these

circumstances all laws then in existence, not inconsistent with the act of 1907, are still in force as a part of the laws relating to the management and control of railroads in that state.

The rule by which the court is governed in ascertaining what part of a prior statute is repealed by a later one is laid down by the Supreme Court of North Carolina in the following language:

"A statute will not be construed as repealing a prior one on the same subject (in the absence of express words to that effect), unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede the prior one upon the subject, and to comprise in itself the sole and complete system of legislation on that subject. Black on Interpretation of Laws, 112; Endlich on Interpretation of Statutes, 210; Sutherland on Statutory Construction, § 138. The two acts now being construed being affirmative, and the subject being such that both may stand together, they both should have concurrent efficacy (1 Blk. 90) unless they be repugnant or inconsistent, or it should appear that the Legislature intended to cover the whole subject embraced in both and to prescribe the only rule in respect of that subject in the later act." College v. Lacy, 130 N. C. 364, 41 S. E. 934.

It is well settled that a repeal by implication is not favored. Jones v. Insurance Co., 88 N. C. 499; Greensboro v. McAdoo, 112 N. C. 360, 17 S. E. 178; State v. Monger, 111 N. C. 675, 16 S. E. 229; State v. Snow, 117 N. C. 774, 23 S. E. 322.

Section 1 of the passenger rate act of 1907 is as follows:

"No railroad company doing business as a common carrier of passengers in the state of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its railroad in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under one-half the rate described," etc.

Then follows a proviso giving to the Corporation Commission the power to exempt certain railroads from the operation of the statute, and to permit them to charge a higher rate.

The foregoing provisions in section 1 do not undertake to make the rate of passenger charges, but simply to fix a maximum limit, so that the effect of section 1 is to substitute "two and one-quarter cents per mile, and for transporting children twelve years of age and under, one-half of the rate above described" in place of the word "five" in line 4 of subsection 9 of section 2567 of the Revisal of 1905, and also to provide that at least 200 pounds of baggage shall be carried for each passenger without extra charge. Under subsection 9 of section 2567, railroad companies had the right to make the compensation for their services within the limit of five cents per mile, which was fixed as the maximum by the section in question. However, the court is of opinion that this subsection repealed by implication subsection 1 of section 1099 of the Revisal of 1905 (passed in 1899), which imposed upon the Commission the duty of making rates for freight and passenger service on railroads, thus taking the power to make rates from the railroads. Subsection 9 of section 2567 has now been expressly repealed by section 7 of the act of March 11, 1907 (chapter 469, p. 675, Pub. Laws 1907), which act is entitled, "An act to extend and enlarge the powers of North Carolina Railroad Commission." Therefore it necessarily follows that the power of making railroad rates still rests upon the

Commission, and that the acts sought to be restrained are not self-executing. The act of March 11th shows that the Legislature clearly intended that all of the acts concerning railroad rates should be considered as being part of the law relating to the subject.

It is proper to consider a repealed statute in arriving at a proper construction of the several acts. Wilson v. Jordan, 124 N. C. 638, 33 S. E. 139.

The Commission has, of course, no right to establish and publish rates higher than those allowed in the act of 1907, yet, within that limit the power and duty devolves upon it, and upon it alone, to make rates for railroad companies. The duty of the Commission to make rates for railroad companies subject to the limitation contained in the act of 1907 is imposed by section 1106 of the Revisal of 1905, which provides:

"The Commission shall from time to time, and as often as circumstances shall require, change and revise or cause to be changed or revised, any schedule of rates fixed by the Commission or allowed to be charged by any carrier of freight, passenger, express or by any telegraph or telephone company."

As an illustration, suppose that after an investigation by the Corporation Commission, under the authority conferred upon it by the statute of the state, and in the performance of the duty therein imposed, it should appear that a flat rate of two cents a mile or less would be a reasonable and just rate, could it be contended that under the provision of the foregoing section the Commission would not have the right to "change and revise or cause to be changed or revised" the rates as now established by law? In establishing rates the Commission is governed and controlled by the provisions of section 1104 quoted, and as stated, cannot make rates higher than those provided for in the statutes of 1907; yet the duty devolves upon it to say what shall be just and reasonable rates, within the maximum prescribed by the Legislature. If this be a proper construction of the act, it makes one harmonious whole, and thus gives force and effect to every statute relating to the subject in accordance with the intention of the Legislature, which, the court is of opinion, was that the Commission might make rates lower than 2¼ cents, except as to certain roads. In this view of the law, the Corporation Commissioners are charged with a duty in connection with the enforcement of the act of 1907, and are therefore proper parties to this suit.

Even if it were conceded that railroad rates can be established other than by the Commission, yet the complainant contends that the Commission is specially charged with important duties in connection with the enforcement of the acts in question by the laws of North Carolina; that, among other things, it is the duty of the Corporation Commission to take necessary steps to secure the enforcement of section 4, which provides for the prosecution of penalty suits against the complainant for a failure to comply with the provisions of section 1, and likewise, to prosecute its agents and employés for a failure on their part to comply with that section. As to the freight rate act, it is not seriously contended by the defendants that that act can go into effect in the

absence of action on the part of the Commission, since section 1 of that act provides:

"That the Corporation Commission, created by the laws of North Carolina shall not, in fixing the maximum rates and charges, or tariff of rates or charges for any common carrier transporting freight in North Carolina permit or allow any such common carrier to charge, collect or receive a greater toll, charge or rate for the transportation of any article of freight or commodity embraced in the present classification and prescribed," etc.

And section 5 of the act provides that:

"The Corporation Commission is hereby directed to prepare and publish a tariff of rates, charges and tolls, to be charged and collected by railroad companies in this state, as authorized by this act, on or before the first day of July, one thousand nine hundred and seven."

The foregoing provisions are important, and should be considered as bearing directly upon the question as to whether the court, independently of the provisions hereinbefore referred to, does not have jurisdiction.

The defendants' counsel rely upon the case of Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, as before stated, to sustain their contention that this is a suit against the state. In that case the Memphis & Charleston Railroad owned the Florence Bridge, under an act of the Legislature of the state of Alabama passed in 1895. It was provided what should be charged as maximum tolls on that bridge, and it was also provided that any one charging more should be subject to a penalty of $20, to be sued for in a court of a justice of the peace. In that case no state officer was charged with the performance of any duty in connection with the enforcement of the act. There was nothing in the act which required the Attorney General or the Governor to perform any duty in connection with the execution or enforcement of the same. When that act was passed, the cases of Samuel Thomas v. Memphis & Charleston Railroad Company and Central Trust Company of New York v. Memphis & Charleston Railroad Company were pending in the court below; and on the 14th day of February, 1895, Charles M. McGhee and Henry Fink, receivers of the Memphis & Charleston Railroad in those causes, having first obtained leave to do so, filed a bill in the name of themselves and the Railroad Company against "the state of Alabama, William C. Oates, as Governor of the state of Alabama, and William C. Fitts, as Attorney General of the state of Alabama." In the meantime a discontinuance was taken as to the Governor and the state of Alabama, and the cause was proceeded with against the Attorney General and the Solicitor of the Eleventh judicial circuit of Alabama. In a very able and exhaustive opinion delivered by Mr. Justice Harlan in that case it was held by the Supreme Court that neither the Attorney General of Alabama nor the Solicitor of the Eleventh judicial circuit of that state were charged by law with any special duty in connection with the enforcement of the act of February 9, 1895. The act of the Legislature in that instance was self-executing, and to all intents and purposes was as much an independent and general law of the state as any of the statutes enacted by the Legislature. Under such circumstances, the only possible means by which the constitutionality of such an act could have been tested would have been by taking an appeal or writ of error from a judgment rendered

thereon to the Supreme Court of the state, where, if it appeared, that a federal question was necessarily involved, or passed upon by the court, thence to the Supreme Court of the United States.

In that case Mr. Justice Harlan said:

"It is to be observed that neither the Attorney General of Alabama nor the Solicitor of the Eleventh judicial circuit of the state appear to have been charged by law with any special duty in connection with the act of February 9, 1895. In support of the contention that the present suit is not one against the state, reference was made by counsel to several cases, among which were Poindexter v. Greengow, 114 U. S. 270, 5 Sup. Ct. 903, 29 L. Ed. 185, Allen v. Baltimore & Ohio R. Co., 114 U. S. 311, 5 Sup. Ct. 925, 29 L. Ed. 200, Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689, Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 388, 14 Sup. Ct. 1047, 38 L. Ed. 1014, Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632, and Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Upon examination, it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official positions under a state to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional."

The learned justice clearly states the distinction between the case of Fitts v. McGhee and the one now under consideration. There is a manifest distinction between that case and the case at bar. In this case it appears that the members of the Corporation Commission of North Carolina are "specially charged" with the performance of duties in connection with the enforcement of the act of the Legislature of that state. Likewise, the Attorney General is charged with the performance of a duty in connection therewith.

Section 1066 of the Revisal of North Carolina of 1905 is as follows:

"The Corporation Commission shall have such general control and supervision of all railroads, street railway, steamboat, canal, express and sleeping car companies or corporations and of all other companies and corporations engaged in the carrying of freight and passengers, of all telegraph and telephone companies, of all public and private banks and all loan and trust companies or corporations, and of all building and loan associations or companies, necessary to carry into effect the provisions of this chapter, and the laws regulating such companies." Pub. Laws 1899, p. 291, c. 164, § 1; Pub. Laws 1901, p. 912, c. 679.

Section 1113 of the same chapter is as follows:

"The Commission, whenever in its judgment any corporation has violated any law, shall give notice thereof in writing to such corporation, and, if the violation or neglect is continued after such notice shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient." Pub. Laws 1899, p. 291, c. 164, § 8.

Section 5380, c. 115, end of chapter 7, of the same Revisal, is as follows:

"It shall be the duty of the Attorney General:

"(1) To defend all actions in the Supreme Court in which the state shall be interested, or is a party, and also when requested by the Governor or either

branch of the General Assembly to appear for the state in any other court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested.

"(2) At the request of the Governor, Secretary of State, Treasurer, Auditor, Corporation Commissioners, Insurance Commissioner, or Superintendent of Public Instruction, he shall prosecute and defend all suits relating to matters connected with their departments.

"(3) To represent all state institutions, including the state's prison, whenever requested so to do by the official head of any such institution.

"(4) To consult with and advise the solicitors when requested by them in all matters pertaining to the duties of their office.

"(5) To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other state officer."

Section 2 of the act of 1907 (Pub. Laws 1907, p. 251, c. 216), relating to passenger rates, is as follows:

"In the case that any railroad company operating as a common carrier of passengers in the state of North Carolina is owned, controlled or operated by any other railroad company doing business in this state, the rate for carrying passengers thereon as prescribed in this act shall be determined for said railroad by the rate prescribed by this act for the railroad company which owns, controls or operates the same; and the North Carolina Corporation Commission shall publish the rates fixed by this act for the several railroad companies operating in this state, on or before the first day of June 1907."

It is also, among other things, provided in section 1, as follows:

"Provided that the Corporation Commission of North Carolina is hereby authorized and empowered to permit all independently owned and operated railroads in North Carolina whose mileage in said state is sixty miles or under to charge a rate for transporting passengers not in excess of the present rate fixed and prescribed for said road and also permit all railroads constructed within twelve months preceding the first day of January 1907, or at that time in course of construction for a term of two years from and after July first 1907, and also all such railroads as may be constructed within two years from January first, 1907, to charge such rate in excess of the rate above prescribed as the said Commission may determine to be reasonable."

Section 2 makes it the duty of the Commission to determine whether a road is controlled or operated by another railroad, and, when that is done, the rate must be determined and published.

It is insisted by counsel for defendants that there is nothing in the act of the Legislature of 1907 which specially charges the Corporation Commission or the Attorney General with the enforcement of such act. This contention, in so far as it relates to passenger rates, with the exception of section 2 of the act, is undoubtedly true. Notwithstanding that such is the case, it must be borne in mind that sections 1066, 1113, 5380, chapter 15, and subdivisions, were a part of the general law relating to the management and control of railroads in North Carolina, and were in full force and effect at the date of the passage of the act in question, and still remain undisturbed as a part of the law applicable to the subject under consideration. Under the well-established rule of construction, these sections must be construed as forming a part of the law relating to the enforcement of any legislation that may have been enacted in regard to the subject fixing maximum rates.

In the case of Wilson v. Jordon, 124 N. C. 683, 33 S. E. 139, the court, in discussing this phase of the question, said:

"All acts of the same session of the Legislature upon the same subject-matter are considered as one act, and must be construed together, under the doctrine of 'in pari materia.' State v. Bell, 25 N. C. 506; Black, Interp. Laws, 86; Eng. Interp. Laws, § 45; Cain v. State, 20 Tex. 355. They should be considered in pari materia, whether passed at the same session or not. Simonton v. Lanier, 71 N. C. 498; Rhodes v. Lewis, 80 N. C. 136. Where a former act has been repealed or has expired by its limitation, when it is in pari materia, it must be considered in connection with the last act, and, if necessary, a part of it. Potter, Dwar. p. 190. 'It certainly appears strange,' said Williams, J., in a late case, 'that, when an act of Parliament is per se abolished, it shall virtually have effect through another act. But in that case the former act was substantially re-enacted. Reg. v. Merionethshirs, 6 Adol. & Ellis, 343. It does, indeed, seem to be the prevailing doctrine (and it is more rational in itself than consistent with coeval maxims) that, where one statute refers to another which is repealed, the words of the former act must still be considered as if introduced into the latter statute.' Potter, Dwar. p. 192."

In Rex v. Laxdale, 1 Burrows, 445, it is held (Lord Mansfield delivering the judgment of the court):

"That where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other."

The same doctrine is held in New York. Smith v. People, 47 N. Y. 330, which is very much in point.

Therefore the sections which refer to the supervision and control of railroads by the Corporation Commission, when read in connection with the act of 1907, as the same should be, it appears that the members of the Corporation Commission, as well as the Attorney General, are charged with the duty of securing the enforcement of the provisions of the act of 1907, and it is made their special duty to secure the enforcement of the provisions of section 4 of the passenger act; hence it necessarily follows that they are proper parties to this proceeding. This conclusion is sustained by the principles enunciated in the case of Smyth v. Ames, 169 U. S. 466–70, 18 Sup. Ct. 418, 42 L. Ed. 819. Prior to the enactment of the statute of the state of Nebraska to "regulate railroads, classify freight, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads of the state and to provide penalties for the violation of this act," the Legislature passed an act to regulate railroads, to prevent unjust discrimination, to provide a board of transportation and define its duty, etc. By this act the Attorney General, Secretary of State, the Auditor of Public Accounts, State Treasurer, and Commissioner of Public Lands and Buildings were constituted a board of transportation, with power to appoint three secretaries to assist it in the performance of its duties, and with authority to inquire into the management of the business of all common carriers subject to its provisions, and obtain from such carriers full and complete information necessary to enable the board thus established to perform its duties and to carry out the objects for which it was created. Thus it will be seen that the Attorney General in that instance was not charged with the performance of any specific duty in regard to the enforcement of the rates in the state of Nebraska by the act which undertook to fix maximum rates, but that

duty was imposed upon him as a member of the board of transportation by the provisions of a law which had been enacted prior to the passage of the act fixing rates, and that case is therefore on all fours with the case at bar.

In the case of Prout v. Starr, 188 U. S. 542, 23 Sup. Ct. 400, 47 L. Ed. 584, the court upheld a suit against the board of transportation and Attorney General of Nebraska arising out of the same statute involved in Smyth v. Ames, and, in discussing the matter, employed the following language:

"But by this appeal we are asked to declare that the Circuit Court had no jurisdiction because it appears, on the face of the bill, that the complaint is essentially against the state of Nebraska, and is in contravention of the eleventh amendment of the Constitution of the United States. It is a sufficient answer to this contention that it was made, considered, and determined in Smyth v. Ames. In the opinion in that case it was said: 'Within the meaning of the eleventh amendment of the Constitution, these suits are not against the state, but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment. Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; In re Tyler, 149 U. S. 164, 190, 13 Sup. Ct. 785, 37 L. Ed. 689; Scott v. Donald, 165 U. S. 58, 68, 17 Sup. Ct. 265, 41 L. Ed. 632; Tindal v. Wesley, 167 U. S. 204, 220, 17 Sup. Ct. 770, 42 L. Ed. 137.'"

Suits and injunctions against the Attorney General of a state have been upheld in the recent cases of Railroad Commission of Louisiana v. Texas & Pacific Company, 144 Fed. 68, 75 C. C. A. 226, and Consolidated Gas Company v. Mayer (C. C.) 146 Fed. 150, 154. In the latter case it appears that the duty of the Attorney General with respect to the enforcement of the statute existed by virtue of his general duties imposed by a separate and antecedent statute.

In the case of Mississippi Railroad Company v. Illinois Central Railroad Company, 203 U. S. 335, 340, 27 Sup. Ct. 90, 93, 51 L. Ed. 209, the court, among other things in discussing this question, said:

"The Commission was created by the state of Mississippi under the authority of its Constitution and laws for the purpose of supervising, and, to some extent, controlling, the acts of the railroads operating within the state. Such a commission is subject to a suit by a citizen. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 363, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584."

In the case of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014, the Attorney General and the Railroad Commission of Texas were enjoined from the enforcement of the act. In that case it was strenuously insisted that it was a suit against the state, and therefore in violation of the eleventh amendment of the Constitution of the United States. The Circuit Court, as well as the Supreme Court, held otherwise.

The Texas statute relating to the same (Gen. Laws Texas, 1853, c. 51) reads as follows:

"Sec. 18. If any railroad, as aforesaid shall wilfully violate any other provisions of this act, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not herein been provided, for every such act of violation it shall pay the state of Texas a penalty of not more than five thousand dollars.

"Sec. 19. All of the penalties herein provided, except as provided in section 17, shall be recovered and suits thereon shall be brought in the name of the state of Texas in the proper court having jurisdiction thereof in Travis county * * * by the Attorney General or under his direction; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected, by him, and ten per cent of the amount collected, to be paid by the state. * * * All fines and penalties recovered by the state under this act shall be paid into the treasury of the state. * * *"

"Sec. 21. It is hereby made the duty of such Railroad Commission to see that the provisions of this act and all laws of this state concerning railroads are enforced and obeyed, and that violations thereof are promptly prosecuted, and penalties due the state therefor are recovered and collected. And said Commission shall report all such violations with the facts in their possession to the Attorney General or any other officer charged with the enforcement of the laws, and request him to institute the proper proceedings. * * *

(a) It shall be the duty of the Commission to investigate all complaints against railroad companies subject hereto and to enforce all laws of this state in reference to railroads."

Section 1113 of the Revisal of North Carolina of 1905 provides that the Commission, whenever in its judgment any corporation has violated any law, shall first give notice of such violation to the offending corporation, and, in the event of a failure on the part of such corporation to comply with the law, "shall forthwith present the facts to the Attorney General, who shall take such proceedings thereon as he may deem expedient."

This provision is positive, and must be construed as being mandatory. In this case the statute of North Carolina makes it clearly the duty of the Attorney General, when called upon, to prosecute any suit or action which may be deemed necessary to secure the enforcement of the laws of the state, in regard to the fixing of maximum rates. This section, when construed in accordance with the rule laid down in the Reagan and Ames Cases, clearly charges the Attorney General with a duty in relation to the enforcement of the act in question.

In this connection, it is well to consider the scope and meaning of the expression "specially charged with the execution of a state enactment." The Supreme Court in the Reagan Case, as well as the Ames Case, expressly held that the officers enjoined in those cases were state officers, "specially charged with the execution of a state enactment." From what appears in those cases, it necessarily follows that the words "specially charged" are not to be construed to mean that the Attorney General cannot be enjoined except in cases where the state statute has expressly commanded him to enforce the act by bringing suits for penalties or prosecuting misdemeanors mentioned in the act. He was only charged by his general duty as the law officer of the state, and yet he was enjoined in language so broad as to include every attempt to enforce the penalties attending the violation of "House Roll 33." In the Reagan Case the Attorney General was not deprived of his discretion and reduced to a mere ministerial agent, as will appear by an examination of the Texas statute. Likewise, an examination of the Ne-

braska statute of 1887 and the re-enactment of it into the Revised Statutes of Nebraska of 1893 (chapter 72, art. 8, §§ 1–23) fails to show that the Nebraska State Board of Transportation was in any way directed to enforce by criminal procedure the act of 1887 or any other act. It was held in that case that the Attorney General of Nebraska was specially charged with the enforcement of the penal clause of the act of 1893 (Laws 1893, p. 164, c. 24), relating to the maximum rate law, known as "House Roll 33," merely because the law of 1893 imposed a penalty for the violation of the maximum rate law. When we come to consider the statutes of North Carolina, we find that to construe the same in accordance with the principles laid down in the Reagan Case, Smyth v. Ames, Consolidated Gas Company v. Mayer, that the Corporation Commission and the Attorney General of North Carolina are specially charged with the enforcement of the acts of 1907.

It is inconceivable that a Circuit Court of the United States, in the exercise of its jurisdiction, should be powerless to afford a remedy to one who seeks to assert a right which is guaranteed by the Constitution of the United States. This is in no sense a suit against the state, nor can it be successfully contended that the state is in anywise a party in interest, in so far as the merits of the controversy are concerned. It cannot be reasonably insisted that this is a suit to prevent the state from enforcing any right which it possesses, nor can it be said to be a suit to compel the performance of an obligation of the state, nor does it in anywise involve a matter in which the state has a pecuniary interest; the parties in interest being the complainant on the one side, and the traveling public on the other. Therefore the questions presented are not such as to warrant the assumption that this court is without jurisdiction, and a careful study of the circumstances attending the adoption of the eleventh amendment, as well as the end to be obtained by the adoption of the same, show conclusively that those who were responsible for its adoption never dreamed that it could be used as a means of depriving an American citizen of a substantial right conferred upon him by the Constitution of the United States. The eleventh amendment, being a part of the Constitution of the United States, must be construed so as to give full force and effect to each and every provision of the instrument of which it forms a part. Any other construction of this amendment would practically nullify that clause of the Constitution which provides that no state shall pass any laws impairing the obligation of contracts, as well as the fourteenth amendment, which, among other things, provides that:

"No state shall make or enforce any law which will abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It cannot be that a state Legislature can so frame an act as to deprive a citizen of a right vouchsafed to him by the Constitution of the United States, and it is equally unreasonable to contend that a state Legislature possesses the power by legislative enactment to deprive this court of its jurisdiction; and the sooner these questions are definitely determined the better it will be for all parties concerned.

That there is a disposition on the part of some to do that, which, if successful, would not only impair the usefulness of the federal courts, but nullify certain provisions of the Constitution, is apparent. This situation is productive of a feeling of unrest and a lack of confidence on the part of the people in the ability of the United States courts to fairly administer the law in accordance with the Constitution.

For the reasons stated, the court is of opinion that this is not a suit against the state within the meaning of the eleventh amendment, and that, therefore, it has jurisdiction to hear and determine the issues raised by the pleadings.

It is charged in the bill that, if the proposed rates are enforced, complainant will suffer irreparable injury, that such rates are unreasonable, unjust, and confiscatory, and that the complainant is about to be deprived of its property without due process of law, and, as a means of having its rights determined in an orderly and judicial way, it comes into a court of equity, and asks that an order be granted restraining the enforcement of the provisions of the act of 1907 until the final hearing of the cause. The complainant insists that it should be protected against the irreparable injury it would sustain if the proposed rates should be put into effect pending the final hearing of the original suit in this cause. Among other things, it is alleged that the Legislature of North Carolina at its recent session passed acts regulating freight and passenger rates, and that, by virtue of the provisions of said acts, it is about to be deprived of its property without due process of law, and also denied the equal protection of the laws. The complainant seeks to enjoin the enforcement of the rates prescribed by the act in question upon the ground that the statute prescribing the same is repugnant to the Constitution of the United States. It is contended that the lapse of any considerable length of time would expose it to innumerable suits by shippers and the traveling public for penalties, as well as subject it to the penalties prescribed by the statute. Complainant prays for an injunction against the Corporation Commissioners, the Attorney General, and the Assistant Attorney General during the pendency of this cause.

On the 8th day of May, 1907, an order was entered restraining the defendants from enforcing the aforesaid act, and at that time notice was issued to the defendants to appear on the 28th day of June, 1907, and show cause why the injunction thus granted should not be continued until the final hearing. In considering this motion it is incumbent upon the court, in the exercise of its discretion, to determine whether, under the circumstances, the complainant is entitled to the relief which it seeks, and also whether it will suffer irreparable injury in the event the court should refuse to continue the injunction until the final hearing. That it is the duty of a court of equity to restrain the enforcement of an act which is alleged to be unconstitutional, when it is shown by the proof that the complainant will, pending a final hearing, suffer irreparable injury, is a well-established rule of such courts. In such cases the court, in order to avoid a multiplicity of suits, will restrain the enforcement of any act with respect to the same until the final hearing. In discussing this phase of the question, the learned

justice who delivered the opinion in the case of Smyth v. Ames, supra, said:

"In these cases the plaintiff stockholders in the corporations named ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the federal system distinguished cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy, and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter or thing required to be done, but a fine of from $1,000 to $5,000 for the first offense, from $5,000 to $10,000 for the second offense, from $10,000 to $20,000 for the third offense, and $25,000 for every subsequent offense. The transactions along the line of any of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions for a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency, and determine, once and for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interest of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi public corporation by which such highway is maintained."

It is well to remember that the allegations in the bill filed by complainant are in many respects similar to those contained in the bill filed in that case.

In the case at bar it is shown that section 4 of the act prescribes heavy and unusual penalties, the enforcement of which, for any considerable length of time in a court of law, would practically bankrupt the complainant.

In addition to the allegations contained in the verified bill, the complainant has offered the affidavit of A. H. Plant, comptroller of complainant, as to the amount of its intrastate as contradistinguished from its interstate business.

Among other things, Mr. Plant says:

"That he is, and for some years past has been, comptroller of the Southern Railway Company, and as such has supervision over its accounts, and charge of its books, and that the following is a true statement of the results of operation of Southern Railway Company in North Carolina during the year ending June 30, 1906, under the rates and classifications existing at that time:

Gross earnings from operation in North Carolina, including both interstate and intrastate	$12,043,727 33
Operating cost to earn one dollar of intrastate revenue in North Carolina was not less than	86 35

"While it is impossible to state the exact cost to earn a dollar of intrastate revenue, it is certain that it cost much more than the average cost to do all business, and at least the above mentioned figures, as this affiant verily believes.

"Gross earnings in North Carolina from intrastate traffic:	
From passengers	$ 1,565,695 33
From freight	1,322,564 30
From mail	230,383 78
From express	169,474 89
From miscellaneous	36,507 44
Total gross revenue from intrastate traffic in North Carolina for said year	3,324,625 74
Minimum expense of earning this gross intrastate revenue, on the basis of $86.35 to earn one dollar	2,870,814 33
Maximum net earnings from intrastate traffic in North Carolina for said year, without allowing for taxes	453,811 41
Taxes chargeable to North Carolina for the fiscal year ended June 30, 1906, were	269,651 18
The proportion of intrastate gross earnings to total gross earnings in North Carolina was 27.60 per cent.	
27.60 per cent. of the total taxes above mentioned which should be charged to intrastate traffic shows intrastate taxes to have been for that year	74,423 73
Improvements and betterments not capitalized chargeable to North Carolina during the year for the purpose of keeping the property up to modern standards and without additions to it, amounted to	197,945 81
27.60 per cent. of which is assignable to intrastate traffic, or	54,633 04
Total taxes and improvements and betterments not capitalized chargeable against intrastate traffic for said year	129,056 77
Leaving as the maximum net intrastate earnings in North Carolina for said year, after deducting the said proportion of taxes and the said proportion of improvements and betterments not capitalized	324,754 64
Applying to the above mentioned intrastate business in North Carolina for the year ended June 30, 1906, the passenger and freight rates proposed by the acts of the legislature of North Carolina passed during March of the current year, there would have been a loss of passenger revenue of	275,055 53
And a loss in freight revenue of	21,691 64
Or a total loss of	296,747 17
Making the net earnings from intrastate operations under the proposed rates and classifications	28,007 47
During the said year the value of the physical properties of this company in North Carolina, according to the assessment made by the state for the purpose of taxation, was	26,134,865 00
The proportion of this tax value used for intrastate purposes should be ascertained on the basis of user, which is on the basis of the proportion of gross earnings from intrastate business to the total gross earnings from all business for said year in North Carolina, or 27.60 per cent. of the said assessed value, which amounts to	7,213,222 74
The maximum net revenue from intrastate traffic in North Carolina under the existing rates would only yield as interest upon said proportion of said tax value, per annum	4.50 per cent.
Under the proposed rates and classifications the net revenue from intrastate traffic in North Carolina would only yield as interest upon the said proportion of said tax value, per annum	.39 per cent.

"The affiant further says that the foregoing results of operation in the state of North Carolina for the year ending June 30, 1906, show a larger net

result to the company than is fairly representative of the results of the company's operations in the future, for the reason that since the 30th day of June, 1906, the close of said fiscal year, there has been a large increase in the expenses of the company, due to increases in wages, and to the increase in cost of all material and supplies and other expenses, as will be shown by the following statement for the system:

For the six months ended December 31, 1906, the gross earnings of the company increased over the same period of the previous year	$ 1,711,861 79
Whereas the operating expenses and taxes increased for the same period	2,623,979 77
Showing a decrease in net earnings for the six months mentioned, of	912,117 98

"In addition to the foregoing increases in wages and other expenses, the company is confronted with still further very substantial demands for increases in wages. While the above figures are for the system, a proportionate part of said increase in expenses would apply to North Carolina."

It is insisted by counsel for defendants that Mr. Plant made certain reports to the Corporation Commission which are inconsistent with the affidavit which he now makes as to local business transacted by complainant in the state of North Carolina. In an affidavit filed by Mr. Plant on the 26th of June, 1907, in referring to the reports which he had previously made to the Corporation Commission, it is said:

"As no account of the difference in such costs was kept upon the books of this company, and no attempt made in the company's books to separate the cost between the interstate and the intrastate business, when called upon for statements of these expenses by the North Carolina Commission, such statements were necessarily made upon an assumed basis, with the statement that the results were approximate. And the basis assumed for these reports in North Carolina was the minimum amount stated in the decision above referred to of the Supreme Court of the United States in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Subsequent investigation and study of the situation and consultation with men of experience have convinced me that the estimated basis made in the report to the commission in North Carolina is entirely too small, and that the minimum should not be less than is given in this affidavit. In fact, when all the conditions are considered and all the elements of increased expenses are given their due weight, I believe that the estimate given in this affidavit will be considerably below what is the real cost of doing such business. It is impossible to arrive at such costs accurately, as there are many of the elements of the expense which are common to all classes of business, and a division of expenses thus common to all classes of traffic must be made more or less upon arbitrary lines. For example: The general expense of doing all the business of the company cannot, with accuracy, be allocated as between the different classes of business, and the same is true of other elements of expense, such as maintenance; but it is safe to say that a reliable minimum can be reached, and this minimum is not, in my judgment, after much consideration of the subject, less than that above mentioned. This estimate of a minimum makes no allowance whatever for any increased cost of maintenance due to the increased wear and tear on the roadbed and equipment incident to the more frequent starts and stops in connection with intrastate business. * * * The earnings from passengers of passenger trains in North Carolina, embracing both interstate and intrastate passenger business, are less than $1 per train mile, and it is the usually accepted opinion among railroad men that a passenger train which does not earn from its passengers more than a dollar per mile is not a profitable train, the general impression being that a passenger train earning less than $1 per train mile from passengers is run at a loss. Whether this is actually true or not, I believe it to be certain that it costs to earn

$1 of every class of passenger train revenue, intrastate as well as interstate, more than the above-mentioned figures of 86.35 cents."

When we come to consider the testimony of Mr. Plant, we find that it is true that he made certain reports to the Corporation Commission which are not strictly in accord with the affidavits which he now makes. While this is so, it is also shown by the marginal notes of the reports of the corporation commission that the same were based only on an estimate, and were not intended to be treated as matters of fact. If it had been shown that the witness had made two contradictory statements or inconsistent utterances as to matters of fact, then the question as to the veracity of the witness would arise, and under such circumstances it would be the duty of the court to consider the same in determining the weight of such testimony as bearing upon the truth or falsity of the same; but, inasmuch as these statements relate solely to a matter of opinion, no question of veracity arises, and when we consider the statements in question, together with the evidence of Mr. Plant, it cannot be said that the testimony which he now gives is calculated to impeach his character as a witness, nor can it be said that such testimony tends to contradict (in the ordinary acceptation of the term) the statements which he made to the Corporation Commission in the first instance. The one is a matter of opinion—an estimate—and may vary with the conditions of one's study and investigation, and his opinion is valuable in proportion to the amount of study and investigation that he may make with respect to the matter about which he is testifying; while, on the other hand, if he makes a contradictory statement as to a question of fact, such statement may be used for the purpose of discrediting him as a witness. Our experience in human affairs teaches us that in matters of opinion men are likely to differ materially, and such difference does not tend in the slightest degree to affect the character of one who may have given expression to conflicting opinion at different stages of an investigation of a subject, the determination of which necessarily involves calculations that are based upon estimates, and which do not depend upon facts to support the same.

The testimony of Mr. Plant is, in the main, sustained by the testimony of the following persons who have filed affidavits in this cause: Frank Ney, general auditor, Rock Island Railroad Company; Erastus Young, general auditor, Union Pacific Railroad Company; Mr. Krebs, general auditor, Illinois Central Railroad Company; H. B. Spencer, vice president of complainant company; Mr. Earling, vice president of the Chicago, Milwaukee & St. Paul Railroad Company; Mr. Truesdale, president, Delaware, Lackawanna & Western Railroad Company; Mr. Harris, president, Chicago, Burlington & Quincy Railroad Company; Mr. Wickersham, president of the Atlantic & West Point Railroad Company; Mr. Sullivan, comptroller, Chesapeake & Ohio Railroad Company. It is also shown by the affidavit of W. H. Tayloe, general passenger agent of complainant, that the rates now in force are the same which were in force during the whole of the year ended June 30, 1906, and that in no instance are such rates unjustly, unreasonably, and unfairly high, and that in no instance are such rates greater than a

reasonable compensation for the services rendered. Mr. Tayloe also states that the passenger tariff established by the act in question is unjustly, unreasonably, and unfairly low, and that the rates therein prescribed would not furnish the complainant a fair, just or reasonable compensation for the services rendered, or a reasonable or fair return on its property engaged in intrastate business; that, if the rates so established are put into effect, the revenue of complainant will be largely reduced, and there would not be a sufficient increase in passenger business to compensate the complainant for the loss of revenue resulting therefrom.

It is also insisted by counsel for complainant that in the case of Smyth v. Ames, supra, it was shown that the evidence justified 20 per cent. higher as the proper basis, and that in the case of Chicago, M. & St. Co. v. Tompkins, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417, the contention of Mr. Plant is sustained. In the case of Smyth v. Ames, supra, the Supreme Court, in referring to the methods similar to those employed by Mr. Plant and other witnesses in this cause, said:

"The conclusion reached by the Circuit Court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. Ames v. Union Pacific Railway (C. C.) 64 Fed. 165, 189. That conclusion was based largely upon the figures presented by Mr. Dilworth while he was secretary of the State Board of Transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for that board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the 'commodities of local rates' was 29.50 per cent.; and this estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses on all business by at least 10 per cent., and that it might go as high as 20 per cent. or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another that the cost of the short haul is 'reasonably double the long haul.' If due regard be had to the testimony—and we have no other basis for our judgment—we are not permitted to place the extra cost of local business at less than 10 per cent. greater than the percentage of the cost of all business."

Counsel for defendants offer no evidence to contradict the testimony produced by the complainant, save the report herein referred to as having been made by Mr. Plant to the Corporation Commission.

It is charged in the bill that the present rates were established with the approval of the Corporation Commission of North Carolina, and this allegation is uncontradicted. This circumstance, taken in connection with the fact that the Corporation Commission had before it the reports made by Mr. Plant as to the amount of complainant's intrastate business at the time the present rates were adopted, is worthy of consideration in determining the merits of this controversy, inasmuch as it appears that at the time the present rates were established it was the judgment of the Corporation Commission that a general reduction of rates could not be made without injury to complainant, and the court

is unable to find anything from the record before it to show that the situation in North Carolina has so changed since that date as to justify a change of the rates which were deemed expedient at that time.

The issue thus raised, when stripped of irrelevant and extraneous matter, presents solely the question as to whether the rates fixed by the Legislature are unjustifiably and unreasonably low in view of the amount of money invested by complainant in such intrastate business, as well as the cost of operating its lines of road, together with the necessary expenses incurred in connection therewith, which are not, technically speaking, operating expenses, yet at the same time should be considered in determining the reasonableness of the rates as being necessarily pertinent thereto. In addition to these items, should be considered taxes and payments on account of casualties and accidents. The unprecedented development and prosperity of the South at this time necessitate double tracking, as well as a general overhauling of the property of complainant, in order that it may be able to meet the demands thus occasioned. There has never been a period in the history of that section of the country when there was such an urgent demand for improved and increased railroad facilities as at the present time. What the public demands at this time is increased facilities in the way of transportation of freight and passengers, and this is especially true in western Carolina, a section of country which until 1881 was practically without railroad facilities. The development of the timber and mineral interests of this section since the completion of the Southern Railway renders it highly important that we should not only have better railroad facilities, but, in addition thereto, new lines of road constructed in order that the people of that section may be able to develop their properties. As a result of this development, it is to be presumed that there has been a large increase in the value of the real estate in that section of the country, which alone inures to the benefit of the people of such territory. It is no ordinary task to construct and operate a railroad in a mountainous region like that of western Carolina. Some of these matters at this stage of the proceeding are pertinent to the questions at issue, and are worthy of consideration.

Much has been said by counsel for defendants in regard to state sovereignty, and newspapers and state officials have undertaken to determine those questions by methods unknown to judicial procedure, and which, if permitted to prevail, would lead to demoralization of public and private business, and would be in utter disregard of the rights of individuals as guaranteed by the Constitution of the United States. In the famous case of Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60, Mr. Chief Justice Marshall, among other things, said:

"The government of the United States has been emphatically termed a government of laws, and not men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. * * *"

It can never be truthfully said that there is an interference with states' rights, so long as the courts of the United States do no more than exercise the judicial power conferred upon such courts by Congress in pursuance of the Constitution of the United States. It is remarkable that any one should at this late day question the power

of the courts to declare an act of a state or federal Legislature unconstitutional when it is shown that it is repugnant to the Constitution; and it is well to remember that a North Carolina court was the first to announce the doctrine that the courts possessed such power, and soon thereafter the Supreme Court of the United States, in the case of Marbury v. Madison, supra, declared it to be the settled doctrine of this country. In the North Carolina case the Court of Conference (which was the highest court at that time), in Bayard v. Singleton, 1 N. C. Rep. 5 (Nov. Term, 1787), in discussing the power of the court to declare an act of the Legislature unconstitutional, said:

"Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision than that of the motion under the aforesaid act. The court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the afore-mentioned motion for the dismission of the said suits, in the course of which the judges observed that the obligation of their oaths and the duty of their office required them in that situation to give their opinion on that important and momentous subject, and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the state, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths; that they, therefore, were bound to declare that they considered that whatever disabilities the persons under whom the plaintiffs were said to derive their title might justly have incurred against their maintaining or prosecuting any suits in the courts of this state, yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase, and that these plaintiffs being citizens of one of the United States, or citizens of this state, by the confederation of all the states, which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly; that by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury, for that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die without the formality of any trial at all; that, if the members of the General Assembly could do this, they might with equal authority not only render themselves the legislators of the state for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever; but that it was clear that no act they could pass could by any means repeal or alter the Constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must, of course, in that instance, stand as abrogated and without any effect."

That the Legislature has the power within the limitations fixed by the Constitution of the United States to prescribe maximum rates for railroads cannot be denied. While this is so, it is equally true as was said by Judge Catron (afterwards a justice of the Supreme Court of the United States), in the case of Vanzant v. Waddell, 2 Yerger (Tenn.) 262–70:

"Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In the case of Smyth v. Ames, supra, in referring to this phase of the question, it is said:

"* * * But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the Legislature of the State has declared such to be the case; for that would make the state Legislature the final judge of the validity of its enactments, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. Article 6. The idea that any Legislature, state or federal, can conclusively determine for the people and for the court that which it enacts into the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

The complainant has invoked the jurisdiction of this court for the purpose of asserting a right which is guaranteed to it by the organic law of the land. This law is supreme, and should be obeyed until the people of the United States through their Legislatures shall deem it expedient to modify the same. Every official, state or federal, is required before entering upon the discharge of the duties of his office to take an oath to support and maintain the Constitution of the United States and the laws made in pursuance thereof, and the state official who takes this oath, among other things, is required to state that he will support the Constitution and laws of the state not inconsistent with the Constitution and laws of the United States. Under these circumstances, there can, and should be, no conflict between the state and federal courts.

If this were a suit in the state court, and it should appear, as it does in this case, that the complainant was threatened with irreparable injury, the injunction would be continued until the final hearing as a matter of course, upon the theory that it is the duty of the court to preserve the status quo until there could be a final determination of the questions involved in the controversy. This is the well-settled rule of the federal courts, and is the universal practice in the state courts of North Carolina.

Counsel for defendants cite the case of Covington & Co. v. Sanford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560. The court has carefully considered that case, and is of opinion that it does not apply to the case at bar. Counsel also referred to the San Diego Case, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, as showing that the railroad com-

pany must show "beyond all doubt" that the rates complained of were confiscatory. This expression in the San Diego Case refers to the rule by which the court should be governed on a final hearing, and has no reference to a hearing on a preliminary motion for an injunction to preserve the status quo. It was also established in that case that the rates complained of would admit of a return of 6 per cent. upon the value of the property. While this court, sitting as a court of equity, possesses ample power to restrain the enforcement of an act of the Legislature in a proceeding of this character, pending a final hearing, it should be borne in mind that the legislation of North Carolina relating to railroads and the fixing of rates for the same contemplates that injunctions should be granted in cases like that under consideration, and the necessary means are provided by which the interests of the patrons of the road may be fully protected in such cases, in so far as freight rates are concerned.

It is provided under subhead B, "Injunctions, When Granted," § 1082, as follows:

"No judge shall grant an injunction, restraining order or other process staying or affecting, during the pending of any appeal, the enforcement of any determination of the Corporation Commission fixing rates or fares, without requiring as a condition precedent the executing and filing with the Corporation Commission of a justified undertaking in the sum of not less than twenty-five thousand dollars for any company whose road is of less length than fifty miles, and fifty thousand dollars for any company whose road is over fifty miles in length, conditioned that the company will make and file with the Corporation Commission a sworn statement every three months during the pending of the appeal of the items of freight, with names of shippers, carried over such company's road within the preceding ninety days, showing the freight charged and those fixed by the Corporation Commission; and in the event that the determination of the Corporation Commission appealed from is affirmed in part or in whole such company shall within thirty days pay into the treasury of North Carolina the aggregate difference between the freights collected and those fixed by the final determination of the matter appealed. Pub. Laws 1899, p. 291, c. 164, § 7."

The foregoing provision clearly indicates that it was the purpose of the Legislature not to interfere with the remedy by injunction in cases where it might appear that the rates fixed were confiscatory in their character, and the only limitation with respect to the same is the provision that in cases where it is sought to restrain an act fixing freight rates, that a bond should be required. (It may be that the state officials have overlooked this provision).

Under these circumstances, the court, in addition to being required by the rules, practice, and procedure in such causes to preserve the status quo pending the hearing, is admonished by the acts of the Legislature that in all such cases where it appears that complainant is about to suffer irreparable injury that it is the policy of the law of North Carolina to restrain the enforcement of such legislation pending the hearing upon giving ample security for the payment of such sums as may be deemed to be necessary to protect the rights of those affected by the rates established. While this provision of the North Carolina law affords ample provision for the protection of shippers of freight pending the final hearing, the statute is silent as to the traveling public; and, while it is contemplated that the enforcement of any act fixing

passenger rates may be restrained, nevertheless the Legislature in its wisdom did not deem it necessary to make any provision for protection of those whose rights might be affected in this respect by the granting of a temporary injunction. Thus it is clearly shown that it is not the policy of the Legislature of North Carolina to go to the extent which the federal courts have gone in such causes (notably in the case of Consolidated Gas Co. v. Mayer [C. C.] 146 Fed. 150) in protecting the rights of the traveling public. The allegations of the bill, which are supported by uncontradicted evidence, clearly show that, if the present rates are permitted to be enforced, the complainant will suffer great and irreparable injury in the event that the act in question should ultimately be declared unconstitutional. And in such event the difference between the proposed rate and the present rate would be a clear loss to the complainant, inasmuch as it would be impracticable for it to bring a suit to recover the difference between the proposed rate and the old rate against each individual who might in the meantime purchase a ticket, and the denial at this time of the remedy universally afforded by courts of equity, under such circumstances, would be to deprive complainant of a right guaranteed to it by the Constitution of the United States. While a railroad is not entitled to earn a profit on every mile of its road, nor upon every article carried by it, nevertheless it is entitled to earn a reasonable profit upon the entire intrastate business in the state.

It is shown by the evidence that the gross revenue from intrastate business in North Carolina in 1906 was $3,324,625. It is also shown that the minimum expense of earning this amount should be on the basis of 86.35 cents on $1 earned, and the aggregate expense thus incurred would be $2,870,814.33; that the maximum net earnings from intrastate business in North Carolina, not making any allowance for taxes, is $453,811.41; that the taxes chargeable to North Carolina for the fiscal year ending June 30, 1906, was $269,651.18; that the proportion of intrastate gross earnings to total gross earnings were 27.60 per cent; that 27.60 per cent. of the total taxes which should be charged to intrastate traffic shows that the intrastate taxes should have been for that year $74,423.73. Improvements and betterments not capitalized chargeable to North Carolina for the same year for the purpose of keeping the property up to modern standard and without additions to it amounted to $197,056.77. Twenty-seven and sixty one-hundredths per cent. of this last item which is assignable to intrastate traffic is $54,633.04, thus making a total of taxes, improvements, and betterments not capitalized, chargeable against intrastate traffic for said year, $129,056.77. The evidence shows that the complainant will sustain a loss of revenue by the proposed passenger rates of $275,055.53, a net loss from freight of $21,691.64, making a total loss of $296,747.17. So it will be seen from the foregoing that the net earnings from intrastate operations under the proposed rates and classifications would only be $28,007.47. That part of the complainant's property in North Carolina devoted to intrastate business was assessed for taxation in that state during the year ended June 30, 1906, at $7,213,222.74. In this connection it should be remembered that no class of property in North Carolina is assessed

at its true value for taxation. Nevertheless, if we assume the tax valuation of the property of complainant to be a proper method of ascertaining the value of its property chargeable to intrastate business, we find that the net earnings of complainant, under the proposed rates and charges for intrastate business, taking the year 1906 as a basis, would only amount to 39/100 of 1 per cent. upon such valuation, before allowing anything for the payment of dividends upon the stock and interest on the bonds of complainant.

The complainant in this cause occupies a fiduciary relation to the holders of its mortgages, stocks, and bonds. The holders of these investments and securities are as much entitled to the protection of the law as any private citizen who may have invested his money in the mercantile business or any other private enterprise. To hold otherwise would be to discourage investments in those public enterprises which are indispensable to the development, progress, and growth of the country. If it is to be held by the courts that those who invest their capital in public enterprises of this kind are to be denied the equal protection of the laws, then the construction of railroads and other public utilities by private capital would at once cease, and the government would be required to embark in the untried, if not hazardous, undertaking of owning and controlling, not only the railroads of the country, but any other utilities which might be deemed necessary for the convenience and advantage of the public.

North Carolina has had a sad experience in attempting to operate railroads within her borders, and her efforts in that respect have proven disastrous in the extreme, and to-day the only railroad property owned by the state is being operated under leases which are deemed to be much more advantageous to the state than any plan of operation which it could adopt under its own management and control. The state of North Carolina undertook to construct and operate the Western Carolina Railroad, but its efforts proved to be a dismal failure, and, had it not been for the purchase of the same by the complainant, in all probability it would never have been completed, and to-day western Carolina would be inaccessible to the outside world.

The court does not deem it proper at this time to pass upon the validity of section 1 of the act relating to passenger rates, feeling, as it does, that the cause should be referred to a master in order that all the facts bearing upon that question should be ascertained and reported by him before a final determination as to the reasonableness of the rates imposed can be had.

Much has been said by counsel as to the power of the court in this cause to grant a temporary restraining order, as well as the expediency of the same. There can be no doubt as to the true rule by which the court is to be governed, when it appears that the complainant is about to suffer irreparable injury. In this instance, the act in question is challenged as being unconstitutional, and, as the court has said, the evidence now before it is sufficient to justify it in continuing the order heretofore granted until the final hearing. However, the court is not bound by this strict rule of construction in dealing with this question. In the case of Cotting v. Kansas Stockyards Company, 183 U.

S. 83, 22 Sup. Ct. 31, 46 L. Ed. 92, Circuit Judge Thayer, who heard the case below, decided that the act in question was valid, and, notwithstanding that the court in that case was of opinion that the act was constitutional and dismissed the bill, nevertheless, the learned judge granted an order restraining the enforcement of the act of the Legislature until the matter could be determined by the Supreme Court. That portion of the order embodied as a part of the final decree is as follows:

"The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stockyards would sustain a great and irreparable loss. Under such circumstances, as was said in substance by the Supreme Court in Hovey v. McDonald, 109 U. S. 161, 3 Sup. Ct. 136, 27 L. Ed. 888, it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment and the questions at issue so balanced with doubt as to justify and require an exercise of the power in question. Therefore, although the bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted for the term of 10 days, and, if in the meantime an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the Supreme Court of the United States, provided that, in addition to the ordinary appeal bond, the Kansas City Stockyards Company shall make and file in this court its bond in the penal sum of $200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that, in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stockyards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violations of sections 4 and 5 of the Kansas statute relative to stockyards, approved March 3, 1897, since an injunction was first awarded herein, to wit, on April —, 1907; and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal. * * *"

Thus it will be seen that in that instance, notwithstanding the fact that the circuit judge was of opinion that the statute challenged was valid, yet, in the exercise of his discretion, an order was made restraining the enforcement of the statute until there could be a final hearing of the same by the Supreme Court.

The action of Judge Thayer in that case affords a striking illustration as to the extent to which a court of equity will go in order to preserve the status quo and thus prevent irreparable injury in a cause where it has assumed jurisdiction. The Supreme Court held that Judge Thayer's action in continuing the restraining order, under the circumstances, was proper, and Mr. Justice Brewer, who delivered the opinion of the court, in referring to the action of the lower court, said:

"The learned circuit judge, in deciding the case, appreciated the importance of the questions involved, and, although denying the relief sought by the plaintiffs, exercised his power of continuing the restraining order until such time as these questions could be determined."

It should be observed that the learned justice concedes to the Circuit Court the power to continue the restraining order until the ques-

tions involved could be determined. And the reasons for continuing the restraining order in the case at bar are much stronger than those which induced Judge Thayer to restrain the enforcement of the act in that case pending the final determination of the same by the Supreme Court.

Notwithstanding the fact that the court had at the hearing of this motion considered section 4 of the rate act of 1907, and was of opinion that the same was unconstitutional, yet during the preparation of this opinion, and before the court had expressed its views in respect to the same, it was called upon to determine the validity of that section in the case of Ex parte Jas. H. Wood, 155 Fed. 190, and, after carefully considering the same, reached the conclusion that the said section was on its face unconstitutional and void.

Inasmuch as the allegations of the bill, supported by the evidence, show that, unless the restraining order heretofore granted is continued until the final hearing, the complainant will suffer great and irreparable injury, in the event the act in question should be finally declared invalid, the court is of opinion that such order should be continued until the final hearing; and, in order that the traveling public may be fully protected in the event that the act should be ultimately declared to be valid, the complainant will be required to give ample bond to secure the payment of a sufficient sum into the registry of the court to reimburse those who may purchase tickets of complainant in the meantime, a sum equal to the difference between the present rate and the proposed rate.

NOTE. Subsequent to the granting of an order continuing the interlocutory injunction until the final hearing, to wit, on the 29th day of July, 1907, the complainant through its counsel filed a petition asking a modification of the interlocutory injunction to the extent of permitting it to put in operation a 2¼ cent rate in accordance with the provisions of the act passed by the Legislature of North Carolina.

It is stated, in the petition substantially that the Governor of the state had threatened to institute proceedings in the state court for the purpose of annulling the lease of the North Carolina Railroad Company, and also to call a special session of the Legislature with the view of securing the passage of additional legislation affecting the rights of the complainant; that a number of suits had been instituted in the state courts against complainant and its agents on account of its having complied with the terms of the decree of this court granting an interlocutory injunction; that the Governor of the state had issued a circular letter to the superior court judges of the state, advising them that it was their duty to see that all parties who failed to comply with the provisions of the act of 1907 were prosecuted, regardless of the order which this court had made temporarily suspending the enforcement of the same; that these attacks on the part of the Governor and state officials against the company and its agents and in the manner therein described had had the effect of demoralizing the servants, agents, and employés of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it

owed the public as a common carrier, and that, owing to many other reasons stated therein, the complainant was deterred from asserting the rights which were guaranteed it by the Constitution of the United States. For a more complete statement of facts reference is made to the petition which has been filed, and is a part of the record.

After considering the petition, the court made the following statement:

"The application now made to modify the injunctions heretofore granted in these causes present a condition of affairs unprecedented in the judicial annals of this country. After a full and complete hearing of the matters raised by the pleadings in these causes, injunctions, pending the hearing of the questions involved in the original suits, were granted. The court, in granting such injunctions, followed the course approved by the Supreme Court of the United States in the cases of Smyth v. Ames, Reagan v. Farmers' Loan & Trust Company, Cotting v. Kansas Stockyards Company, and Prout v. Starr, and followed by the Circuit Courts of the United States in numerous other cases."

The effect of the order restraining the Corporation Commission of North Carolina et al. was to preserve the rights of the parties until the master to whom this cause had been referred could have an opportunity to report the facts and thereby enable the court to correctly determine whether the act in question is confiscatory, and, in order to protect the traveling public, the complainants were required to give ample bond and security to secure the payment into the registry of the court a sum sufficient to pay the difference between the present rate and the proposed rate to those who might in the meantime purchase tickets.

It is unjust to say that the question of states' rights is involved in this controversy. It is equally unjust to insist that what the court has done in the premises was an interference on the part of the federal court with the state courts. However, on the other hand, there has been a manifest disposition on the part of the state officials to interfere with the orderly procedure of the federal court in the exercise of those powers necessarily incident to the protection of its jurisdiction.

If this kind of obstruction should prevail, and citizens are thus to be denied the rights guaranteed them by the Constitution of the United States, then those provisions of the Constitution would become a dead letter, as there would be no means of enforcing them. When the motion for an interlocutory injunction was made in these causes, there was full argument before me by counsel representing the complainant and by counsel representing the defendants, the members of the Corporation Commission, the Attorney General, and the Assistant Attorney General of North Carolina. This argument lasted over several days and covered all points at issue. Upon this argument and my consideration of the case I entered the interlocutory injunctions. On a subsequent occasion the matter was again presented on the trial of a writ of habeas corpus, at which time a written opinion was delivered fully stating the views of the court. The court feels no doubt as to the soundness of the views therein expressed, nor as to its power and duty to enter the interlocutory decree, nor, in order to protect the jurisdiction of this court, to discharge on habeas corpus the persons who had been arrested by the state authorities for compliance with the orders of this court.

The court still considers that it would be its duty to continue this protection whenever its action in the premises should be thus lawfully invoked. But, as the complainants, for the protection of whose rights the interlocutory decrees were entered, now move the court permission to surrender the protection of said order to the extent indicated in their respective petitions, there is nothing for the court to do except to grant the permission prayed.

In view of the facts contained in the petition, the court at that time entered an order modifying the order theretofore granted in accordance with the request of the petitioner.

SEABOARD AIR LINE RY. CO. et al. v. RAILROAD COMMISSION OF ALABAMA et al.

(Circuit Court, M. D. Alabama. July 14, 1907.)

1. CORPORATIONS—FOREIGN CORPORATIONS—EXCLUSION FROM STATE.

The state, unless forbidden by its own Constitution, or estopped by its dealings with a particular corporation, or a right has vested in such corporation to do business in consequence of contracts and investments made on the faith of state statutes, may at any time, and for any cause, exercise its sovereign, political, prerogative of preventing, at its own pleasure, any foreign corporation from doing a domestic business in its borders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2505.

Exclusive regulation and taxation of foreign corporations, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 24 C. C. A. 13.]

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—FOREIGN CORPORATIONS.

Section 240 of the Constitution of Alabama of 1901, which gives the right to foreign corporations "to sue in all courts, in like cases, as natural persons," prohibits any court from giving effect to an enactment which provides that the bringing of a suit by a foreign corporation in the federal court shall ipso facto forfeit its right to do domestic business in Alabama, when, under the law of the land, no such consequence attaches to a domestic corporation or a natural person for bringing a like suit. The fourteenth amendment also annuls such a statute, since its enforcement would amount to a denial of the equal protection of the laws to the foreign corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 678.]

3. SAME—OBLIGATION OF CONTRACTS.

Where state statutes provide that a domestic corporation may sell "all its property, roadbed, rights and franchises" to a foreign railroad corporation, and such property, when so purchased, "shall be subject, in all respects, to the laws of the state as if owned by a domestic corporation," and set forth other terms upon which such foreign railroad corporation may lease, operate, and aid domestic railroad corporations, the provisions of such statutes enter into and form part of the obligation of the contracts made thereunder between the domestic railroad corporation and the foreign railroad corporation.

4. SAME—VESTED RIGHTS—ESTOPPEL.

The state, after foreign corporations have invested large sums of money, and made contracts in the purchase and lease of domestic railroads, and in carrying on domestic and foreign commerce, on the faith of such statutes, cannot deny or impair the enjoyment of the vested right, thus ac-

quired, to do such business, by the exercise of its arbitrary prerogative, which might otherwise exist, to prevent foreign corporations, at its pleasure, from doing a domestic business in its borders. The state is estopped, by the acceptance of the proposals made in its own laws and acts done on the faith thereof, to claim or exercise such a prerogative thereafter; and it is also forbidden to exercise it, because the denial to the foreign corporation of the right to do domestic business would be a denial or impairment by the state of the obligation of contracts, which the Constitution of the state and United States forbids the state to effect by any law.

[Ed. Note.—Estoppel against, see notes to State v. Jackson, L. & S. R. Co., 16 C. C. A. 353.]

5. SAME—DUE PROCESS OF LAW.

After such purchase and lease of domestic railroad property by foreign railroad corporations, their owners and lessees hold them, with the right to operate them in both domestic and interstate commerce, for the time and upon the conditions the law provided, and the state cannot interfere with any lawful use of such property by the foreign corporation, except by forfeiture of the right so to use the property, for misuser or nonuser, for cause defined by law, applicable alike to all persons similarly situated, and only after hearing and judgment in the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 762, 763.]

6. CONSTITUTIONAL LAW—POLICE POWER.

The police power is limited to the prevention and punishment of such acts as may, or do, menace the welfare, happiness, morals, or peace of the state, and the people within its borders, and as these cannot be invaded or imperiled by the exercise of the right to resort to a federal court, which is given by the supreme law of the land, no court can recognize the bringing of such a suit as any legal cause for the forfeiture of any vested right of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 148.]

7. CARRIERS—REASONABLENESS OF RATES—BASIS OF CALCULATION.

Under the fourteenth amendment, the basis of all calculations as to the reasonableness of rates charged by a railroad must be the fair value of the property used by it for the convenience of the public; and, as to rates prescribed for transportation of persons and property carried only within the limits of the state, the reasonableness of such rates must be based upon the value of the property devoted to domestic commerce, without reference to the value of the property devoted to interstate commerce, and neither the profits nor the losses in the one business can be estimated in determining the reasonableness of the rates as to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 19.]

8. SAME—DETERMINATION.

As the Constitution forbids rates to be fixed unreasonably low, a court, when asked to enjoin the enforcement of rate legislation, on the ground that it violates the Constitution in this respect, must necessarily ascertain the facts upon which the reasonableness of the rates depends before it can pronounce upon the validity of the statute.

9. INJUNCTION—UNREASONABLE RATES—IRREPARABLE INJURY.

Rates fixed by statute are prima facie reasonable, and the burden devolves upon him who complains of them to show to the contrary. When, upon application for preliminary injunction, complainant shows a state of facts, which, taken in connection with the opposing evidence, presents a reasonable probability that the rates may be adjudged invalid on final hearing, the court, acting for the best interest of all concerned, in view of the facts of the particular case, will balance the relative harm which may befall the adverse interests from the issue of the writ, and grant or withhold the writ accordingly. Under the facts of this case, the com-

plainants showing a prima facie case of irreparable injury, if the operation of the statute be not suspended, while the interests of the public can be protected by the exaction of bonds to refund amount of any excess rate if complainants finally be cast in the suit, preliminary injunction against the enforcement of the rate legislation issued upon those terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 305.]

10. CARRIERS—REASONABLE RATES.

One of the most satisfactory modes of arriving at the harmful or beneficial effect, upon the revenues of corporations, of the operation of the statutes reducing rates, is to take the gross and net income for the years just preceding the enactment of the statute, if it be probable that the business will continue in substantially the same volume, and at the same cost, and compare the results in the prior years under the prior laws, and the results which would have been effected, if the reduced rates had been applied to such business.

11. SAME.

In order to ascertain whether the reduced rates would be harmful or beneficial, the court may, in case of doubt, order them tested by actual operation; but such experimentation with the property of any one is never justifiable in any case, where the facts presented on the preliminary hearing show only a moderate income under the former law, and a very strong probability of deficiency, or scant earnings, at best, under the reduced rates.

12. STATES—ACTIONS AGAINST.

A suit against an individual, although he be a state official, to prevent him from effecting the destruction of property, or the impairment of property rights, under color of an unconstitutional law, is not a suit against the state, within the meaning of the eleventh amendment to the Constitution of the United States.

(Syllabus by the Court.)

In Equity.

The Seaboard Air Line Railway, the Atlantic Coast Line Railroad Company, the Kansas City, Memphis & Birmingham Railroad Company, the Southern Railway Company, Central of Georgia Railway Company, the Nashville, Chattanooga & St. Louis Railway Company, the Louisville & Nashville Railroad Company, all foreign corporations, the Western Railway of Alabama, the Alabama Great Southern Railroad Company, the Mobile & Ohio Railroad Company, the Atlanta & Birmingham Air Line Railway Company, and the South & North Alabama Railroad Company, domestic corporations, operating railroads in this state, filed their bills in the United States Circuit Court for the Middle District of Alabama, on the 25th day of March, 1907, against the Railroad Commission of Alabama and the Attorney General of Alabama, praying on final hearing to suspend and enjoin the enforcement of four statutes passed at the present session of the Legislature. One of these statutes fixed 2½ cents per mile as the maximum rate for intrastate passengers. Another classified and fixed the maximum rates for intrastate transportation of 110 commodities. Another provided that the rates in force on the 1st of January, 1907, should be the maximum intrastate freight rates on the articles not included in the other statutes. The fourth statute provides that the bringing of a suit by a foreign corporation in the federal court "shall ipso facto forfeit all its right or license to engage in or carry on business, originating and terminating in this state, of freight or passengers, and its right or license to engage in or carry on such business in this state shall by said act itself be revoked and shall cease." The statutes as to freight and passenger rates provide severe penalties for their violation in each instance by fine or imprisonment, and other laws make it the duty of the Railroad Commission and the Attorney General to enforce the provisions of these statutes. All the corporations, both domestic and foreign, sought relief against the three first-named statutes. All the foreign corporations sought relief against the statute forbidding their doing a domestic business in consequence of bringing a suit

In this court. Only two of the complainants sought a preliminary injunction to prevent the enforcement of the act which makes the rates in force on the 1st of January, 1907, the maximum freight rates thereafter, and they asked a preliminary injunction against its enforcement. As no order was made in those cases pending further investigation, no statement is necessary as to the rights claimed by them in that behalf. All the complainants asked a preliminary injunction against the enforcement of the statute reducing the passenger rates and the rates on 110 commodities. Each of the bills alleges that the enforcement of the several statutes would either confiscate complainants' property or deprive them of any adequate return on the value of the property devoted to intrastate business or deprive them of property without due process, deny to them the equal protection of the laws, and impair the obligation of contracts. A restraining order was issued on the 30th of March, 1907, and the hearing for preliminary injunction went over until the 8th of May, 1907. No answers having been filed in the cases, the issue of preliminary injunction was taken up on the allegations of the sworn bills of the 8th of May, 1907; no opposing evidence by way of affidavit or otherwise being offered.

L. F. Parker and John P. Tillman, for St. Louis & S. F. R. Co.

A. P. Thom, Alex. P. Humphrey, and James Weatherly, for Southern Ry. Co.

H. L. Stone, Gregory L. Smith, and Geo. W. Jones, for Louisville & N. R. Co.

John P. Tillman, for Atlanta & B. A. L. R. Co. and Seaboard Air Line Ry. Co.

A. G. Smith, for Alabama Great Southern R. Co.

A. A. Wiley and W. E. Kay, for Atlantic Coast Line R. Co.

Claude Waller, for Nashville, C. & St. L. Ry. Co.

Lawton & Cunningham and R. E. Steiner, for Central of Georgia Ry. Co.

Geo. P. Harrison, for Western Ry. of Alabama.

E. L. Russell and S. R. Prince, for Mobile & O. R. Co.

Alex. M. Garber, Atty. Gen., R. W. Walker, H. C. Selheimer, S. D. Weakley, Horace Stringfellow, and F. S. White, for respondents.

JONES, District Judge. These preliminary injunctions concern matters of vast public moment. The court had no opportunity at the time they were granted to file an opinion, and does so now. Clearly, if the act of March 6, 1907, which, upon the institution of these suits, ipso facto forfeits the right of complainants to do intrastate business, can be upheld, there is no equity in complainants' bills, except as to antecedent transactions in domestic commerce. After the taking effect of the statute, if it be constitutional, complainants would have no right to enjoin the enforcement of rates in future for carrying on business, in which they would then have no right to engage. The question is one of pure law, and lies at the very threshold of the litigation. While courts are reluctant on preliminary hearing to pronounce upon the constitutionality of a statute, litigation frequently presents phases, of which this is an illustration, when a court is compelled to do so. The obvious fact that the statute recks little of consequences, and that its enforcement would disorder industry, trade, and travel, and entail great hardship and loss in many ways upon communities and thousands of individuals, by depriving them of their usual means of transportation in their intercourse and commerce within this state, sheds no light

whatever upon the authority of the Legislature to enact the statute. The wisdom or unwisdom of the statute is a question the Constitution commits solely to the discretion and judgment of the lawmakers. The courts, whatever may be their view of the policy of a statute, must uphold the enactment, regardless of consequences, unless the Legislature in its passage infringed some express prohibition or necessary implication of the state or federal Constitution. Unless thus restrained, the legislative power of the state is supreme.

Section 240 of Constitution of Alabama.

Among other provisions of the Constitution of Alabama, bearing upon this matter, is section 240, which ordains:

"That all corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases, as natural persons."

This provision is found at the close of the article regulating "foreign corporations" and "corporations chartered under the laws of this state." The framers of the Constitution were well aware that from the foundation of the state foreign corporations had exercised the right to resort to the federal court. If there had been a purpose to prevent their doing so in future, naturally those who made the Constitution would have said so in so many words, or at least limited the right to sue "in all courts of the state." They chose, however, in conferring the right to use the broad words "all courts." There is nothing which authorizes us to reject the popular meaning, in which sense, unless the contrary in some way appears, words in the Constitution must always be taken. Clearly these sweeping words refer to all the courts which dispense justice in the state, and give to "all corporations" the right to enter every court in which a natural person could sue. Aside from the construction which must result from the rule that the framers of a Constitution know the force of words, and employ fit language to express their intentions, reasons are not far to seek, if the court could search for them outside of the plain and unambiguous words, to show that the intent of the authors of this provision was to apply the words "all courts" to the federal, as well as state, courts. The "stranger in a strange land" always values the right to resort to the tribunals which the Constitution of our forefathers wisely provides for him, if he becomes involved in litigation in his adversary's home. Strangers frequently will not invest their money or do business in communities which are known to be hostile to this policy of the Constitution. This section, by giving foreign corporations the constitutional right to resort to "all courts" on equal terms with natural persons, whom other sections give the absolute right to resort to all courts, would prevent future Legislatures from hampering the right to resort to the federal courts, as had been done in some other states. It would be an assurance to all who thought of casting their fortunes with us that Alabama would not depart from its traditional policy, and expel foreign corporations if they chose to exercise the same rights as natural persons to resort to the federal courts. Natural persons and domestic corporations can resort to a federal court in cases arising under the Constitution and laws without subjecting themselves, so far as the state laws

can affect the right to suit in a federal court, to any forfeiture of the right to pursue any business; while under the identical circumstances the foreign corporation can be expelled from the state. Five domestic corporations have filed their bills attacking this same rate legislation. Under this statute they lose no right whatever by so doing; while ipso facto it forfeits the right of the foreign corporations to use property worth millions of dollars in domestic business because they brought a like suit here. If the Legislature may subject a foreign corporation to loss or damage for bringing such a suit here, when no such consequence can attach to a domestic corporation or a natural person, it needs no argument to prove that the right of the foreign corporation to sue "in all courts in like cases," is not the same as that of "natural persons." The statute destroys the perfect equality in this respect which this section exacts, and subverts the declared policy of the Constitution. There is nothing in the nature of the suit which can justify putting the foreign corporation in one class, and other suitors in a different class, in order to attach different consequences to the bringing of suits by them in a federal court. If, however, it were a case where, ordinarily, the Legislature might classify them differently for such a purpose, legislative power to so classify was denied, when the Constitution itself, by a mandatory provision, put all kinds of corporations in one and the same class with natural persons, and gave them the same, identical right as to waging suits "in all courts."

Prerogative to Expel Limited.

The otherwise absolute prerogative to expel a foreign corporation at will is, by this provision, shorn of all power to expel a corporation, because it resorts to any court. The arms of the prerogative cannot reach out and throttle the enjoyment of rights which the Constitution declares shall exist and shall be enjoyed. The constitutionality of a statute leveled at the enjoyment of a right "must be determined by its natural and reasonable effect" upon the exercise of the right. Henderson v. Mayor, 92 U. S. 259, 23 L. Ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550. It is also a maxim of constitutional law that "what cannot be done directly, cannot be done indirectly." Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. Ed. 356. A statute which declares that a corporation is ipso facto expelled, because it resorts to a federal court, or any other court, is ipso facto a defiance of the constitutional provision; for it is an attempt to expel the corporation for doing something which the Constitution gives it an express right to do. The Constitution is the sovereign. The government it regulates can have no prerogative to take away that which the sovereign gives. Else, what the power or good of the Constitution? The Legislature by this penalty upon the exercise of the right, which it cannot directly take away, cannot despoil a corporation of the enjoyment of a right the Constitution gives it. Greene v. Briggs, 1 Curtis (U. S.) 327, Fed. Cas. No. 5,764; Almy v. California, 24 How. (U. S.) 173, 16 L. Ed. 644. The penalty is aimed at the exercise of a constitutional right. The statute puts in the same plane wrongful and vexatious suits and meritorious and successful litigation. It is not an endeavor to prevent vexatious and unfounded litigation by imposing a penalty in event of failure

of the suit. It is a mere naked effort to terrorize foreign corporations and thus prevent them from resorting to the federal court in any event, whether rightly or wrongly, by imposing enormous penalties if they do so, no matter how well-founded their cause of action. This phase of the matter, quite apart from the limitation the Constitution puts upon the discrimination in this respect between foreign corporations and natural persons, places the penalty outside the pale of the Constitution, and compels the court to strike it down. To effect the expulsion of the foreign corporation, there must be some valid declaration of the legislative will to that effect. The only statute we have is not only unconstitutional, but it acts automatically, only upon the happening of the suit. Even if it were valid, it contains no command and expresses no policy whatever as to the expulsion of the foreign corporation in any other event, or for any other cause. The only expression of the legislative will is that the bringing of the suit ipso facto expels the corporation. It stops there. There is silence as to the legislative will in every other particular regarding the expulsion of foreign corporations. The Legislature having no power to pass the enactment, the statute is a mere nullity, and the right of the foreign corporation to remain stands as though the act had never been passed. We cannot bring the dead statute to life, and say that, as the Legislature had power to expel the corporation for some other reason, we must construe this unconstitutional statute, which ipso facto expels the corporation in one event only, as stretching out to any other cause, and, because some other reason might exist, ipso facto expelling the corporation for that other reason. If the court did that, it would usurp the legislative prerogative, and create and invent a command which the Legislature never gave, or intended to give, in order to nullify the constitutional veto upon the statute actually passed. State v. Buckley, 54 Ala. 622; United States v. Reese, 92 U. S. 214, 23 L. Ed. 563.

Construction of Constitutional Provision by Supreme Court of Alabama.

More than a quarter of a century ago the Supreme Court of this state, in Railroad Company v. Morris, 65 Ala. 199—which involved a discrimination between the rights of a domestic corporation and a natural person in the courts—after referring to a provision identical with section 240 and various other provisions repeated in the present Constitution, declared:

"The clear, legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement of their rights in the courts of this state, except in so far as may be otherwise provided in the Constitution. * * * Nor can it be permitted that litigants can be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under the color of establishing peculiar rules for a particular occupation. Unequal, partial, discriminatory legislation, which secures a right to some favored class or classes and denies it to others, who are thereby excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing provisions."

The same question, involving a discrimination against a foreign corporation as a suitor in the courts, came before the Supreme Court

of Alabama, in Smith v. Railroad Company, 75 Ala. 451, which followed and reaffirmed the doctrine declared in Railroad Company v. Morris, supra. In the Smith Case, Chief Justice Stone, delivering the opinion of the court, said:

"This question, however, would seem to be settled by our own state Constitution (article 14, § 12), carried forward in identical words in section 240 of the present Constitution, which ordains that 'all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases, as natural persons.' 'In like cases, as natural persons,' must mean where the cases are alike, the same description of contract or tort; there must be no discrimination between corporations and natural persons in the matter of prosecuting or defending suits. * * * The sum of these provisions is that no burden can be imposed upon one class, natural or artificial, which is not, in like conditions, imposed on all other classes."

The same rule was enforced by the Supreme Court of the state in the subsequent cases of L. & N. R. R. Co. v. Baldwin, 85 Ala. 627, 5 South. 311, 7 L. R. A. 266, Brown v. A. G. S. R. R. Co., 87 Ala. 370, 6 South. 295, Randolph v. Builders' & Painters' Supply Company, 106 Ala. 511, 17 South. 721, in each of which statutes making the forbidden discrimination between corporations and other suitors were adjudged unconstitutional. See, also, Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500; Wally's Heirs v. Kennedy, 2 Yerger (Tenn.) 554, 24 Am. Dec. 511; Holden v. James, 11 Mass. 396, 6 Am. Dec. 174; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Railroad Company v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666.

The provision now embodied in section 240 of the Constitution appeared for the first time in Alabama in the Constitution of 1875, and is incorporated in identical words in the present Constitution. In Ex parte Roundtree, 51 Ala. 42, the Supreme Court of this state held:

"When a constitutional provision has received a settled construction, and is afterwards incorporated into a new or revised Constitution, it must be presumed to have been retained with a knowledge of that construction, and courts will therefore feel bound to adhere to that construction."

We have here, not only the settled construction by the highest court of the state of the meaning of a constitutional provision, but the adoption of that construction by the framers of the Constitution themselves. This settled construction of the scope and effect of a constitutional provision, by the highest court of the state, is binding upon every federal court. As said in Gatewood v. North Carolina, 203 U. S. 541, 27 Sup. Ct. 170, 51 L. Ed. 305:

"It is elementary that, under such circumstances, we must follow the construction given by the state court, and test the constitutionality of the statute under that view."

If, therefore, there be any conflict between the courts' holding on this point and the general doctrine declared in Life Ins. Co. v. Prewitt, hereafter cited, the Supreme Court of the United States and all other courts, as to all cases of the kind, arising in Alabama, must follow and apply the views of the highest court of the state, regardless of what might be their own view in the exercise of an independent judgment. Smiley v. Kansas, 196 U. S. 445, 25 Sup. Ct. 289, 49 L. Ed. 546; Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451.

When State May Exercise Sovereign, Political, Prerogative of Expelling Foreign Corporation at Will.

The validity of this statute, as applied to complainants, is challenged under several provisions of the Constitution of the United States. Unless the Constitution of the state forbids, or the state, by its laws or dealings with a foreign corporation, has disabled itself from exercising the right, there is no hindrance, arising under the Constitution of the United States, to a state's forbidding any foreign corporation, not engaged in interstate commerce, from coming into the state in the first instance, or from afterwards preventing such corporation from doing a domestic business, though at the time of its entry the state's laws did not forbid, and the state made no objection otherwise. Such corporations have no right to migrate from the state where they were chartered and enter another state, and do business there without its consent. Ordinarily they come and remain as a matter of grace, and their expulsion violates no right secured to them by the Constitution and laws of the United States. All their contracts, save in the exceptional cases stated, are made subject to the right of the state to expel them at pleasure. As "the laws which exist at the time and place of the making of the contract, and where it is to be performed, enter into and form part of it," their contracts are made subject to the exercise of the right, and their expulsion after coming into the state and making contracts does not, therefore, deprive them of property without due process, or deny them the equal protection of the laws, or impair the obligation of their contracts, at least so far as they are concerned. The state, ordinarily, having the right, with or without reason, at its uncontrolled pleasure, to expel the foreign corporation, may do so, after the corporation has entered the state, by a law subsequently enacted which gives the resort to the federal court as the reason for the passage of the statute.

In view of the consideration that no right of a foreign corporation is invaded, save under special circumstances, by the state's refusing to allow it to continue to do business in its borders, the Supreme Court has held in general, in the absence of prohibitions in the Constitution of the state, that the state may compel a foreign corporation "to abstain from the federal court, or cease to do business in the state," without stating any reasons for its action. "The fact that it may give what some may think a poor reason, or none at all, for a valid act, is immaterial." Life Insurance Company v. Prewitt, 202 U. S. 253, 26 Sup. Ct. 621, 50 L. Ed. 1013. This was held in reference to a statute of Kentucky, which, without requiring any agreement to abstain from the federal court, "merely said to the foreign corporation, if it chose to exercise its rights to resort to the federal court, its right to do further business in the state should cease." The whole theory and reasoning of that decision is based upon the consideration that the corporation, having acquired no vested right to do business in the state, was subject to the exercise by the state of its arbitrary power of expulsion, whether for a good or bad reason. That case dealt solely with the expulsion of an insurance company, which was doing business in the state simply by the grace of the sovereign, and touched upon no

other phase of the right of the foreign corporation to remain in the state, under other circumstances. It was not treating of any question of the forfeiture of property or vested rights of the foreign corporation, or of the right to use its property in a particular business, when the property was purchased by a corporation under special laws relating to it, whose terms were inconsistent with any reservation of the arbitrary power to expel, and where the carrying on of such business, from the very nature of the property, was the thing which gave it value, and which, when forbidden, impaired the obligation of contracts.

State May Abandon or Lose Right to Expel a Foreign Corporation at Pleasure.

Plainly there is nothing in what was actually decided in Insurance Company v. Prewitt, supra, or in its reasoning, which conflicts with the long and unbroken line of decisions, of the Supreme Court, up to its last sitting, that a state may by its course of conduct towards a foreign corporation estop itself from exercising this arbitrary sovereign prerogative, in particular cases, and that by force of contracts and completed transactions, made under the authority of the state's laws, vested rights of property may be created in the foreign corporation, which the Constitution of the United States protects against impairment or defeat, by the arbitrary exercise of the state's sovereign or political right of expulsion, as distinguished from the legal right of expulsion for cause. Do not both conditions concur here? Davis v. Gray, 16 Wall. (U. S.) 232, 21 L. Ed. 447.

To rightly answer these questions, we must recall the circumstances and laws under which the foreign corporations entered the state and acquired the property, the use of which the statute now seeks to prevent.

Circumstances and Legislation Under Which Complainants Acquired Vested Rights to do Local Business in Alabama.

Apart from the facts stated in the bills, the court judicially knows that at the close of the war in 1865 our railroad system, then in its infancy, lay in dilapidation and ruin. The building of more railroads was vital to the welfare of the state. Of home capital there was none, and foreign capital would not invest without better security than the new railroads could give. Hence the state lent railroads its credit, and further encouraged their building by allowing counties, cities, and towns to aid them. The disasters and difficulties which this legislation entailed upon the state and people are a part of the history of the times, as well as the conditions existing for many years thereafter, which prostrated all kinds of enterprise.

The operation of these laws left the state and municipalities in debt, with a few important lines of railway built, others partly completed, and all poorly built and equipped. Public opinion discountenanced further state and municipal aid, the laws were repealed, and prohibition put in the Constitution against such aid in the future. As late as 1894 it appears from Executive Documents, Senate Journal of 1894–95, p. 56, that "many of our railroads are in the hands of receivers, and it has been a struggle on the part of others to pre-

vent a like fate." Three years before the Legislature, in view of the need for more railroads, the completion of the unfinished roads, and the renovation and betterment of existing systems, sought to induce foreign railroad corporations to aid in the development of the state, by holding out to them the promise of the enjoyment of large powers and privileges, if they bought or leased or aided and operated railroads within this state.

In pursuance of this policy, the Legislature enacted, whenever all the capital stock of a domestic railroad corporation is owned by a foreign corporation, the domestic corporation might sell and convey to the foreign corporation "all of its property, roadbed, rights and franchises," and that the railroads so purchased "shall be subject, in all respects, to the laws of the state, as if owned by domestic corporations." It was also enacted that any foreign corporation might subscribe to the capital stock of any other company, or otherwise aid it in the construction of its road, for the purpose of forming a connection with it, and that a foreign railroad corporation might lease or purchase any part or all of any railroad constructed by any other corporation, if the lines of such roads were contiguous or connected. Foreign corporations were also authorized to aid railroads chartered under the laws of this state "in the construction, renovation or operation of their railroads," by the indorsement of their bonds, or by guaranteeing the rental in the lease of such railroads, on any terms agreed upon by the respective boards of directors. Foreign corporations owning and operating any railroads here were also authorized "to purchase at judicial sale or otherwise, or lease or hold and use, any domestic railroad, or to acquire the whole or use all or any part of the capital stock, or of the property, roadbed, rights and franchises of any railroad corporation in this state whose railroad, the road of the foreign corporation or its predecessor in interest shall be connected, either directly or by means of an intervening line." Afterwards the Legislature imposed a license tax upon railroads, and enacted, upon the payment of such tax and producing satisfactory evidence to the auditor that such corporation is prepared to transport passengers and freight, he shall issue a license to the corporation to operate its railroad in this state, and complainants have paid such tax, and received such license.

The Proposal Made by the State's Laws.

These laws were a standing invitation to a particular class of persons, foreign corporations, not to the general public, to become pecuniarily interested in domestic railroads, a peculiar species of property, whose value comes from the exercise of the right to use it in transporting persons and things from point to point within the state, as well as in interstate commerce. Such a use of such property effected objects so important to the welfare of the people that the state as an inducement to foreign corporations to come to Alabama and engage in that business here might well bargain if they did so that their property rights would be protected by all the sanctions which the law throws around like property of domestic corporations. A person who is clearly within the class to whom a proposal is made, and who accepts it, and complies

with its conditions, acquires contract rights thereby, as much so as when the proposal is addressed to him by name. Piqua Bank v. Knoop, 16 How. (U. S.) 380, 14 L. Ed. 977; American Smelting Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393.

The right of the foreign corporation to use this property, for both domestic and interstate commerce, was the right to which these statutes related. The state acting through the Legislature, which represents the sovereign as to such matters, proclaimed, in effect, to these foreign railroad corporations:

"If you buy a domestic railroad, the property and franchises of such corporations shall remain subject to the laws of Alabama, in the same manner as if owned by a domestic corporation, and you shall hold and enjoy the franchise of your vendor for the length of time, and upon the conditions, the charter or laws of the state prescribe while he holds it. If you lease a domestic railroad, you shall have the right to operate it, and transport over it all kinds of commerce, local as well as interstate, for the term specified in the laws of Alabama for the duration of leases. If you aid a domestic corporation by indorsement of its bonds, or make other business arrangements with it, you shall acquire such contract rights concerning such property as you and it may agree upon. The state, if you invest under these laws, will make them a part of your chartered rights in Alabama." Bank v. Knoop, 16 How. 380, 14 L. Ed. 977.

The Acceptance of the Proposal and Acts Done Thereunder.

On the faith of these proposals, solemnly made by the state in its own statutes, these foreign corporations came to Alabama, and spent many millions of dollars in the purchase and leases of railroads, and arranged their business accordingly, and now operate several thousand miles of railway here. Did they not acquire some rights thereby? Can the state now lawfully say to them: "You cannot now hold and use this property upon the terms and conditions held out by the statutes. You purchased the mere privilege of using what you bought, in domestic commerce, only so long as the state does not object."

No Right of Arbitrary Expulsion Reserved.

There is no hint in these statutes that the rights to be acquired might in any contingency be less in extent or value than those these laws offered, or that, instead of buying the right to use the property in local commerce for the time, and upon the conditions, prescribed by the existing laws, the purchaser took out only a temporary license to do a local business, revocable at the mere will of the state, at any time, or that the state might forfeit the right to do such business for any cause, which would not forfeit the right of any other property holder, similarly situated, to put his property to any lawful use. The reservation of any such right on the part of the state cannot be raised by implication, except by repudiating alike the plain language of the statutes, the declared objects they had in view, and the obligation of contracts entered into in pursuance of them. "It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." Murray v. Charleston, 96 U. S. 445, 24 L. Ed. 760.

The mere arbitrary right of the state to expel a foreign corporation not having been reserved, it was abandoned and waived. It was at

the option of the state in the first instance to permit complainants to come only as its tenants at will, as to domestic business, or to permit them to contract for the enjoyment of property rights inconsistent with the exercise of this arbitrary prerogative of expulsion at pleasure. When the state consented to complainants' making contracts inconsistent with this prerogative, which contracts, if made, necessarily involved the acquisition of a vested right in the foreign corporation to use railroad property here, upon the terms and for the time and for the uses provided in the statute, the state consented to waive and abandon this right, and it is now estopped to withdraw its consent, to the prejudice of any one who acted upon that consent. Walker v. United States (C. C.) 139 Fed. 413.

Besides, acts the state suggested and desired the foreign corporations to do, under its own proposal, contained in its own laws, have resulted in contracts vesting in the foreign corporation the title to property and the right to use it, for the very purpose which the state now seeks to prevent. The Constitution of Alabama, § 95, forbids the state from now interfering with that use. Rights like these the Constitution of the United States also protects, in their integrity, against all hostile action of the state, except for forfeiture for cause, for misuser, or nonuser, prescribed by the law of the land, and applicable alike to all other corporations and natural persons similarly situated, and by judgment of the courts, after hearing, and not by statutory edict. Sinking Fund Cases, 99 U. S. 719, 25 L. Ed. 496; New Jersey v. Yard, 95 U. S. 105, 24 L. Ed. 352; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 L. Ed. 495; Steamship Company v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805; Farrington v. Tennessee, 95 U. S. 680, 24 L. Ed. 558; Powers v. Detroit Railway Company, 201 U. S. 543, 26 Sup. Ct. 556, 50 L. Ed. 860; American Smelting Company v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393; Edwards v. Williamson, 70 Ala. 145; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Wilburn v. McCalley, 63 Ala. 436.

Complainants took, and now hold, the leased and purchased railroads, and the right to enjoy their use in local commerce, subject to no other restriction or ground of forfeiture than the laws of the state prescribed at the time of the leases, purchases and contracts, or as might thereafter be lawfully enacted under the police power. The police power of the state extends to the protection of its peace, good order, morals, welfare, and the health, lives, and limbs of its people. If the doing of an act cannot militate against the enjoyment of these rights, the state is without authority to forbid such act. Const. Ala. § 35; Joseph v. Randolph, 71 Ala. 506, 46 Am. Rep. 347.

The bringing of a suit by a foreign corporation in a federal court, to prevent the infringement of any right, given by the supreme law of the land, cannot imperil any interest or right of which the police power is the guardian. To attempt to support such an exercise of power under the police power of the state is to assert that the operation of the Constitution and laws, and the exercise of rights thereunder in the courts of the United States, are an attack upon the welfare of the state, or in some way menaces their well being and happiness. The accept-

ance of such a doctrine would finally carry with it the overthrow of our institutions.

Complainants Entitled to Injunction Against Attempts to Prevent Their Doing Intrastate Business.

The state no longer has any arbitrary, sovereign, prerogative to prevent complainants at pleasure from carrying on intrastate commerce. It has parted with the power to expel complainants for bringing their suits here, not only by incorporating section 240 in its Constitution, but because contracts its laws authorized have ripened into vested rights, and also because the proposal made in its laws to a particular class of persons as regards the corporate rights they might enjoy as to a peculiar species of property, and their acceptance and acts under that proposal, have ripened into a "legislative contract." American Smelting Co. v. Colorado, supra. Such a contract needs no consideration outside of the object sought to be effected by it. The object in this case was the development of the state. The coming of foreign corporations here to engage in railroad business was deemed by the Legislature to be beneficial to the state. "That benefit constitutes the consideration for the contract and no other is required to support it." Home of the Friendless v. Rouse, 8 Wall. (U. S.) 437, 19 L. Ed. 495.

No arbitrary power of expulsion remaining, and the reasons assigned in this statute not constituting any legal cause for the forfeiture and confiscation of complainants' property which would be effected by its expulsion from local business, the execution of the statute must necessarily be enjoined. Its enforcement would violate the Constitution of Alabama, as well as infringe those provisions of the Constitution of the United States, which forbid a state to deprive any one of property without due process, or to deny the equal protection of the laws, or to impair the obligations of contracts.

In Fixing Rates, Justice to Both Railroad and Public Must Be Considered.

The remaining question is whether, in the posture of these cases at this time, the court should grant a preliminary injunction against the enforcement of the statutes which prescribe 2½ cents per mile as the maximum rate for the carriage of intrastate passengers, and fix the maximum intrastate freight rate upon 110 specific commodities which the statute classifies, no preliminary relief being now asked as to the act which makes the freight rate in force on the 1st of January, 1907, the maximum freight rate thereafter to be charged for all other intrastate freight.

The most important of the principles of law which must govern these questions have been settled by the Supreme Court, though the bills raise some grave questions which have not been determined by that court, and which, on the present hearing, it is needless to consider. The court is now concerned only with an order which, while settling no equities in advance of final decree, may best preserve the status quo pending final hearing.

A railroad carrier not only engages in a public calling, but discharges a state function in building and maintaining highways, upon

which, as the state does not, it transports persons and things for a reward. Its rates are therefore subject to legislative regulation. In fixing rates the rights both of the corporation and of the public are to be considered. A corporation may not be required to use property for the benefit of the public without just compensation for the services which it renders. As is said by the Supreme Court:

"Each case must depend upon its special facts, and when the court, without assuming to itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling public highways are, as an entirety, so unjust as to destroy the value of its property, for all the purposes for which it was acquired, its duty is to take into consideration the interest, both of the public and of the owners of the property, together with all the other circumstances that are fairly to be considered, in determining whether the Legislature, under the guise of regulating rates, exceeded its constitutional authority and practically deprived the owner of the property or its use without due process of law." Covington Turnpike v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Smyth v. Ames, 169 U. S. 465, 18 Sup. Ct. 418, 42 L. Ed. 819.

It is also the settled doctrine of the Supreme Court that "the basis of all calculations as to the reasonableness of the rates charged by the corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public," and that, where the rates are prescribed for the transportation of persons and property only within the limits of the state, "their reasonableness or unreasonableness must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. A state cannot justify unreasonably low rates for domestic transportation considered alone upon the ground that the carrier is earning large profits upon interstate business, over which, so far as the rates are concerned, the state has no control, nor can the carrier justify unreasonably high rates on domestic business on the ground that it will be able, in that way, to meet the losses on its intrastate business." Domestic and interstate commerce, and the value of the property so devoted, must be kept separate in determining reasonableness of rates for domestic commerce.

It has been further ruled by the Supreme Court that, "in order to ascertain the value of the property devoted to the convenience of the public, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present, as compared with the original, cost of construction, and the probable earning capacity of the property, under the particular rates prescribed by the statute, and the sum required to meet operating expenses, are all matters for consideration, and can be given such weight as may be just and right in each case." These matters, however, serve only as guides in ascertaining the real value of the property; and it is upon this value, in most cases at least, that calculations must be made as to the reasonableness of rates fixed by law. Prima facie the rates fixed by law are reasonable. It devolves upon those who contest such rates to show that they are unreasonable. Ordinarily the constitutionality of a statute presents a pure question of law on the face of the statutes. In this class of cases, however, the Constitution forbidding rates to be fixed unreasonably low, a court, when it is

averred that the Constitution has been violated in this respect, must ascertain the facts upon which the reasonableness of the rates depends before it can finally pronounce upon the validity of the statute.

The question before the court on this preliminary hearing, therefore, is not what the final proof will show, but whether complainants by the state of facts now presented, in view of any opposing evidence, show such a probability that the rates will be held to be unreasonable on the final hearing, as justifies the court, in view of all the circumstances, in suspending the operation of the statute until the final decree, and, that appearing, whether the relative harm which may befall the adverse interest by restraining the operation of the statute requires the granting or withholding of the injunction.

Facts Shown by the Bills.

Each of the bills show the number of miles of railroad operated in this state, and the amount of business both domestic and interstate, the gross income derived from each kind of business, the expenses of carrying on the business, the net income derived from each, and the value of their property devoted to domestic commerce.

They insist that the rates charged prior to the passage of the acts complained were reasonably low, fair, and just, and increased the prosperity of the country through which the roads ran, and that their lines of road have been economically and skillfully administered, the expense being reduced to a minimum consistent with proper service, and the discharge of their duties to the public, and that they have charged and received for the transportation of intrastate traffic rates which, though just and reasonably low, were as high as allowed by law or by the competitive conditions and other circumstances affecting traffic on each of said lines.

It is alleged that equipment, material, and nearly every kind of supplies used in their business and wages are higher now than in 1905 and 1906, which were the most profitable years in complainants' history; that taxes have been increased; that complainants have been adding to and improving their depot and terminal facilities and track equipments, but they are not adequate to meet the rapidly increasing demands upon the service; that business is congested for lack of facilities; that they have not the necessary money to meet these wants, and cannot borrow it unless they are permitted to earn a fair and just return. Each of the bills contains a detailed array and statement of figures showing the effect upon their business, if the rates complained of had been in force during their best years. These statements show, assuming that their business will be as good hereafter as in the years mentioned, and conducted at about the same cost, and consisting of same volume, that under the operation of the rates fixed by the statutes some of the complainants would not earn operating expenses, some a little above operating expenses, while the net earnings which any of the bills show, under the reduced rates, judging by past experience, will be 1½ per cent. per annum upon the value of property devoted to domestic commerce. Each of these bills is sworn to by the chief officers of the complainants.

Sufficient Showing Made.

Making due allowance for errors in bookkeeping, and that items may have been charged to operating expenses which should go to capital, and for motives to overestimate the value of the property used in complainants' business, the court finds no reason to doubt that the figures furnish prima facie a fairly safe measure for estimating at this time the value of the property devoted to domestic commerce, and the amount of such business which may be expected to be done in the future, and thereby of measuring the effect of the reduced rates, if put into operation.

The court can know, as every other well-informed person in the jurisdiction knows, that their taxes will be greater in consequence of increased assessments and the imposition of new taxes, and that the tendency of wages, supplies, and equipments is upward. The complainants could not well misstate the actual amount of their income and business. Their property has been given in for taxation under the prevailing custom in Alabama, and is probably worth more than double the amount at which it is taxed. The income under the operation of the former laws is shown to have been moderate. Under these circumstances sufficient is shown to overcome the burden on the part of complainants as to the unreasonableness of the rates. No answers have been filed, and no affidavits presented, impugning the accuracy of the figures and statements of the value, or in any way denying the statements of facts in the bills.

Under well-settled principles of law, under such circumstances, preliminary injunction follows as of course. The eminent counsel for defendants could not, and did not, resist the issue of the preliminary injunctions.

Not a Case for Experimenting with the Property of Complainants.

The court has not overlooked the rule that there are situations where the result of the operations of reduced rates, whether beneficial or otherwise, cannot well be ascertained, except by their actual operation, in which event courts may order such test. But the scant earnings and the probable deficiencies shown in the present posture of the cases cannot bring any of them within the influence of the rule. For the court, on this showing, to order the reduced rates to be put in force to ascertain their effect upon the revenues of complainants, would be as reckless as for a physician to deny a sufficient amount of nourishment to a man in order to ascertain whether it would harm his health.

Not a Suit Against the State.

It has been settled beyond controversy by the decisions of the Supreme Court that a suit against individuals, who are state officers, to prevent their enforcing an unconstitutional statute which deprives a person of property rights, is not a suit against the state, within the meaning of the eleventh amendment to the Constitution. These decisions also uphold the right of complainants to go into equity, which alone can give them any adequate relief in cases of this kind. Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; Smythe v. Ames, 169

U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584; Mississippi Railroad Commission v. Illinois Central Railroad Co., 203 U. S. 341, 27 Sup. Ct. 90, 51 L. Ed. 209.

Complainants Entitled to Preliminary Injunction.

A preliminary injunction must issue against the defendants in each of the cases enjoining the execution of the statute, forfeiting complainants' rights, in consequence of suing in this court, to do domestic business, and the statutes reducing the passenger rate, and classifying and fixing the maximum rates upon 110 articles, until the final decree, upon complainants giving bond, to be fixed by the court, conditioned to pay, or cause to be paid, all loss or damage caused by the issue of the preliminary injunction, including overcharges or excess rates or charges, to every person, firm, company, or corporation which shall sustain any such loss or damage, or pay any such overcharge, excess rate, or charge.

BRISSELL v. KNAPP.

(Circuit Court, D. Nevada. August 5, 1907.)

No. 844.

1. EQUITY—LACHES AS DEFENSE—PREJUDICE TO DEFENDANT.

Laches is not a matter of time merely, but of inequity, and delay will not bar a suit in equity before it would be barred at law by limitation, unless the delay has been prejudicial to the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 206, 242.]

2. SAME.

In a suit in equity to recover shares of mining stock alleged to have been fraudulently acquired by defendant, and to be still in his possession or under his control, a delay of two years before bringing the suit does not constitute such laches as will bar the right to relief, solely because the stock has during that time increased in value, where such increase is not shown to have been due to any action or expenditure of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 212.]

3. TRUSTS — CONSTRUCTIVE TRUST — ENFORCEMENT OF TRUST — REMEDY IN EQUITY.

A bill in equity alleged that defendant as vice president of a mining company held the certificates of stock of a stockholder under a pooling agreement, which required him to return the same to the owner or his assigns on a specified date; that complainant purchased such stock from the owner, taking an assignment of the pool certificates and also of the stock; that defendant was notified of the purchase, but refused to permit a transfer of the stock on the books of the company, and later fraudulently obtained a judgment against the former owner under which he caused the stock to be sold, purchased the same, and caused the certificates to be canceled and new ones issued to himself and others in his interest. By the law of Arizona, where the corporation was organized, no transfer of the stock was valid, except between the parties, until regularly entered on the books of the company. *Held* that, under the facts alleged, defendant held title to the stock in trust for the benefit of complainant, who was the equitable owner; that complainant was without an adequate remedy at law, since, not having the legal title to the stock, he could not recover it by an action at law, nor was he compelled to

resort to an action for damages; that he was entitled to maintain a suit in equity to enforce the trust by compelling defendant to transfer the stock to him or to pay the value of such part, if any, as he could not so transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 153, 559.]

4. SAME—PARTIES.

To such a suit neither the corporation nor the former owner of the stock is a necessary party.

In Equity. On demurrer to bill.

It is alleged in the bill that the defendant, Knapp, then vice president of the Tonapah Home Mining Company, on the 10th day of March, 1903, held, under a pooling agreement, certain stocks issued by said company belonging to Adolf Longabaugh. The terms of the agreement are not disclosed, other than the condition that the stock should be delivered to Longabaugh on August 12, 1904. March 11, 1903, Longabaugh, for a valuable consideration, assigned this stock to the complainant. March 15, 1903, the defendant was duly notified of the assignment. April 1, 1903, the defendant refused to permit this stock to be transferred on the books of the corporation to complainant, unless he was paid $100, which he claimed was due him, the defendant, from Longabaugh. April, 1904, the defendant, Knapp, brought suit against Longabaugh in the justice court of Tonopah township, Nye county, Nev., and caused the stock to be attached, and, although he knew that Longabaugh was in the state, he caused services to be made by publication of summons. Judgment for $239.20 damages, and $29.70 costs, was obtained May 27, 1904. Thereafter the stock was purchased on execution sale by the defendant, Knapp, for the amount of his judgment and costs, the stock certificates were surrendered and canceled, new certificates in lieu thereof were issued, some to Knapp, some to his wife, some to his son, and some to other persons in privity with him. The stock so issued was issued without consideration other than the judgment, and is all under the control of Knapp. It is alleged in the bill that said claim of indebtedness from Longabaugh was fraudulent, and had no foundation in law or in fact, and was not owing by Longabaugh. The stock was worth at the time of the sale $3,608, and at the time suit was commenced it had increased in value to $8,118. The complainant, Brissell, demanded this stock of Knapp prior to its conversion, but was refused.

McIntosh & Cooke, for complainant.

Key Pittman, F. A. Stevens, and W. B. Pittman, for defendant.

FARRINGTON, District Judge (after stating the facts). The first question raised by the demurrer is as to whether complainant's remedy is barred by laches. The rules controlling the application of the doctrine of laches are among the most characteristic in equity jurisprudence. If unreasonable delay in seeking relief is the only element to be considered, courts of equity will usually follow the statute of limitations, if there be one which is applicable. The statute of limitations is an arbitrary rule. The doctrine of laches is flexible. Its application depends upon the circumstances of each case. It will not, save in exceptional cass, be applied unless there are conditions other than mere lapse of time which render the maintenance of the suit inequitable and unjust. Laches is not merely a matter of time. It is a question of equity or inequity, of justice or injustice. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14; Williamson v. Monroe (C. C.) 101 Fed. 322, 330. "Laches," says the Supreme Court of the United States in Galliher v. Cadwell, 145 U. S. 368, 373, 12 Sup. Ct. 873, 875, 36 L. Ed. 738, "is not, like limitation, a

mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

The questions which must be asked and answered in deciding each case are: Has the delay been unreasonable? If so, have the conditions or the relations of the property, or of the parties, so changed that it would be inequitable and unjust to permit the plaintiff to enforce his claim? If, during the long delay, important testimony has been lost or destroyed, and the memory of the original transaction become hazy and indistinct, a court of equity may refuse to grant relief because of its inability to do certain and complete justice. Speidell v. Henrici (C. C.) 15 Fed. 753, 756; Selden's Ex'r v. Kennedy, 52 S. E. 635, 104 Va. 826, 4 L. R. A. (N. S.) 944. If, during the delay, the property in dispute has passed into the hands of innocent purchasers, or the defendant has been lulled into doing something which he would not have done, except he had been led to believe that the claim was abandoned, the rule of laches may be applied. Tazewell's Ex'r v. Saunders, 13 Grat. (Va.) 354, 362. If the defendant has risked large sums of money developing the property, as a result of which it has greatly increased in value, and the plaintiff has suffered this to be done, intending if the venture proved profitable to assert his claim, but, if unprofitable, to allow the defendant to pay all the losses, then in such a case the court will be justified in saying to the plaintiff: You have been guilty of laches, your delay was not without a motive, and that motive was not good. You were silent while the defendant was risking his money and his labor, but now, when there are no chances to take, you are willing to come in and share the profits." The dominant idea in cases where the doctrine of laches has been applied is that the delay has been productive of changes which render it unjust and unfair to prosecute the suit. If the delay has not prejudiced the defendant, there is no laches. Pacific R. R. v. Atlantic & P. R. Co. (C. C.) 20 Fed. 277; Bartlett v. Ambrose, 78 Fed. 839, 24 C. C. A. 397; Williamson v. Monroe (C. C.) 101 Fed. 322, 329; London & San Francisco Bank v. Dexter Horton & Co., 126 Fed. 593, 601, 61 C. C. A. 515; Galliher v. Cadwell, 145 U. S. 368, 373, 12 Sup. Ct. 873, 36 L. Ed. 738; Cahill v. Superior Court, 78 Pac. 467, 469, 145 Cal. 42; Cook v. Ceas, 82 Pac. 370, 147 Cal. 614; Hawley v. Von Lanken (Neb.) 106 N. W. 456; Daggers v. Van Dyck, 37 N. J. Eq. 130; Rozell v. Chicago Mill & Lumber Co., 89 S. W. 469, 76 Ark. 525; Demuth v. Bank, 37 Atl. 266, 85 Md. 326, 60 Am. St. Rep. 322. In Daggers v. Van Dyck, 37 N. J. Eq. 137, the rule is thus stated:

"It is only when the complainant has slept over his wrongs so long that, if relief be given to him, great and serious wrong will be done to the defendant, that laches constitute a complete defense. Here the parties are in almost exactly the same position now that they were at the time the wrong for which redress is sought was done, and relief may be given to the complainant without doing any harm whatever to the defendant."

In Hawley v. Von Lanken (Neb.) 106 N. W. 458, the court says:

"Where it is sought to apply the doctrine of laches independent of the statute of limitations, the true inquiry should be whether the adverse party

has been prejudiced by the delay in bringing the action, and whether a reasonable excuse is offered for the delay, because, if the delay has resulted in no injustice to the adversary, or if it can be excused upon reasonable grounds, then equity will not refuse relief."

In Pacific R. R. v. Atlantic & P. R. Co. (C. C.) 20 Fed. 277, it was held that where the defendant had suffered no prejudice by delay in bringing the suit, and the demand was not barred by the statute of limitations, a demurrer would not lie for laches. In this case at this time laches can only be predicated on the facts stated in the complainant's bill. Under the pooling agreement, as recited in the record, neither complainant nor his grantor was entitled to a delivery of the stock in question until August 12, 1904. This suit was commenced June 7, 1906. While the stock does not all stand in the name of the defendant, it is alleged that a portion of it does, and the remainder was reissued, without consideration, to Mr. Knapp's wife and son, and to other persons in privity with Mr. Knapp. It does not appear that the nature and character of the transaction are obscured, or that any evidence which would have been available to defendant immediately after the alleged conversion of the stock has been lost. So far as the pleadings show, there has been no change in the condition or relations of the parties, or of the property, during the interval of delay, except that the stock has increased in value from $3,608 to $8,118. The doctrine of laches has been applied more rigorously in mining cases than in any other, because such property is liable to great and sudden fluctuations in value; but, even in such cases, courts of equity never lose sight of the rule which requires them to follow the statute of limitations, unless some extraordinary circumstances or conditions are presented which render it inequitable to permit the suit to be prosecuted. There is nothing in the nature of mining property which changes the essential character of the equitable doctrine of laches. In mining suits where laches has been held a sufficient bar, with very few exceptions, it will be found that the controlling fact was not lapse of time, or increase in the value of the property, or its liability to great and sudden fluctuations in value, but the fact that it would be unfair and unjust to permit the complainant to push his claim.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328, Johnston v. Standard Mg. Co., 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480, and Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222, are leading cases on this subject, and in each of them the delay was prompted by speculative reasons; in other words, the plaintiff was waiting to see whether the developments undertaken by the defendant would be successful before he decided whether to assert his claim. In each of these cases the developments and discoveries which made the property valuable were at the risk and expense of the defendant. It is true the bill shows the stock has more than doubled in value, but there is nothing in the record which even suggests that this increment of value was created or earned by the defendant. It does not appear that complainant was waiting the result of any expenditure of money or labor by defendant, or that defendant during the delay devoted any money or labor whatever to the property. The pleadings show simply a fraud-

ulent acquisition of mining stock, an increase in the value of the stock, delay short of the period fixed by the statute of limitations and that the stock still remains in the name of or under the control of defendant. It does not appear that the delay has injured defendant. The mere fact that mining property or mining stock, obtained by fraud, has since become immensely valuable, is not sufficient to justify an application of the doctrine of laches. The profitableness of a fraudulent transaction can never be its justification, and it can never shorten the arm of this court. The circumstances disclosed by the pleadings are not sufficient to constitute laches.

The defendant also contends that the complainant has an adequate remedy at law, and that he has not stated facts sufficient to entitle him to equitable relief. These objections will be considered together. The allegation of the bill is that the certificate of the Tonopah Home Mining Company's stock was duly issued and subsequently placed in the hands of defendant, as vice president of said company, to be held in trust under a pooling agreement for the use and benefit of Longabaugh. The defendant appears to have been charged with no other duty under the agreement than the mere custody of this stock until August 12, 1904, when it was to be delivered to Longabaugh or his assigns. It is alleged that Knapp had full control of the stock, and that it was held in trust; but otherwise it does not appear that he had any other title or interest than the possession of the certificate, or that he had any power to dispose of it. The stock was issued in the name of Longabaugh, and stood on the books of the company in Longabaugh's name. Knapp had neither the legal nor the equitable title. Both titles were vested in Longabaugh. There is nothing in the pleadings indicating a relation of confidence on one side and discretion on the other. Knapp was therefore a bailee, rather than a trustee. Brown v. Spohr (Sup.) 84 N. Y. S. 998; Young v. Mercantile Trust Co. (C. C.) 140 Fed. 61.

It is alleged that on March 11, 1903, this stock was duly sold, transferred, and assigned by Longabaugh to complainant for a valuable consideration, by written indorsement to that effect on the pool certificate, and also by a separate instrument of conveyance. The original certificate of stock remained in the pool in the name of Longabaugh. Four days after the assignment defendant was duly notified of the transaction. The stock was never transferred on the books of the company from Longabaugh to Brissell. Such a transfer defendant, being then the vice president of the company, as well as the custodian of the stock, refused to permit. It appears from the pleadings that the stock never stood in the name of complainant. He had given a valuable consideration, and received an instrument of conveyance, but there was no indorsement or delivery of the stock certificate, or transfer on the books of the company. The Tonopah Home Mining Company is an Arizona corporation, and, under the laws of that territory, no transfer of stock is valid except as between the parties thereto, until the same is regularly entered upon the books of the company. Rev. St. Ariz. 1901, § 773. By this assignment from Longabaugh complainant did not acquire the legal title to the stock, the legal title remained in Longabaugh, and he held it in trust for

complainant as long as the stock stood in his name on the books of the company. The beneficial interest was all that Brissell obtained by the transfer, but this he did acquire. Black v. Zacharie, 3 How. 482, 511, 11 L. Ed. 690; Leyson v. Davis, 17 Mont. 220, 281, 42 Pac. 775, 31 L. R. A. 429; Becher v. Wells Flouring Mill Co. (C. C.) 1 Fed. 276; Lippitt v. American Wood Paper Co., 23 Atl. 111, 15 R. I. 141, 2 Am. St. Rep. 886. The only rights which complainant has are based upon this assignment from Longabaugh. If the assignment is invalid, he has no interest in the stock, and he cannot maintain this suit, even though Knapp's judgment against Longabaugh was rotten with fraud. On the other hand, if the assignment is valid, and its validity does not appear to be questioned by the demurrer, his beneficial interest is neither increased nor diminished by defendant's subsequent fraudulent transactions. The relation between Longaabaugh and Knapp was that of bailor and bailee, but the relation between Longabaugh and complainant, after the assignment, was that of trustee and beneficiary. In order to secure the legal title, it was essential that the stock be transferred on the books of the company, and to such a transfer complainant was entitled. Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299, 305, 7 L. Ed. 152; 2 Thompson on Corp. §§ 2425, 2430; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315. Defendant, being then vice president of the company, as well as custodian of the stock, refused to permit the stock to be transferred to complainant, and complainant never did secure either the legal title to the stock or the certificates of stock themselves. In the following year, by means of an alleged fraudulent judgment and execution sale thereon, after he had been duly informed of the equitable assignment to complainant, Knapp caused the certificates of stock to be levied upon and sold. He became the purchaser for the amount of his judgment, and later caused the original certificates to be canceled and new certificates to be issued, some to himself, some to his wife, some to his son, and some to other persons in privity with him. It is alleged that all of this stock is still under his control, and that no consideration was given by any of the holders except Knapp himself. These persons are not innocent purchasers. They are apparently holding the legal title to the stock for the use and benefit of Knapp, and are to return it to him whenever he so directs. The effect of the execution sale and reissue of the stock was to take the legal title out of Longabaugh and vest it in Knapp and his friends. Longabaugh has no interest in the stock, either legal or equitable, as against complainant. It does not appear that he claims any, and, if he were to make such a claim against complainant, he would be estopped.

No relief is sought against Longabaugh, and there is no allegation in the bill which would support a decree against him. He is not a necessary party to the cause of action set out in the pleadings, and the demurrer in this respect must be overruled. Mechanics' Bank v. Seton, 1 Pet. (U. S.) 298, 306, 7 L. Ed. 152.

The act of defendant in securing for himself the legal title to the stock when he knew it belonged to another was fraudulent. "The taking of a legal estate after notice of a prior right makes a person a mala fide purchaser (and not that he is not a purchaser for a

valuable consideration in every other respect). This is a species of fraud, and dolus malus itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate." Le Neve v. Le Neve, 3 Atk. 619; Hardy v. Harbin, 4 Sawy. 536, 550, Fed. Cas. No. 6,061; Weston v. Bear River & Auburn Co., 6 Cal. 425. Knapp secured the legal title to the stock after it had been assigned to complainant, after he knew of the assignment, by refusing to permit its transfer on the books, and by means of a fictitious claim and a fraudulent judgment against Longabaugh. The beneficial interest held by complainant was not divested by this act. A court of equity will impress upon this stock in Knapp's hands and under his control, and wherever it may be found, until it reaches the hands of an innocent purchaser, a constructive trust in favor of complainant. 3 Pom. Eq. Jur. § 1053; 1 Perry on Trusts, § 166; 1 Pom. Eq. Jur. (3d Ed.) § 155; Eaton on Equity, § 194; Dow v. Berry, 18 Fed. 124.

The fact that the property involved here is corporate stock does not change the rule. "A trust may arise or be created with reference to personal property upon the same facts and circumstances which would give rise to a trust in real estate." Levi v. Evans, 57 Fed. 677, 682, 6 C. C. A. 500; 4 Pom. Eq. Jur. p. 2763. The doctrine of trusts, and especially of constructive trusts, has been created, interpreted, and enforced by equity, not by the common law. An action at law must be based upon a legal title or a legal right. An equitable title cannot be set up in an action at law, and, when the legal title is held by one person and the equitable title by another, the latter must look to a court of equity for the protection and preservation of his rights. Therefore the subject of trusts naturally falls within the exclusive jurisdiction of equity. Oelrichs v. Spain, 15 Wall. 211, 228, 21 L. Ed. 43; Shainwald v. Davids (D. C.) 69 Fed. 687, 698; Clews v. Jamieson, 182 U. S. 461, 479, 21 Sup. Ct. 845, 45 L. Ed. 1183; 1 Pomeroy, Eq. Jur. § 151. "An element of trust in the case," says the court in Oelrichs v. Spain, supra, "always confers jurisdiction in equity." "All possible trusts," remarks Justice Peckham in Clews v. Jamieson, supra, "whether express or implied, are within the jurisdiction of the chancellor." It is true the federal statute provides 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." Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]. This, however, is merely a statutory expression of the equitable rule. In no sense does it enlarge or contract the equitable jurisdiction of the federal courts, or exclude them from any recognized field of equitable jurisdiction. Whitehead v. Shattuck, 138 U. S. 146, 150, 11 Sup. Ct. 276, 34 L. Ed. 873; Dow v. Berry (C. C.) 18 Fed. 121, 125. At section 137 of volume 1 of the third edition of his work on Equity Jurisprudence, Prof. Pomeroy uses the following language:

"The exclusive jurisdiction extends to and embraces, first, all civil cases in which the primary right violated or to be declared, maintained, or enforced—whether such right be an estate, title, or interest in property, or a lien on property, or a thing in action arising out of contract—is purely equitable,

and not legal, a right, estate, title, or interest created by equity, and not by law. All cases of this kind fall under the equitable jurisdiction alone, because of the nature of the primary or substantive right to be redressed, maintained, or enforced, and not because of the nature of the remedies to be granted, although in most of such instances the remedy is also equitable. It is a proposition of universal application that courts of law never take cognizance of cases in which the primary right, estate, or interest to be maintained, or the violation of which is sought to be redressed, is purely equitable, unless such power has been expressly conferred by statute."

In Kilgour v. New Orleans Gaslight Co. et al., 2 Woods (U. S.) 144, Fed. Cas. No. 7,764, one of the defendants by fraudulent assessments had secured the transfer to his own name of shares of stock in an incorporated company. The court said:

"It is clear that there is no adequate remedy at law. A money judgment against Attrill for his fraudulent conversion of the stock of complainant would not give complainant the relief he wants. The purpose of the bill is the recovery of complainant's stock, of which he has been fraudulently dispossessed by Attrill, who claims title to it. Clearly this result can only be reached by the decree of a court of equity."

In the case of Hagan v. Continental National Bank, 81 S. W. 171, 182 Mo. 319, where the pledgee of stock had, by means of a fraudulent sale, purchased the stock in his own name, and caused the same to be transferred on the books of the company in the name of other parties, and it appeared that the defendant still controlled and could produce all of the stock, it was held that equity had jurisdiction.

Defendant has cited a number of authorities to the effect that equity will not, in general, "decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality." This rule is correct, and has been frequently applied to contracts for the sale of corporate stock. Equity has uniformly refused relief, except when it appeared that there was some special and cogent reason why the vendee should have the particular stock contracted for. In such cases the underlying right is legal. It is based on contract, and the common law, as a rule, provides ample and adequate relief for the violation of such a right. But in a case like the present complainant's rights are purely equitable; his title is equitable. The legal title is in defendant. The shares of stock have been transferred on the books of the company, and stand in the name of defendant. The relation between defendant and complainant is that of trustee and beneficiary. The law falls short of the remedy which complainant asks, and to which he is entitled. Equity alone in such cases can afford him ample relief by the restoration of his property. To contend that complainant must resort to an action in damages, as for a wrongful conversion of the stock, is to ignore the facts set out in the bill. If these facts are true, complainant is the equitable owner of the stock, and in equity is entitled to have his property. A court of law cannot decree a return of this stock, and for this reason the legal remedy is incomplete. In Krohn v. Williamson (C. C.) 62 Fed. 869, the suit was between the promoters of a bridge company. The promoters were to receive a certain amount of the stock and bonds of the company for their services. Two of the promoters,

however, by indirect means, secured to themselves and in their own names additional stock from the company. It was contended that the complainant had an adequate remedy at law, but it was decided that the defendants held complainant's share of the additional stock as trustees. Judge Taft, at page 877, used the following language:

"It is true that the relief asked is in the nature of a decree for the specific performance of an obligation to transfer personal property, and that ordinarily courts of equity will not afford such a remedy. * * * But the controlling reason why, in this case, the delivery of the stock in specie should be decreed, is that the defendants hold it in trust for the complainant. * * * The court as a court of equity acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust, and, having jurisdiction on this ground, may give such full relief as the nature of the case requires. Johnson v. Brooks, 93 N. Y. 337; Stanton v. Percival, 5 H. L. Cas. 257; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Dec. 621."

In Pooley v. Budd, 14 Beav. 34, the Ystalyfera Iron Company, one of the defendants, had sold a quantity of iron. The full price had been paid, but afterwards the company refused to deliver the goods. In deciding the case the court held that, inasmuch as the company had received full pay, they had no claim upon or interest in the iron arising from the contract, and that they had become mere trustees of the iron sold for the benefit of the real purchaser, or the person entitled to claim it under him, and that a court of equity had jurisdiction. At page 43 the court uses the following language:

"It is and has long been the law of this court that it will not lend its assistance to enforce the specific performance of ordinary contracts for the sale and purchase of personal chattels, unless, as in the case of Buxton v. Lister, 3 Atk. 383, there be something very special in the nature of the contract. On the other hand, if a trust be created, the circumstance that the subject-matter to which the trust is attached is a personal chattel will not prevent this court from enforcing the due execution of that trust."

To the same effect are the following: Hill v. Bank, 44 N. H. 567; Kimball v. Morton, 5 N. J. Eq. 26, 43 Am. Dec. 621; Young v. Fox (C. C.) 37 Fed. 385.

The fact that complainant asks a judgment for the value of the stock which cannot be returned does not affect the equitable jurisdiction. If the stock in defendant's hands was impressed with a trust in favor of complainant, the proceeds of such stock in his hands were subject to the same equity. This is elementary, and the rule is undoubtedly the same as to stock issued to the wife and son of defendant, even though the title thereto may never have stood in defendant's name on the books of the company. In cases where the wrongdoer has no title originally, equity frequently converts such a party into a trustee, as when a thief sells or exchanges stolen goods for money or securities equity will lay hold of the substituted property in the hands of the thief, or in the hands of his assignees with notice, and treat it as a trust, and the holder as a trustee, whether it be money, stock, chattels, or real estate. Equity will never permit a wrongdoer to profit by his fraud. Wood v. Perkins (C. C.) 57 Fed. 258, 260; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152.

The objection that the Tonopah Home Mining Company is an in-

dispensable party to this suit is not well taken. The bill does not show that the corporation has any interest in the stock in question, and no relief is asked against the company. Williamson v. Krohn, 66 Fed. 655, 661, 13 C. C. A. 668.

The suggestion that, if complainant has a cause of action, it is not against defendant, but against the Tonopah Home Mining Company, is entirely without merit, and the same may be said as to other objections raised by the demurrer and not already discussed in this opinion. The complainant has set out facts sufficient to entitle him to equitable relief.

The demurrer is therefore overruled.

CONKLIN et al. v. R. P. & J. H. STAATS CO.

(District Court, D. New Jersey. July 24, 1907.)

WHARVES—NEGLIGENCE—INJURY OF SCOW AT PIER—SUNKEN PILE.

Respondent, as contractor, was constructing the piers of a steamship company at Hoboken to replace others which had burned and had contracted with libelant to furnish crushed stone delivered on scows. It had removed all stubs of piers extending above low water, and an independent contractor had dredged the botton under and alongside the old piers to a depth of 25 feet, and removed all other stubs found, and had also taken proper measures to ascertain that none remained. By agreement libelant left five scows loaded with stone which was to be used by respondent as required during the winter. Respondent caused one of such scows to be moved from one side of a slip to the other, and there made fast to the pier to which others of the scows were also tied up. A very strong wind blowing from the west for two days caused an extraordinary fall of the tide, and as she settled such scow was pierced by an unknown sunken pile, and capsized and injured. The pile or stub appeared to be an old one, but the span alongside the pier had been used by other vessels during the work with safety, and it was shown that respondent had dragged the bottom to discover any obstruction. *Held*, that conceding that respondent owed the duty of reasonable care to protect the vessel, as bailee or otherwise, such care had been exercised, and that no negligence or fault was shown which rendered it liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Wharves, §§ 36, 37.]

In Admiralty.

Walter L. McDermott, for libelants.

J. D. Beedle and R. S. Hudspeth, for respondent.

CROSS, District Judge. The libel in this case was filed for the purpose of recovering damages for injuries to the scow Sarah while used for carrying crushed stone, also for the loss of her furniture, tackle, cargo, etc. The respondent is a New Jersey corporation, and at the time of the injury to the scow was engaged in building docks and piers for the North German Lloyd Steamship Company, on the Hudson river at Hoboken, to replace docks and piers which had been destroyed by fire.. The contract involved work of great extent and importance, and which, although commenced in 1900, was not completed and turned over to the steamship company until 1906. A fire had destroyed all the superstructure of the old piers, but had left the stumps

of a large number of piles standing in the river bed, and the first work of reconstruction required the removal of these old and partially burnt piles. This work, in so far as it embraced the removal of the piles which showed above low water, was done by the respondent. Then the necessary dredging followed, which, when completed, was of a depth of 30 feet below low water, but at the time of the accident was of a depth of 25 feet only. That work, however, was not performed by the respondent, but by an independent contractor. When the respondent had pulled all of the piles which showed above low water from the whole or a portion of an old pier site, the dredging was begun over the area thus cleared, during which operation any piles found below low water were removed by the dredgers as a necessary incident to the continuance of their work. The dredging, when completed, embraced the entire sites of the old piers and slips, but at the time of the accident extended only to the former pier sites and a margin of 25 to 40 feet or more on either side thereof. There is some conflict in the testimony as to when this preliminary dredging was completed, but I think it sufficiently appears that it was substantially finished during the year 1901. Some work of that character, however, was performed during the entire period of construction. The piers were from 800 to 950 feet long, and the slip in which the accident occurred was 250 feet wide.

A contractual relationship existed between the parties to this suit, which was established in the following manner, and for the following purposes: In January, 1901, the Rockland Lake Trap Rock Company, which is shown to have been the selling agent of the libelants, opened negotiations with the respondent for the delivery of crushed stone at the piers, to be used in their construction. These negotiations were carried on by the Rockland Lake Trap Rock Company, as agent for the libelant. On January 31, 1901, the Staats Company accepted the proposal of the libelant to furnish 20,000 cubic yards of broken trap rock, to be delivered f. o. b. scows at their work at Hoboken, N. J. More definite information, however, was to be given later as to the time when the stone would be required. Pursuant to this contract, stone was delivered during the following season and until navigation was about to close in the fall of 1901. The respondent, requiring some stone for its use during the winter season, communicated with libelant by a letter dated December 13, 1901, in which it requested that 3,000 cubic yards of stone should be delivered to them before navigation closed, and that the scows laden with the stone should remain in Hoboken during the winter months. This proposal was accepted. The respondent's letter making the request contained the following paragraph:

"Confirming our conversation to-day with reference to the delivery to us of several scow loads of broken stone for use in our work at Hoboken during the winter, we understand that you will send us five scow loads of such stone, containing about 3,000 cubic yards in all, and will deliver the same alongside the North German Lloyd docks at Hoboken, within the next few days, allowing them to remain there during the winter months. Also that we may use the stone from these scows as occasion requires without charge for demurrage to us until such time as a scow is taken from the lot for our use, and demurrage shall only accrue on that scow after sufficient time has elapsed in

which to unload the scow at a minimum rate of 75 yards per day (Sundays and holidays excepted). The scows while lying in the slip to be solely at your risk, and you will provide such men as may be needed to look after them, and when a scow shall have been unloaded by us you will remove it from the premises."

Pursuant to this arrangement, the scow Sarah, laden with crushed stone, was towed to Hoboken, N. J., and tied up on the north side of Pier No. 2, December 29, 1901. Her tie up at that point was made pursuant to a telephone message received by the libelant from respondent's office. The scow, still laden with the stone, lay at this mooring until January 3, 1902, on the evening of which day a tugboat The Castor, belonging to the North German Lloyd Steamship Company, took her in tow, and conveyed her over and across the slip between piers 1 and 2 to the south side of pier No. 1, about 150 feet from its end, and directly opposite the point at which it lay while at pier 2. Two other scows of libelant were already tied to the south side of pier 1, but at points nearer the bulkhead line. The removal of the Sarah was made by the tug at the instance of the respondent. The scow had a draft of 10 feet. She was two years old, in good condition, and in charge of a captain, so called, although he was little more that a caretaker, since the scow was without any means of self-propulsion. The scow was moored on the south side of pier 1, breast off five feet, and was tied with two breast and two spring lines. The tide was ebbing rapidly, aided by a strong westerly wind which had been blowing for two days, and which had caused the tide at the time of the accident to fall from 18 inches to 2 feet lower than usual. After the scow had laid at her new mooring about three-quarters of an hour, she began to list away from the pier. Her captain sounded the water around her with a 16-foot pole to see if the water were shallow, but he found no bottom. He then went down into the hold, and heard water beginning to trickle slowly in. While he waited on the scow, a pile broke through her bottom, and she careened over gradually to the port side. He then went up the pier to look for help, and, when he came back a few minutes after, the scow lay bottom up with one corner on the pier, and the other in the water. He tried to ease up the lines to see if she would slide off, but she did not. While she lay there, the watchman says he saw a jagged hole in her bottom 16 or 17 inches wide by about 2 feet in length. The hole was about one-third of her length from the bow, and about two feet from her starboard side, which had lain next to the pier. Subsequent examination of the scow at a dry dock to which she was taken for repairs showed that the injury to her was in all probability caused by her bottom coming in contact with a sunken pile, which, owing to the weight of her load, was forced through and rammed up in her hold as far as it could go, about nine feet, and then, when the scow capsized by the spilling of its load, was broken off and a piece thereof, about eight feet in length, left in her hold in a reclining position between the stanchions and cross-pieces. The portion of the pile found in the scow was a little less than 15 inches in diameter, about 9 feet long, and was in good condition, although it had a few barnacles on it. At one end appeared what is called a "battered break," as though a heavy weight had rested

on it. This break had an old appearance, while at the other end was a new and longer break. It is apparent from the evidence that the accident happened by reason of the fact that the scow had been moored over a hidden pile; but how or when the pile came there is not disclosed. The important question for consideration therefore is whether the respondent was negligent in the premises. The case was tried in the Supreme Court of New Jersey, before the late Judge Dixon, who granted a nonsuit. His action in that respect was subsequently reviewed by the Court of Errors and Appeals on writ of error, and affirmed. Conklin et al. v. R. P. & J. H. Staats Co., 70 N. J. Law 771, 59 Atl. 144. The court, among other things, held in that case that no negligence on the part of the defendant had been shown. Of course, that judgment is not controlling here, since the evidence now presented is not altogether the same as that presented in the state court. However, certain legal propositions were there adjudged which may be of service at the present time.

The question has been raised whether the respondent, if liable, is liable as bailee or under the law of invitation. The libelant has suggested that the scow was in law turned over to the respondent as bailee when at its suggestion she was taken by the tug and shifted from one pier to the other. That the respondent was not a wharfinger within the strict signification of that term does not seem to require serious discussion. Such a person has been defined as one who maintains for hire a wharf for the purpose of accommodating vessels in the loading and unloading of freight, or the receipt and landing of passengers. This definition, while not complete, answers the present purpose. There are no facts disclosed which would warrant a finding that the respondent occupied any such position; but it is quite unnecessary to determine in which of the above relations the respondent stood toward the libelant, since, as was decided in the state court, his duty and responsibility in either capacity would be the same. The respondent in any case was not an insurer of the safety of the scow, nor, if liable, is it so merely because of the happening of the accident, but rather because it failed to exercise reasonable and ordinary care and prudence in the discharge of some duty which it owed to the libelant. Where reasonable care is employed in doing an act which is not in itself illegal or inherently likely to produce damage to others, there will be no liability, although damage, in fact, ensues. The exercise of reasonable care does not require the adoption of such precautions as will absolutely prevent accident and injury. As was said by Chief Justice Beasley in Marshall v. Welwood, 38 N. J. Law, 339, 343, 20 Am. Dec. 394:

"No man is in law an insurer that the act which he does, such acts being lawful and done with care, shall not injuriously affect others."

And, again, on page 345 of 38 N. J. Law (20 Am. Dec. 394):

"Everywhere in all the branches of the law the general principle that blame must be imputable as a ground of responsibility for damage proceeding from a lawful act is apparent."

The principle of law just enunciated is elemental, and the extracts given are only warranted because of the clarity and conciseness with which the principle is stated. Nor again does the exercise of ordinary

and reasonable care require the adoption of every precaution, and the exercise of every known means to prevent injury or accident, but only of such precautions and means as a reasonably prudent and careful person would, under the existing circumstances, adopt and use. As applicable to wharfingers the degree of care required will be found laid down in Smith v. Burnett, 173 U. S. 430, 433, 19 Sup. Ct. 442, 443 (43 L. Ed. 756); where the Chief Justice, speaking for the court says:

"Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and, if there is any dangerous obstruction, to remove it or to give due notice of its existence to vessels about to use the berths, at the same time the master is bound to use ordinary care, and cannot carelessly run into danger." (Citing cases.)

This principle seems to apply in all cases where docks or wharves are in the possession and under the control of owners, lessees, or occupants. It is a universal rule that where a source of danger is known to one in control of a wharf or dock, and he fails to take means to obviate or remove it, or to warn a person about to use the dock or wharf of the hidden danger, he is responsible. It requires no argument to show the reasonableness of the principle just stated. But the liability of an owner, lessee, or other person in control of a wharf does not stop there. The rule is broader and extends his liability to hidden dangers of which he had neither notice nor knowledge, but of which by the exercise of reasonable care and diligence he might or should have known. Among the numerous cases which support this broader proposition the following may be mentioned: Nickerson et al. v. Tirrell, 127 Mass. 236; The John A. Berkman (D. C.) 6 Fed. 535; Manhattan Transportation Co. v. Mayor, etc. (D. C.) 37 Fed. 160; The Annie R. Lewis (D. C.) 50 Fed. 558; Onderdonk v. Smith et al. (D. C.) 21 Fed. 588; Penn. R. R. Co. v. Atha (D. C.) 22 Fed. 920; The Nellie (D. C.) 130 Fed. 213; Philadelphia & R. Ry. Co. v. Walker (D. C.) 139 Fed. 855. This is the general rule, and I do not think any case can be found which establishes any broader liability under circumstances such as are here disclosed. There is no pretense or claim that the respondent had actual knowledge or notice of any danger, hidden or exposed, at or near the point where the scow Sarah was moored, so that the only question for determination is whether it exercised reasonable care and prudence in the premises. As already stated, it matters little what specific relationship the respondent sustained toward the libelant, and, in the further consideration of this case, I shall assume that the respondent owed a duty to the libelant to exercise reasonable care and prudence to see that the place in question was free from danger, notwithstanding the state court, in the suit above referred to, held that no such duty existed, and I shall also assume that the respondent was not absolved from liability for any accident to the scow by reason of anything contained in the letter of December 13th, above quoted.

In my opinion the evidence does not show that the respondent was negligent, admitting that it owed a duty to the libelant. Prior to the accident all of the old and burnt piles which extended above low water had been removed. Furthermore, after this was done, the site of the old piers and waters adjacent thereto were dredged, so that there was

a depth of 25 feet of clear water at low tide. This dredging included the slip between the piers, and in the use of the dredge, whenever an old or sunken pile was struck, it was removed. The dredging in and of itself, from the manner in which it was conducted, would seem to have necessarily disclosed any hidden obstruction of the character which apparently caused the accident in question. The cut made by the dredge was also sounded and tested from time to time, as hereinafter indicated. Furthermore, it appears that clusters or groups of piles were driven in the mud from the ends of the piers back to the bulkhead in a line parallel with and 60 feet from the piers, so that between the groups of piles and the pier was a clear waterway of about 60 feet in width and that a waterway of that width and character existed on the south side of pier 1 at the time of the accident. The testimony shows that these clusters or groups of piles were driven for the protection of the piers during construction, so that, when vessels approached the piers for whatever purpose, they would have to come through this waterway, and be warped in and through it to any desired point along the pier. It has already been remarked that two of the respondent's scows had been warped in and along the south side of pier 1, in the manner above stated, and at the time of the accident to the Sarah were tied to that side of pier 1, but nearer to the bulkhead than where the Sarah was subsequently tied. The dredging was not done by the respondent, but was done by a company known as the "Dubois Company," under the direction of the engineer of the North German Lloyd Steamship Company, and the dredging company determined that the water was clear by means of a sinker and line, and also by means of a pipe with a rope at each end fastened to boats and dragged along below the surface of the water. The testimony on behalf of the dredging company is that there were no obstructions in the water or mud after the dredges went over, and that there was nothing left there, that by the method of dredging adopted they could surely have detected whether or not any obstruction remained, and, although the evidence shows that this was not the only means of ascertaining that the bottom of the river was free from obstruction, one of the witnesses swears that no other test was needed. It also appears that, before the respondents started to drive piles for the purpose of building thereon the substructure of the new piers, they hung a rod down from two boats which was dragged through the water to see if it met any obstruction, that this bar was lowered in the water from 10 to 15 feet, and that the water was free from obstruction to that grade. Again, after the removal of the piles, and after the dredging had been completed, and after the substructure of the piers had been built, it appears that vessels of various kinds, such as two and four masted schooners, lighters, barges, mud scows, and piledrivers, some of them loaded with timber, stone, and granite, had frequently been warped into the waterway between the clustered piles and the south side of pier 1; that this was done at all stages of the tide; and that no obstructions had been discovered at the point of the accident. It seems to me that all was done in this case that ordinary care and prudence required. It should be remembered in this connection that the Sarah was not anchored at an old and established pier,

but that there and elsewhere in the vicinity new construction was and had been in progress for some time. The facts in my judgment would justify a conclusion that extraordinary care was used, rather than a finding that ordinary care was not used. It is possible that something more might have been done, but I do not think it was necessary in order to exonerate the respondent from liability. As reasonably prudent and careful men, the respondents were justified in believing that the water at the point in question was free from dangerous obstruction; they were not put upon inquiry, and no sufficient circumstances existed to put them upon inquiry. The counsel of the libelant in his brief says, "The presence of the pile is the best evidence that the respondent did not use due care"; but in this statement he is clearly wrong. The only question is: Did the respondent exercise due care to discover the pile? If it did, it is absolved from liability, notwithstanding its efforts in that direction failed. There is another view of the case, however, which might reasonably be taken, and that is that the accident happened because of an unusually low tide. Ordinary care only requires reasonable protection against ordinary dangers, such dangers as might naturally be expected to exist. The tide at the time of this accident, by reason of the very strong and exceptional wind which had been blowing for two days, was undeniably from 18 inches to 2 feet lower than usual. The testimony shows that it was an extraordinarily low tide, and, if the accident occurred by reason of a submerged pile, which under all ordinary conditions of wind and tide would have been harmless, it must be attributed, I think, to the unusual conditions then existing, rather than to the failure of the respondent to exercise such care as would anticipate and provide against the unexpected. Whether such an unusual condition had ever prevailed before in the experience of the parties the evidence does not disclose, but, if it had, doubtless a greater degree of care would have been imposed on the respondent. Furthermore, there is evidence tending to show that the pile which caused the injury might have drifted to the place where the accident happened, and have become caught and partially imbedded in the mud, which was soft and deep at that point, and, while in this position, have come in contact with the bottom of the scow, but in the view I have taken of the case it is unnecessary to consider that testimony at length.

The libel will be dismissed with costs.

WEIR v. WINNETT et al.

(Circuit Court, D. Nebraska. July 26, 1907.)

No. 20.

1. INJUNCTION—PRELIMINARY INJUNCTION—GROUNDS.

To warrant the granting of a preliminary injunction, complainant must generally present a clear title and set forth acts done or threatened which will seriously or irreparably injure his rights under such title, unless restrained. It is not sufficient that such an order will do no harm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

2. SAME—THREATENED IRREPARABLE INJURY.

Immediately on the going into effect of a state statute regulating rates of charge by express companies the Attorney General of the state commenced a suit in a state court against defendant, an express company, to obtain an adjudication upon the validity of the statute and enforce obedience to its provisions. The defendant removed such suit into the federal court, and also commenced another suit in such court against the Attorney General and other officers of the state, alleging the unconstitutionality of the statute, and moved for a preliminary injunction to restrain its enforcement. On the hearing it was shown that no steps to enforce the statute had been taken, except the institution of the prior suit, and defendants disclaimed any intention of taking such steps until its validity had been adjudicated. *Held* that, the issues in the two suits being the same, no injury was threatened to complainant which required or authorized the granting of a preliminary injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

3. ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—FEDERAL AND STATE COURTS.

The pendency of a suit in a state court to obtain a judgment in personam is not a bar to the institution and prosecution of a suit in a federal court involving the same subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 87.

Pendency of action in state or federal court as ground for abatement of action in the other, see notes to Bunker Hill & Sullivan M. & C. Co. v. Shoshone M. Co., 47 C. C. A. 205; Barnsdall v. Waltmeyer, 73 C. C. A. 521.]

In Equity. On motion for preliminary injunction.

Charles J. Greene and Ralph W. Breckenridge, for complainant.

William T. Thompson, Atty. Gen., and Halleck F. Rose, for respondents.

W. H. MUNGER, District Judge. This is an application for a temporary order of injunction.

The Legislature of the state of Nebraska passed an act, which was approved by the Governor April 5, 1907, requiring all express companies doing business within the state, within 30 days after the passage and approval of the act, to file with the railway commission a schedule of rates and classifications charged for the transportation of money or merchandise within this state by such company which was in force the 1st of January, 1907. The act further prohibited express companies from charging and receiving for the transportation of merchandise within the state of Nebraska any sum exceeding 75 per cent. of the rate as shown in such schedule, until the railway commission shall have provided a greater rate. The act provided that it should take effect on and after its passage and approval; but the act did not, even in its title, or in the body, or anywhere, recite that any emergency existed. Section 24, art. 3, of the Nebraska Constitution provides:

"No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct."

The Legislature having adjourned on the 5th day of April, 1907, the act without an emergency provision would not take effect until July 5, 1907.

On July 5, 1907, the state of Nebraska, by William T. Thompson, its Attorney General, instituted an original proceeding in the Supreme Court of the state against the said Adams Express Company, setting forth the passage of the act and all of its provisions, and alleged that the defendant, Adams Express Company, was violating the act and would continue to violate the act unless restrained by the judgment of the court. The defendant express company filed in the Supreme Court of the state a petition for removal of the cause into this court; said petition being accompanied by the required bond, which bond, with the sureties, was approved by said court.

Subsequently, and on July 10, 1907, the plaintiff herein instituted this proceeding, alleging that the legislative enactment referred to, if enforced, will violate the fourteenth amendment to the Constitution of the United States, in that it will deprive the plaintiff of its property without due process of law, alleging 75 per cent. of the rate as shown by their schedule to be in force on January 1, 1907, would require the express company to do business within the state of Nebraska at a loss —in other words, that the earnings and income of the company, based on the business for the year 1906, at 75 per cent. of the charges, would not equal the expenses of conducting the business—and asked that the defendants be enjoined from in any manner seeking to enforce said legislative enactment, and for a temporary order of injunction pending the final hearing. The defendants have each filed an affidavit showing in substance that they have not taken any steps, have not threatened to take any steps, and do not contemplate taking any steps, seeking to enforce any of the penal provisions of the statute, or to enforce the statute in any manner, excepting the suit brought by the state in its Supreme Court for the purpose of testing the validity of said enactment, and that they do not contemplate the enforcement of any of its provisions until after such question can be determined; that said action was brought in the Supreme Court of the state promptly for the purpose of having a speedy determination of the question.

That this court has jurisdiction to enjoin the defendants, members of the state railway commission, and the Attorney General, from taking any steps to enforce a statute, the enforcement of which would result in depriving plaintiff of its property without due process of law, has so often been determined by the Supreme Court of the United States that it is no longer an open or debatable question. That the allegations of the plaintiff's bill show that the enforcement of the statute in question would deprive it of its property without due process of law is clear and unquestioned; but this alone does not entitle plaintiff to a temporary order of injunction. As said by the Circuit Court of Appeals in the case of Stevens et al. v. Missouri, K. & T. Ry. Co. et al., 106 Fed. 771, 45 C. C. A. 611:

"The prerequisites to the allowance of a preliminary injunction are that the complainant must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by defendant which will seriously or irreparably injure his rights under such title, unless restrained."

The single question presented in this case is whether or not, under the facts set forth, plaintiff has shown such acts done or threatened by defendants, which will seriously or irreparably injure it in its rights, pending the final hearing and determination of the case, unless aided by a temporary restraining order.

The only act shown to have been done or threatened by the defendants is the causing of the suit before mentioned to be instituted in the Supreme Court of the state. That suit—its objects and purpose—was to have the validity of the act in question determined, and the duty of the express company under all the facts and circumstances to obey its provisions. If the act by its enforcement would deprive the express company of its property without due process of law, that fact could properly be shown in that case, and, if shown, would defeat complainant in that case. In other words, the ultimate purpose of that action was the same as the purpose of this suit before the court, namely, to determine whether or not the act was so far valid under the provisions of the Constitution of the state and of the United States that it should be obeyed by the express company. In the suit instituted in the Supreme Court by the state it is claimed that the act is valid and should be obeyed by the express company; in the suit in this court it is claimed that the act is invalid and the express company should not be required to obey it; each action to determine the same ultimate result, but in different form.

The action brought by the state in its Supreme Court, as has been stated, is at present pending in this court by virtue of the removal proceedings. No steps have been taken to have the case remanded to the state court, and we are not advised that any such steps are contemplated. If both cases remain in this court, they will doubtless be heard together. The question, then, is: Will the prosecution of such a suit, in which the identical question which is presented in this case may be determined and adjudicated, result in irreparable injury, pending the hearing in this case? I think clearly not.

It is, however, urged by counsel that, as defendants disclaim any purpose to enforce the provisions of the act until an adjudication is had as to the validity of the statute, no harm can or will result to defendants by the granting of a temporary order of injunction. A similar proposition was answered by the Court of Appeals of this circuit in Teller v. United States, 113 Fed. 463, 51 C. C. A. 297, as follows:

"There must be, in cases of this kind, as in all others seeking equitable relief in the nature of a restraining order, a reasonable ground to believe that some threatened or probable injury will result, before a court of equity will subject a defendant to the annoyance, cost, and expense incident to a restraining order. It is not sufficient that such an order will do no harm. It should at least be made to appear that it would do some good."

It not appearing to the satisfaction of the court from the facts shown that the complainant will sustain any irreparable injury before the final determination of this action, the temporary order of injunction is denied, with leave to renew the application at a future date, should changed conditions require.

The defendants have filed a plea in abatement, alleging that the suit instituted in the state Supreme Court, and which has been removed

into this court, is a bar to the present action. This plea is overruled. It is sufficient to say that the parties are not the same and that the pendency of a suit in the state court to obtain a judgment in personam is not a bar to the institution and prosecution of a suit involving the same subject-matter in the federal court.

SKINNER & MOUNCE CO., Limited, v. WAITE et al.

(Circuit Court, D. Idaho, N. D. July, 1907.)

No. 383.

PROCESS—SERVICE—PRIVILEGE DURING ATTENDANCE AT COURT.

A person going into another state as a witness or as a party defendant in a suit therein, either nominally or as a defendant in interest, is exempt from process in such state while he is necessarily attending there in respect to such trial, at least in the absence of a state statute unequivocally abrogating such exemption.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 146. Following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 599; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 393.]

On Motion to Quash and Vacate Service of Summons.

George W. Tannahill and S. O. Tannahill, for plaintiff.

James E. Babb, for defendant Waite.

DIETRICH, District Judge. The defendant Waite never resided in the state of Idaho, but at all times referred to in the record was a resident of the city of Portland, in the state of Oregon. He owned real estate in Nez Perce county, Idaho, the title to which he conveyed to the defendant Burns as security for a loan. This suit was commenced in the state district court of Nez Perce county to recover from the defendants $2,500 alleged to be due to the plaintiff on account of commission for the sale of this real estate. No service was made on Burns. Waite, having been served with process in Nez Perce county, appeared specially for the purpose of removing the cause to this court, and also for the purpose of quashing the service of summons.

It seems that the plaintiff is an Idaho corporation, engaged in the real estate brokerage business at Lewiston, Idaho, and it claims that the defendants listed with it for sale the real estate referred to, and that it procured a purchaser, but after it had procured such purchaser the defendants declined to convey the property to him and transferred the same to other parties. Thereupon the purchaser brought suit in the state district court against Walter J. Burns and his wife, Mary C. Burns, and the parties to whom the property was conveyed, to enforce specific performance of a contract alleged to have been made with the purchaser to convey the property to him. Waite was not made a party to the suit, but by notice the defendants demanded that he appear and defend their title to the property. Responding to this notice, Waite came to Lewiston to participate in the trial, and after coming into the state he was served with a subpœna requiring him to attend and testify as a witness upon behalf of the defendants. During the

course of the trial and after the subpœna had been served, summons in this action was served upon him while he was in the courtroom. The contention presented by his motion to quash the service of summons is that Waite was exempt from service by reason of the fact that he came into the state virtually as a defendant, and for the purpose of making a defense in a suit to which he was a party in interest, and, further, because he was being held in the state by the subpœna requiring him to be present as a witness.

No question is made by the plaintiff that the cause has been properly removed to this court, or that the objection to the service of summons was made seasonably and in a proper manner; nor is it claimed that the defendant came into Idaho for any other purpose than to participate in the trial of the action in the state court, or that he transacted any other business in the state, or that he remained in the state longer than was required after the subpœna was served upon him. As I understand the position of counsel for the plaintiff, it is tacitly, if not expressly, conceded that, however diverse the decisions of the state courts may be, the rule in the federal courts, almost without exception, is that a person going into another state as a witness or as a party to attend upon a trial of a cause is exempt from process in such state while he is necessarily attending there in respect to such trial.

The only case from a federal jurisdiction cited upon behalf of the plaintiff and supposed to support the validity of the service under consideration is Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. et al. (C. C.) 132 Fed. 208. The contention of the defendants in that case was that "their presence was necessary as plaintiffs and witnesses," and that, therefore, they were exempt from service. The plaintiff "contended, against the motion, that this exemption only exists in favor of witnesses, and that it does not exist in any case in favor of the plaintiff." It will thus be seen that it was conceded by both parties that the exemption exists in favor of witnesses for the defendant, and the contention was over the application of the rule to the case of a plaintiff. But the court declined to consider the question in dispute, for the reason, as the court stated, that:

> "It appears that these defendants organized a corporation and made surveys for the purpose of acquiring valuable franchises, in violation, as alleged, of the right of the Iron Dyke Copper Mining Company, and that they were so engaged at the time of the service upon them. In such a case the defendants are not entitled to plead the exemption claimed for them."

And this is in accordance with a general exception that, where persons entitled to the exemption lay aside their character of parties or witnesses and engage in transactions giving rise to the institution of actions against them by third parties, they are deemed to have waived the privilege which they might otherwise claim.

It is apparently attempted to bring this case within the general exception thus stated by suggesting that this action grew out of the issues involved in the case which the defendant Waite was attending at the time of the service of summons, and by further suggesting that the defendant was in the state of Idaho as a witness in furtherance of

the wrong for which the plaintiff sues in this action. But I am not able to fully appreciate the bearing or force of these suggestions. Upon the showing made by the record, I cannot see how the success or failure of the plaintiff in that case could affect the cause of action set forth in the complaint in this suit. If, as alleged in the complaint, the defendants Waite and Burns entered into an agreement with the plaintiff by which the plaintiff was to receive 5 per cent. of the selling price if they would find for the defendants a purchaser for the land referred to, and if, as alleged, the plaintiff, pursuant to this agreement, found a purchaser who was able and willing to purchase the land for the price for which the plaintiff was authorized by the defendants to sell it, it would hardly be conceded by the plaintiff that it could not recover from the defendants its commission, after the same was fully earned, because the defendants, in violation of their understanding with the plaintiff, declined to make the sale. If the allegations in the complaint are true, the plaintiff's right of action fully accrued when it found a purchaser who was able and willing to purchase the property at the price for which the defendants had authorized the sale, and its right to recover could not be made to depend on the adjudication of the issues in the suit brought by the purchaser for specific performance.

In the following federal cases the general rule of exemption is stated in various forms and is applicable to these circumstances: Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10,739; Lyell v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8,616; Brooks v. Farwell (C. C.) 4 Fed. 166; Plimpton v. Winslow (C. C.) 9 Fed. 365; Atchinson v. Morris (C. C.) 11 Fed. 582; Nichols v. Horton (C. C.) 14 Fed. 327; Small v. Montgomery (C. C.) 23 Fed. 707; Kauffman v. Kennedy (C. C.) 25 Fed. 785; Ex parte Schulenberg (C. C.) 25 Fed. 211; Holyoke Co. v. Ambden, 55 Fed. 593, 21 L. R. A. 319; Kinne v. Lant (C. C.) 68 Fed. 436; Hale v. Wharton (C. C.) 73 Fed. 739; Morrow v. Dudley (D. C.) 144 Fed. 441.

Five cases from state courts are cited in support of plaintiff's position—one from Illinois, two from Indiana, one from California, and one from Idaho. No useful purpose would be subserved by an attempt on my part to collocate or classify or distinguish the decisions upon this subject from the state courts. It must be conceded that they are hopelessly in conflict; and I think it must be further conceded that the weight of authority is in harmony with the rule followed by the federal courts. It is proper, however, that I should refer to the case decided by the Supreme Court of Idaho and relied upon by the plaintiff, namely, Guynn v. McDaneld, 43 Pac. 74, 4 Idaho, 605, 95 Am. St. Rep. 158. There the court held that McDaneld, who was a nonresident of the state, while attending the United States Circuit Court in Idaho as plaintiff in a suit brought by him against Guynn, a resident of Idaho, was not exempt from service of a summons in an action commenced by Guynn against him in the state district court. The court, through Mr. Justice Huston, says:

"The only question before us is: Is a nonresident plaintiff exempt from service of summons in a civil suit while in attendance upon court within this

state as plaintiff. This question has frequently been before the courts of this country, both state and federal; and, while there has been a pretty general uniformity in the decisions of the federal courts, those in state courts have been almost distractingly variant."

While in general language dissent from what is conceded to be the doctrine of a majority of the cases is expressed, still it would seem, from the reasoning and illustrations used in the course of the opinion, that it was intended to confine the decision to the facts of the case, and to hold merely that the rule would not be recognized as exempting a nonresident plaintiff who is "in attendance upon a court within this state as a plaintiff." This appears from the language above quoted, and it further appears from other parts of the decision. For instance:

"The nonresident has sued his debtor in a forum selected by himself wherein to enforce his claimed rights, but he will not submit to have the claim of his debtor adjudicated in the same forum."

Under some circumstances, at least, there would appear to be a material distinction between the right of exemption of one who of choice goes into a jurisdiction for the purpose of enforcing a claim and the right of one who is compelled to come into a foreign jurisdiction to protect himself against a claim which is being made upon him in a suit to which he is defendant. Judge Huston also quotes from and makes a vague reference to section 4123 and 4143 of the Revised Statutes of 1887 of Idaho; but it is not at all clear that they were intended to be made the basis of the decision. While it may be that the court was influenced somewhat by these statutory provisions, the conclusion reached is neither by express language nor by fair implication made to depend thereon; and if the view was entertained that, whatever the general rule of law might be, these sections authorized the service of process under the circumstances disclosed by the record, it is difficult to perceive the pertinency of the discussion indulged in by the court, or to understand why it should have stated that, while the majority of the decisions were to the contrary, it was comforted by the reflection that in the position which it had taken it had the support and concurrence of many of the most highly esteemed courts of the country. If, in the judgment of the court, the service in question was authorized by the statutes of the state, there was reason neither to express dissent from the rule conceded as prevailing in the federal courts and in a majority of the state courts where there are no pertinent statutory provisions, nor to seek comfort in the concurrence of courts which refuse to recognize the rule, even where there has been no legislation.

Upon behalf of the defendant it is suggested that, whatever view may be taken of the scope of the decision, it could, at most, be regarded as only persuasive, and that it is my duty to follow the general rule as recognized in the federal courts; and in support of the proposition my attention is called to the elaborate and very able discussion of the precise question in the case of Hale v. Wharton (C. C.) 73 Fed. 739, opinion by Judge Philips. No material distinction can be drawn between the circumstances of that case and this, even if it be

assumed that in the Guynn-McDaneld Case the Idaho Supreme Court based its decision upon a construction of the statutes referred to, and it is there held that where an action is brought in a state court, and personal service is made upon the defendant while he is within the territorial jurisdiction of the court in the mode prescribed by the statutes as construed by the highest court of that state, the defendant can, after removing the cause to the federal court, successfully move to quash and vacate service of summons by invoking the general rule under consideration. While not questioning that the rule is well founded in reason and embodies a wise judicial policy, I am not convinced, as seems to be held in this case, that the immunity thus furnished to parties and witnesses is such a constitutional or natural right that it can be neither taken away nor impaired by legislative enactment or judicial construction, and that the rule belongs so exclusively to the domain of general jurisprudence that the federal courts may exercise their independent judgment, in disregard of the action of state Legislatures and state courts.

But whether the exemption is a mere matter of judicial expediency, or whether it inheres in the fundamental principles of justice, is, in my view of the case, unnecessary for me to determine at this time. Assuming, but not deciding, that it is not a principle, but a mere policy, and that it may be set aside by legislative enactment, and that the federal courts are bound by state legislation and the construction placed thereon by the state courts, what should be my conclusion in the premises? If there is no controlling statute, the prevailing rule in the federal courts, with which I am in accord, requires that I grant the motion. Turning to the Idaho statutes and exercising my independent judgment, after a most earnest consideration, I must confess that I am utterly unable to see how either section referred to has any application to or bearing upon the question under consideration. Section 4123 is found in a chapter concerned exclusively with the place of trial of civil actions. There is no attempt to prescribe the mode of service, or to designate the place of service, or to enumerate the persons or classes of persons upon whom service may be made, or to prescribe or limit the conditions of service. Section 4143, especially the first sentence thereof, to which reference is made in the Guynn-McDaneld Case, only provides by whom the service may be made. There seems to be no purpose to prescribe the conditions or circumstances under which a valid service may be made, or to designate the person upon whom summons may be served. It is simply provided that within his county a sheriff may serve process, and that other persons, with certain qualifications, may make such service anywhere. Being unable to construe these statutes as evincing an intention on the part of the Legislature to modify or abrogate the general rule of exemption, it is my plain duty, in the absence of an unequivocal construction to that effect by the Supreme Court of the state, to give force and effect to the general rule recognized in federal jurisdictions.

The motion will therefore be allowed.

AARON v. UNITED STATES et al.

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

No. 2,161.

1. INJUNCTION—PERSONS BOUND—MISNAMING OF DEFENDANT.
The fact that a defendant's first name was stated incorrectly in the pleadings, decree, and an injunction order does not relieve him from liability for contempt for violation of such order, where he was in fact served with process or appeared, and the circumstances were such that he could not have been misled as to the person intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 439–441.]

2. CONTEMPT—SUFFICIENCY OF INFORMATION.
The information in a proceeding for contempt is sufficient, if it clearly apprises the defendant of the nature of the charge against him, and no particular form is essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 146.]

3. INJUNCTION—VIOLATION—CONTEMPT—PLEADING.
A petition or motion for the attachment of a defendant for contempt in violating an injunction, which is entitled as in the original suit, and refers to the order of injunction granted therein by its date, and sets out in detail the alleged acts of violation, is sufficient, and need not set out the order in terms.

4. CONTEMPT—INFORMATION—OBJECTIONS TO SUFFICIENCY—WAIVER.
Where a party charged with contempt appears and goes to trial without objection to the sufficiency of the information and affidavits by appropriate motion, such objection is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 147.]

5. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—PRESUMPTION.
The entry of appearance for a defendant by an attorney is presumed to have been authorized, and, to relieve himself from the effect of such appearance, such defendant has the burden of proving to the satisfaction of the court that it was unauthorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 94, 95.]

6. WITNESSES—PRIVILEGED COMMUNICATIONS—LETTERS FROM ATTORNEY TO CLIENT.
A letter written by an attorney to his client, advising him of the terms of an injunction granted against him in a suit in which the attorney is employed, is not a privileged communication, since it contains nothing in the way of a confidential disclosure, and it is admissible in evidence to show actual notice of the injunction by the client.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 753, 763.]

7. WRIT OF ERROR—FEDERAL PRACTICE—NECESSITY FOR MOTION FOR NEW TRIAL.
A motion for a new trial is not essential in a federal court to entitle a party to a review of the judgment on writ of error by the Circuit Court of Appeals.

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

See 128 Fed. 770.

David Goldsmith, for plaintiff in error.

George F. McNulty, James A. Seddon, and R. A. Holland, Jr., for defendants in error.

Before HOOK, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, District Judge. This is a contempt proceeding, in which the plaintiff in error was fined $250 and costs, growing out of the following state of facts:

In December, 1903, various railroad companies, including the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, filed bills in equity in the United States Circuit Court for the Eastern District of Missouri against several so-called railroad ticket "scalpers," to enjoin them from dealing in that class of tickets being and to be sold by said railroad companies as round-trip tickets to and from the Louisiana Purchase Exposition, at St. Louis. One of the suits by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was instituted against Bennett Wasserman, Wasserman & Co., a corporation, and A. Aaron et al. The subpœna issued in this case was not served personally on the defendant Aaron; but on the return day the defendants, including Aaron, appeared by counsel, Judson and Green and others, and by written stipulation with complainants' solicitors consented that a temporary injunction be ordered by the court, without prejudice to put in contestation the truth of the allegations of the bill and the right to the relief prayed for on final hearing. Accordingly, on the 29th day of April, 1904, Circuit Judge Adams presiding, the court entered a temporary injunction, enjoining the defendants "and each of them, and also their agents, servants, employés, attorneys and all persons acting by or under their authority or direction, or the authority or direction of either of them, during the pendency of this suit, from buying, selling, dealing in or soliciting the purchase or sale of any signed contract nontransferable reduced rate ticket or tickets, or any part thereof, or any coupon thereof hereafter issued in good faith by said complainant, or by any other connecting railroad company for use over the road or roads of said complainant, its lines or any part thereof, issued on account of the Louisiana Purchase Exposition or World's Fair, to be held in the city of St. Louis, Missouri, in the year 1904, which tickets are by their terms nontransferable reduced fare tickets, and from soliciting, advising or urging persons other than the original purchaser thereof to use or attempt to use said tickets or any part thereof, on any train or trains on any lines of road of said complainant."

On the 30th day of July, 1904, the complainant in said suit presented to the Honorable Walter H. Sanborn, one of the circuit judges of said court, a petition for an attachment in contempt against said Wasserman & Co., Bennett Wasserman, and A. Aaron, for having violated said injunction order. The offense charged consisted in the "scalping" and sale of such ticket sold on behalf of the complainant, by the Erie Railroad Company, at the city of New York, on the 22d day of July, 1904, to one L. Goldman. The defendant, Aaron, made return to the writ by the name of Lewis Aaron, as his true name, and

therein set forth as an answer to the writ: (1) That the information upon which the said order to show cause was granted, as also the affidavits filed in support thereof, failed to show that the said Aaron had been guilty of any violation of the order of injunction theretofore entered in said cause; (2) that said order of injunction was not served upon him, and he had no knowledge of the same or any of the proceedings in the cause theretofore.

The answer further stated and admitted that, as an employé of Wasserman & Co., he, the said Aaron, did undertake to sell the ticket which had been issued to said Goldman, and that being informed that said ticket had not been honored, but had been taken up at the Union Station in the city of St. Louis, subsequently refunded the amount of money, to wit, $14, which he had previously received from said person, but denied generally the other averments in said information.

The assignments of error are that the information for the attachment is insufficient, for the reason that it does not show service of the order of injunction upon the defendant and knowledge on his part thereof, and because the record fails to show such service; and (2) that there was no competent evidence that the sale of the ticket in question was in violation of the injunction, and that the offer of the ticket in evidence should have been rejected; (3) that the court erred in admitting in evidence the letter written by Mr. Judson.

While the defendant was impleaded by the name of "A. Aaron," the trial court found that there was sufficient evidence to show that sometimes he was known, especially to some of the police force of the city of St. Louis stationed in the vicinity of the office where he conducted his business, by the name of A. Aaron; and there is no ground for permissible contention but that he was the identical Aaron proceeded against in the original bill of complaint, and the person had in view in the contempt proceedings. The evidence shows that he was the only Aaron connected with the business of Wasserman & Co. in the sale of such tickets at St. Louis; that he was the vice president of the company, and the active agent therefor, and the identical Mr. Aaron who obtained from Goldman the ticket in question and sold it to one Ernst F. Barthel. It could not therefore be held that he was misled, or that he was not a party in fact to the proceeding.

The second objection goes to the sufficiency of the petition or motion for attachment. It is urged that the petition is defective in not sufficiently referring to the original bill of complaint and reciting the terms of the injunction order alleged to have been disobeyed. The petition is entitled as in the original bill of complaint. It charges that the defendant violated and disobeyed the temporary injunction heretofore granted by the court against the defendants in the suit, including Wasserman & Co., Bennett Wasserman, and said Aaron, granted on the 29th day of April, 1904, in pursuance of the stipulation entered into by all the parties to the cause. It then sets out with particularity the issuing to, and the purchase of the ticket in question by, said L. Goldman, who traveled thereon from the city of New York to St. Louis, and the purchase thereof by said Wasserman & Co., Bennett Wasserman, and said Aaron, and the sale by them of the return portion of said signed contract of the nontransferable reduced rate rail-

road ticket on the 25th day of July, 1904, at the city of St. Louis, Mo., for the price of $14, to one Ernst F. Barthel. It then sets out the provisions of the contract on said ticket. The petition was sworn to by one Deppe, alleging that the matters and facts set forth therein are true as he verily believes. It was also accompanied by the affidavits of witnesses, specifically charging the facts upon their own knowledge.

It is now the recognized rule that the information in a contempt proceeding is sufficient if it clearly apprises the defendant of the nature of the charge against him, and no particular form is necessary. Spelling on Injunctions, § 1121. As the defendant is alleged to have been a party to the suit and the injunction order, and appeared thereto, he was sufficiently advised of the provisions thereof, and the precise order he was charged to have violated; and the affidavits filed therewith, in support of the writ, fully described the offense. If the information for the writ was defective in matter of form, it should have been taken advantage of by the defendant in proper manner by motion before going to trial. Where the party charged with the contempt appears without objection to the sufficiency of the information and affidavits by appropriate motion, but answers and goes to trial, the objection is deemed as waived. Davis v. State, 31 Neb. 252, 47 N. W. 854; Zimmerman v. State, 46 Neb. 14, 64 N. W. 375; People ex rel. Barnes v. Court of Sessions, 147 N. Y. 295, 296, 41 N. E. 700; Enc. of Pl. & Prac. vol. 4, p. 786.

It is further contended that the injunction order was not served on the defendant, and that he had no knowledge thereof. It is conceded that, if the defendant was in court when the temporary injunction was granted, this objection is not good. His contention, however, is that he never authorized Judson and Green, and others, to appear and represent him in the original suit in which the temporary injunction was granted. The authority of an attorney or counsellor to appear in court as the representative of a litigant is no longer required to be expressed by the filing of his warrant of attorney. In the early case of Osborn v. United States Bank, 9 Wheat. 738, 830, 6 L. Ed. 204, Chief Justice Marshall expressed the rule, now universally recognized, as follows:

"Certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar, with a general capacity to represent all suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union."

Presumptively, therefore, the counsel who appeared for the defendant were authorized to do so, and the burden rested upon him to show to the satisfaction of the court the nonexistence of this authority. Enc. of Plead. & Prac. vol. 2, p. 682. Mr. Judson, the leading and active counsel for the defendants in the original suit, testified that he certainly would not have appeared for any defendant without feeling well assured that he was authorized thereto; that there were a large number of like suits instituted by various railroads concerned against the so-called dealers in such alleged transactions; that his law firm was em-

ployed by a committee representing such parties to appear and defend for them; that Bennett Wasserman, the then president of the corporation, of which the defendant, Aaron, was vice president, visited and talked with him about the case. As the defendant was vice president of the company, and its active agent in the purchase and sale of such tickets, it is incredible, in view of the evidence that the public press of the city of St. Louis was publishing and discussing the injunctive proceedings against the "scalpers," that this defendant was not advised by Wasserman of these proceedings. No impartial mind can read the cross-examination of this defendant, with its studied lack-candor, evasive answers, without the conviction that he was rather concealing than telling the whole truth. His conduct connected with the transaction of the sale of the Goldman ticket shows that he was conscious of violating the law and cunningly contriving to evade detection. At the time he sold the ticket to Barthel he directed him to practice a deception on the agents of the railroad company by being cautioned, if questioned by them, to answer that his name was L. Goldman, and that when he left the "scalper's" office not to go direct to the railroad station, but to pass around the corner, so that if any watcher should be standing on the outside of the office he might avoid detection. It is quite evident from the opinion of the learned trial judge who sat in the hearing of this case that he discredited the testimony of the defendant touching this issue of fact, and we are of opinion that he was justified therein.

Moreover, immediately after the granting of the injunctive order, Mr. Judson, as counsel for the defendants, addressed and mailed a letter to said Wasserman & Co., advising it of the granting of the injunction against it, and said Lewis Aaron and others, stating, among other things:

"That the injunctions are against your successors and assigns as well as against your servants and agents. * * * We can only add that while we regret that situation, and have spared no efforts to prevent it, we now feel it our duty to call your attention to the injunction, and to warn you of the very serious consequences of their violation. There is only one course to pursue in the case of an injunction, however erroneous or oppressive it may be; and that is, to obey it until it is set aside."

As the defendant, Aaron, was the active manager in charge of the office of Wasserman & Co., it is asking too much of credulity to believe that such advice coming to that office could have escaped the keen eyes of this wide-awake, active agent. He never complained to Mr. Judson that he was not his counsel.

The admission of this letter in evidence is assigned for error, on the ground that it was a privileged communication. This contention is remarkable for this party to make in view of his denial that the relation of attorney and client existed between him and Judson. He protests too much. Had he conceded that Judson was his counsel, there would have been no occasion for the introduction in evidence of this letter, as Judson's appearance to the suit and consent to the order of injunction would have concluded him as to notice thereof. Having denied such notice, the letter addressed to the company, of which he was vice president and active agent, was competent on the ground that it was a circumstantial fact contributing to the proof of his knowl-

edge that Judson was acting as counsel for him. On the other hand, if he had conceded that Judson was his counsel, the letter was harmless. The letter contained nothing more than information imparted to him by counsel of what the court record itself showed. Such a communication is not within the spirit of the statutory exemption as being privileged. It was not a fact which was communicated by counsel which came to the possession of counsel alone by reason of the relation of attorney and client. The rule of the statute "does not extend to the protection of matter communicated not in its nature private or which cannot properly be termed the subject of a confidential disclosure." Beeson v. Beeson, 9 Pa. 301, approved in Schaaf v. Fries, 77 Mo. App. 359; Greenleaf, Ev. (16th Ed.) § 244.

Other questions are suggested by counsel for plaintiff in error, some of which are not specified in the assignment of errors; and, as they in no degree affect the conclusion reached on the law of the case, no practical end can be subserved by further discussion. It may be properly added, however, that the contention of the defendants in error that the right to have the sentence of the Circuit Court reviewed by this court should be conditioned upon a motion for new trial in the court below and the overruling of the same (citing Zimmerman v. State, 46 Neb. 15, 64 N. W. 375), is not tenable. A motion for new trial is not essential in this jurisdiction to entitle a party to a review by the Court of Appeals. This has been so repeatedly decided as not to require the citation of authorities. The writ of error in this case was the proper remedy. Bessette v. W. B. Conkey Company, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

It results that the judgment of the Circuit Court must be affirmed.

In re LOVELAND. In re LITTLEFIELD. PUTNAM v. LOVELAND.

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

Nos. 675, 676.

1. BANKRUPTCY—JURISDICTION OF COURT—SALE OF PROPERTY.
   A court of bankruptcy has jurisdiction to order a sale of property of a bankrupt upon which a lien is asserted free from such lien, and without first determining either its validity or amount.
2. SAME—VALIDITY OF TRANSFER—EFFECT OF STATE STATUTE.
   Although the rights of a trustee in bankruptcy and those of an assignee in insolvency under a state statute are defined in similar language, yet a state statute making a certain transfer void as against an assignee eo nomine does not make it void as against a trustee in bankruptcy.
3. SAME—VALIDITY OF MORTGAGE—INCREASE OF DEBT BY AGREEMENT.
   A mortgagor, after having paid a part of a mortgage debt, borrowed further sums from the mortgagee, and indorsements were made upon the mortgage note, to the effect that such sums should be added to the amount previously remaining due thereon. *Held*, that the mortgage was a valid lien in equity for the full amount of the debt as so increased as against the mortgagor's trustee in bankruptcy, whether tested by the statutes of Massachusetts as construed by its Supreme Judicial Court or by the provisions of the bankruptcy act.

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

Charles F. Hall and Arthur W. Blakemore, for petitioner.
George Chandler Coit, for trustee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. On July 14th Littlefield, the bankrupt, mortgaged real estate to Hall for $6,000, payable in five years. Note and mortgage were in the usual form. Payment of interest to July 14, 1905, was duly made and indorsed on the note, as were sundry payments of principal, the last in 1899 amounting in all to $4,800. Hall died before October 1, 1901, and on that day Littlefield borrowed from Hall's estate $3,500. The following indorsement was then made on the note:

"Boston, October 1, 1901.

"I have this day borrowed of the estate of Joseph E. Hall the sum of $3500, making the amount of the principal of this note the sum of $4700.

"Warren H. Littlefield."

On July 26, 1902, Littlefield borrowed $1,300 more, and a corresponding indorsement was made. Littlefield was adjudged bankrupt October 16, 1905, on a creditor's petition filed September 27th.

Thereafter the trustee in bankruptcy filed a petition with the referee, praying for leave to sell the real estate free from the incumbrance of the mortgage. The referee ordered a sale for not less than $7,500, which sum was to be deposited in a separate account to meet the claims of the mortgagee, Hall's administratrix. This order was affirmed by the district judge ,and the mortgagee has filed in this court an original petition to revise the order of the District Court in matter of law. This is the question presented in No. 675.

Beside these proceedings, and without prejudice thereto, the mortgagee filed a petition with the referee, asking that her lien be satisfied from the proceeds of the sale. The referee ruled that the lien of the mortgage was valid only to the extent of $1,200 and interest, but the learned district judge held it valid for $6,000 and interest, and from his decree the trustee took an appeal to this court. This is the question presented in No. 676.

The petition for revision is easily disposed of. The court of bankruptcy has jurisdiction to order a sale of the estate of the bankrupt upon which a lien is asserted, without first determining either the validity or amount of the lien. In re Union Trust Co., 122 Fed. 937, 59 C. C. A. 461; Mason v. Wolkowich (decided by this court October 9, 1906) 150 Fed. 699; Marion E. Tucker, Petitioner (decided October 31, 1906) 153 Fed. 91. The petition for revision, therefore, must be dismissed with costs for the respondent.

We pass to the question presented by the appeal. It will be convenient to set out certain statutes of Massachusetts and certain sections of the bankrupt act which have been supposed to be material.

Rev. Laws, Mass. c. 127, § 4:

"A conveyance of an estate in fee simple, fee tail or for life, or a lease for more than seven years from the making thereof, shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it, or an office copy as provided in section

fifteen of chapter twenty-two, is recorded in the registry of deeds for the county or district in which the land to which it relates is situated."

Mass. Rev. Laws, c. 163, § 37:

"A mortgage of land recorded more than four months after its date shall not be valid against an assignee of the estate of the mortgagor if proceedings in insolvency are commenced within one year from the recording of such mortgage."

Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Bankr. Act, § 70a (5):

"The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the discharge of the bankrupt * * * 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."

Where the trustee in bankruptcy and a transferee of the bankrupt both claim certain property which once belonged to the bankrupt, it may be difficult to decide how far the title to the property in question depends upon the state law which determines the effect of the bankrupt's conveyance, and how far upon the bankrupt act which declares what property the trustee shall take. The one law regulates the passage of title from the bankrupt, and is interpreted by the state court. The other law regulates its passage to the trustee, and is interpreted by the federal court. Concerning the questions raised in the case at bar both courts have reached the same conclusion.

That the payment made on the mortgage operated pro tanto to discharge it at law is not disputed. No oral agreement, and, indeed, nothing but a deed duly executed, could thereafter make the mortgage valid in a court of law as security for a sum larger than the balance left due upon it. But in Upton v. National Bank of South Reading, 120 Mass. 153, where the mortgagor and mortgagee had attempted by oral agreement to increase the amount for which a mortgage of real estate stood as security after it had been partly paid, the Supreme Court of Massachusetts, sitting in equity, refused to allow an assignee in bankruptcy under the act of 1867 to redeem the property, except upon payment of the money secured by the oral agreement. If the rights of the trustee in bankruptcy here depend upon the statutes of Massachusetts governing the title to real estate, there is no material difference between the Upton case and the case at bar. It is true that the trustee's proceeding here is not in the form of a bill to redeem, but a court of bankruptcy is a court of equity, and the form of proceeding in unimportant. It is true, also, that the registry statute of Massachusetts was not cited in the Upton case, but it was then in existence, and, if the state court deemed it material, doubtless it would have been noticed. We mention St. 1888, p. 402, c. 393, passed after the decision in the Upton case and embodied in Rev. Laws Mass. c. 163, § 37, only to show that we have not overlooked it. Although the rights of a trustee

in bankruptcy and those of an assignee in insolvency under the statutes of Massachusetts are defined in similar language, yet a statute making a certain transfer void as against the latter eo nomine does not make it void as against the former.

The bankrupt act of 1898, it is true, defines the rights in property which pass to the trustee in language different from that used in the act of 1867 to define the rights which passed thereunder to an assignee in bankruptcy. In this respect, as has been said, there is much similarity between the bankrupt act of 1898 and the insolvent law of Massachusetts. Section 70a (5) of the bankrupt act vests in the trustee property which the bankrupt "could by any means have transferred or which might have been levied upon or sold under judicial process." Pub. St. c. 157, § 46, vested in the assignee in insolvency the property of the debtor "which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution upon a judgment against him." See Rev. Laws, c. 163, § 54. In Smythe v. Sprague, 149 Mass. 310, 21 N. E. 383, 3 L. R. A. 822, the Supreme Court of Massachusetts held that land conveyed by a deed unrecorded until after the assignment in insolvency did not pass to the assignee. It follows that the state statutes before us, as construed by the courts of Massachusetts, allow an unrecorded deed to pass to the grantee thereunder a title valid as against a trustee in bankruptcy appointed under the existing federal law. The Supreme Court of Massachusetts has in effect construed the statutes before us in favor of the appellee in this case.

The Supreme Court of the United States has reached the same conclusion in its interpretation of the present bankrupt act. The general principles of equity, as recognized in the federal courts, give effect to the intention of parties who intend to create a lien under the circumstances of this case, notwithstanding that their agreement by reason of its informality is invalid at law. In York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court had to deal with an unrecorded conveyance in a state whose statutes required a record, and the title of the transferee was held to be superior to that of the trustee in bankruptcy. The statute there in question, as construed by the state court, made an unrecorded mortgage void as against certain classes of creditors, while leaving it valid as against other classes. The state statute before us makes the unrecorded conveyance void as against creditors without notice, leaving it valid as against those creditors who have notice of it.

To whatever extent the title of the trustee in bankruptcy to the property here in question depends, either upon the statute of Massachusetts as interpreted by the state courts, or upon the bankrupt act as interpreted by the Supreme Court, or upon both, we find that all the statutes in question have been construed by the courts which have ultimate authority to fix their meaning as giving to the mortgagee in the case at bar a lien superior to the rights of the trustee in bankruptcy.

In No. 675, Loveland, Petitioner, let there be a decree that the petition be dismissed, with costs for the respondent.

In No. 676, Putnam v. Loveland, the decree of the District Court is affirmed, and the appellee recovers costs in this court.

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

(Circuit Court of Appeals, First Circuit. August 2, 1907.)

No. 689.

1. PATENTS—TERM—EXPIRATION OF FOREIGN PATENT.
The claim that a British patent covering an invention also patented in the United States was taken out by an intermeddler, and was unauthorized, and therefore that its expiration did not affect the term of the American patent, cannot be sustained, where the American patentees authorized the taking out of a patent in England, and under the other circumstances named in the opinion, did not repudiate the one in fact obtained until after its expiration.

2. TREATIES—CONSTRUCTION AND EFFECT—RELATION TO STATUTES.
Treaties and statutes of the United States have always been practically put in the same class, so far as judicial action is concerned, to the extent that a later treaty has the same effect on a prior statute that a later statute has, and may supersede it as a later statute may supersede a prior treaty. Nor is there any practical distinction as between a statute and a treaty with regard to its becoming presently effective without awaiting further legislation which depends entirely upon its terms.

3. STATUTES—CONSTRUCTION—RESORT TO TITLE.
When a legislative act is general in its terms, the title may be resorted to for the purpose of ascertaining its proper limitations.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 288.]

4. PATENTS—TERM—EFFECT OF TREATY.
Article 4 bis, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional convention or act of December 14, 1900, proclaimed by the President August 25, 1902 (32 Stat. 1936, 1939), as controlled and construed by Act March 3, 1903, c. 1019, 32 Stat. 1225 [U. S. Comp. St. Supp. 1905, p. 663], "to effectuate the provisions" of such additional act of convention, did not have the effect of changing the term of an existing United States patent as fixed by statute at the time of its issuance; and such a patent granted prior to January 1, 1898, and which is limited by the provisions of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], to the term of a prior foreign patent, is not extended by such additional act.

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

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

For opinion below, see 148 Fed. 31.

Elmer P. Howe and Benjamin Phillips, for appellant.

T. Hart Anderson, for appellee.

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

PUTNAM, Circuit Judge. This is a bill in equity based on an alleged infringement of letters patent No. 412,704, covering an invention for an alleged improvement in sewing machines, and issued to Zachary T. French and William C. Meyer on October 8, 1889, on an applica-

tion filed on July 30, 1888. The bill was filed on December 21, 1903, and it alleged infringements on and after October 1, 1903. The decree below was for the respondent.

The only question we need consider is whether, under section 4887 of the Revised Statutes, with its various amendments, the patent in suit was terminated on September 17, 1902, by reason of the termination of a certain British patent on that day. The legal questions involved relating to the identity of the patenting were fully discussed by us in Westinghouse Electric Co. v. Stanley Instrument Co., 138 Fed. 823, 71 C. C. A. 189, in an opinion passed down on June 14, 1905, and in Thomson-Houston Electric Co. v. McLean, in an opinion passed down on April 11, 1907, 153 Fed. 883. The learned judge of the Circuit Court correctly applied the principles stated in those opinions to the facts of this case. We have no occasion to reconsider anything said by him on that issue. This especially applies to his observation, not limited to any particular claim in either patent, but relating to the whole of each patent, to the effect as follows:

"I can find in neither patent here in question evidence of 'an essential, novel, and patentable improvement on what was claimed' in the other."

The complainant maintains that the British patent was taken out by an intermeddler. The position on this point is as follows: It is not questioned that Mr. Gregory, a patent solicitor, was authorized to represent the inventor in England, and that he sent instructions to Brooks, his correspondent there, the purpose of which was to secure simultaneous patenting. At some time, not named, a letter was discovered from one Munyon and one Goodyear to Brooks of September 14, 1888, directing Brooks to disregard Gregory's instructions, and to file the application in each country as soon as possible. There is a failure to directly prove any authority of Munyon and Goodyear to thus override Gregory. Nevertheless the Circuit Court, and we on appeal, proceeding on a bill in equity of this character as finders of the facts, have as wide a range for drawing inferences as a jury. There is no evidence that the inventor, or whoever controlled the invention, ever repudiated the British patent until after this suit was commenced, or attempted to do so. As he, whoever he was, knew that there was to be an application for a British patent, and that there was a purpose to take it out, it is beyond reasonable probability to assume that he never informed himself as to the issue of such a patent. On the other hand, the Circuit Court, and we, are entitled to assume that he obtained knowledge of what was done and acquiesced therein. Any hypothesis which would reject the conclusion of the Circuit Court in this respect, to the effect that the British patent was properly taken out, would be unreasonable.

The only other topic which we need consider is covered by the proposition of the complainant based on a series of conventions, or treaties, for the "international protection of industrial property," by which is meant especially trade-marks and patents. The first was signed at Paris on March 20, 1883, between various nations, to which ratification by the United States was completed on March 29, 1887. Articles 3, 4, and 5 of this treaty relate to patents for inventions. A subsequent

treaty, which is of no consequence in this connection, as it related only to some details, was signed at Madrid on April 15, 1891. The treaty in which we are particularly interested was signed at Brussels on December 14, 1900, and was proclaimed by the President of the United States on August 25, 1902, 32 Stat. 1936. By the agreement among the ratifying governments, this treaty which is ordinarily called "An additional act," went into effect on September 14, 1902, three days before the British patent in question here terminated. 32 Stat. 1943. Article 1, p. 1939, reads as follows:

"The International Convention of March 20, 1883, is modified as follows:
"I. Article 3 of the convention shall read as follows:
"Art. 3. Are assimilated to the subjects or citizens of the contracting states, the subjects or citizens of states not forming part of the Union, who are domiciled or have bona fide industrial or commercial establishments upon the territory of one of the states of the Union.
"II. Article 4 shall read as follows:
"Art. 4. Any one who shall have regularly deposited an application for a patent of invention, of an industrial model, or design, of a trade or commercial mark, in one of the contracting states shall enjoy for the purpose of making the deposit in the other states, and under reserve of the rights of third parties, a right of priority during the periods hereinafter mentioned.
"In consequence, the deposit subsequently made in one of the other states of the Union before the expiration of these periods cannot be invalidated by acts performed in the interval, especially by another deposit, by the publication of the invention or its working, by the sale of copies of the design or model, by the employment of the mark.
"The periods of priority above mentioned shall be twelve months for patents of invention, and four months for design or industrial models, as well as for trade or commercial marks.
"III. There is inserted in the convention an article 4 bis, as follows:
"Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3 shall be independent of the patents obtained for the same invention in the other states adherents or nonadherents to the Union.
"This provision shall apply to patents existing at the time of its going into effect.
"The same rule applies, in the case of adhesion of new states, to patents already existing on both sides at the time of the adhesion."

The complainant maintains that the first paragraph of article 4 bis relates specifically to the topic we have under consideration, and that the declaration of independency is intended to prohibit any result by virtue of which a patent granted by one nation for a specified statutory term should be abbreviated as to its term by reason of the expiration of any patent granted by another nation. The paragraph relied on is obscure, because there are so many different aspects in which a patent, or anything, may be independent of or dependent on something else.

There were several internationl conferences between 1883 and 1900 on the topic of patents and trade-marks to which we need not refer, except the one at Brussels at which a convention was signed on December 14, 1897, never in force in the United States.

One question is the weight to be given to the article 4 bis under the Constitution of the United States. The Constitution speaks of treaties and statutes in the same breath; and they have always been practically put in the same class by the Supreme Court. More than 100 years

ago, in United States v. The Schooner Peggy, 1 Cranch, 103, 110 (2 L. Ed. 49) the court said:

"But yet where a treaty is the law of the land, and as such affects the right of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court as an act of Congress."

There never has been any doubt on this proposition. Consequently it was said absolutely in The Cherokee Tobacco, 11 Wall. 616, 621 (20 L. Ed. 227):

"The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."

This has been repeated many times, the last in Hijo v. United States, 194 U. S. 315, 324, 24 Sup. Ct. 727, 48 L. Ed. 994. Consequently, so far as judicial action is concerned, a later treaty has the same effect on a prior statute as a later statute has; and, so far as the conventions pertinent here are concerned, the fact that the Constitution commits to Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," is of no consequence, because all the powers of Congress are especially vested, either directly or indirectly, by the Constitution in similar manner; and to hold that a treaty could not abrogate a prior statute regarding patents because this particular legislative power is committed to Congress could not be permitted so long as the general rule as to statutes superseding treaties, and, vice versa, declared by the Supreme Court in the way we have pointed out exists. The rules which we have explained with reference to the relation of treaties to statutes, and as to treaties becoming immediately effective, are the necessary sequence of the decisions explained in United States v. Lee Yen Tai, 185 U. S. 213, 220, 221, 222, 22 Sup. Ct. 629, 46 L. Ed. 878.

But the respondent, now the appellee, maintains that article 4 bis of the convention of 1900 was not effectual until enacted into a statute by Congress. An examination of the decisions of the Supreme Court on this topic will show there is no practical distinction whatever as betwen a statute and a treaty with regard to its becoming presently effective, without awaiting further legislation. A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission intrusted with certain powers with reference thereto. The same may be said with regard to a treaty. Both statutes and treaties become presently effective when their purposes are expressed as presently effective; and, on its face, article 4 bis of the convention in question is so expressed. A striking illustration of the rule that treaties become effective in the same manner as statutes is found in United States v. The Schooner Peggy, 1 Cranch, 103, 2 L. Ed. 49, already cited. This vessel was condemned in the Circuit Court on September 23, 1800. A treaty with France became effective on September 30, 1800; and, inasmuch as the judgment of the Circuit Court

was subject to a writ of error which was sued out on October 2, 1800, the Supreme Court held that the treaty annulled the condemnation.

Nevertheless, Congress has legislated on the topic since the treaty was ratified; and, under the rule which we have stated, that subsequent legislation, so far as it expresses any Congressional purpose inconsistent with any claimed construction of article 4 bis, or inconsistent with its becoming effective of its own force, that purpose controls, and the purpose of Congress in the act to which we will refer is so marked out by implication, although not stated in express terms, that what construction should be put on article 4 bis, and what rule should be applied as to its becoming effective, have become purely academical questions so far as this appeal is concerned. The act to which we refer is that of March 3, 1903 (32 Stat. 1225, c. 1019 [U. S. Comp. St. Supp. 1905, p. 663]), which preceded in time the filing of this bill and the infringements alleged therein.

It becomes necessary in this connection to turn back to Senate Document 331, Fifty-Fifth Congress, Second Session, being a report from the Committee on Foreign Relations, with accompanying papers. This concerns the convention signed at Brussels on December 14, 1897, which we have spoken of, never accepted by the United States. We refer to the report of the United States commissioners who took part in the conference at Brussels, dated December 15, 1897. That stated as follows:

"A new article, entitled article 4 bis, provides for the mutual independence of patents applied for in the different states of the Union by persons entitled to the rights granted by the convention."

It added that the delegates from the United States supported this proposed new article under instructions; but it then proceeded as follows:

"In order to avoid any confusion in regard to the interpretation hereafter to be given to the second paragraph, which reads, 'This provision shall apply to all patents existing at the time of its entering into force,' we called attention to it in the regular meeting and found that it was the unanimous sense of the conference that the paragraph was not applicable to existing United States patents, but only to those patents whose terms might be shortened by the laws of those states of the Union in which provision is made for a shortening of the term on the lapsing of patents for the same inventions in other states.

"An existing United States patent cannot be affected by what may take place in regard to a patent for the same invention abroad. The limitation of the terms of the United States patents imposed by section 4887 was a determination at the moment of the grant of the patent of its term, and therefore the duration of the patent is unaffected by the subsequent expiration of a foreign patent for the same invention by reason of non-payment of taxes or non-working."

The article in the proposed convention to which these observations related read as follows:

"Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3, shall be independent of the patents obtained for the same invention in the other states adhering or not to the Union.

"This provision shall apply to patents existing at the time of its going into effect.

"The same rule applied in the case of adhesion of new states as to patents already existing either in the Union or in the new adhering state at the time of the adhesion."

This language was literally the same as that now under discussion, found in the convention of December 14, 1900, with the following exceptions: The first sentence now closes with the words, "adherents or non-adherents to the Union," instead of the words, "adhering or not to the Union"; and also the last sentence now ends with the words, "to patents already existing on both sides at the time of the adhesion," instead of the words, "to patents already existing either in the Union or in the new adhering state at the time of the adhesion." It is not possible that these merely literal changes can in any way affect any question which we have before us. It is especially to be noted that the commissioners reported that all the commissioners present were unanimous that this proposed phraseology of the convention of 1897 would not affect the expiration of United States patents already issued. We have received, through the courtesy of the state department, a copy of the report of the commissioners who negotiated the treaty of December 14, 1900, but it makes no reference to the topic we are discussing.

Thus the convention of 1900 and the proposed convention of 1897 alike contained the provisions in reference to patents existing at the time the treaty went into effect, and relative to new adhering states, on which the complainant relies as saving its patent.

The act of 1903, to which we have referred, is entitled:

"An act to effectuate the provisions of the additional act of the international convention for the protection of industrial property."

What is there called "the additional act" is the convention of December 14, 1900. There is no express provision in the statute itself in line with the title; and it is rare that the title is effectual. We all know that Lord Coke said that it ought not be taken into consideration at all; but there are occasions when the language of an act is couched in such general terms that we must go to the title to find its limitations. The Supreme Court has reiterated Lord Coke's observation, but with the qualification which we state, to the effect that, when the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived, and then the title will have its due share of consideration. The Bark Eudora, 190 U. S. 169, 172, 173, 23 Sup. Ct. 821, 47 L. Ed. 1002. A very striking illustration of this with reference to the later statutes about aliens appears in the opinion of Judge Gray, in behalf of the Circuit Court of Appeals for the Third Circuit, in Rodgers v. United States (C. C. A.) 152 Fed. 346, 350. The statutes there in issue use the broad word aliens, and yet the title was availed of by the court to limit them to aliens who were immigrants. We cannot doubt that the act of 1903 to which we refer is to be construed as passed for the purpose named in its title; and, inasmuch as it relates to the same topics involved here as the convention of December 14, 1900, we can also have no doubt that it is to be regarded as covering the entire ground so far as it concerns us. This is the well-settled rule of construction applied under such circumstances to legis-

lation which has the form of codification. The ruling of the Supreme Court in Dallemagne v. Moisan, 197 U. S. 169, 175, 25 Sup. Ct. 422, 49 L. Ed. 709, in regard to various treaties respecting consular jurisdiction over crews of vessels of foreign nations, and referring to a statute of the United States enacted in relation thereto, observed as follows:

"This statute, having been passed by the United States for the purpose of executing the treaties it had entered into with foreign governments, must be regarded as the only means proper to be adopted for that purpose."

That observation directly applies here, and fully supports the rule of construction which we have stated with regard to legislation which has the form of codification. Fairly paraphrasing the language of the Supreme Court cited, we may say that the statute of 1903, having been passed for the purpose of executing treaties, must be regarded as expressing the only effect which Congress intended they should have to the extent of the subject-matters to which the act relates. It reenacts section 4887 in such form as Congress desired, faithfully omitting such parts of the convention of 1900 as referred to patents existing at the time it went into effect, or as referred to newly adhering states. It is to be borne in mind that treaties with foreign nations have a liberal construction, even at variance with the apparent meaning of the mere letter when interpreted according to the rules of the common law. The purpose is to work out the common intention, including that of peoples who know nothing about the common law, and who use phraseology different from that to which we are accustomed. A noticeable declaration of this fact is found in United States v. Winans, 198 U. S. 371, 380, 25 Sup. Ct. 662, 49 L. Ed. 1089, where the Supreme Court reiterated that it would sometimes go to the extent of construing a treaty with Indians as they understood it when it was made, rather than according to its letter. Certainly it would not violate any just rules, if either the executive, the judiciary, or the Congress of the United States should construe a treaty in accordance with what was clearly the common understanding of all the commissioners who negotiated it. The courts might safely do this; and, perhaps, they would be compelled to when there was a formal protocol of the proceedings of the negotiations expressing it. Under the circumstances here, Congress might well be justified in acting on the report of the commissioners who were concerned in the intended convention of 1897, to the effect that all present were of the opinion that the proposed article then under consideration could not affect existing patents in the United States, in view of the fact that the same language was carried forward into the treaty of 1900, without any contravening statement from any of the parties who negotiated it. This may well explain why it is that we find the act of 1903 in the form in which we do find it. At any rate, that act did omit the special provisions with reference to existing patents, and future adhering states, on which the complainant relies; and, for the reasons which we have stated, we must conclude that this was purposely done.

Whatever might have been the condition with reference to a bill in equity filed before the act of 1903, covering infringement prior

thereto, we have here a statute passed before filing of the existing bill, and the infringements now alleged, which pronounces the construction we must give the convention of 1900, according to the legislative will declared since it was ratified. In any event, the courts would hesitate before giving a treaty an interpretation differing from that solemnly given it by the executive or by Congress, even if they would ever do it. According to the law as it stood when the patent in suit issued, it expired with the British patent. To enable it to run its statutory term, retroactive legislation by statute or treaty was necessary. It is not impossible that the convention of 1900 might have been regarded as retroactive and as reaching this patent; but, before any issue arose between the parties to this appeal, and therefore before any rights against the respondent could have vested in the complainant, Congress interposed and pronounced the legislative will, subsequently to the ratification of the convention, that it should not be regarded as retroactive. Consequently we find no saving clause so far as the litigation here is concerned.

In Sawyer Spindle Company v. Carpenter, 143 Fed. 976, 75 C. C. A. 162, in which we passed down an opinion on February 23, 1906, that portion of the act of 1903 which re-enacted section 4887 of the Revised Statutes [U. S. Comp. St. 1901, p. 3382] was held not to be retroactive so far as concerns patents which had then expired, and the general rule that statutes are not to be held retroactive was stated. While it is true that in Sawyer Spindle Company v. Carpenter the patentee did not rely on any international convention, and brought none to our attention, yet it is also true that the result reached in that case was in harmony with the ordinary rules of statutory construction. We are of the opinion that here the Circuit Court was correct, and that there is nothing in the treaties made by the United States, as controlled and construed by the later federal statute, which saves the complainant.

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

BALTIMORE & O. R. CO. v. HAMBURGER et al. MERCHANTS' & MINERS' TRANSP. CO. v. SAME. PENNSYLVANIA R. CO. v. SAME.

(Circuit Court, E. D. Virginia. August 30, 1907.)

CARRIERS—INTERSTATE TRAFFIC—RATES—SCHEDULES — CONTENTS — NONTRANSFERABLE PROVISION IN TICKETS — INJUNCTION AGAINST TRANSFER OF TICKETS.

Under Interstate Commerce Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156], as amended by Act June 29, 1906, 34 Stat. 584, c. 3591, which, after requiring carriers to publish and file schedules showing all of their rates, fares, and charges, provides that "the schedule printed as aforesaid by any such common carrier shall plainly state * * * all privileges or facilities granted or allowed and any rules or regulations which in any wise change affect or determine * * * the value of the service rendered the passenger, shipper or consignee," a provision in a passenger's ticket sold by a railroad company making it nontransferable, where no such limitation is shown in the company's schedule, is unlawful and void, and the company cannot maintain a suit in equity based on such provision to enjoin transfers of such tickets.

In Equity. On demurrer to bills.

These are three suits in equity, in which bills were filed for the purpose, briefly, of enjoining the defendants, whether acting individually or in concert, or in their own names or that of sundry associates, companies, and combinations, in which it is charged they were severally doing business, from dealing in nontransferable tickets issued by the complainants as public service corporations to and from the Jamestown Exposition, now being held near the city of Norfolk, Va., in due course of business of the said several corporations.

Thomas W. Shelton, for the Baltimore & Ohio and Pennsylvania Railroad Companies.

Hughes & Little for Merchants' & Miners' Transp. Co.

Jeffries & Lawless, for defendants.

WADDILL, District Judge. Upon the presentation of the bills, temporary restraining orders were issued at the instance of said several complainants, and a day fixed for the hearing of the applications for injunctions prayed for, which said restraining orders were made returnable on that day, and continued in force until the further order of the court herein. On the return day the three cases were jointly submitted to the court upon demurrers filed by the defendants which present for the court's consideration certain legal questions affecting the right to maintain the suits, as follows:

(1) The bill does not name the joint or connecting carriers of the plaintiff over whose lines the tickets described in the bill may be used.

(2) Separate and distinct causes against separate and distinct parties are joined in one bill, rendering the same multifarious.

(3) The bill seeks to enjoin a future injury to imaginary nonexisting rights in tickets which have never been issued, and which may never be issued.

(4) Because such action by the court would be legislative, rather than judicial.

(5) Because the bill and the exhibits filed therewith show that the nontransferable provisions of the tickets described in the bill are not contained in the schedules filed with the Interstate Commerce Commission, as required by law, and the same are therefore void, and the said tickets are therefore transferable, and said defendants have the legal right to buy and sell the same.

(6) Because said bill and exhibits show that in the sale of said tickets the provisions of the act of Congress known as "An act to regulate commerce" were violated in the following particulars:

(a) The nontransferable provisions of said tickets do not appear in the schedules filed with the Interstate Commerce Commission.

(b) Said schedules do not show the rates, fares and charges for the transportation of passengers between points on the plaintiff's route or points on the route of its connecting carriers with which the joint rates alleged in the bill have been established; nor do they show the points on the plaintiff's line and the points on the route of its connecting carriers between which passengers will be carried.

(c) Said schedules do not show the names of the carriers which are parties to said joint tariffs.

In the view taken by the court, the first four grounds of demurrer are without merit, leaving for determination the fifth and sixth grounds, and it will only be necessary to pass upon the fifth and paragraph "a" of the sixth assignment; it not being material to pass upon the questions presented by paragraphs "b" and "c" of the sixth assignment. The fifth assignment and paragraph "a" of the sixth present for the consideration of the court the meaning of certain provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], and the amendments subsequently made thereto, including that of June 29, 1906, 34 Stat. 584, c. 3591 and may be stated thus: Can a railway company, where its tariff and schedule of rates, published and filed with the Interstate Commerce Commission as required by law, fail to state that the tickets sold by them between given points are nontransferable, add to such tickets this nontransferable feature?

It is virtually a concessuum in this case—at all events, it is manifest from an inspection of the complainants' bills and the schedules filed therewith as exhibits—that as to the rates in question the tariff and schedules as published and filed with the Interstate Commerce Commission do not show the nontransferable feature of the tickets to the Jamestown Exposition, the sale and transfer of which is sought to be enjoined here, except that in the case of the Baltimore & Ohio Railroad Company such nontransferable feature is noted on tickets sold beyond or at points west of the Ohio river. Section 6 of the interstate commerce act, as amended, after providing for the publication and filing by common carriers of their schedules showing all of the rates, fares, and charges for transportation between different points on their routes, and between points on their own routes and those on the routes of other carriers by railroad, or by pipe line, or by water, when the through route and joint rate have been established, among other things provides that:

"The schedule printed as aforesaid by any such common carrier shall plainly state the place between which the property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered the passenger, shipper or consignee."

This language is clear and explicit, and its meaning too plain to admit of serious question or doubt as to what was intended by Congress. The published schedule filed with the commission must show "all privileges or facilities granted or allowed." To illustrate: Whether the tickets sold between given points at fixed rates have attached the privilege of stop-over or the right of sale and transfer, as well as "any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee." Whatever may be said as to stop-over and such like advan-

tages, the sale and transfer of the ticket is not only a privilege, but a right which directly enters into and affects the value of the ticket; and hence, if either the right is to be denied or the privilege abridged, under the plain language of the act in question, it must be shown in the published tariff and schedule of the company. The requirement in this respect is quite as positive as the one providing for publication of schedules showing such rates and charges, and prohibiting deviation therefrom.

The tickets in question, having been issued, in so far as the nontransferable feature is concerned, not in accordance with the published tariff and schedules of the company, come clearly within the rule of law in that particular governing contracts made in violation of a statute, and as to the nontransferable feature are void; and to the extent that the complainants' causes of action are dependent upon this feature of the ticket the same must fail. Authorities to support this proposition are abundant. A leading case on the subject is that of Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, wherein Mr. Justice Brewer, speaking for the court, at page 426, of 145 U. S. and page 886 of 12 Sup. Ct., said:

"The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Pollock's Principles of Contracts, pp. 253 to 260; Penn v. Bornman, 102 Ill. 523; Alexander v. O'Donnell, 12 Kan. 608; Gunter v. Leckey, 30 Ala. 591; Kennedy v. Cochrane, 65 Me. 594; Bank of the United States v. Owens, 2 Pet. 527, 539, 7 L. Ed. 508; Pangborn v. Westlake, 36 Iowa, 546, 549; Harris v. Runnels, 12 How. 79, 84, 13 L. Ed. 901. In Bank v. Owens this court said: 'There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.'"

The exceptions to the doctrine will be found to be aptly stated in Mr. Justice Brewer's opinion; that is, that the whole statute must be examined to ascertain whether it was intended that a contract made in contravention of it should be avoided—the learned Justice concluding:

"When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

The cases of Gulf, etc., R. R. v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, Wight v. United States, 167 U. S. 512, 518, 17 Sup. Ct. 822, 42 L. Ed. 258, Texas & P. R. R. Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, Same v. Abilene Cotton Oil Co., 204 U. S. 445, 27 Sup. Ct. 350, 51 L. Ed. 553, and Southern Railway Co. v. Wilcox, 99 Va. 394, 39 S. E. 144, will be found to refer specially to controversies arising over interstate shipments of freight at rates different from the lawful tariff as published and filed with the Interstate Commerce Commission, pursuant to the act of Congress under consideration in this case. In Texas, etc., R. R. v. Abilene Cotton Oil Co., 204 U. S. 445, 27 Sup. Ct. 357, 51 L. Ed. 553, Mr. Justice White said:

"In view of the binding effect of the established rates upon both the cerrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both

the carrier and the shipper would have been guilty of a criminal offense, and the agreement would have been so absolutely void as to be impossible of enforcement."

In the case of Southern Railway Co. v. Wilcox, 99 Va. 394, 408, 39 S. E. 144, 147, Judge Buchanan, speaking for the Supreme Court of Appeals of Virginia, said:

"The plaintiff's shipments were interstate freight, and must be governed by the interstate commerce act. That statute prohibits an interstate carrier from contracting for or collecting a less rate of freight on interstate shipments than that specified in the schedule of rates in force at the time, and which are required to be printed and kept at all stations for the inspection and use of the public. The evidence, as before stated, tended to show that the alleged contract was in violation of that act. If it was, there could be no recovery upon it; the general rule of law being that a contract made in violation of law is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873; Hancock v. Railroad Co., 145 U. S. 416, 12 Sup. Ct. 969, 36 L. Ed. 755; 5 Rob. Pr. 409 et seq. There is no reason why contracts in violation of the interstate commerce act should not be governed by the general rule, and the courts which have passed upon this question have generally so held. (Citing numerous cases.)"

Complainants earnestly insist that, whatever may be the effect of the failure properly to embody in the published schedule of tariff rates the fact of the nontransferability of the tickets, the defendants, the purchasers of such tickets with knowledge of their limitations, cannot avail themselves of the defense interposed by them. The answer to this is that the defendants are not seeking any relief at the hands of the court, and the complainants cannot escape the consequences of weakness in their own case by relying on any disability that may or may not attach to the defendants.

The contention is further made that the act of default on the part of the complainants in publishing and filing the tariff and schedule of rates necessary to impose the nontransferable feature on their tickets, being something not wrong within itself, the defense interposed regarding the tickets has no application, and should not avail the defendants. This position, however, is untenable, as the undertaking to do what the law forbids is void, whether the acts done or undertaken be malum in se or malum prohibitum. See note to Harris v. Runnels, 53 U. S. (12 How. [2d Ed.] Rapalje's Notes No. 2) 79, 13 L. Ed. 901, and cases there cited; also Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759.

It follows, from what has been said, that the injunction prayed for by the Baltimore & Ohio Railroad Company should be denied, except as to tickets issued by it west of the Ohio river; that that of the Pennsylvania Railroad Company should be refused; and the injunction sought by the Merchants' & Miners' Transportation Company granted only in so far as it pertains to the tickets issued over its own water lines, but not to tickets issued upon connecting lines of railway; and the temporary restraining orders heretofore entered, except in the particulars mentioned, will be vacated.

THE CHESTER W. CHAPIN.

(District Court, E. D. New York. July 29, 1907.)

1. SHIPPING—INJURY TO TOW FROM SWELL—NEGLIGENT NAVIGATION OF STEAMER.

A vessel causing injury to others by her swell must be held responsible for any failure to appreciate the reasonable effect of her own speed and motion through the water at the particular place and under the particular circumstances where the injury occurred, and her officers are required to take into consideration other vessels which may reasonably be expected to be affected, and to take all reasonable precautions to avoid their injury, even though former experience has shown that in the ordinary and usual course of events they are likely to escape injury, and a tug with small craft in tow, if properly managed, with the tow properly arranged, has the right to assume that a larger craft will observe such reasonable precautions and is under no obligation to warn her of the danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.

Liability of vessel for injuries caused by creating swell, see note to The Asbury Park, 78 C. C. A. 3.]

2. SAME.

A tug with three scows loaded with sand in tow tandem with 4 to 5 feet between them was passing down the channel in East river to the west of Blackwell's Island in the daytime on an ebb tide, when she saw the steamer Chapin coming up a distance of about nine streets below, and gave her a signal of one whistle. This was not answered, and the tug blew alarm whistles, but the Chapin did not answer and kept her course and speed, and as she passed within 75 to 100 feet from the scows her swells caused them to bump together, and one was turned over and seriously injured. The Chapin was about the middle of the channel, which was from 1,000 to 1,100 feet wide, and was proceeding through the water at a speed of from 15 to 18 miles. The tow was made up in the proper and usual manner. The Chapin was a large screw steamer, creating a considerable swell, and which made almost daily trips up the river and was accustomed to meeting tows and scows. *Held*, that her master must be presumed to be acquainted with the amount of disturbance caused by her and its probable effect on the meeting scows, and that she was in fault and liable because of his failure to reduce his speed or keep at a greater distance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.]

In Admiralty.

William Greenough, for claimant.
John F. Foley (W. J. Martin, of counsel), for libelant.

CHATFIELD, District Judge. This action arose from a claim for injuries to three scows constituting a tow, all of which scows belonged to the libelant. The tow met the steamer Chester W. Chapin when proceeding down the East river in the channel to the westward of Blackwell's Island upon the 14th day of July, 1906, about 6 o'clock in the afternoon, in daylight, under the influence of an ebb tide, and the swell of the Chapin brought the scows in contact with each other, with resulting injuries. The three scows were in tow of a tug, the C. R. Stone, and were fastened one after the other; the scow Dauntless being the middle one of the three. The tow had started from Hempstead. The three scows carried upon their decks gravel and sand,

each scow being loaded in the customary manner and with an ordinary quantity of material. The tug was connected with the first scow by a hawser 15 fathoms in length, and the three scows were fastened together by two hawsers, one to port and one to starboard, between the first scow and the Dauntless, and two hawsers, one to port and one to starboard, between the Dauntless and the third scow. The channel to the westward of Blackwell's Island, and down to a point opposite East Forty-Sixth street, is from 1,000 to 1,100 feet in width, and the string of scows was 350 to 400 feet out in the channel. When the tug had reached Fifty-Third street, the captain, who had had 18 years' experience in navigation, and had been employed 3 years in hauling sand, testified that he saw the Chapin at Thirty-Fourth street. His tug was then opposite Fifty-Third street, and he blew one whistle to indicate that he would pass to port of the Chapin. This whistle was not answered, and at Forty-Ninth street he blew an alarm whistle. The Chapin, however, without answering, proceeded up the river and passed at a distance of about 75 feet, going, as the captain of the tug estimated her speed, 15 statute miles an hour. The captain estimated that the ebb tide was running at the rate of five miles an hour, and that the swell from the Chapin caused the scows to bump several times. During the bumping, the port hawsers fastened to the scow Dauntless parted, and (the starboard hawser holding), as the scow filled, she turned over, and the load of sand was precipitated into the water. The tug took the scow Dauntless ashore, left her there wrong side up, and proceeded with the other scows to Twenty-Third street. The captain testifies that there was no wind except an ordinary breeze, that he ordinarily meets the Chapin two or three times a week, and that the swells caused by the Chapin on this occasion were large. It appears that the hawser which was parted was a nine-inch hawser. The captain of the Dauntless testifies that his scow bumped into the scow ahead, breaking the planks, and that the third scow took the stern and a portion of the deck out of the Dauntless in the same manner.

On behalf of the Chapin, testimony was given by her captain and the quartermaster, who was in the pilothouse. They had no recollection of the occurrence, but testified that on the day in question the Chapin had proceeded up the river, on her way to New Haven, at her usual rate of speed, had slowed down at Man of War's Rock, opposite Forty-First street, and then proceeded up the West Channel along Blackwell's Island, but had not regained full speed at the time of reaching Forty-Sixth street. Evidence was given as to the time it had taken the Chapin to go from her pier in the North river to Hell Gate, but this evidence is of use to determine only what average speed the Chapin could make against the tide which existed upon that day. This distance as shown on the chart is about 9¼ miles, which being covered in 42 minutes would show an average of nearly 12 knots an hour over the ground, and this speed was maintained against the ebb tide. It is fair to assume, therefore, that the Chapin was going at a very rapid rate through the water at all times when she was not actually slowed down.

The testimony shows that the scows were fastened some four or five feet apart, this being the customary method of fastening scows of this

sort, loaded as these scows were, for passage through the East river. The scows were in good repair and seaworthy. There would appear to be no negligence on the part of the scowmen in their method of towing the scows, and the captain of the tug, observing the Chapin in good season, had a right to be navigating in the place in which he was, and to assume that the Chapin would not pass within such a distance or at such a rate of speed as to cause damage. The libelant's witnesses place the Chapin somewhat to the westward of the center of the channel, but the distances given by them, and the general situation, seem to indicate that the Chapin was proceeding about in the middle of the channel at the point of meeting. The water is deeper on the westward side of the river than on the eastward, and a point 450 to 500 feet from the New York shore would be approximately in the center of the river. The Chapin was therefore as far to the westward and as close to the tow as she could legally be, under article 25 of the inspectors' rules [U. S. Comp. St. 1901, p. 2870], requiring her, in narrow channels, to keep to the starboard side, when safe and practicable so to do. The Galatea, 92 U. S. 439, 23 L. Ed. 727; The Lowell M. Palmer (D. C.) 58 Fed. 701.

The number of cases arising from injuries caused by the swell of steamers is very great, and the reported decisions are many in number. One of the earliest cases, that of the Daniel Drew, 13 Blatchf. 523, Fed. Cas. No. 3,565, arose from an injury occurring under circumstances almost identical with the situation shown in the present case. The Daniel Drew was a Hudson river steamer, and the accident occurred at a point in the Hudson river where the channel was about 1,000 feet in width. In this channel the Drew met a tugboat, the Ohio, followed by a number of scows in tow, the first of the scows being attached to the tug by a hawser, and the various scows being fastened by lines to each other, with a space of some six feet between the different tiers. The Drew was proceeding at customary speed. The water was deep, and the officers of the Drew took no notice of the Ohio and her tow. The officers of the Ohio, on the contrary, saw the Drew approaching and held their course. There was one circumstance, however, in the case of the Drew which differs from that of the Chapin. The officers of the Ohio assumed that the Drew was not proceeding at such a rate as to cause them injury, and gave no signals of warning. In the case of the Chapin the pilot upon the tug saw the Chapin approaching, apprehended danger from the situation, and blew a signal to indicate the course of the tug, and to attract the Chapin's attention, but, like the pilot of the Ohio in the Drew Case, did not change his course. The opinion in the case of the Drew has been taken as a basis for the decisions in most of the subsequent cases, and nearly all of the opinions subsequent have distinguished the facts in those respective cases from the facts in the Daniel Drew. The court finds in the Drew Case that she—

"was proceeding at her customary speed, which was not unusual for passenger boats, and not unreasonable, and made no unusual swell. * * * There is no law which limits the space a boat may occupy, or which prescribes how fast it may go, or how much swell it may cause, or how near it may pass to another boat. The rule of permission or of restriction depends in each case upon the reasonableness of the thing done. * * * Nor is a large

vessel, under all circumstances, absolutely liable for an injury caused by its swells to an inferior vessel. The waters are open to the use of all kinds of crafts, large as well as small, and, while the rights of the smaller are to be carefully guarded, they are not to be made a pretense for excluding, or preventing the practical use of, larger or different vessels. * * * Is there any greater or more stringent test of liability than that a large vessel shall use its large powers with care and diligence?"

The decision seems to have turned upon the fact that none of the witnesses, either on behalf of the Ohio or the Drew, testified that the Drew was going at what seemed to them too rapid a rate. The court further said:

"I am not justified in holding, upon the testimony of all the witnesses, that the swell made by the Drew was unusually large, or that it was dangerous in any other manner than as danger is necessarily incident to the swell from a passing vessel."

A number of cases have arisen from damage done by the Asbury Park, which navigates the harbor of New York, and which, as these cases have determined, is a boat causing large and unusual swells. The ground of holding the Asbury Park liable in all of these cases seems to be that the Asbury Park is responsible for creating swells which are dangerous to a reasonably seaworthy boat, when the injury occurs under such conditions that the officers of the Asbury Park are considered by the court to have been negligent in not appreciating the probability that damage may result, under circumstances which were so brought to their attention, or of which they should have been cognizant, so as to make it negligent on their part to maintain the speed of the Asbury Park at the rate which was maintained when the accident happened. The Asbury Park (D. C.) 136 Fed. 269; The Asbury Park (D. C.) 138 Fed. 617; The Asbury Park (D. C.) 138 Fed. 925. In the latter case the court held that:

"The navigators of the Asbury Park had full opportunity to observe the size, progress, and range of her waves, and to judge of the force of their contact with vessels at either side of a waterway."

It is no answer to an injury to say that property had not been injured upon other previous occasions. The Asbury Park (D. C.) 138 Fed. 925; The Asbury Park (D. C.) 144 Fed. 553; Ross v. Central R. R. of New Jersey (D. C.) 146 Fed. 608. In the last case named the scows were damaged by the swells of the Asbury Park, and the court, finding that the scows were properly attached in the tow and properly and carefully managed, and there being no evidence to show that the persons in charge of the Asbury Park observed the scows or paid any attention to them, or slowed down, but passed at her usual and regular rate of speed, held the Asbury Park liable for creating the swells which proved dangerous on this particular occasion; it being shown that, if the speed of the boat were reduced, the swells would be reduced accordingly. The principle followed in all of these cases relating to the Asbury Park was established by the Circuit Court of Appeals in the case of The Majestic, 48 Fed. 730, 1 C. C. A. 78, in which the court held that, if the swells of the Majestic produced harmful results, then it was necessary for her officers to be watchful of craft, and to regulate the motions of the Majestic

accordingly. The court said, further, that small craft had a right to navigate without anticipation of "any abnormal dangerous condition, produced solely by the wish of the owners of exceptionally large craft to run them at such a rate of speed as will insure the quickest passage"; and the Majestic was held liable for injuries, although "navigating in the way and at the speed customarily adopted by vessels of her class," inasmuch as the towboats were held not to have been in fault.

Another class of cases has relation to injuries occurring to vessels lying at wharves at the side of narrow channels up and down which the vessel causing the injury is passing. The Rhode Island (D. C.) 24 Fed. 295; The Tiger Lily (D. C.) 11 Fed. 744; The New Hampshire (D. C.) 88 Fed. 306. In such cases the courts have held the doctrine set forth in the case of The New Hampshire, supra, that:

"The size of each steamer's waves when they reach the slips depends upon her model, the speed of her propeller, and her distance from the docks; and every steamer must take the risk of regulating her speed and distance accordingly."

The C. H. Northam, Fed. Cases Nos. 2,689, 2,690 (the reports being those of the original trial and of the hearing upon the appeal), contains the following statement:

"Her right to pass the tow where she did was dependent upon her ability to pass without causing injury. If she could not pass in that place without causing injury by her swell, she was bound to wait until beyond the narrow place, and the attempt to pass when she did was negligence. If, on the other hand, by going slower than she did, she could pass where she did without causing a dangerous swell, then it was negligence to maintain the speed she did in passing."

The Northam was a Sound steamer, passing up New York Harbor on the way to the port of New Haven at the time the accident happened.

In the case of The Columbia, 61 Fed. 220, 9 C. C. A. 455, the steamer, passing up the Delaware river near Philadelphia, met three barges and a lighter upon a trip which the Columbia had been in the habit of making daily, and had frequently met similar tows in the same neighborhood. The court says that those in charge of the tows were justified in assuming that the Columbia would slow down, or that precautions would be taken in time to avoid endangering their safety, and that the Columbia would proceed as she had ordinarily done in such a manner as to avoid injury to the tow. In another case relating to the same steamer (The Columbia [D. C.] 55 Fed. 767), the boat was held liable for injuries done to loaded barges, upon testimony showing that there was unusual motion in the water caused by the Columbia, which it was testified had slowed down before meeting the barges; but that the barge was under no obligation to anticipate that the Columbia would not slow sufficiently, as she had done upon previous occasions, and that the consequences could not be realized until too late for the barge to avoid the accident. The case of The Monmouth (D. C.) 44 Fed. 809, held the Monmouth responsible for damages, in the following language:

"The weight of testimony and of probability, upon all the evidence, is that the steamer, through some preoccupation of her men, or false estimate of

distance, went nearer than usual to the tow, and nearer than was safe at full speed, and that the accident arose from the failure to use the customary and requisite caution when going so near."

The general principle deducible from these cases would seem to be that stated in the case of The Batavia, 9 Moore, P. C. 286, in which it was stated, that, if the steamer "was going at such a rate as made it dangerous to any craft which she ought to have seen, she had no right to go at that rate. At all events, she was bound to stop, if it was necessary to do so, in order to prevent damage being done by the swell to the craft that were in the river."

The rule is also stated in the case of The Morrisania, 13 Blatchf. 512, Fed. Cas. No. 9,838, where Judge Hunt, the same judge who decided the case of The Daniel Drew, supra, said that the "undoubted right to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid."

In so far as deductions of principle can be made from the various statutes and cases, as illustrated by the above citations, it would seem: (1) That the boat causing the injury must be held responsible for any failure to appreciate the reasonable effect of its own speed and motion through the water at the particular place and under the particular circumstances where the accident occurred. (2) That boats in the neighborhood, which may be reasonably expected to be affected by the swells of the steamer causing the injury, are to be taken into consideration, and that the officers of the steamer must use reasonable judgment and care, not only to see whether such an accident is likely to happen, but whether they have taken all reasonable precautions to avoid such an accident, even when the result of former experience has shown that, in the ordinary and usual course of events, the boat passed is likely to escape injury. (3) That the tug or smaller craft, if properly managed, with the tow properly arranged, has a right to assume that large craft will observe such precautions as are reasonable to avoid inflicting injury, and that these precautions will not be merely such as would be sufficient to produce ordinary and customary circumstances of passing. (4) That the tug or smaller craft, relying on the presumption that the larger craft will take precautions, is under no obligation to warn the larger craft, if the tug or smaller craft is in a proper place and navigated properly according to general rules.

From this view of the authorities let us look at the case at bar. The testimony shows that the Chapin is a large steamer, propelled by a screw, and creating a considerable swell. She passes up the East river and through the Sound on practically daily trips during the summer season, and is accustomed to frequently meet tows and scows. Her captain and mate must be held to be acquainted with the amount of disturbance which she creates moving through the water at her various rates of speed, and to be sufficiently informed upon all matters connected therewith to estimate the effect of the passage of the steamer at any particular time upon boats either being overhauled or met with in the narrow channels of the East river and Long Island Sound. The fact that this accident happened under the conditions above stated of itself shows that the Chapin was proceeding at such a rate of speed, and

causing such swells, as to make it dangerous for scows laden in the customary manner, at least if the Chapin passed within a distance of from 75 to 100 feet of the scows. These facts were matters which the captain or pilot of the Chapin could take into account in estimating the speed and nearness with which the Chapin could pass a scow or a tow of scows, approaching in daylight, with nothing to prevent the Chapin from choosing her position and rate of speed. It would appear that the Chapin had slowed down and was proceeding at a somewhat slower rate of speed, so far as her engines were concerned; but there is nothing to rebut the testimony that the effect of the Chapin passing through the water was to cause swells, which were the only proximate cause of the injuries sustained. The Chapin may have passed tows exactly similar to this numerous times, and the tows invariably have passed through the swells safely, but that fact would not relieve the officers of the Chapin from considering, upon this particular occasion, the amount of disturbance which was then being caused, and the effect which that disturbance would have upon the scows which the Chapin was about to meet. The tow was in plain sight for a sufficient distance for the officers of the Chapin to have formed an opinion and to have exercised judgment in directing the movements of their boat. It is considered that the officers in charge of the Chapin either relied upon their past experience, and therefore made no attempt to estimate the necessities of the particular situation, or that from familiarity, or because of freedom from previous accidents, these officers misjudged the effect of the swells from their own boat.

On either theory the Chapin must be held responsible, and the libelant may have a decree.

JAMES SHEWAN & SONS v. NEW ENGLAND NAVIGATION CO.

(District Court, E. D. New York. July 31, 1907.)

1. SHIPPING—DUTY OF STEAMER WITH RESPECT TO SWELL—STRUCTURES AT DOCK.

The duty of a passing steamer with respect to causing dangerous swells is the same toward a floating dry dock permanently located alongside of a pier as toward vessels in the same situation, and she is bound to exercise reasonable care to avoid causing injury to such dock, having regard to the character of the structure and its greater liability to injury from its size and therefore longer subjection to the action of the swells; and it is also the duty of the owner of the dock to take into account the same liability to injury from swells and to make reasonable provisions against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

2. SAME—INJURY TO FLOATING DRY DOCK FROM SWELL.

Libelants were the owners of a floating dry dock 278 feet long and 90 feet wide permanently stationed alongside of a pier on East river by means of four very heavy vertical timbers or spiles driven along the side of the pier, to which the dock was secured by means of yokes or eyes of heavy lumber built around the vertical timbers, allowing the dock to move down and up as it was submerged or pumped out, or as the tide fell and rose. The large steamer Payne, owned by respondent, passed down

the river in the daytime at a distance of about 1,100 feet from the pier against a flood tide at a speed of 12 knots or more through the water, and her large swell caused the dock to oscillate to such extent as to break the end yokes and also one of the vertical timbers. *Held*, that the Payne was in fault for not reducing speed so as to avoid causing such dangerous swells; that libelants were also in fault for failing to make better provision against the action of swells from passing vessels by giving greater play to the yokes at the ends of the dock.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.]

In Admiralty.

John F. Foley, for libelant.

William Greenough (James T. Kilbreth, of counsel), for respondent.

CHATFIELD, District Judge. The libelants are the owners and proprietors of a stationary, but floating, dry dock, located at the south side of a slip between the piers at East Fourth and East Fifth streets, New York City. The dry dock consists of a pontoon or submerged structure, about 278 feet long, 90 feet wide, and about 11 feet deep. On this pontoon bulkheads arise for the entire length along each side, and the complete structure, up to a distance of about two feet from the top of the bulkheads, can be submerged to allow a vessel to pass in at the outside end of the dock. The total submerged draught is 33 feet. The pontoon being pumped out, the dock rises until the deck of the pontoon is out of water. In manner of construction it is similar to other wooden dry docks, but it is stationary in the sense that it is fastened by four extremely heavy vertical timbers, placed upon the south side of the dry dock and immediately along the face of the north side of the pier at East Fourth street. As the tide rises and falls, or as the pontoon of the dry dock is pumped out or submerged, the dock slides up and down next to these four timbers, while four yokes or eyes of heavy lumber, called "saddles," built around these vertical timbers, prevent the dock from moving in or out, upstream or downstream, and allow but slight play about the timbers themselves. These four vertical timbers are sunk in the ground to a considerable depth, and make the dock stationary, with the exception of the up and down motion. The testimony shows that the libelants have maintained this dock, constructed in this fashion, for a considerable period at the same spot, and that the libelants have made claims for injuries occurring from the swells of passing steamers on some occasions. The testimony also shows that there is but one other dock of this particular style so far as its mode of fastening is concerned, in the waters around New York, and that that dock is in a protected basin, rather than alongside of a waterway used frequently by large vessels, as is the East river.

The occurrence for which damages are asked was caused by the passage of the steamer William G. Payne down the East river, in the neighborhood of 11:15 o'clock in the forenoon, upon the 11th of June, 1905. At that time the tide had started to run up the river with the beginning of the flood; low water at Governor's Island having occurred in the neighborhood of 9 a. m., and the tides at the locality in question being less than an hour later than that at Governor's Island. The dock had been submerged in order to admit a boat, the steamer

Surprise, which was moored at the outside end of the Fourth Street Pier, ready to move into the dock. The testimony of the libelants is that the Payne passed within a few hundred feet of the dock, the distance varying; but from a consideration of all the testimony and of the localities referred to, and taking into account the Third street reef, shown upon the government charts almost opposite Third street, it is believed that the Payne passed down outside of this reef some little distance, and probably 1,100 to 1,200 feet from the end of the pier where the Surprise was moored. The Payne was seen by the docking superintendent of the libelants, and, as she passed, he, as also some of the witnesses who were upon the Surprise, observed her swell, and watched it strike the Surprise and the dry dock. Under the action of the swell the Surprise was considerably tossed around, but her method of mooring by lines prevented any injury to her. The dry dock, however, was carried up and down the timbers, and the yokes or saddles, passing around the outside and the inmost timbers or spiles, were broken, while the saddles upon the spiles in the center were loosened. One of the spiles, which was testified to be about 22 inches square, and 58 feet long, with 16 feet of its length driven into the river bottom, was cracked, and injuries resulted for which the libelants charge that they suffered damage for repairs, loss of service, and other incidental expenses to the amount of $1,501.43. The witnesses for the libelants estimate the speed of the Payne at from 12 to 15 knots an hour over the ground. The officers of the Payne say about 10 knots an hour, which is her rate of running under one bell in slack water. Most of the witnesses for the libelants were of the opinion that the tide was running out, but, taking into account the lapse of time, it is believed that the respondent is right as to the condition of the tide, and that it was running up the river. If this were so, the Payne, when running against the tide, which had turned at least an hour before, in order to be going down the river at the rate estimated, must have made rapid progress through the water, even if running under one bell. The size of the swell depends principally upon the speed of the boat through the water, although the progress of the swell along the shore would be retarded, and the waves would not move as rapidly down the river against the tide as they would with it. But the point with which we are interested is the size of the swells rather than their rate of progression, and it is believed that the conditions shown indicate conclusively that the swells were large, and that the Payne causes considerable commotion for a boat of her size when under way. The responsibility of a large boat such as the Payne, which is a screw steamer of considerable size, when passing up and down a narrow and much used waterway such as the East river, has been frequently considered in the courts. Many of these cases have been reviewed in a case recently decided by this court (Phœnix Towing & Transportation Co. v. The Chester W. Chapin, 155 Fed. 854), and it is unnecessary to repeat that review here. The cases, however, arising from damages to a structure either built upon the shore, or to a vessel moored at the shore, while based upon the same principles as those arising from damages to a vessel proceeding in the channel, show that the courts have taken into account the condition, manner of construction, and location

of the structure or vessel along the shore in determining whether the injured party had used reasonable care on its part to avoid injury, even more strictly than they have considered the manner of fastening, and the seaworthiness of vessels in tows or craft injured by a large steamer when passing in midstream. Injuries occurring to a structure built upon or fastened to the shore are much fewer in number than those happening to floating, temporarily moored vessels, but the permanent character of such a structure evidently requires the exercise of not only the same degree of care, but the consideration of greater possibilities and more frequent and long-continued subjection to the swells of passing steamers than would be necessary in the case of a vessel moving up and down the channel or fastened to a dock by lines.

The responsibility of a vessel passing up and down a channel, with respect to the effect of its waves upon objects along the shore, is set forth in the case of The Rotherfield (D. C.) 123 Fed. 461, in the following language:

"Where a vessel properly moored at a dock, at anchor, or not in motion, is damaged by a vessel in motion, the presumption of law is that it was the fault of the one under way; and it is presumptively liable until the contrary is shown, the burden of doing which is upon the vessel under way. The Morrisania, 13 Blatchf. 512, Fed. Cas. No. 9,838; The Tiger Lily (D. C.) 11 Fed. 745; The Worthington (D. C.) 19 Fed. 836; The Drew (D. C.) 22 Fed. 852; The Rhode Island (D. C.) 24 Fed. 295; The El Dorado (D. C.) 27 Fed. 762; The Ogemaw (D. C.) 32 Fed. 919; The New York (D. C.) 34 Fed. 757. The vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent the injury by adopting any practicable precautions. The Virginia Ehrman, 97 U. S. 309, 24 L. Ed. 890; The Bridgeport, 14 Wall. 119, 20 L. Ed. 787. It is the duty of steamers passing docks or other mooring places to pass at such a rate of speed that no danger will result from her swell, or to pass at such a distance that no harm will result to a vessel, lawfully there and properly moored, from the suction produced by her passage through the water or from her displacement wave, and she is bound to know the effect of her swell. Spencer on Marine Collisions, § 72. 'A steamboat passing in the vicinity of other craft in shallow water is bound to use all reasonable precautions to avoid doing them injury from the known suction she causes.' The Drew (D. C.) 22 Fed. 852. In that case Judge Brown says: 'The liability to do damage to boats lying in shallow waters through the swell and suction of her passage is a familiar fact.' 'The undoubted right of the steamer to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner, and do no injury to others that care and prudence may avoid.'"

The conclusion from an examination of the authorities and from the facts shown in this case is that the Payne was proceeding at a rate of speed and causing a swell which her officers should have been observant of. If the swell which the Payne was causing upon this trip had inflicted injury upon a tow or a boat properly moored, the authorities seem to agree that she would be responsible for the injuries caused, and there seems to be no reason why she should not be responsible to the same extent to the dry dock itself.

In the case of the dry dock there is nothing to indicate that the officers of the Payne had any reasonable ground for supposing that the dock could be injured if boats properly moored at the same distance from the passing vessel would escape injury, and their duty, therefore, was the same as to such a vessel.

The peculiar construction and the permanent location of the dry dock seem to put an obligation upon its owners as well, which does not leave them free from responsibility. Let us consider the injury which was actually caused, and compare the movement of the dock, as shown by the injury, with the movements allowed for by this method of fastening. The dock is 278 feet long, and it can readily be seen that if waves of a steamer should be so spaced that their distance from crest to crest caused the dry dock to swing in the direction of its longest dimension, with the center of the dock as a pivot; that is, if the waves should be large enough so that but one wave should lift the dock at a time, the extreme end of the dock would describe a considerable arc, while the middle portion of the dock would not move far from the direct up and down line. In the same way, if the waves were large enough to give a twisting or up and down the river motion to the whole dock, the end would be thrown up or down to a much greater distance than the center of the dock. The effect would be like the movement of a walking beam, and the long arm made by one-half of the dock's length could not afford much freedom of motion, if the saddles upon the outermost and innermost timbers or spiles were so built around the spiles as to give little freedom except in a direct vertical line. It is not considered that the method of fastening a dry dock by spiles and saddles is of itself negligent, nor is it considered that such a method of fastening is unsuitable, if sufficient freedom of motion is provided for to meet the necessities of the locality and the possibilities of motion caused by passing steamers. But in the case at bar it appears to the court that the owners of the dry dock should have anticipated that the movement at the ends of the dock would be great enough, so that more opportunity for such movement should have been provided than is shown by the testimony was afforded by the method of fastening in use.

The Payne, therefore, being negligent in proceeding in such a way as to produce an injury where under proper precautions no injury would have occurred, and under such circumstances as to make it a reasonable obligation upon the part of her officers to anticipate probable injury, and, on the other hand, the dock having been so constructed and maintained as to indicate that its owners were not free from fault, this case would seem to be a proper opportunity for the application of the rule of divided responsibility and divided damage. De Lelle v. The Atalanta (D. C.) 34 Fed. 918. The libelants, therefore, may have a decree for one-half its provable damages, the costs of both parties to be divided.

ENTWISLE v. SEIDT et al.

(District Court, E. D. New York. August 16, 1907.)

BANKRUPTCY—SUIT BY TRUSTEE TO SET ASIDE TRANSFERS AS FRAUDULENT—SUFFICIENCY OF PROOF.

Evidence considered, and *held* insufficient to sustain the allegations of a bill filed by a trustee in bankruptcy to set aside certain conveyances made by the bankrupt as made to hinder, delay, and defraud creditors, where the only witnesses were the parties to the transactions introduced by com-

plainant, each one of whom testified that the transfers were made in good faith and for a fair consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 462.]

In Equity.

Engel, Engel & Oppenheimer, for complainant.
Rudolph Marks, for defendants.

CHATFIELD, District Judge. One Adolph Seidt was adjudicated a bankrupt upon an involuntary petition filed on the 2d day of September, 1902. His discharge, after opposition by creditors and a reference to a referee as special commissioner, was granted upon the 19th day of October, 1905. Upon the hearing before the special commissioner most of the questions involved in this action were considered. On or about the 19th day of March, 1904, the trustee in bankruptcy filed a bill of complaint in this court, under the provisions of the bankruptcy act of 1898, to set aside, vacate, and annul a certain instrument purporting to be a mortgage made by the bankrupt and his wife to the defendant Solomon Neuman, thereafter assigned by the said Solomon Neuman to the defendant Max Cohen. Both the assignment and the mortgage have been duly recorded in the proper county. This mortgage and assignment covered lots situated at Rockaway, in this district. The bill of complaint also asks to have set aside, abrogated, and annulled a certain deed, dated August 30, 1902, made and executed by the bankrupt and his wife to one Julius Mandel, since deceased, whose heirs at law have since been made parties defendant herein. The deed conveyed the equity of the bankrupt in the same lots at Rockaway, and the complaint asks that title and possession of the said lands, free and clear of the foregoing mortgage, and of any other conveyance, liens, etc., be given to the complainant, the trustee in bankruptcy. The complaint also asks that the complainant recover from the bankrupt certain property and moneys, consisting of wines, liquors, cigars, etc., and certain outstanding accounts due the said bankrupt, or the avails thereof, on the ground that all of this property, or the avails thereof, is now in the custody or control of the said bankrupt, and was concealed by him from his trustee for the purpose of defrauding his creditors.

The defendants Adolph Seidt and his wife, Solomon Neuman, and Max Cohen have answered separately, denying the allegations of the complaint relating to the transactions by them. The defendant Julius Mandel appeared in the action by attorney, but did not file any pleading, and was in default at the time of his death. No pleading has been filed on behalf of his representatives since the action was revived and continued as against them, and they appear to be in default. The allegations of the complaint as to the transactions with Mandel are denied by the defendants Seidt and his wife, except that they admit executing the instrument in writing, and claim that the deed was given, subject to the Neuman mortgage, in payment of an existing debt, and that Mandel agreed to reconvey if the debt to him was paid by the bankrupt. The defendants also allege affirmatively, as defenses to the complaint, that the transactions in question were for a valid

consideration, without contemplation of insolvency, and not in pursuance of a fraudulent scheme.

The case has proceeded in a similar manner to that in which a suit on a bill in equity in the Circuit Court would be conducted, and by an order of this court a special examiner was appointed to take the testimony of the various parties. This testimony has been reported to the court, and the case argued and submitted.

The witnesses called on behalf of the complainant are the defendants and the persons engaged as principals in the various transactions. Their examination was conducted apparently on the theory that they were biased witnesses, to such an extent that the complainant would not be bound by the statements made, and the direct-examination is in almost all cases in reality cross-examination. But the complainant has presented no proofs showing any of the facts alleged, outside of the testimony of these witnesses produced by himself, and aside from the general situation there is nothing brought out to show bias nor fraudulent motives on the part of the parties to the transaction. The attorneys for all the parties have so violated the rules of evidence that the most of the testifying has been done by the attorneys, apparently without objection, and it is impossible, from a reading of the testimony as transcribed, to form an opinion as to whether the witnesses were telling the truth, or whether they were following the lead of the testimony put into their mouths by the questions of the attorneys. On the whole testimony it would appear that the complainant is bound by the statements of his own witnesses, and in every instance these statements show a valid consideration and an actual transfer of property. There is no extraneous or disinterested testimony to prove the contrary.

As to the mortgage in question the testimony shows plainly that the transaction occurred exactly as claimed by the bankrupt. It appears that the defendant Cohen, assignee of the mortgage, is a brother-in-law of the bankrupt, and the apparent object of the action, as far as the mortgage is concerned, is to show that Cohen purchased a valid mortgage for the benefit of the bankrupt, and, inferentially, with funds supplied by the bankrupt. But no evidence whatever is furnished as to these surmises, and no examination of the defendant Cohen as to the source of the funds with which he purchased the mortgage, and no evidence of other witnesses as to where the money used by him was obtained, is offered. The complainant's case as to this mortgage rests merely upon the contradictory statements and the rather lame explanations of motive on the part of the defendant Cohen, who, nevertheless, is shown by the testimony to have actually purchased for a valid consideration the assignment of the mortgage in question.

As to the third matter or cause of action in the complaint, relating to goods or accounts alleged to have been concealed by the bankrupt the complainant attempts to show that the bankrupt made large purchases and sold considerable goods on credit within a short period before his bankruptcy, and not only concealed some of these goods, but has disposed of them or sold them upon credit, and collected the

outstanding accounts, without turning the property or the money over to his trustee. But no evidence of any of these facts is offered. The testimony merely shows that the transactions occurred, and that the bankrupt does not explain, with any great degree of certainty or clearness, what became of the goods. He does testify that the goods were sold, and that he has none of the proceeds in his hands, and that no one is holding, or has held, these goods or accounts for him. The matters contained in this third cause of action might properly have been the subject of an order to show cause, or a proceeding brought in bankruptcy to compel the defendant to account for and turn over these goods and proceeds, and were matters that should have been considered, as they apparently were, upon opposition to his discharge. In spite of these allegations and the charges made with reference thereto, the discharge of the bankrupt was granted after a hearing, and the proofs do not in any way trace the goods or the funds, so that any decree is possible. The parties who purchased the goods, or in whose hands they are alleged to be, are not defendants in this proceeding, and, in so far as they were witnesses, denied the transactions, or testified that they were not holding any property or money for the bankrupt, and no decree can be given to the complainant with respect thereto.

As to the second cause of action, relating to the deed of the equity in the lots at Rockaway, given to Julius Mandel by the bankrupt and his wife, there appears to have been a default. This equity of redemption is involved in the foreclosure suit now pending in the Supreme Court of the state of New York, for the county of Queens, upon the mortgage which is made the basis of the first cause of action in this suit; and the trustee in bankruptcy is a party thereto, and has set up the allegations of this complaint as a defense therein. That suit was started before the commencement of this action, and while, because of the default, the complainant is entitled as a matter of law to a decree, nevertheless in equity there would seem to be no relief which this court should grant, as the complainant has his remedy at law in the foreclosure action, which was instituted prior to the beginning of this equity suit.

Upon the entire matter, therefore, it is considered that no case has been made out, and that the bill of complaint must be dismissed.

In re NECHAMKUS et al.

(District Court, E. D. New York. August 13, 1907.)

BANKRUPTCY—VOIDABLE PREFERENCE—SUIT TO RECOVER.

In a proceeding by a trustee in bankruptcy to recover a horse which had been delivered by the bankrupt to a creditor as payment or security under circumstances which rendered it a voidable preference, the fact that the creditor had expended money for keeping of the horse and for medical treatment is no defense; any claim to recover such money being one which must be presented for allowance against the estate.

In Bankruptcy.

Henry W. Sykes, for trustee.
Bachrach & Berg, for Williamsburg Plumbing Supply Co.

CHATFIELD, District Judge. This is an application to compel the Williamsburg Plumbing Supply Company to turn over to the trustee herein a horse of which the value is stated to be $175. It appears from the affidavits that one Morris Grossman is in business with Louis Fischman, at Nos. 1 and 3 Moore street, in the borough of Brooklyn, under the name of the Williamsburg Plumbing Supply Company. Grossman, in his replying affidavits, states that the bankrupts at the time of their bankruptcy owed his firm about $1,400; that some three or four months before the bankruptcy one of the bankrupts persuaded Grossman to cash a check for $200, which was returned unpaid; and that later this bankrupt gave to Grossman the horse in question, as he had no cash. Grossman states that he has expended for stable hire, medical attendance, etc., the sum of $104, as the horse was sick for about four months, and that he has only used the horse for about two months. The trustee's affidavit, and also the affidavit of the receiver, state that demand was made of Grossman for the horse, and that Grossman agreed to pay the appraised value thereof, viz., $135, but that he refused to carry out his agreement.

Under the admitted facts, the delivery of this horse was a voidable preference, tending to hinder, delay, or defraud creditors, and the trustee is entitled to the possession of the horse. The referee's records show that Grossman has filed no claim against the estate in bankruptcy, and his time to do so has not yet expired. When Grossman took the horse, either as payment of the debt or as security, he must have contemplated the risk of loss of use of the horse, either from illness or from any other source, and there is nothing in the papers to show whether the value of the services of the horse for the period during which Grossman has had him is more than the sum which Grossman has expended for his keep and care. If he has any claim for what he has expended, over the value of the use of the horse to him, he may present such a claim to the trustee and the court, and it can be considered in the proper way, as an expense of the receiver; but the horse must be delivered to the trustee, and should be sold with the other property, or under such terms as will be most advantageous to the estate.

The bankrupt claims title to the horse in question, but he has consented to the determination of this claim upon this motion, and has not raised any question of jurisdiction, so that it is unnecessary for the trustee to bring a separate action.

The motion will be granted.

BIGELOW v. CALUMET & HECLA MINING CO. et al.

(Circuit Court, W. D. Michigan, N. D. April 12, 1907.)

1. MONOPOLIES—CONTROL OF COMPETING CORPORATION.

The control by one mining corporation organized under the laws of Michigan of another similar corporation engaged in a competing business in interstate and foreign commerce by acquiring a majority of its stock, or in part by acquiring stock and in part by soliciting and obtaining proxies from other stockholders with the purpose and intention of eliminating competition and obtaining a monopoly of trade in their products, either complete or partial, is in violation of the federal anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), which makes unlawful every combination in restraint of interstate or foreign trade and commerce, and also of Pub. Acts Mich. 1899, p. 409, No. 255, as supplemented by Pub. Acts Mich. 1905, p. 507, No. 329, prohibiting all combinations entered into for the purpose and with the intent of establishing and maintaining a monopoly; nor is such transaction relieved from its invalidity under the latter statute by Pub. Acts Mich. 1905, pp. 153, 154, No. 105, which authorizes mining corporations of the state to purchase and own stock in other similar corporations.

2. SAME—FEDERAL ANTI-TRUST STATUTE—SUIT FOR INJUNCTION.

A private party, who has sustained special injury by a violation of the federal anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), may sue in a federal court for injunction under the general equity jurisdiction of the court, where, by reason of diversity of citizenship of the parties, the court has jurisdiction of the suit.

3. CORPORATIONS—SUIT BY STOCKHOLDER—CONDITIONS PRECEDENT.

A stockholder of a corporation may sue in a federal court to restrain another corporation which has obtained control of a majority of its stock from voting the same for the purpose of electing its own directors and eliminating competition between the two companies in alleged violation of law and to the irreparable injury of complainant as a stockholder, although the bill does not show a formal demand upon the directors to bring the suit as provided by equity rule 94, even conceding that the right of action is in fact that of the corporation, where the allegations prima facie negative collusion and fairly show that such demand would have been unavailing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 791–795.]

4. INJUNCTION—SPECIAL INJURY TO COMPLAINANT.

A bill by a stockholder of a corporation, who is also an officer and director to enjoin the voting of stock by another corporation for the alleged purpose of changing the management in its own interest and creating an illegal monopoly to the detriment of the minority stockholders, shows such a special interest in complainant as distinct from the public and such threatened irreparable injury to his rights as to justify the granting of a preliminary injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 305, 306.]

5. SAME—PRELIMINARY INJUNCTION—GROUNDS.

The bill of a stockholder and supporting affidavits *held* to make a showing which entitled him to a preliminary injunction to restrain defendant from voting stock to change the officers and management of the corporation pending a hearing on the merits.

In Equity. On application for preliminary injunction.

Angell, Boynton, McMillan & Bodman and Taggart, Denison & Wilson, for complainant.

Otto Kirchner, Chadbourne & Rees, and Butterfield & Keeney, for defendant Calumet & Hecla Mining Company.

KNAPPEN, District Judge. The complainant is a citizen of Massachusetts. The defendants, hereafter called, respectively, the Calumet & Hecla Company and the Osceola Company, are corporations organized under the Michigan mining law, and engaged in the manufacture and sale of copper. The complainant, who is the president of, and a substantial stockholder in, the Osceola Company, filed his bill on the 12th day of March, 1907, for the purpose of obtaining injunction, both temporary and permanent, restraining the Calument & Hecla Company from voting at the annual stockholders' meeting of the Osceola Company (then appointed to be held on March 14, 1907) a large block of Osceola Company stock held by the Calumet & Hecla Company, as well as proxies for a large amount of other of such stock held by that company, upon the ground that the action of the Calumet & Hecla Company in buying and obtaining proxies for such stock constitutes an attempt to establish and maintain a monopoly of the business of mining, smelting, refining, and selling copper, contrary to the Sherman anti-trust act, the Michigan anti-monopoly law, and common-law obligations. Upon the filing of the bill, an order was issued restraining the voting of such stock in advance of the hearing of the application for temporary injunction, except to the extent of adjourning the annual meeting. Hearing upon the application for temporary injunction has been had upon the bill, answer, and testimony by way of ex parte affidavits filed on both sides.

The Calument & Hecla Company was organized in 1871, and capitalized at $2,500,000, only $1,200,000 of which has been paid in. Its operation has been highly profitable; the market value of its stock being now about $90,000,000. The Osceola Company is capitalized at $2,403,750. It likewise has been profitably operated, having for the past 20 years (except in 1903) paid dividends without interruption; those paid in 1906 aggregating 64 per cent. of the par value of the stock, whose market value is now nearly six times the par value. The two mining companies are in active competition with each other in the production and sale of copper throughout the United States and foreign countries; the mining operations of both being carried on in the upper peninsula of Michigan.

Until 1905, companies organized under the Michigan mining law had no power to own stock in other mining companies in this state, although for many years they had been authorized to own stock in companies outside the state. 2 Comp. Laws Mich. 1897, § 7012. In 1903, mining companies were given authority to hold stock in companies formed under the Michigan mining law or under any other laws for refining, smelting, or manufacturing ores, minerals, or metals. Pub. Acts Mich. 1903, pp. 382, 383, No. 233. In 1905, corporations organized under the Michigan mining law were empowered to "subscribe for, purchase, own and dispose of stock in any company organized under this act, or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals." Pub. Acts Mich. 1905, No. 105, pp. 153, 154.

The testimony tends to show that Michigan copper, which is known commercially as "lake copper," is of a different quality from that produced elsewhere in the United States, having superior tensile and tor-

sional strength, ductility, and conductivity, usually bringing in the market a slightly higher price than other copper; that the best grade of lake copper, called in the bill "prime lake copper," has thus far been produced only by five companies, in the following amounts annually, Calumet & Hecla 100,000,000 pounds, Osceola 18,000,000, Quincy 18,000,000, Tamarack 10,000,000, and Wolverine 10,000,000; the Calumet & Hecla Company thus producing over 75 per cent. of the aggregate—defendants' testimony tending to show that at least five other Michigan mines are producing copper, aggregating over 11,000,000 pounds annually, which rightly treated would be equally good. It is undisputed that for certain purposes lake copper is preferable to any other copper, and the testimony tends to show that the United States government, in its purchases of unmixed copper for the manufacture of cartridge cases, buys only lake copper, and thus far has specified only Calumet & Hecla, Osceola, Quincy, and Tamarack. It is undisputed that of the 1,000,000,000 pounds of copper produced annually in the United States (which is considerably more than produced in all other countries) lake copper constitutes one-quarter or one-fifth, about one-half of which amount is produced by the Calumet & Hecla Company. The testimony tends further to show that since the 1905 amendment to the Michigan mining law the Calumet & Hecla Company has embarked upon a pronounced policy of expansion; that it has expended from $2,000,000 to $3,000,000 in exploring mines on lands of other companies, and several million dollars in the purchase of stocks in competing mining companies, and that it has taken options on stocks of other mining companies. The companies in which such interests have lately been acquired include the Centennial, Allouez, La Salle, Gratiot, Manitou, Frontenac, Superior, and others, some of which mines are now competitive and productive, others of which are still in the exploratory stage; the Calumet & Hecla Company owning in most of these companies a majority interest, and in one or more cases the entire. As a part of this policy of expansion, the Calumet & Hecla Company has increased its own land holdings from about 2,700 acres to about 50,000 acres; the land holdings of the companies in which interests have been acquired bringing the aggregate holdings of land to above 70,000 acres. The testimony further tends to show that within a few months before the date fixed for the 1907 annual meeting of the Osceola Company the Calumet & Hecla Company quietly bought up a large amount of Osceola stock; the management of the Osceola Company knowing nothing of such purchase until February 20th (22 days before the proposed annual meeting), on which date 20,000 shares were transferred to the Calumet & Hecla Company on the books of the Osceola Company, and the Calumet & Hecla Company also being the owner of additional holdings not of record, the amount of which is not shown, except that the answer of the defendant says that its holdings are less than a majority, which majority would be about 48,000 shares. On February 21, 1907, the Calumet & Hecla Company sent, in its own name, to all the stockholders of the Osceola Company whose names and addresses it could learn, a circular letter in which the Calumet & Hecla Company, "as the largest stockholder of the Osceola Consolidated Mining Company," asked that all Osceola stockholders who should be willing to

intrust the management of the company to a board of directors "the majority of whom should be selected" from a list given in the letter (who in fact were representatives of the Calumet & Hecla Company) appoint as their proxies three Calumet & Hecla representatives named therein, one of whom is the vice president of that company. The testimony tends to show that on the same 21st day of February the Calumet & Hecla Company wrote to complainant, as president of the Osceola Company, a letter stating that the Calumet & Hecla Company had become the largest shareholder of record in the Osceola Company, and expected to "elect a majority of the directors at its annual meeting, March 14th, next," and requesting that until such election no contract be entered into by the president, directors, or agents of the Osceola Company which by its terms was not to be performed entirely during the term of the present board of directors (which would naturally then extend but a few weeks longer), especially contracts for the sale of its copper product or for the purchase of coal, contracts with railways and mills, for the sale of lands or for the location of mills. The manifest purpose of the Calumet & Hecla Company in sending this letter was to prevent the Osceola Company from entering into any contracts, or assuming any obligations, which could conflict with the management of the Osceola Company by the Calumet & Hecla Company in case the latter should secure such expected control. The case presented fairly tends to show that the Calumet & Hecla Company bought its holdings of Osceola stock, and procured the proxies referred to, with the intention, if possible, of thereby controlling the management of this competing company, with which it had previously no connection by way of stock ownership or otherwise, and of turning out the present management of the Osceola Company; that it would have bought a controlling interest had such interest been readily acquirable on satisfactory terms; and that it has obtained enough proxies, together with its own stock holdings, to elect a controlling majority of the board of directors of the Osceola Company, and at the time the bill was filed was intending to so vote such shares and to so act.

The Kearsarge lode runs through the mines of the Calumet & Hecla, Osceola, Centennial, Allouez, La Salle, and Gratiot. The testimony tends to show that the Calumet & Hecla Company proposes by combining the Osceola with its other holdings to operate that company, the Calumet & Hecla, Centennial, Allouez, and possibly other mines, by sinking through Osceola lands shafts for other mines, shafts for the Osceola through the lands of other companies, and using for some or all of these mines on the lode drifts or openings from the lands of other mines, using machinery in common to some extent for two or more of such mines, including the Osceola, and having ores from all these mines stamped, smelted, refined, and sold through Calumet & Hecla agencies; that the Osceola's product is now, and for a long time has been, sold through the United Metals Selling Company, with which the Calumet & Hecla is not in sympathy; that the Osceola, in connection with two other mines, owns a smelter and is interested in a chemical company, the use of both of which the Calumet & Hecla Company proposes to dispense with. Complainant's affidavits tend to show that such proposed change of policy and management, in-

cluding such proposed interuse of shafts, drifts, and machinery, would be injurious to the interests of the Osceola and its stockholders, through the increased danger of fire, peril to life, and otherwise; that the management of the Calumet & Hecla Company has been, and is, extravagant, and it is only by reason of the phenomenal richness of its ores that its management has been profitable; that the alleged extravagant management of the Calumet & Hecla Company applied to the Osceola ores would render the operation of the latter company unprofitable, would depress stock values, and would greatly injure complainant and other minority stockholders in the Osceola Company. Complainant's testimony further tends to show that the control of the copper output of the mines of Michigan would establish an absolute and complete monopoly in the production of the best grades of copper, independently of the ownership of any mines now in operation within the United States or elsewhere, and would permit the raising of the price of such copper; that the control of the Calumet & Hecla and the Osceola mines by one corporation will tend to create a practical monopoly in the supply of such copper so used and would eliminate all competitive bidding as between the two companies, thus creating a monopoly in the supply of such copper; that such control of the Osceola Company by the Calumet & Hecla Company would result in at least a partial monopoly in prime lake copper; that the acquisition of the Tamarack and Quincy mines would make such monopoly complete; and that the effect of the control of the Osceola Company by the Calumet & Hecla Company would of itself enable the latter to raise the price of prime lake copper.

The bill alleges that lake copper is used in all branches of the arts in enormous quantities, and is used and sold outside the state of Michigan, being delivered by the companies producing it to all parts of this and foreign countries; that the Osceola Company is in active competition with the Calumet & Hecla Company in producing and selling such copper throughout the United States and in foreign countries; that each of said companies is engaged in interstate and foreign commerce; that the action of the Calumet & Hecla Company in so attempting to secure control of the Osceola Company, including the election of its board of directors, is a part of the general plan of the Calumet & Hecla Company to secure control of practically the entire output of lake copper, and thereby secure a complete and absolute monopoly of the product of such copper throughout the United States, and especially of such prime lake copper; and that such purchase of stock and procurement of proxies are ultra vires and confer no authority upon the Calumet & Hecla Company to vote the same.

The defendant, both by answer and affidavits, disputes many of complainant's allegations of fact, expressly denying that it is intending or attempting to obtain a monopoly or control either of prime lake copper or of lake copper generally, and denying that its control of the Osceola Company would or could accomplish such monopoly, complete or partial. It disclaims any intention to operate the Osceola Company to the injury of the minority stockholders; alleges that the majority of the stockholders of that company are dissatisfied with the present management, and that it intends to make the operation

of the Osceola Company's property more profitable to the latter's stockholders than heretofore. It submits that the acts complained of do not offend against either the federal anti-trust act, the Michigan anti-monopoly act, or common-law equity principles; that if the acts complained of are unlawful the remedy by injunction may be invoked only by the Attorney General of the United States, or the Attorney General or prosecuting attorneys of the state of Michigan; that, if such injunctive relief may be given to a private party, it can be given only to the Osceola Company; that complainant, as a minority stockholder, has shown no right to act on behalf of the corporation; that no peculiar injury to complainant, actual or threatened, is alleged; and that, upon the face of the testimony presented, an injunction in advance of final hearing would be an unwarranted divesting of property rights and an unwarranted disturbing of the existing status.

1. The bill plainly alleges a violation of law, unless the transaction complained of is made lawful by the fact that the alleged attempted monopoly is proposed to be accomplished by means of a control of stock in a competing company, rather than by direct previous agreement between the two companies. The allegation is, in substance, that the stock has been purchased, and the proxies obtained, for the purpose of suppressing competition between two otherwise competing companies, and that the proposed control will in fact enable the creation of a monopoly. The formation of a monopoly for the purpose of suppressing trade or commerce is unlawful, both at common law (Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Hunt v. Riverside Co-operative Club, 140 Mich. 548, 104 N. W. 40, 112 Am. St. Rep. 420; Chesapeake & Ohio Fuel Co. v. U. S., 115 Fed. 610, 53 C. C. A. 256), and under both the federal and state anti-trust laws. The federal act provides that every combination in restraint of trade or commerce is illegal. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. As said by Judge (now Justice) Day, in Chesapeake & Ohio Fuel Co. v. U. S., 115 Fed. 619, 53 C. C. A. 265: "All contracts and combinations are declared illegal if in restraint of trade or commerce among the states." Under the Michigan statute, a trust is a "combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons, * * * (3) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity," and it is declared to be unlawful, against public policy, and void for two or more persons or corporations to "pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected." Pub. Acts Mich. 1899, p. 409, No. 255. The supplementary and declaratory act of 1905 provides that:

"All combinations of persons, partnerships or corporations made or entered into for the purpose and with the intent of establishing and maintaining, or of attempting to establish or maintain, a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy, illegal and void." Pub. Acts Mich. 1905, p. 507, No. 329.

It is not necessary under either the federal or state statutes that a complete monopoly be effected. It is sufficient if it tends to that end, and to deprive the public of the advantages which flow from free competition. U. S. v. E. C. Knight Co., 156 U. S. 16, 15 Sup. Ct. 249, 39 L. Ed. 325; Northern Securities Co. v. U. S., 193 U. S. 332, 24 Sup. Ct. 436, 48 L. Ed. 679; Hunt v. Riverside Co-operative Club, 140 Mich. 547, 104 N. W. 40, 112 Am. St. Rep. 420. The above-quoted language of both the federal and state statutes is in terms broad enough to cover any means purposely adopted for, and manifestly adapted to, the accomplishment of the unlawful purposes. It seems clear that, under the decision in Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the creation of a monopoly by way of stock purchase and control offends against the statute. In that case, at page 331 of 193 U. S., and page 454 of 24 Sup. Ct. [48 L. Ed. 679], it is said:

"It (the Sherman anti-trust act) does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states, or with foreign nations."

The distinction recognized in Davis v. A. Booth & Co., 131 Fed. 31, 65 C. C. A. 269, and in Northern Securities Co. v. U. S., between cases of outright purchase of the entire property of the absorbed company, and cases of combination of owners and property under one management, where each owner's interest is continued in the combination, would seem to place a combination by way of stock purchase and stock proxies within the prohibition of the statute. In the late case of Dunbar v. American Tel. & Tel. Co., 79 N. E. 427, 224 Ill. 9, the Supreme Court of Illinois has directly held that, where a corporation purchased the majority of the stock of another corporation, it is sufficient to condemn the transaction as unlawful, if its tendency is to restrain competition. This principle is impliedly recognized in Clark & Marshall on Private Corporations, § 652 (14). Nor can the fact that the alleged monopoly is proposed to be effected in part by the holding of proxies relieve an otherwise unlawful transaction of its unlawful character. If the object of obtaining the proxies was, as alleged, to create a monopoly, it is within the manifest prohibition of the law. The identity of the two corporations is maintained, and the combination is as effective as if a lease of the corporate property had been given.

The fact that the Michigan mining statute of 1905 gave the Calumet & Hecla Company power to purchase and own stocks in other mining corporations is invoked as making lawful the monopolistic control obtained through such purchase. The proposition is, in other words, that the Michigan statute gives the right to do the act complained of. Pub. Acts Mich. 1905, p. 153, No. 105. But this statute must be read in connection with the avowed policy of the state as expressed by its statutes. Distilling & Cattle Feeding Co. v. People, 156 Ill. 491, 41 N. E. 188, 47 Am. St. Rep. 200. When the amendment above referred to was passed, the statute of 1899, above referred to, was in force. The same Legislature which passed the mining amendment of 1905

later passed Act No. 329, p. 508, Acts 1905, "supplementary to, and declaratory of," the anti-monopoly act of 1899, containing the express provision before quoted, and in addition thereto exceptionally drastic provisions designed to prevent monopolies, total or partial, by whatever means accomplished. The result of these two statutes is that power was given to the Calumet & Hecla Company to purchase stock in the Osceola Company, but the right to exercise that power in violation of the anti-monopoly statutes of the state was not given. For the reasons stated, the conclusion reached is that the bill sufficiently alleges an unlawful combination.

2. The question whether a bill for injunctive relief can be maintained under the federal anti-trust act at the instance of a private party is not free from difficulty. It is strenuously contended that under neither the federal anti-trust act nor the state act can relief by way of injunction be granted to a private party; that section 4 of the federal act, which provides for injunctive relief, is expressly limited to suits brought at the instance of the Attorney General; and that section 7 of the federal act, giving to an injured party a right of action at law for treble damages, considered in connection with section 4 referred to, by necessary implication excludes the right of a private party to maintain any suit except that for treble damages under section 7, regardless of the general equitable jurisdiction of the court. Some of the cases cited affirm this contention. Others of them, in my judgment, do not, but, on the contrary, recognize the rule that the prohibition against injunctive relief under the federal act is limited to suits brought for injuries common to the general public, and that under the general jurisdiction of equity relief may be granted to a private party against violations of the anti-trust act.

In Blindell v. Hagan (C. C.) 54 Fed. 40, and Id., 56 Fed. 696, 6 C. C. A. 86, relief was asked, first, under the federal anti-trust act; and, second, under the general equity jurisdiction of the court. The district judge held that no one but the Attorney General could file a bill under the anti-trust act, but that, as the court had jurisdiction of the case by reason of diverse citizenship of the parties, it could grant relief upon the grounds of inadequacy of legal remedy and the prevention of multiplicity of suits. The relief granted was given none the less on account of the unlawful combination in restraint of trade.

In Pidcock v. Harrington (C. C.) 64 Fed. 821, complainant expressly disclaimed any right to relief under the general equity principles of the common law, and planted himself solely on the Sherman act. The district judge sustained a demurrer to the bill. The decision was not reviewed. It does not appear that there was diverse citizenship of the parties, and thus that the court would have had jurisdiction of the case but for the federal question.

In Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142, it was held that no case was stated under either the federal anti-trust act or the common law; but it was said:

"We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief, in a proper case, against threatened injury about to result to an individual, for any unlawful agreement, combination or conspiracy in restraint of trade."

In So. Ind. Exp. Co. v. U. S. Exp. Co. (C. C.) 88 Fed. 659, and Id., 92 Fed. 1022, 35 C. C. A. 172, heard on demurrer to bill, the acts complained of were entirely lawful unless by reason of the federal anti-trust act. It was held that under that law a private party could not obtain relief by bill in equity. It does not appear that the court had jurisdiction by reason of diverse citizenship.

In Metcalf v. American School Furn. Co. (C. C.) 108 Fed. 909, and Id., 113 Fed. 1020, 51 C. C. A. 599, heard on motion for temporary injunction and on demurrer to the bill, complainant sought, first, relief against the monopoly created by the absorption of the Buffalo Company by the American School Furniture Company, and, second, the assessment and collection in the equity suit of the treble damages given by the seventh section of the federal anti-trust act. The district judge held that these damages were recoverable only in an action at law for the sole benefit of the complainant, while the equitable relief was for the benefit of all interested in the corporation, and that the bill was thus multifarious. The right to equitable relief was not, however, denied, but expressly affirmed. After the bill had been amended by eliminating the demand for treble damages, and upon hearing upon demurrers and pleas to the amended bill ([C. C.] 122 Fed. 115), the district judge held that the bill presented no case except under the federal anti-trust law, and that under that law suit for injunctive relief could be brought only at the instance of the Attorney General. This decision has not been reviewed.

While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the anti-trust act, to relief by injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule.

The case of Minnesota v. Northern Securities Co., 194 U. S. 48, 70, 72, 24 Sup. Ct. 598, 48 L. Ed. 870, does not, to my mind, assert the rule contended for by defendant. On the contrary, it seems to recognize by implication a contrary rule. In that case, which was decided since the decisions in all the cases referred to above, the state sought relief under both the Minnesota statute and the federal anti-trust act. It was held that relief could not be given under the Minnesota statute for lack of diverse citizenship of the parties, nor under the federal statute because the injury alleged to have been sustained by the state was not direct or special, but only "remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such state; not such a direct, actual injury as that provided for in the seventh section of the statute." It was accordingly merely held (so far as right to relief under the federal anti-trust act is concerned) that the intention of the statute was "to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those in-

stituted in the name of the United States under the fourth section of the act, by district attorneys of the United States, acting under the direction of the Attorney General."

I cannot overlook the fact that the federal anti-trust act is highly remedial. Its apparent object is not to restrict, but to extend, remedies. The seventh section gives the Circuit Courts jurisdiction without respect to the amount in controversy, allows threefold damages and the costs of suit, including a reasonable attorney's fee. The very penal provisions invoked by defendant's counsel as requiring a strict construction of the act are but evidence of the highly remedial nature of the statute, and I am loath to conclude that a statute of this nature should be construed as taking away the otherwise existing jurisdiction of equity to afford relief. In this case jurisdiction is conferred by the diverse citizenship of the parties.

The case of In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, is not without pertinency. It was there held (under habeas corpus proceedings alleging lack of jurisdiction) that a bill in equity was properly filed by one railroad company against other railroad companies under the interstate commerce act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to restrain the refusal to afford equal facilities to the connecting line, as exhibiting a case arising under the laws of the United States, namely, the interstate commerce act. The court there said (page 554 of 166 U. S. and page 660 of 17 Sup. Ct. [41 L. Ed. 1110]):

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

It is noticeable that the act there in question expressly provided for relief to the injured person either by suit against the offending carrier or through complaint to the commission (sections 8 and 9), but not for injunction, except under circumstances not existing, and by methods not employed in the suit in question.

The bill alleges that the complainant's remedy at law is inadequate, and it may well be. It is fairly inferable from the case presented that, if the control of the Osceola Company by the Calumet & Hecla Company is had, a complete revolution in the management and in the method of operation of the former company will take place. To prove damages as resulting from such a combination, in view of the complete change of methods intended, and under an entirely new management, may well be difficult. The reasons for such difficulty seem too apparent to require elaboration. The Michigan statute, however (Pub. Acts Mich. 1899, p. 409, No. 255), contains no express provision for injunction suits by the district attorney or prosecuting attorneys, although "for a violation of any of the provisions of the act" it authorizes the institution of "proper suits or quo warranto proceedings in a court of competent jurisdiction," which is recognized as giving authority to maintain injunction suits to restrain violations of the anti-trust law. Hunt v. Riverside Co-operative Club, supra. It is therefore not necessarily subject to the same considerations as the federal statute.

In my opinion, under the case here presented, the objection that remedy by injunction cannot be afforded at the instance of the injured party should not be sustained.

3. It is contended that under the case made by the bill the grievance complained of is that of the Osceola Company, and that complainant, as a stockholder in that company, has not complied with general equity rule No. 94, adopted to prevent a collusive conferring of jurisdiction. The authorities agree that, where the relief is sought for the benefit of the corporation, the complaining stockholder must show that he has exhausted all means within his reach to induce the corporation to take action, to the extent of formally making demand for action upon the board of directors (and, as held in some cases, even upon the stockholders), unless it appears that such demand would be an idle ceremony. It is clear that such demand upon the stockholders would have been, in this case, an idle ceremony, as a majority of the stock is apparently controlled by the Calumet & Hecla Company. Moreover, but 22 days intervened between February 20th and March 14th, and the mining law required four weeks' publication of notice for special stockholders' meeting. 2 Comp. Laws Mich. 1897, § 6999. The bill alleges that the suit is not collusive; that complainant had consulted with a majority of the directors, all of whom expressed their opinion that the corporation should not bring the suit, in view of the antagonism thereto on the part of the majority of the stockholders, and in view of the near expiration of their terms as directors. Assuming that the relief asked for belongs to the corporation, the question is: Does the bill show that demand upon the directors to bring the suit would be an idle ceremony? This hearing is not upon demurrer to the bill, but upon answer and affidavits. There is force in the suggestion that the directors might properly be adverse to taking corporate action under the circumstances stated, and that under the allegations referred to there is as much ground for an inference that the board, if formally called together, would have declined to take corporate action, as in a case where individual directors are known to favor the situation complained of. The allegations prima facie negative collusion. If upon final hearing the jurisdiction of this court should be found to rest upon collusion, the bill would be then dismissed. The fact that the original bill did not allege compliance with rule 94 is not material. The amended bill was filed as a matter of right. On this hearing relief can be given on the amended bill with the same effect as if it were an original bill.

It is not clear, however, that the grievance complained of belongs solely to the corporation. An action at law for the recovery of damages on account of the acts sought to be enjoined would accrue to individual stockholders, under section 7 of the federal act and the eleventh section of the Michigan statute. Metcalf v. American School Furn. Co. (C. C.) 108 Fed. 909, 912; s. c. (C. C.) 122 Fed. 115, 116. The right of the complainant to maintain the bill for his personal interest is recognized by respectable authorities. High on Injunctions (4th Ed.) § 1227, and cases cited; Dunbar v. American Tel. & Tel. Co., 79 N. E. 423, 224 Ill. 9. If the Osceola Company was not a necessary party, and the bill is maintainable upon general equity princi-

ples, this court would have jurisdiction through diversity of citizenship, and thus the case would not be within the mischief aimed at by the rule in question.

4. It is contended that the bill does not allege a threatened, direct injury to complainant from the proposed monopoly charged, beyond such injury as would be suffered by the general public, and that irreparable injury is not sufficiently alleged to justify injunction. The seventeenth paragraph of the bill alleges that if the Calumet & Hecla Company shall secure the intended control of the Osceola Company it will be able to, and will, control the Osceola Company in its own interests, and not in the interests of complainant and other stockholders similarly situated; that the officers of the Osceola Company will have no independence of action in the management of that company's affairs; and that thereby complainant and other stockholders will suffer great loss and damage. As before said, this hearing is not on demurrer to the bill. The paragraph in question must be construed in connection with the other paragraphs of the bill and the case presented upon this application. The bill alleges that the complainant is director and officer of the Osceola Company, and defendant's affidavits allege that he receives a substantial salary. It is alleged that the Calumet & Hecla Company proposes to oust the present directors, including the complainant, as a director and officer. Complainant's affidavits tend to show that the Calumet & Hecla Company proposes to revolutionize the method of operation of the Osceola mine, both in mining, manufacturing, and selling, and in the interuse of shafts, drifts, and openings, and that the proposed methods, if applied, will injure the value of complainant's stock. Surely injuries such as these are distinct from such as would be suffered by the general public through the creation of a monopoly, and are injurious not only to the corporation as an entity, but to the individual stockholders. Moreover, under the anti-trust laws, if an unlawful monopoly is created, the Osceola Company would be subject not only to fine, but to forfeiture of franchises, notwithstanding the monopoly is created by action of the stockholders rather than by corporate action. Clark & Marshall on Private Corporations, § 314 (R). These injuries likewise are distinct from those suffered by the general public. If the injuries referred to shall be suffered by complainant, they are properly termed irreparable. High on Injunctions (4th Ed.) § 1227, and cases cited.

5. It is urged that the case made by complainant's bill and affidavits is fully met by defendant's answer and affidavits; that it is clearly shown that no combination in restraint of trade is actually threatened, or is possible; that this suit is a mere attempt on the part of minority stockholders to maintain themselves in power; that complainant and his associates are shown to have abused their trusts; that the proposed action sought to be restrained is in the best interest of the Osceola Company and its stockholders; that the injunction should be denied for these reasons, and for the further reason that it would violate the fundamental rule which forbids the disturbing, by injunction, of vested rights and existing status. In this connection, the apparent fact that the Calumet & Hecla Company bought its Osceola stock not merely for investment, but for the purpose of intervening in the man-

agement of the affairs of a competing company, is worthy of consideration. The fact that the answer completely denies the equity of the bill does not require a refusal of the injunction, nor should the court upon this hearing, and from affidavits, determine litigated questions of fact. It may be that upon the final hearing it must be held that complainant's case is completely overthrown. It is apparent, however, that if complainant shall sustain, on final hearing, the case presented by his bill, he is entitled to relief, unless it shall be found that the right belongs to some one other than complainant. The court is not to be understood as expressing an opinion upon the merits. It is sufficient for the purposes of this hearing that the court be convinced that upon the pleadings and upon the evidence a case is presented which makes the transaction a proper subject of investigation in a court of equity; or, otherwise stated, that complainant has a fair question to raise as to the existence of such right. It is in this view that the testimony favorable to complainant's case has been so fully set out. The court cannot say upon this application that complainant may not prevail upon final hearing, but is convinced that a fair question is raised as to the existence of the right asserted, and that opportunity should be given for a final decision upon the difficult questions of law and fact involved. Such being the case, the injunction should not be refused unless upon the balancing of convenience and inconvenience, to the one party or the other, an injunction appears inexpedient.

Upon such balancing, the considerations in favor of the injunction preponderate. If the injunction is not issued, the office of this suit is practically ended. On the other hand, if the injunction issues, the worst that can happen to the Calumet & Hecla Company is a continuance, until final hearing, of the present management, which, although unsatisfactory to the majority of the stockholders (including the Calumet & Hecla Company) is not shown to seriously jeopardize the interests of the Osceola Company and its stockholders. The rules and considerations applicable to conditions such as here presented are so fully stated in the recent case of Pere Marquette Ry. Co. v. Bradford (C. C.) 149 Fed. 492, as to make unnecessary further citation of authorities thereon. The consideration that complainant would have no right to appeal from an order refusing an injunction is properly entitled to weight. Harriman v. Northern Securities Co. (C. C.) 132 Fed. 464. Such injunction will not disturb the existing status, which is not, properly speaking, the abstract right of majority stock control, but rather the concrete fact of the present management of the Osceola Company as distinguished from a management by the Calumet & Hecla Company. The Osceola stockholders who have given their proxies to the Calumet & Hecla Company are not punished by the issuing of the contemplated injunction. No reason is suggested why their proxies given that company may not be revoked.

Upon these considerations, the issuing of temporary injunction in substantially the terms of the existing restraining order, which would operate to protect all interests concerned, seems both proper and expedient.

Temporary injunction will issue accordingly.

WHITAKER & RAY CO. v. ROBERTS, County Superintendent of Schools, et al.

(Circuit Court, D. Nevada. July 8, 1907.)

No. 847.

1. SCHOOLS AND SCHOOL DISTRICTS—CLAIMS FOR SUPPLIES—ACTION—PARTIES.
Where, in a suit against a county school superintendent a board of citizens and taxpayers, and a board of county commissioners, to compel payment for certain school desks purchased by a board of school trustees, as authorized by Comp. Laws Nev. §§ 1294, 1298, it appeared that the trustees executed the contract, received the desks, and allowed complainant's claim, which was thereafter disallowed by defendants, a bill, not joining the school trustees representing the school district, from whose funds any judgment would have to be paid, nor praying any relief against them, was demurrable.

2. SAME—DISALLOWANCE OF CLAIMS.
Comp. Laws Nev. § 1287, provides that no public money can be paid out except on warrants of the county auditor issued on orders of the county superintendent of public schools, and section 1338 makes it the duty of the county superintendent of public schools to draw his order on the county auditor in favor of the trustees of any school district in his county for any bill signed by the trustees and authorized by the act, except that, if in the opinion of the superintendent the bill contains an exorbitant or unwarranted charge, he may refuse to draw his order until ordered to do so by the board of county commissioners, who are required to act as auditors on any bill rejected by the county superintendent. Act Feb. 13, 1905, p. 23, § 9, authorizes the trustees of the district in question to purchase new school furniture, and provides that no purchase shall be valid until it has received the approval of a majority of a board of taxpayers and citizens created by such act. *Held* that where, after the allowance of a bill for school desks by school trustees, it was allowed only for a portion of the amount by the county superintendent, whose ruling was confirmed by the board of citizens and taxpayers and the board of county commissioners, the allowance of the bill by the trustees was insufficient to establish the claim as a valid claim for the full amount against the district.

3. SAME—PAYMENT—ENFORCEMENT.
Prior to the allowance of claims against a school district by the officers selected therefor by law or the establishement of such claim by a judgment against the district, proceedings will not lie to compel payment of the claims by the officers of the county.

4. MANDAMUS—SCOPE OF WRIT—SCHOOL DISTRICTS—CLAIMS—PAYMENT.
After a claim against a school district has been duly established and liquidated, mandamus is the proper remedy to compel payment thereof.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 226.]

5. EQUITY—GROUNDS OF JURISDICTION—MULTIPLICITY OF SUITS.
Where complainant's claim against a school district for school desks was partly disallowed, all the desks having been purchased under a single contract, complainant was not entitled to sue in equity to compel payment of the full amount claimed in order to prevent a multiplicity of suits.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 167, 169.]

On Demurrer.

Samuel Platt, for complainant.
S. Summerfield, for defendants.

FARRINGTON, District Judge (orally). December 4, 1905, the board of trustees of Carson school district, Ormsby county, Nev., entered into a written contract with the complainant for the purchase of 410 school desks. The desks having been delivered, the board of trustees allowed the complainant's bill, amounting to $2,385.10. Subsequently, the claim was presented for approval to the board of three citizens and taxpayers of the school district, appointed under the provisions of the statute of Nevada of February 13, 1905, p. 23, § 9. This board refused to allow the claim in full, and approved it for but $2,065.30. The claim was next presented to the defendant E. E. Roberts, county superintendent of public schools for Ormsby county, who declined to approve it for any amount in excess of $2,065.30, on the ground that the claim was exorbitant. July 18, 1906, the complainant presented the claim to the board of county commissioners of Ormsby county, with the request that the board compel the county superintendent to allow and approve it for the full amount claimed. This the board refused to do, but approved the claim to the amount of $2,065.30, and no more.

September 14, 1906, the complainant filed its bill in equity in this court. In this bill the county superintendent of schools, the board of three citizens and taxpayers, and the board of county commissioners are defendants.

The complainant asks: First, that the board of three citizens and taxpayers and the board of county commissioners of Ormsby county be compelled to allow and approve complainant's bill in full, and to indorse their approval thereon; second, that E. E. Roberts, county superintendent of public schools, be compelled to allow and approve complainant's bill in full, and indorse his approval thereon, and to draw his warrant on the county auditor in favor of the complainant for the sum of $2,385.10, the total amount of complainant's bill, with interest thereon at 7 per cent. per annum, and also for $300 additional as attorney's fees; third, that it be decreed that complainant is justly entitled to the sum of $2,385.10, and interest thereon from June 15, 1906, to the date of judgment herein, at 7 per cent. per annum, also to the sum of $300 additional for attorney's fees, and also to its costs and other appropriate relief.

The board of school trustees is a body corporate. Comp. Laws Nev. § 1294. It had the power, and it was its duty, to supply schoolhouses within its district with necessary furniture, and to pay for the same out of the county school moneys belonging to the district. Comp. Laws Nev. §§ 1294, 1298.

The board of school trustees executed the contract attached to complainant's bill, and received the desks contracted for, but the price has never been paid. The relief prayed for does not include a demand for a judgment against the board of school trutees; neither is the school district, nor its board of trustees, in any manner made a party to this proceeding. Furthermore, it does not appear that the demand of the complainant has ever been reduced to a judgment. This court is asked to decree that the complainant is justly entitled to the full amount of its claim, with interest, costs, and attorney's fees, and also

to approve and ratify the action of the board of school trustees in allowing the claim. Such a decree, if rendered, would be rendered against no one, and could not be enforced; at best, it would be but the opinion of the court. The desire of complainant is to recover compensation for the desks furnished the board of school trustees. Such compensation must come, if at all, out of the school moneys belonging to the school district. Neither the county superintendent, nor the board of taxpayers, nor the board of county commissioners, is personally or officially liable in any manner for the desks. They entered into no contract, they received no desks, and they were not parties in any sense to the written agreement attached to the complainant's bill. The complainant makes no such contention, nor does it set up the breach of any contractual obligation by the defendants, or by either or any of them; neither does it show that they have violated any legal duty owing to the complainant. This court is simply asked to compel defendants to allow and approve complainant's demand in full, and to draw the appropriate warrants and orders for its payment, and for the payment of interest, costs, and attorney's fees.

The alleged contract, delivery of the desks, and failure to pay for them is set up in the bill to supply a basis for an order compelling defendants to approve the demand and draw the necessary warrants for its payment. The difficulty here is that the warrants, if paid, must be paid out of the moneys belonging to the district, and this involves an assumption that the validity of the contract alleged to have been executed by the board of school trustees of the district, and the amount due thereon, can be determined in a proceeding to which the district is not a party, and that the money belonging to the district can be taken without giving the district, or rather its board of trustees, their day in court. The mere statement of the proposition carries with it its own refutation. The school district must be heard in this court before the court can pronounce a decree of any validity determining its liability or depriving it of any money or property. Liebman v. City and County of San Francisco (C. C.) 24 Fed. 705, 713.

It is true the board of school trustees approved and allowed the claim, but it was refused approval by each and all of the defendants. This approval by the trustees, standing alone, however, does not give the claim any binding effect against the school district. Before the claim is paid, it must be officially approved by the county superintendent, if not by the board of taxpayers and the board of county commissioners. If either or any of the boards or officials, whose approval is necessary to secure the payment of a claim against a school district, refuses such approval and rejects the claim, the effect is the same as though the claim had been rejected by each and all of such boards and officials. It cannot be treated as though it had been partly rejected and partly allowed. In this case, when the county superintendent of public schools and the board of citizens and taxpayers and the board of county commissioners refused to approve the claim for a sum in excess of $2,065.30, the complainant was legally in the same plight that it would have been had the board of school trustees also taken the same adverse action as the other boards and the county superintendent.

The board of school trustees of a school district is a body corporate. For many purposes it represents and acts as the district. For instance, it can sue and be sued, and valid judgments against it bind the district. It can make contracts for the district, and it has the custody of the schoolhouses and the control of the schools. But, in the allowance and payment of claims against the district, it is but one of the agencies through which the district expresses its will. The county superintendent of schools and the board of county commissioners are not a part of this body corporate. They are in no sense the school district, but they are the agents, or rather tribunals, by which claims against the district must be examined and allowed before they are voluntarily paid. Under the general school law of Nevada no public money can be paid out except "on warrants of the county auditor, issued upon orders of the county superintendent of public schools of such county." Comp. Laws Nev. § 1287.

It is the power and the duty of the county superintendent of public schools "to draw his order on the county auditor in favor of the trustees of any school district in his county for any bill signed by said trustees and authorized by this act; provided, * * * that, if in the opinion of the superintendent, any bill contains an exorbitant or unwarranted charge, he may refuse to draw his order until ordered to do so by the board of county commissioners, who shall act as auditors upon all bills rejected by the county superintendent." Comp. Laws Nev. § 1338.

The statute of February 13, 1905, p. 23, § 9, referred to in the bill of complaint, authorizes the school trustees of Carson school district to sell all or any of the real estate belonging to the district. The proceeds of such sales must be devoted to the purchase of a suitable site for a schoolhouse, or for the purchase of furniture and school supplies, providing "that all sales and all purchases of property as provided for in this act, shall be subject to the approval of a board of three (3) citizens and taxpayers of the said school district. * * * No sale or purchase made in accordance with the provisions of this section shall be valid unless it receive the approval of the majority of" said board.

If the desks in question were not purchased under the provisions of the statute of February 13, 1905, or with the proceeds of the sales therein authorized, it is doubtful whether the approval of the board of taxpayers is essential. It is unnecessary, however, to decide this question. It is sufficient to say that, unless complainant's claim is approved and allowed in the manner and by each and all of the various officials and boards, as provided in the statutes, it cannot be regarded as approved or allowed in any respect or to any degree, as against the district or as against its property. The approval by the board of trustees, without other approval, and in the absence of a judgment against the district, or rather against the board of school trustees of the district, will not afford any support to an order of this court directing the defendants to approve and allow complainant's claim.

Whatever power the statutes have vested in the county superintendent of public schools, the board of taxpayers, or the board of county

commissioners, to allow or reject claims against the Carson school district, is discretionary. Each board having a claim under consideration is authorized to allow or reject, as its best judgment dictates. It is the discretion of the board, not the discretion of the court, which is provided for in the statute. Discretionary power is in its very nature independent, and when it is controlled it ceases to be discretionary. If this court directs the county superintendent, or the board of taxpayers, or the board of county commissioners, in advance of any judgment against the district, to approve or reject complainant's bill, it is simply substituting its own discretion for the discretion of the several boards and the county superintendent, and assuming a power which is not conferred by law. The board of taxpayers, the county superintendent, and the board of county commissioners have already exercised their discretion. They may have made a mistake, but such a mistake would not be a legal wrong. If either defendant had any right to act on the claim, it had full legal power to allow or reject. The complainant, in the absence of fraud or other improper motives controlling the action of the defendants has no cause of action whatever against them because of their partial rejection of its claim.

This court cannot compel the defendants "to do over again what they have already done, but with a different result." Such an order would be void, unless the law has vested in this court the power to control and dictate the official judgment and discretion of the defendants. This court, as a court of equity, has no supervisory authority over the county superintendent of schools, the board of county commissioners, or the board of taxpayers. "Courts are not permitted, nor do they assume, to exercise any restraining or other influence in regard to the performance or nonperformance of discretionary duties, except when fraud, corruption, or bad faith is involved." 5 Pom. Eq. Jur. § 342; 1 Abbott, Municipal Corp. p. 197; Ingersoll on Pub. Corp. § 87.

It has been repeatedly held that the Circuit Courts of the United States have no power to issue writs of mandamus to state courts and officers except in aid of a jurisdiction already acquired. In such cases, "in those courts the judgment at law is necessary to support the writ, which is in the nature of an execution to carry the judgment into effect." Davenport v. County of Dodge, 105 U. S. 237, 242, 26 L. Ed. 1018; Graham v. Norton, 15 Wall. 427, 428, 21 L. Ed. 177; In re Blake, 175 U. S. 114, 118, 20 Sup. Ct. 42, 44 L. Ed. 94; Osborne v. Co. Com'rs of Adams Co. (C. C.) 7 Fed. 441, 443; Rosenbaum v. Bd. of Supervisors (C. C.) 28 Fed. 223; Gares v. Northwestern Nat. Bldg. L. & I. Ass'n (C. C.) 55 Fed. 209.

If in this case and in this court the complainant had already obtained a judgment against the board of school trustees of the district, establishing its claim, a writ of mandamus would issue, upon proper showing, to compel the necessary official action to provide for its payment. Such a writ would then be ancillary to the original action. It would be in aid of a jurisdiction already acquired. But no judgment has been obtained in this court, and no action has been brought here against the board of school trustees. No jurisdiction has been acquired. A writ of mandamus issued by this court, under such con-

ditions, would be absolutely void. This court has no more power to enter a decree compelling the board of county commissioners and the board of taxpayers to approve and allow complainant's claim than it has to issue a writ of mandamus to compel like action. Lack of jurisdiction cannot be supplied by stating the facts and demanding relief in the form of a bill in equity. Jurisdiction is a matter of substance, and not of mere form. Smith v. Bourbon County, 127 U. S. 105, 112, 8 Sup. Ct. 1043, 32 L. Ed. 73.

It has been earnestly contended that a court of equity has jurisdiction of this action in order to prevent a multiplicity of suits. In reply to this it is sufficient to say that there is but one contract set out in the bill. To that contract none of the defendants were parties. The party executing that contract, and who is alleged to have violated its terms, alone is liable. Ingersoll on Pub. Corp. § 89; United States v. Bitter Root Co., 200 U. S. 451, 479, 26 Sup. Ct. 318, 50 L. Ed. 550.

It is possible that the defendants, after complainant's claim has been put into a judgment, may refuse to provide for its payment; but this is a contingency which the court cannot anticipate. On the contrary, the presumption is, not only that if a judgment be obtained it will be correct, but that the county superintendent, the board of taxpayers, and the county commissioners will take proper action to provide for its payment. This court cannot presume or even anticipate that any public official or board will resist its judgment. State v. Noyes, 25 Nev. 31, 48, 56 Pac. 946.

If, after judgment is obtained, such a contingency should arise, no additional suits are necessary. The proper remedy would be a writ of mandamus based upon the judgment, and in the nature of a writ of execution. State v. Com'rs of Lander Co., 22 Nev. 71, 76, 35 Pac. 300; Labette Co. Com'rs v. Moulton, 112 U. S. 217, 221, 5 Sup. Ct. 108, 28 L. Ed. 698.

The demurrer is sustained.

KELLY v. HERRMAN et al.

(Circuit Court, S. D. Ohio, W. D. February, 1906.)

CONTRACTS—IMPLIED CONDITIONS—CONTRACT WITH BASEBALL PLAYER.

The provisions of the "national agreement for the government of professional baseball," adopted by the so-called "major" and "minor" leagues in 1903, and of the rules of the national commission created thereby, which give to a club having a player under contract with it the right to reserve such player for the ensuing season or to sell him to another club, in the absence of a stipulation to the contrary in the contract, are not binding upon a player who continued during succeeding years to play with a club under a contract entered into prior to the adoption of such agreement or the promulgation of the rules, and who did not thereafter make any new contract under or with reference to the same, and such club has no power to sell him without his consent, nor has the commission the right to enforce the prescribed penalties because of his refusal to recognize such a sale.

In Equity. On motion for preliminary injunction.

F. L. Hoffman, for plaintiff.

J. E. Bruce, C. J. McDiarmid, and Ernst Rehm, for defendants.

THOMPSON, District Judge. Three great organizations, viz., the National League, the American League, and the National Association, include in their membership "practically every professional baseball club in the United States." The first two are known as the "major" leagues and the last as the "minor" league. These organizations on September 11, 1903, formed a combination under what is known as the "national agreement for the government of professional baseball." Article 1 of this agreement provides that:

"This agreement shall be indissoluble except by the unanimous vote of the parties to it, and if any of said parties withdraws from it, or violates any of its fundamental principles, the party so withdrawing or offending shall be treated as the enemy of organized baseball."

Article 3 provides that:

"On or before March first of each year a committee of three from each of the major leagues to this agreement—the National and the American League —shall meet and adopt a code of rules to regulate the playing of the game of baseball for the ensuing season, a majority vote being required to adopt, revise or repeal a rule."

Article 4, § 1, provides that:

"A commission of three members, to be known as the national commission, is hereby created with power to construe and carry out the terms and provisions of this agreement, excepting when it pertains to the internal affairs of the National Association. One member shall be the president of the National League and one the president of the American League. These two members shall meet, on or before the first Monday of January in each year, to elect by a majority vote a suitable person as a third member. The third member so chosen shall be the chairman of the commission for one year from the date of his election, and shall preside at all meetings. Each member shall have a vote on all questions which may come before it, except as hereinafter directed."

Section 3 provides that:

"The national commission shall have the power to inflict and enforce fines or suspensions, or both, upon either party to this agreement who are adjudged by it to have violated the letter or spirit of this agreement."

Section 4 provides that:

"Whenever a National League club or an American League club claims the services of the same player by selection, reservation or contract, the right to said player shall be established by the decision of the chairman of the commission, who shall determine the case on the law and evidence without the aid of either of his associates."

Article 6, § 1, provides that:

"All parties to this instrument, pledge themselves to recognize the right of reservation, and respect contracts between players and clubs under its protection."

Section 2 provides that:

"Any club or league which harbors a player who refuses to observe his contract with a club member of any party to this agreement, or to abide its reservation, shall be considered an outlaw organization and its claims to contractual and territorial rights ignored."

Section 3 provides that:

"The right and title of a major league club to its players shall be absolute, and can only be terminated by release or failure to reserve under the terms of this agreement by the club to which a player has been under contract. When a major league club serves notice of release on one of its players, he shall be ineligible to contract with a club or another league, if, during ten days after the service of such notice of release, a club in the league in which he has been playing shall demand his services."

Section 8 provides that:

"A major league club may, at any time, purchase the release of a player from a minor league club, to take effect forthwith, or on a specified date, provided such purchase is recorded with the secretary of the commission and secretary of the National Association for promulgation within five days of the date of the transaction."

Article 7 provides that:

"On or before the twenty-fifth day of September in each year the secretary of each party to this agreement shall transmit to the secretary of the commission a list of players then under contract with each of its several club members for the current season, and in addition thereto a list of such players reserved in any prior annual reserve list who have refused to contract with such clubs. Such players, together with all others thereafter to be regularly contracted with by such clubs (namely, those whose releases have been secured for future services by purchase or selection by draft under this agreement), are and shall be ineligible to contract with any other club of any league during the period of time between the termination of their contracts and the beginning of the next season. The secretary of the commission shall thereupon promulgate such lists. No club shall be permitted to reserve any player while in arrears of salary to him. Failure of a club to tender a contract to a player by March first shall operate as a release."

Article 8, § 1, provides that:

"All contracts between clubs and players in the major league shall be in a form prescribed by the national commission."

Section 2 provides that:

"Any agreement between club and player for service, evidenced by written acceptance, whether by letter or telegram, or receipt from player for money advanced to him to bind such agreement, shall be construed to be a contract and held to be binding, provided the player declines to enter into a formal contract; but his refusal to sign such formal contract shall render him ineligible to play with the contracting club for more than a period of ten days, or to enter the service of a club of any party to this agreement unless released."

Rule 24 of the "Rules and Regulations Governing the National Commission" provides that:

"On or before the thirty-first day of August of each year each club of the National and American Leagues shall furnish the secretary of the national commission with a list of all players purchased by them; and any claim that a player has been purchased previous to August thirty-first of any year shall not be considered by the commission, unless the name of such player appears upon such list."

Rule 26 provides that:

"All major league clubs in submitting lists of purchased players as required by rule 24, of the national commission, shall also be required to file with the commission copies of the agreement entered into relating to such purchases; it being the intent and desire of the commission to make close inquiry into all agreements providing for purchases, in order that all transactions may be

bona fide, and not made with a view of protecting clubs in retaining players, thereby preventing the players from developing in their profession, and enabling them to secure adequate compensation for their expertness, as is provided by the national agreement."

Rule 27, par. "a," provides that:

"Where the contract contains a reservation clause, the player shall in no instance be held to be free from reservation unless the clause is stricken from the contract."

Paragraph "b" provides that:

"Where the contract does not contain a reservation clause, every club, nevertheless, has a right to reserve a player, unless the contract itself contains a written stipulation that the player is not to be reserved."

Paragraph "e" provides that:

"In order that the attention of players may be called to this rule, the secretary of the commission will be required to advertise the same in at least two papers devoted to sport, no less than twice each year."

Article 4, § 4, mentions three methods by which the service of players may be obtained or continued, viz., selection, reservation, and contract; but it is only necessary here to consider the control of the services of a player by reservation.

A player under contract to serve may be reserved for the ensuing year, "unless the contract itself contains a written stipulation that the player is not to be reserved." See rule 27b. That is, he must serve the club for the ensuing year unless he is sold to some other club, or unless—to use another form of expression in baseball parlance—some other club buys his release. The players are not parties to the "national agreement for the government of professional baseball," but the claim of the defendants is that the players know of the usage of reservation, and therefore must be deemed to have contracted with reference to it.

The affidavits show that in the fall of 1901, nearly two years before the national agreement was entered into, Kelly entered into a written contract with the St. Paul Baseball Club to serve as its playing manager and first baseman, and continued to serve as such until November 19, 1904, when he was further and additionally employed to act as president and general manager of the club, and thereafter was paid a salary commensurate with the services required of him, "and during the season of 1905 received from the St. Paul Baseball Club a sum of money which was larger than any sum ever paid to a playing manager of any minor baseball club," to the knowledge of Lennon, the owner of the St. Paul Baseball Club (see Lennon's affidavit); that, as the reputed president of the St. Paul Baseball Club, he was on January 19, 1905, elected a member and chairman of the board of directors of the American Association of Baseball Clubs; that he never signed the player's contract required by the national agreement, or any contract other than the special contract entered into with the said St. Paul Baseball Club in the fall of 1901, his employment as acting president and general manager not having been the subject of a written contract; that as manager he forwarded, at the end of each season, a list of players in reserve by the St. Paul Baseball Club, but did not at any time include his own name in the list; that, in addition to the performance of his

duties as acting president and general manager, he played as first baseman during the season of 1905; that early in the season of 1905 there was "personal disagreement" between Lennon and Kelly, and on August 16, 1905, the St. Paul Baseball Club, owned and controlled by Lennon, sold Kelly to the St. Louis American League Club. Kelly complains that, when he was sold to the St. Louis club, he was not under contract to the St. Paul Baseball Club as a player, within the meaning of the reservation provisions of the national agreement; and that, if he was, the St. Paul Baseball Club had no legal right to sell his services to the St. Louis club without his consent, yet, if he refuses to serve the St. Louis club, the defendants, unless restrained therefrom by this court, will blacklist him and prevent him from contracting as a player with any other baseball club in the United States, and will cause a loss to him in the sum of not less than $4,000 per year.

It would seem, from the above brief summary of the material facts, that the relation of Kelly to the club was not that of a mere player, within the meaning of the reservation provisions of the national agreement; but the national commission, in its interpretation of the national agreement, has held otherwise, and it is not necessary for the purpose of the present application to review its action.

Assuming, then, that he was a player within the meaning of the reservation provisions of the national agreement, notwithstanding his employment as acting president and general manager of the St. Paul Baseball Club, had the St. Paul Baseball Club a legal right to sell his services to the St. Louis club without his consent? He was not a party to the national agreement, nor did he ever contract with the St. Paul Baseball Club with reference to, or in contemplation of, it. He never signed the player's contract required by the national agreement, and the only written contract signed by him was entered into nearly two years before the national agreement was made and the national commission created, and the verbal contract or arrangement of November 19, 1904, had no relation to his employment as a player. All his service as a player was performed under the contract of 1901, or, if not we are wholly unadvised of any new contract or any modification of the old one, save an increase of salary from time to time. See Lennon's affidavit.

There is no evidence that the claim was made that the adoption of the national agreement in any way operated to change the relation of the parties under the old contract until Kelly was sold to the St. Louis club. Kelly would not be bound by the provisions of the national agreement unless he was a party to it, or contracted with reference to it. He did nothing in the course of his employment in recognition of any right to reserve or sell him under the national agreement. The reservation provisions of the national agreement can only become a part of a player's contract by express stipulation or necessary implication; but Kelly never entered into any contract, express or implied, under the national agreement. His continued service under the contract of 1901, after the adoption of the national agreement, permitted by the St. Paul Baseball Club, may have been violative of that agreement on the part of the St. Paul Baseball Club, but not on the part of Kelly.

The consequences of his refusal to play for the St. Louis club are plainly indicated by article 6, § 2, of the national agreement, above quoted.

An injunction as prayed will be allowed pending the final hearing.

In re PFEIFFER.

(District Court, W. D. Pennsylvania. August 2, 1907.)

No. 3,047.

1. BANKRUPTCY—EXEMPTIONS—PENNSYLVANIA STATUTE.

Under the law of Pennsylvania (P. L. 1849, 533) exempting to a debtor "property to the value of $300," as construed by the Supreme Court of the state, the exemption must be taken in property, and cannot be claimed in the proceeds of property to be subsequently sold, and a claim by a bankrupt of an exemption of "$300 in cash out of the proceeds of bankruptcy estate" is invalid and gives him no right.

2. SAME—WAIVER OF EXEMPTION—RIGHT TO WITHDRAW.

Under the law of Pennsylvania a debtor may waive his claim to exemption, but may not assign it; and a bankrupt who has filed a formal waiver of his claim will not be permitted to withdraw such waiver for the benefit of a single creditor to whom he has made an assignment of his claim.

In Bankruptcy. On certificate from referee.

A. M. Lee, for trustee.

Frederick L. Kahle, for bankrupt.

EWING, District Judge. The question here certified is "whether the bankrupt, having filed his petition withdrawing his claim for exemption contained in the schedule, should be allowed to withdraw said withdrawal and be allowed the exemption claimed." Pfeiffer filed a voluntary petition in bankruptcy November 24, 1905, accompanied by the proper schedules, and therein made his claim for exemption as follows: "$300 in cash out of the proceeds of bankruptcy estate." On the same day he was duly adjudged a bankrupt, and on December 5th following the United States marshal was appointed receiver and authorized to make sale of the goods of the bankrupt for the sum of $600. On February 22, 1906, the receiver made report of said sale, accompanied by an account, which account was confirmed absolutely, and the receiver thereupon discharged. On December 21, 1905, M. J. McGeary was elected trustee, and the fund arising from the bankrupt's estate is now in his hands for distribution.

Some time in December, 1905, the bankrupt executed a paper selling, assigning, and transferring to D. B. Kahle all his right, title, and interest in and to that certain exemption of $300 out of his estate in bankruptcy, and on April 15, 1907, he presented his petition to Wm. R. Blair, referee, praying that he be permitted to withdraw his claim for exemption, and that the $300 be distributed as his other assets, which petition was granted, and his claim for exemption withdrawn. Two days later, on April 17, 1907, the bankrupt presented his petition reciting his assignment of his exemption fund to Kahle, and stating that in consideration of the above assignment he should not

have presented his petition to withdraw his claim for exemption, and praying leave to withdraw that petition and have the exemption allowed as provided by law. To this second petition his creditors made objection, and a hearing was held by the referee, and the testimony of the bankrupt with respect to these matters taken.

There is no allegation that the bankrupt's petition to withdraw his claim for exemption was induced by anything other than a feeling on his part that his creditors should have that fund rather than himself; but it does appear in the papers that some pressure was brought to bear upon him to induce him to make the application to withdraw his waiver, and that the said Kahle, who is a creditor of the bankrupt was originally, if not even yet, to receive at least one-half of the exemption fund in case the bankrupt obtained it. In one place the bankrupt so states, and in another place that it is not now his intention that he shall have any of it, and that Kahle has relinquished any right he might claim under the assignment aforesaid. While it is not directly so stated in any of the papers, the inference to be drawn from the papers and the statement of counsel on the argument is that the bankrupt is a young man and without any parties depending upon him.

Under the bankrupt act claims for exemption are to be allowed and administered under the state laws and in accordance with the decisions of the Supreme Courts of the respective states. Under the decision of the Supreme Court of this state in the case of Hammer v. Freese, 19 Pa. 255, the claim for exemption in this case could not be allowed as made in the bankrupt's schedules. The act of 1849 (P. L. 533) provides that "property to the value of $300 shall be exempt," etc., and does not permit, under the decision aforesaid, the claimant for the exemption to take the proceeds of property to be subsequently sold. A debtor may waive his right to the exemption (Case v. Dunmore, 23 Pa. 93), but may not assign it (Bowyer's Appeal, 21 Pa. 210; Bogart v. Batterton, 6 Pa. Super Ct. 468); and he may withdraw his claim (Appeal of Overseers of the Poor, etc., 95 Pa. 191; Kyle & Dunlap's Appeal, 45 Pa. 353).

Under the foregoing authorities it appears that the bankrupt's claim for the exemption was invalid in the first place, as was also his assignment of it, and that, even if the claim were valid, he had a perfect right to withdraw it, and, having done so, especially in view of the facts in regard to the disposition of it, in case he should get it, he should not be permitted to play battledoor and shuttlecock any longer. The referee was correct in his decision not to permit the withdrawal of the waiver.

The question, therefore, is answered in the negative, and the $300 directed to be distributed to the creditors in connection with the remainder of the fund in the hands of the trustee.

THE MARIE PALMER (two cases). THE JAMES McCAULLEY (two cases). THE BLANCHE HOPKINS (two cases).

(District Court, E. D. Pennsylvania. August 27, 1907.)

Nos. 76, 77.

COLLISION—SCHOONER AND TUG AND TOW MEETING—FAULT OF TUG—EVIDENCE.

A tug with a schooner in tow on a hawser *held*, on the evidence, solely in fault for a collision between her tow and a meeting schooner in Delaware Bay at night, on the ground that she held her course directly toward the meeting schooner, until they were so close that there was danger of collision, and then attempted to cross the schooner's bows with her tow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 84.]

In Admiralty. Suits for collision.

Howard M. Long, for The Marie Palmer.
John F. Lewis and Francis C. Adler, for The James McCaulley.
Henry R. Edmunds, for The Blanche Hopkins.

J. B. McPHERSON, District Judge. About 3 o'clock, or shortly afterwards, in the early morning of Friday, October 30, 1903, the schooner Palmer, in tow of the tug McCaulley, was in collision with the schooner Hopkins about three miles below Cross Ledge Light in the Delaware Bay. Both schooners suffered a good deal of injury, and these actions are the result. In one, the Palmer seeks to hold the tug and the Hopkins, either or both, liable for the damage inflicted upon her, and in the other the Hopkins seeks to lay all the blame upon the tug. In the latter action, the tug has impleaded the Palmer under the fifty-ninth rule.

The following facts are undisputed: The Palmer is a large four-masted schooner, 254 feet keel, and was bound down the bay on a voyage from the port of Philadelphia to Boston, carrying a cargo of nearly 3,000 tons of coal. She drew about 23½ feet, and was in tow of the tug McCaulley at the end of a hawser about 500 feet long. By direction of the captain of the tug, she had set some of her sails (the foresail, mainsail, mizzen-topsail, jib and flying jib) and, as there was a good breeze blowing from west by south, or thereabouts, her booms were on the port side. The Hopkins is a three-masted schooner of 505 tons register, and was bound to Philadelphia from Fernandina with a cargo of lumber. She was proceeding up the bay under her own sail on the port tack, nearly, but not quite, close hauled. The tide was flood, or high water slack. The night was clear, there being no fog or mist; and each of the three vessels had all of her lights properly set and burning. It appears clearly from the testimony that the presence of the Hopkins was observed by the tug about two miles away, and that the tug with her tow was seen by the Hopkins nearly, perhaps quite, as far. So far as appears, no other vessels were in the neighborhood to obstruct the navigation. Both the tow and the Hopkins were about in the center of the channel, which was from a mile to a mile and a half wide, and thus afforded ample room for the proper maneuvers;

and, with the conceded fact that the approaching vessels had more than sufficient knowledge of each other's approach, it is hard to understand how they could have failed to pass in safety. Nevertheless, it is beyond doubt that a collision between the two schooners did take place. The tug, steering a course to the eastward shortly before the impact, succeeded in crossing the bows of the Hopkins and in saving herself by a narrow margin, but the Hopkins, bound in the same direction, struck the towing hawser and sawed it in two; the result being that the Palmer continued on with the impetus of her sails and of the pull of the tug, and struck the Hopkins on the port quarter, not far from the stern; the blow, or blows, doing much injury to both vessels.

It remains to determine who was to blame. The charge of the tug against the Palmer may be dismissed with a few words. It is wholly based upon the averment that the schooner was not properly steered, and was dragging too far upon the starboard quarter of the tug; and that, if she had been following in the right place—that is, nearly behind, or slightly over on the port quarter—the tug could have pulled her clear, and the collision would not have taken place. Upon this point I shall only say that, in my opinion, the testimony fails to establish the charge of fault. On the contrary, I am satisfied that the Palmer was properly and carefully steered after the tug, that she was keeping a vigilant watch, and that she is in no way to blame for the collision. This leaves the tug and the Hopkins for further consideration, and here the opposing theories cannot be reconciled. The schooner's account is to be found substantially in the following extract from her libel:

"That at the time of the collision the vessel was by the wind on the port tack. It was the master's watch, and this deponent as such was standing aft near the man at the wheel observing the handling of the vessel. There was a competent and efficient man at the wheel and another watchful and vigilant on the forcastle-head on the lookout, and another man standing by waiting orders. That about 20 minutes before the collision hereinafter described, the man on the lookout reported the lights of the tug coming down the Delaware Bay. The tide was about high water slack. The wind was light, and with slight flaws from west by south. When first discovered, both of the side lights of the tug could be seen; the red plainly, and glimpses of the green from time to time. That, shortly after being discovered, the tug shut out her green light and showed her red light, and at this time there was no danger of any collision; both vessels being upon safe courses, the tug and her tow occupying about the center of the channel, and the schooner Hopkins to the eastward of her. The tug James McCaulley, with her tow, which subsequently proved to be the schooner Marie Palmer, at the end of a long hawser, continued on her course until very near the Blanche Hopkins, when the tug suddenly changed her course to the eastward in an attempt to go across the Blanche Hopkins' bow. That when the tug had got across the bow of the Hopkins, she blew two whistles, and, although the danger was imminent and apparently impossible to avoid, this deponent gave the wheelsman of the Hopkins an order to hard up; but the distance was so short and the time so insufficient that the Hopkins did not respond to the wheel at all. About this time the bow of the Hopkins struck the hawser between the tug and the schooner Palmer; the Palmer being at that time about four points off the port bow of the Hopkins. The hawser was broken in two, the tug went away to the eastward, and the schooner Palmer came down and struck the Hopkins on the port side two blows, the first being near the main rigging, and the second opposite the mizzen rigging, and carried away the mizzen rigging, some of the

sails, the house and wheel, and doing great damage, knocking this deponent, the mate, and wheelsman overboard."

The tug's statement is as follows:

"The tug James McCaulley, with the schooner Marie Palmer in tow, loaded with coal, and bound for Boston, was proceeding down the Delaware Bay, with the side lights of the tugboat and her towing lights and the side lights of the schooner all properly set and burning. The mate of the tugboat, who had been serving her as her mate for over two years, was in the pilot house and in charge of her navigation; it being his watch on deck. He had relieved the captain at midnight, and at that time the schooner and tugboat were proceeding down the bay; the schooner being towed astern on about 80 fathoms of hawser out. All went well with tug and tow until they were about three miles below Cross Ledge Light, when the mate of the tugboat observed the green light of a vessel, which subsequently proved to be the schooner Blanche Hopkins. The schooner was bearing slightly on the tug's starboard bow, and was between two and three miles away. The wheel of the tugboat was starboarded so as to give the approaching schooner more room and enable the schooner and tug and tow to pass in entire safety, green light to green. At this time the tug and tow were about in the center of the channel. The wind was from west southwest, blowing a fair breeze, and the schooner Hopkins and the tug and tow continued upon their respective courses, and would have passed in entire safety had not the schooner Hopkins altered her course and showed her red light to those on the tugboat, and indicating thereby that she had changed her course to the eastward. The wheel of the tug was immediately put further over to starboard, so that she might be enabled with her tow to keep more over to the eastward out of the way of the approaching schooner, and the whistles of the tugboat were blown twice to notify those in charge of the Marie Palmer, and to notify those in charge of the Blanche Hopkins of this manœuvre; but the Blanche Hopkins failed to hold the course that she was on when showing her green light to the tug, but continued her wrongful sheer to the eastward directly across the course of the tug and tow. The wheel of the tugboat was at once put hard over, and her danger signals were blown. The tugboat passed the Hopkins in safety upon the starboard bow, but the schooner Marie Palmer failed to follow, and the Blanche Hopkins, continuing her wrongful sheer to the eastward, struck and parted the tow line between the tugboat and tow, and the Marie Palmer came on and struck the Blanche Hopkins on the port quarter, inflicting the damages referred to in the libel."

It will be seen at once that it is necessary to choose between these two accounts of the transaction, and I may say, without discussing it in detail, that I have read all the testimony attentively, and am of opinion that the weight of it is with the schooner. She had the right of way, and it is incredible to me that she should have held a course safe to both vessels until she had come within about 200 yards of the tug, and should then have deliberately and needlessly chosen the certainly fatal course of crossing the bows of the McCaulley. No reason for this extraordinary movement appears, and it is, I think, more probable that the tug held on too long, perhaps miscalculating the distance or the combined speed of the approaching vessels, and suddenly found herself in a position from which only the desperate measure of a quick sheer to the wrong side of the channel could save her. Her quickness of movement did save herself, but her heavy, slow moving tow could not escape.

In my opinion the tug was solely at fault, and decrees to that effect may be drawn, including a reference to a commissioner.

OMAHA PACKING CO. v. SANDUSKI.

(Circuit Court of Appeals, Eighth Circuit. July 22, 1907.)

No. 2,585.

1. MASTER AND SERVANT—INJURY OF SERVANT—EVIDENCE OF MASTER'S NEGLIGENCE.

The mere fact that an accident happened by which a servant was injured does not itself create a presumption of negligence on the part of the master, and, where negligence is charged as a ground for recovery by the servant against the master, the burden is upon the plaintiff to show that by some act or omission the defendant violated some duty he owed to the plaintiff which caused the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 895.]

2. SAME—DUTY OF MASTER—SAFE PLACE TO WORK.

The rule which makes it the positive duty of a master to exercise reasonable care to provide a servant with a reasonably safe place in which to work, even if it extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, is not applicable to a case where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 550.]

3. SAME—CONDITION OF WAY.

Plaintiff was employed on the third floor of defendant's packing house, which was reached by an outside stairway running up from a platform, 10 to 14 feet wide, extending along the side of the building. This platform was used by other employés in conveying meat on trucks from one part of the building to another, and there were more or less drippings from the trucks which in cold weather froze upon the platform. After plaintiff had been so employed for three years, in walking along the platform from the stairway in going from work one night in the winter, he slipped on the platform, and was injured. *Held* that, assuming that the fall was caused by ice resulting from such drippings, it was not due to any neglect or breach of duty on the part of defendant, but to a cause the risk from which was known to and assumed by plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 610.]

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

Ralph W. Breckenridge (Charles J. Greene, on the brief), for plaintiff in error.

Constantine J. Smyth (Edward P. Smith, on the brief), for defendant in error.

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

RINER, District Judge. This is an action to recover damages for personal injuries alleged to have been suffered by the defendant in error by reason of the negligence of the plaintiff in error.

Louis Sanduski, plaintiff in the court below (referred to hereinafter as the plaintiff), at the time of his alleged injuries, January 20, 1906, was in the employ of the Omaha Packing Company, defendant in the court below (referred to hereinafter as the defendant), in its

packing house, located at South Omaha, in the hog casing room, or department, and had been so employed for about three years. The room where the plaintiff worked was located in the third story of the building, connected with the defendant's packing plant and accessible from the street by means of a platform and stairway. The platform was 600 feet long, and between 10 and 14 feet wide. There is some conflict in the evidence as to its exact width. The platform, where it connected with the stairway leading up on the outside of the building to the door of the room where Sanduski worked, was between 10 and 15 feet above the ground. John Tnczar, a witness for the plaintiff, testified that it was "maybe 10 and maybe 12" feet from the foot of the stairs to the edge of the platform. There was a railing along the outside of the stairway, but no railing on the platform. It had, however, two pieces of two by four timber spiked to the edge of it. The platform sloped slightly toward the building; the outer edge being about three inches higher than the inner edge. The platform was used, not only as a passageway for employés going to and from their work, but also for trucking the product of the plant, as one of the witnesses puts it, "from the beef house to the tank room," located at different points along the platform, and had been so used during the entire time of plaintiff's employment. The testimony shows that in this trucking process, if there was anything wet in the product conveyed by the trucks, the water would drip off on the platform, and that there usually was water dripping from the product carried on the trucks. All of this was known to the plaintiff. He testified that he knew the platform was used by truckers every day, in cold as well as warm weather, and that water dripped off the meat carried on the trucks onto the platform, and that during his entire term of service he had used this platform and stairway as a passageway in going to and from his work, sometimes during the day time and at other times after dark.

As to the condition of the platform on the morning when plaintiff went to work, the testimony is not altogether clear. Tnczar, who went to work about the same time plaintiff did, testified that he did not see any ice on the platform. Zalinski, another witness, could not say whether there was ice on the platform in the morning. Plaintiff at first said there was ice on the platform, but subsequently said he did not notice whether the platform was frozen or not in the morning. Plaintiff testified that on the day of his injury he went to work in the morning about 6:45, and quit work at about 6:30 in the evening; that it was dark both when he went to work in the morning and when he quit in the evening; that he descended the stairs on the outside of the building leading from the third story down to the platform; that he took a few steps after reaching the platform, when he slipped, and that was all he knew. He testified also that the night was foggy. He could not say whether there was ice on the platform, but stated that he felt "under his feet it was kind of slippery, but not long, and slipped, and that is all he knew." The record does not disclose who found him when he was picked up, or the condition in which he was found. Both Tnczar and Zalinski testified that there was ice in ridges on that part of the platform where they trucked beef, and, when asked how high these ridges were, said they were small. Tnczar further testi-

fied that the ice came there from the water dripping from the product carried on the trucks and that the ridges were made by the trucks.

The theory upon which the plaintiff sought to recover in this case was that the defendant was negligent, in that it had failed to use reasonable care to provide him with a reasonably safe place in which to work, and it is contended by counsel in their brief that this duty of the master extends to a reasonably safe mode of entrance to and exit from the place where the servant was employed. Conceding, for the purposes of this case, that the rule in regard to the master's duty to his servant is as broad as contended for by counsel, yet we think there can be no recovery upon the facts as they are presented by this record. Both the platform and stairway were open and exposed. No one knew better than the plaintiff the manner in which the business was carried on there. He knew that this platform was used daily by men trucking the product of the plant from the beef house to the tank room, and that the drippings fell from the trucks upon the platform. He had been coming and going back and forth to his work almost daily over this platform for about three years, as had the other workmen, and that it was, as one of the witnesses described it, "one of the most traveled ways in the establishment."

It is not contended that there was any defect in the platform itself, but it is sought to charge the defendant with liability upon the sole ground that drippings from the product carried on the trucks on that particular day were permitted to freeze upon the platform, thus making it slippery. The plaintiff must have known the weather conditions before reaching the platform, because he had descended the stairway, which was open and exposed, from the third story of the building, down to the platform, and, if the weather was cold enough to form ice, he must have known that he would necessarily find that portion of the platform, over which the trucking was done, to some degree in a slippery condition, and that it devolved upon him to use more care than at other times when the weather conditions were more favorable.

The mere fact that an accident happened does not of itself create a presumption of negligence on the part of the defendant. Where negligence is charged as a basis of recovery, the burden is upon the plaintiff to show that by some act or omission the defendant has violated some duty which he owed to the plaintiff and which caused the injury complained of. The rule is stated by this court in Northern Pac. Ry. Co. v. Dixon, 139 Fed. 737, 71 C. C. A. 555, as follows:

"The mere happening of an accident which injures a servant fails to indicate whether it resulted from one of the causes the risk of which is the servant's, or from one of those the risk of which is the master's; and for this reason it raises no presumption that it was caused by the negligence of the latter. In such cases the burden of proof is always upon him who avers that the negligence of the master caused the accident to establish that fact, and a naked finding, as in this case, that the accident occurred and that the servant was guilty of no negligence which contributed to cause his injury, is insufficient to sustain this burden, for there are many other causes than the negligence of the master and that of the servant, such as the negligence of fellow servants and latent and undiscoverable defects in place or machinery, which may have produced it." Chicago & N. W. Ry. Co. v. O'Brien, 132 Fed. 593, 67 C. C. A. 421, and cases there cited.

Neither is the rule which makes it the positive duty of the master to provide the servant a reasonably safe place in which to work, even if it extends to providing a reasonably safe mode of entrance to and exit from the place where the workmen are employed, applicable to a case where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done. In this case, if this platform became dangerous during the day, it was by reason of this trucking carried on in the progress of the work, either necessarily or from the manner in which the work was done by other employés, fellow servants of the plaintiff, engaged in the same general business, and, if the platform became dangerous through their negligence, that was one of the risks which the plaintiff assumed when he entered the defendant's employment. In Deye v. Lodge & Shipley Mach. Tool Co., 137 Fed. 480, 70 C. C. A. 64, the court said:

"Unless the business be of such a complex and dangerous character as to require that it shall be conducted upon a system or scheme, in order to secure the orderly conduct of the business and the safety of those engaged in it, the master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have there undertaken to do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation." American Bridge Company v. Seeds, 144 Fed. 605, 75 C. C. A. 407; City of Minneapolis v. Lundin, 58 Fed. 525, 7 C. C. A. 344.

In any aspect, therefore, in which the case may be viewed, on the facts disclosed by this record, we think the plaintiff was not entitled to recover.

The judgment of the Circuit Court is reversed, with directions to grant a new trial.

LIBERTY MFG. CO. v. AMERICAN BREWING CO.

(Circuit Court, W. D. Pennsylvania. September 9, 1907.)

No. 47.

PATENTS—INFRINGEMENT—TUBE CLEANER.

The Elliott patent, No. 641,092, for a rotary boiler tube cleaner, was not anticipated, and discloses invention; also *held* valid as against the claim of prior use, and infringed.

In Equity. On final hearing.

Bakewell & Byrnes, for complainant.

H. A. Toulmin and Miller & Reamer, for respondent.

BUFFINGTON, Circuit Judge. This bill in equity brought by the Liberty Manufacturing Company against the American Brewing Company charges infringement of claims 1, 2, 5, and 6 of patent No. 641,092, issued January 9, 1900, to W. S. Elliott for a boiler tube cleaner. The respondent is a mere user, and the case is defended by the maker of the device in question, the Lagonda Manufacturing Company.

Prior to the patent in question, the use of water tube boilers had developed a serious trouble in the formation of a stone-like crust on

the inner surface of the tubes, due to the action of heat on the mineral salts contained in the water. This layer reduced steam space and capacity, and increased fuel consumption. So serious was this trouble owing to the difficulty in removing the crust that the Stirling Company, one of the largest makers of such boilers, was threatened with disuse of their boilers on that account; its tubes, owing to end curves, being especially hard to clean. Elliott, the patentee, who had charge of the Pittsburgh agency of that company, being aware of this trouble, set about to solve it, and as early as February 12, 1897, drew a sketch which disclosed the device subsequently embodied in the patent in suit. With his device is used a turbine, of smaller diameter than the tube to be cleaned, which is attached to a hose. To the shaft of the turbine, which shaft may be provided with a universal joint to allow the device to follow the end curvature of tubes, is attached a head which constitutes the Elliott device. This head is provided with four longitudinally extending arms pivoted at their rear ends in inset openings at four equidistant points on the periphery of the head. A set of two arms of longer length and a set of two of shorter length are mounted at right angles. On the forward, free end of each arm a toothed movable cutting wheel is mounted on a shaft extending lengthwise the arm. When the turbine shaft is rotated at high speed, the forward extending arms on the head by centrifugal force fly outward bring the cutters in contact with the scale, and deliver a rapid succession of blows of both a revolving and striking character. This blow is variously described in the proofs as a "sidewise" or "swiping" blow, and the process is styled a "picking" action. By these blows the crust is broken into small pieces, which are washed out ahead of the device by the exhaust of the turbine. The claims in controversy are as follows:

"A rotary tube-cleaner having freely swinging arms, the planes of movement of the arms being longitudinal of the axis of the tool, and cutting-disks secured to the arms and lying in planes transverse to the axes of said arms; substantially as described."

"2. A rotary tube-cleaner, having freely swinging arms moving in planes longitudinal of the axis of the tool, each arm carrying a series of toothed disks lying in planes transverse to the axes of said arms; substantially as described."

"5. A rotary tube-cleaner, having freely swinging arms moving in planes longitudinal of the axis of the tool, said arms carrying cutting disks lying in planes transverse to the axes of the arms, the cutters upon one arm being in advance of those upon the other; substantially as described."

"6. A rotary tube-cleaner, having pivoted thereto freely swinging arms with free outer ends, said arms moving in planes longitudinal of the axes of the tool, and cutting-disks rotably mounted upon the arms near their outer ends and lying in planes transverse of said arms; substantially as described."

The device was successful, supplied a recognized need in boiler practice, and met with prompt commercial success. It is sought to invalidate the patent on the ground it was a joint invention of Elliott and Faber. The uncontradicted evidence afforded by Elliott's sketch of February, 1897, however, carries the conception of the device by Elliott back of any alleged suggestion by Faber. Much testimony has been taken. Narrowed down, it discloses no patent which so resembles Elliott's device as to warrant present discussion. It is sought, however, to show two prior uses, viz., that of Bradley and those of Weinland.

As to the former, we are clear that the device, if a subsequent use, would not infringe Elliott's claims, and as a prior use did not anticipate. While Bradley had forward pointed arms, yet they were provided with stationary slanting cutting knives which served to scrape the tube. It lacked the revoluble cutters of the Elliott device. The Bradley device left no impress on the art, and the reason for this we find in the testimony of respondent's witness Kennedy, the manager of the Isabella Furnace where Bradley used the cleaner, who says he "objected to the use of this cutter on the boilers for fear that the cutters being revolved at great speed in the tube would cut the tube. * * * I considered they were cleaning them too well." As to the numerous Weinland devices, we are convinced by the proofs that a clear and satisfactory case of prior use, such as the law requires, is not made out. Indeed, the statements made by Weinland himself in 1901 to Swartz, a friendly witness, in commenting on their conversation and views on the boiler cleaner problem in 1898, are wholly at variance with the contention now made by the respondent. It may be conceded that some of the contended for devices of Weinland were along the line of development which Elliott successfully perfected, but none of them went to the full extent Elliott did, and it required that full extent of development to make the device, such as is now made by the complainant and defending company, a success.

On the whole, we are satisfied that a prior use is not established, either by the proofs or the character of Weinland's devices. The patent being adjudged valid, we are of opinion infringement is established. The main difference between the two devices is in the fact that in the Lagonda device the two sets of arms, instead of being of different lengths pivoted on the same plane, are of the same length, but pivoted from two different planes. This, however, is a mere mechanical alternative, which still serves to answer the element of the fifth claim, which reads: "One arm being in advance of those upon the other."

Let a decree be drawn.

THE ALGERIA. THE ELLEN S. JENNINGS. THE BAILEY. THE MAJESTIC.

(District Court, E. D. Pennsylvania. August 15, 1907.)

No. 53.

COLLISION—STEAMSHIP AND CROSSING TOW—MUTUAL FAULT.

A tug with four barges in tow, the entire tow being 1,250 feet in length, was passing up near the east side of the Delaware river in the daytime on a flood tide, and, it being necessary to cross to leave some of the barges on the west side, the tug signaled the tow her intention to shorten up the hawsers as was customary and proper to lessen the danger of collisions with other vessels in crossing, but she did not then shorten the hawsers, but proceeded out to the middle of the channel, and then stopped for that purpose. Meantime the steamship Algeria was coming slowly down the river, being about a half mile distant, when the tow started to cross. No signals were exchanged, but, seeing the tow turn to cross, the Algeria starboarded her helm, and slowed still more, but did not reverse until the tug stopped, when it was too late, and she came into collision with the second barge from the rear. *Held*, that the tug and the Algeria were

both in fault, the former for not stopping and shortening her tow before crossing in the usual manner, and for stopping when halfway across, and thus obstructing the channel with her long and cumbersome tow in front or the coming steamship; and the latter for not stopping at once when such dangerous maneuver was seen; and that the barges were not in fault for casting off their hawsers when the collision was imminent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 79.]

In Admiralty. Suit for collision.

John F. Lewis and Francis C. Adler, for the Ellen S. Jennings and the Bailey.

Howard H. Yocum and N. Dubois Miller, for the Algeria.

Willard M. Harris, for the Majestic.

J. B. McPHERSON, District Judge. This is an action in rem brought by the owners of two barges, the Ellen S. Jennings and the Bailey, to recover damages for a collision in the Delaware river, whereby both barges suffered injury. The Algeria is a large steamship, belonging to the Anchor Line, and the Majestic is the tug that had the barges in tow; both vessels being charged with fault. The testimony presents the usual conflict, and I have therefore had the usual difficulty in arriving at what seems on the whole to be the truth of the occurrence. In my opinion, the following facts are established by the weight of the evidence, although there is scarcely one fact that is not denied by opposing witnesses. My conclusions have necessarily been reached in large part by weighing the probabilities of the various accounts, and in this I have fortunately had the assistance of some disinterested testimony, upon which I have felt justified in placing a good deal of reliance. The unexplained absence of some witnesses has also received consideration.

With this preface, I state the facts to be as follows:

On Sunday afternoon, June 28, 1903, about half past 3 or 4 o'clock, the tug Majestic was proceeding up the river, towing four barges in three tiers, tandem, the first tier composed of the Frank Bellville and the Thomas J. Naulty lashed together, the Bellville (which was a small vessel) being upon the port side of the Naulty, the second tier consisting of the Jennings, and the third of the Bailey. The Bellville was light, but the other three barges were loaded with railroad ties. The tug was about 100 feet long. The Naulty, the Jennings, and the Bailey were each about 150 feet in length. The hawsers between the tug and the first tier, and between the first and second tiers, were each from 200 to 250 feet long, and the hawser between the Jennings and the Bailey was somewhat longer. The length of the whole tow, therefore, was more than 1,250 feet. The tow was made up under the supervision of the tug, whose master had entire charge of the navigation. The tide was flood, the weather was clear, only a light breeze was blowing, which did not interfere with navigation, and the speed of the tug was from five to six miles an hour. The course of the tow was along the eastern, or New Jersey, side of the river, and this course was maintained until Gloucester ferry was reached, when the series of maneuvers took place that finally resulted in the collision.

Two of the barges, the Naulty and the Bailey, were to be landed at Point House wharf on the western, or Pennsylvania, shore not far be-

low Greenwich Point, and nearly opposite Gloucester ferry. To make the landing, it was necessary for the tug to cross the river; but, as the navigable channel at this point is only between 1,500 and 1,600 feet in width, it is obvious that much caution was needed, especially with a tow so long and unwieldly. No doubt the tug was a burdened vessel, and to that extent had the right of way, but even with this privilege it was still under obligation to exercise due care and not to obstruct the channel unnecessarily, or without proper regard for the rights of other craft. As the tug approached Gloucester, and while she was still to the south of the ferry slip, upon the eastern side, she blew three or four short blasts to notify the barges that the hawsers were about to be shortened, in order that the tow might be handled more readily, and the crossing be accomplished more safely. These blasts were intended only for the barges, and were so understood by the Algeria and by the other vessels that heard them. The custom for tows bound across the river from Gloucester to Point House wharf was to stop below the ferry slip on the eastern side, and to shorten hawsers before beginning the crossing. This was a reasonable and proper practice, and the Majestic should have observed it on this occasion. On the contrary, however, she disregarded her own signals to the barges, failed to stop on the eastern side of the channel, and began to cross without shortening any of the hawsers. When she had gone part of the way over, far enough probably to obstruct at least one-half of the channel, she stopped in midstream, and, in that situation, undertook to do the work of shortening the hawsers, that ought to have been done before she began the passage. While this process was going on, the collision with the Algeria took place, the steamship striking a severe blow upon the starboard side of the Jennings, not far from the stern, and the Bailey (which cast herself loose from the Jennings when the peril was seen to be imminent) drifting further upstream on the port side of the Algeria, and striking the barge Cardenas, which was lying at anchor to the eastward of the Algeria. The Majestic gave no signal of her intention to cross the stream, although the Algeria was in full view, and was seen by the tug about half a mile up the river. If the tug had stopped until the Algeria had passed, the collision could not have taken place, nor if she had kept on slowly, until it became certain that the steamship was not coming down, instead of turning directly across her path.

Turning now to the Algeria, it is to be observed that she had come up the river earlier in the afternoon, and had overtaken and passed the tow on her way. She was then and afterwards in charge of a licensed pilot, and came to anchor off Kaighn's Point about 3 o'clock. For some reason, this anchorage ground was not regarded as safe or suitable, and about half past 3 she began to drop down the river in search of a better place. Her speed was very slow, not more than two miles over the ground, and she was still in charge of the pilot. The master and third officer were on the bridge, and a lookout was on duty at the forecastle head, where the chief officer was also on watch. The Majestic, with her barges, was seen from three-quarters of a mile to a mile away, proceeding north along the eastern side of the channel. Her signals to the barges were heard on the Algeria, but, as already

stated, these were not intended for other vessels, and the Algeria did not suppose they were meant for her. When the Majestic turned to port without signal, and began to string out her tow across the river, the Algeria was half a mile away, and coming down very slowly against the flood tide. Seeing this threatening movement, the Algeria's wheel was put hard a-starboard, and her engines were stopped, or slowed down so as to secure a mere movement through the water. Thus she continued to approach the tow, although under control and at a slow rate of speed, evidently calculating that the tug could draw the tow clear before the courses would intersect. Whether this would have happened or not cannot now be known. Considering that the Jennings was struck very soon after she had turned across the stream, and that the Bailey apparently never turned at all, it may well be doubted whether the Algeria's calculation would have proved to be correct. At all events, it was utterly vitiated by the tug's stopping in midstream and undertaking to shorten hawsers in that dangerous position. When this maneuver was seen by the Algeria, her engines were ordered full speed astern, and her anchor was dropped, but she had already come too close to permit these very proper efforts to succeed, for the collision with the Jennings followed almost at once, and the injury to the Bailey happened very soon afterward.

In this state of facts, I think the tug and the steamship were both at fault. The tug should have stopped and shortened her hawsers before attempting to cross, should have signaled her intention before undertaking the passage, and should not have stopped in midchannel, and thus have increased a danger already apparent. The steamship may have been at fault in not keeping farther off to the westward, although I am not greatly disposed to insist upon this, but I think she was certainly to blame in holding on too long after she saw the unusual obstruction before her. She was going at slow speed against a flood tide, and her movements could have been easily controlled. If she had stopped altogether, even at the loss of 15 minutes, or had stopped and reversed, when she observed the dangerous character of the tug's maneuver, the collision would not have occurred, and I think she must be held liable for taking the chance that the tug would be able to pull the tow across before she herself got down to the barges. Certainly she did not leave herself much margin, for with all her efforts she was not able to clear the second tier of the tow, although she began the attempt when she was half a mile away.

Moreover, it must not be forgotten that the tow had the right of way, and the Algeria was bound to pay proper respect to this privilege, even if she were somewhat inconvenienced thereby. Neither did she give any signal of her movements, and this too may have contributed to the accident, although it is quite sufficient to hold the steamship at fault for failing to stop when stopping would have surely prevented the injury.

Some argument was made in support of the charge that the barges were also negligent in casting off their hawsers and in failing to anchor after they found themselves adrift, but I am not disposed to regard it seriously. Whatever the barges may have done was in the stress of

peril, and should be judged leniently. I see no sufficient ground on which they, or either of them, can be adjudged in fault.

A decree may be entered against the tug and the steamship, with an order of reference to a commissioner.

In re AMERICAN KNIT GOODS MFG. CO.

(District Court, E. D. New York. August 16, 1907.)

1. BANKRUPTCY—RECLAMATION OF PROPERTY BY SELLER—RESCISSION OF SALE CONTRACT.

   Circumstances under which a court of equity might permit a rescission of a contract of sale on the ground of mistake in the representations, where the parties could be restored to their original position, may not warrant such relief after the purchaser has become bankrupt, and especially where the specific property purchased cannot be restored.

2. SAME—SALE INDUCED BY FRAUD.

   Evidence *held* not to sustain the claim of a seller of goods to a bankrupt that such sales were induced by fraud on the part of the bankrupt in knowingly making materially false statements of assets, such as would entitle the seller to rescind.

In Bankruptcy. On exceptions to report of special master.

James, Schell & Elkus, for trustee.
Hyman, Campbell & Eaton, for petitioners.

CHATFIELD, District Judge. A special master in reclamation proceedings has reported that the goods sought to be reclaimed should be retained by the trustee, and the petitioning creditors left to prove their claim as general creditors for the balance due them, amounting to $15,280.21. To this report the attorneys for the trustee have excepted, upon one ground, but have also moved to have the report confirmed; and the petitioning creditors have excepted separately to various findings by the special master, and to his conclusion.

The principal ground of objection by the petitioning creditors is that a statement of assets made by the bankrupt a few months prior to its failure is claimed to have been an inducement for further deliveries of goods by these creditors, and that this statement was not only false in fact, but that the bankrupt's officers knew it to be such, and issued it with a fraudulent purpose, in order to conceal the true condition of the corporation. Much of the goods delivered upon the orders made subsequent to the giving of the statement referred to have been paid for, and the balance amounts to the sum above mentioned, viz., $15,280.21. Subsequent to the making of this statement two separate contracts were entered into, one upon April 11, and one upon May 3, 1905, and a former contract of November 19, 1904, was modified, and the special master has found that this modification was not a new giving of credit, but merely a reduction in amount of the original contract.

However this may be, it appears from the testimony that the bankrupt corporation was in default, and that the creditors did not enforce this default, but allowed the modification of the contract, relying up-

on the statement of condition dated March 17, 1905. It is necessary therefore, to consider (1) whether this statement was false and fraudulent to a material extent; (2) whether the bankrupt, through its officers, knew that it was so false and misleading, and purposely intended to deceive by the use of the statement; and (3) whether the claimant creditors relied upon this statement for facts so material that the transaction would be set aside by a court of equity (if these statements were not in fact true) as having been entered into upon a mistake of fact, and causing the unjust enrichment of the party responsible for the mistake.

As to the first and second points, the special master has reported at length as to the truth and accuracy of the statement. He has found that the statement issued was not materially false, and that the bankrupt corporation and its officers did not intend to issue a false statement, or to deceive. The special master has also reported that the creditors relied in part upon this statement and in part upon personal examinations for their action subsequent to the date of the statement of March 17, 1905, and the evidence seems to bear out the special master's report. Some of the items included as quick assets are capable of argument as to whether they are assets or liabilities; but there is no sufficient proof that the officers of the corporation purposely and fraudulently inserted these amounts with the intention of making a false statement, and it does not seem that these items are of such a character that they can be called mistakes of fact, or misrepresentations of fact, especially if made without intentional fault upon the part of the person making the representations.

The creditors have claimed a right to rescind upon two theories: (1) That there was actual fraud; and (2) that, in the absence of actual fraud, equity would grant a rescission, if the representations were false in fact and the person making them mistakenly supposed them to be true.

It is unnecessary to go into the law of the latter proposition. The circumstances under which equity will allow the rescission of a contract, and attempt to restore the parties to their original position, when such can equitably be done, do not seem to be applicable to the present case, when other creditors' rights have intervened, and the debtor has been thrown into bankruptcy. It is believed that no court of equity would, under the present circumstances, allow the rescission. At any rate, no such rescission would be allowed, except with relation to some specific object or subject-matter of a contract, which could be returned to the party from whom it was obtained, and the parties thus be restored to their original position. In the present case this is not possible, and the petitioners have not prayed for the return of specific objects alone, but, on the contrary, have asked that they be given the balance in their favor upon an accounting; and, even if the return of the yarns in the possession of the trustee were what was asked, it does not seem to this court that the statement of March 17, 1905, contains such mistakes of fact as to show that the creditors did not assume the risk of the contract made, or were deceived as to material facts into making that contract.

The special master's findings as to the accuracy of the financial statement in its material features, and the freedom of the officers of the bankrupt from fraudulent and intentional deceit, seem to be supported by evidence, and the burden of showing them incorrect to such a degree as to justify setting aside the report has not been sustained.

It is unnecessary to consider the exception on behalf of the trustee to the special master's report, as the report is in his favor.

The exceptions of the creditors should be overruled, and the report confirmed.

Ex parte BICK.

(Circuit Court, S. D. New York. June 29, 1907.)

1. BANKRUPTCY—CONTEMPT—ACTS CONSTITUTING MISBEHAVIOR—GIVING FALSE TESTIMONY.

   The giving of false, vague, and evasive testimony by an alleged bankrupt on his examination before a special commissioner, with the intention of misleading the court and concealing assets of his estate, is a misbehavior, and constitutes a contempt, which the District Court has power to punish under Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], on a summary hearing without a jury.

2. HABEAS CORPUS—JURISDICTION AND RELIEF—CIRCUIT AND DISTRICT COURTS.

   A Circuit Court of the United States has no appellate jurisdiction over a District Court, and cannot review its proceedings for any error or irregularity on petition for a writ of habeas corpus, where the District Court had jurisdiction.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1118. Jurisdiction of federal courts, see note to In re Huse, 25 C. C. A. 4.]

Habeas Corpus.

Charles Golzier, for petitioner.
Abram I. Elkus, opposed.

WARD, Circuit Judge. This is a proceeding to discharge the petitioner by means of a writ of habeas corpus from a commitment for contempt of court. After a petition of involuntary bankruptcy had been filed against Philip and Joseph E. Bick, copartners, the petitioner, Joseph E. Bick, was required by an order of the United States District Court for the Southern District of New York to appear before a special commissioner for examination. After having testified several times before the special commissioner he was adjudicated a bankrupt, and subsequently, on the petition of William Henkel, Jr., receiver, the District Court made an order requiring the petitioner to show cause why he should not be adjudged guilty of contempt for false testimony, and for vague, contradictory, contemptuous and evasive answers given in order to conceal assets of his estate. The petitioner filed an answer denying the contempt, and appeared on the return day personally and by counsel. The return of the United States marshal shows that the district judge permitted the petitioner to testify before him in open court with reference to the acts and conduct charged against him. At the conclusion of the hearing the court adjudged the peti-

tioner to be guilty of contempt and committed him to the United States marshal for imprisonment in Ludlow Street jail for two months.

It is objected on behalf of the petitioner that he has not been charged with misbehavior within the provisions of Rev. St. U. S. § 725 [U. S. Comp. St. 1901, p. 583]. It is true that this word is not used; but the District Court has found that the petitioner's testimony is false, vague, and evasive, with the intent of misleading the court and concealing assets of his estate. It is as clear an instance of misbehavior as if the petitioner had refused to testify at all. Mr. Collier's work on Bankruptcy (page 125) is cited as showing that unsatisfactory answers, even if contemptuous, are not contempt in law, and cannot be punished as such. If he includes within the category of unsatisfactory answers such testimony as the petitioner's, I prefer to follow the decision of Hough, J., in the Matter of Fellerman (D. C.) 149 Fed. 244.

The petitioner also contends that the proceeding before the District Court was a criminal proceeding for the punishment of perjury, and that he was, therefore, entitled to a trial by jury. The proceeding was not an indictment or criminal proceeding to punish him for perjury, but was a proceeding to punish him for contempt of court, in which he was not entitled to a trial by jury.

It is also suggested that, as the order to show cause was founded on the petitioner's testimony before the special commissioner, the court could not punish him for contempt because of his testimony before the court. I think the special commissioner was only the instrument of the court to take the testimony, and that his testimony was really before the court. Were this not so, the testimony before the special commissioner and before the court was upon the same subject, and was the same contempt, for which he might have been committed on either or both occasions. This court has no appellate jurisdiction over the District Court, and, if there were any error or irregularity in the proceedings, that could only be corrected by appeal.

As I find that the District Court had jurisdiction of the petitioner and of the subject-matter, and was competent to pass upon his conduct, which it has found to be a contempt, the writ is discharged, and the petitioner remanded.

DWINELL-WRIGHT CO. v. CO-OPERATIVE SUPPLY CO.

(Circuit Court, E. D. Pennsylvania. May 29, 1907.)

TRADE-MARKS AND TRADE-NAMES.

The name "White House," and the picture of the White House at Washington, *held*, upon final hearing, to constitute a valid trade-mark and trade-name for plaintiff's coffee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 8, 11.]

In Equity.

Burr, Brown & Lloyd and George L. Huntress, for plaintiff.

I. H. Mirkil and Franklin L. Lyle, for defendant.

HOLLAND, District Judge. For prior report of this cause, upon preliminary injunction being granted, see 148 Fed. 242. The case is now heard on bill, answer, and proofs, and these proofs are found to fully maintain the allegations of the bill, and a final decree is to be entered, permanently enjoining the defendants from selling or offering for sale, directly or indirectly, any coffee inclosed in wrappers upon which appears a picture or representation of the White House at Washington, or any coffee under the name of "White House," with or without said picture.

So ordered.

DUVALL et al. v. SULZNER et al.

(Circuit Court, W. D. Pennsylvania. August 21, 1907.)

No. 33.

1. ARBITRATION AND AWARD—VALIDITY OF AWARD—NOTICE OF HEARING.
   Mere statements made by one claiming the ownership of certain stock of a corporation that, if he recovered it, he would use or dispose of it for the benefit of the corporation, did not constitute a transfer which gave the corporation the right to notice of a hearing before arbitrators to determine the ownership of the stock under an agreement to which it was not a party, or to join in a bill to set aside the award and for the recovery of the stock.

2. SAME.
   A dispute having arisen between several persons as to the ownership of certain shares of stock in a corporation, an agreement was made to submit all questions as to such ownership to arbitration, and arbitrators were selected, the most of whom were stockholders, and had heard the claims of the respective parties discussed. Complainant, who was one of such parties, after the arbitrators were selected, repeatedly stated to them that he had said all he wished to say, and that, as he was going away, they should proceed without him, which they did, making an award before his return. *Held*, that complainant could not impeach the award because no notice of the hearing was given to him, nor because the arbitrators may have considered evidence which would not have been admissible in court, having evidently intended that they should do so in respect to his own claim.

3. SAME—IMPEACHMENT OF AWARD—GROUNDS.
   An allegation that arbitrators acted "with manifest unfairness, and with such partiality as to destroy the judicial character of the proceedings," does not state any ground for impeachment of their award, in the absence of any allegation that the party benefited participated in any misconduct or was guilty of fraud or collusion.

   [Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, §§ 322, 415.

   Setting aside award for interest, prejudice on misconduct of arbitrator, see note to Nolan v. Colorado Cent. Consol. Min. Co., 12 C. C. A. 589.]

4. SAME—WAIVER OF OBJECTIONS.
   A party to an arbitration agreement who voluntarily joins in the selection of persons as arbitrators, who are known to have formed opinions upon the merits of the controversy, cannot impeach the award on the ground that the arbitrators were not impartial.

In Equity. On plea.

Patterson, Sterrett & Acheson, for complainants.

J. M. Shields, for respondents.

EWING, District Judge. Upon the organization of the Gold Bullion Mining & Development Company, 250,000 shares of the capital stock, of the par value of $1 per share, were given William B. Duvall, in consideration of his transfer to said company of certain options on mineral lands in Mexico. One hundred and twenty five thousand shares of this stock said Duvall put aside, and proposed appropriating towards financing and developing the property of said company.

The finances of the company were causing some trouble, and some time during the year 1904 certain certificates of stock were placed in escrow with the Mercantile Trust Company, under the following agreement:

"The undersigned, being the owners of the certificates of stock of the Gold Bullion Mining & Development Company, which are herewith inclosed, have agreed as follows:

	No.	Shares.
Joseph F. Sulzner	21	26,250
L. L. Duvall	4	62,500
E. P. Coles	14	1,667
M. D. Judah	24	24,583
K. C. Tebbetts	25	26,250
Jos. F. Sulzner	22	5,000
E. P. Cole	20	26,250
E. P. Cole	13	5,000
W. B. Duvall	11	57,500

"(1) The certificates are hereby deposited in escrow in the hands of the Mercantile Trust Company, upon the following condition and purposes:

"(2) To prevent the parties named in certificates from selling or transferring the same pending the organization and financing of the Company.

"(3) The sum of $12,500 shall be raised in cash, by sale of stock, and paid into the treasury of the company on or before the 1st day of January, 1905, and if so paid in, then upon the certificate of the Company Treasurer showing that fact, the said The Mercantile Trust Company, Trustee, is authorized thereupon to deliver the said parties respectively, the certificates above mentioned.

"(4) Should the parties signing this paper fail to raise the money as above (No. 3) stated, then the said the Mercantile Trust Company, trustee, shall (and hereby authorized to) deliver all of the said certificates to W. B. Duvall.

"Jos. F. Sulzner. [Seal.]
"E. P. Cole. [Seal.]
"W. B. Duvall. [Seal.]
"M. Douglas Judah. [Seal.]
"K. C. Tebbetts. [Seal.]
"For J. C. Tebbetts, Atty."

The certificates embraced in said deposits numbered 21, 24, 25, and 20, aggregating 103,333 shares of said stock, constituted what was then left of the 125,000 shares which Duvall purposed using in financing the company and developing its property; the balance of the stock having been disposed of. The terms of the agreement under which said stock was deposited were not complied with, and in January, 1905, according to the provisions of said agreement, this stock was returned to Mr. Duvall, and he then obtained from the company one certificate for said 103,333 shares in his own name. Subsequently he delivered that certificate, after having signed the power of attorney on back thereof for its transfer, to Joseph F. Sulzner, and said Duvall, as against it, gave orders to various parties for certain blocks

of the stock represented thereby. This certificate Sulzner turned over to the company, and received in exchange therefor a certificate to himself as trustee.

Thus matters stood until January, 1906, when, on the 6th of that month, Duvall filed a bill in equity in this court at No. 19 May term, 1906, against Sulzner, praying for an injunction to restrain Sulzner from voting that stock at the annual election of the company to be held on January 9, 1906, and for an order directing said stock certificate to be delivered up to the company and a new one, representing the same amount of stock, to be issued in his name. The injunction was not granted; but at the meeting on January 9th there was considerable discussion about the trouble among the stockholders regarding this stock, and the proposition was made that the entire matter be settled by arbitration. At that meeting Mr. Duvall moved "that a committee be appointed to arbitrate the differences between all parties claiming equity in the 103,333 shares of stock of the Gold Bullion Mining & Development Company and William B. Duvall, that the stockholders appoint a man to represent the stockholders' interest, and Joseph F. Sulzner appoint a man and William B. Duvall appoint a man, and these three men appoint two men, and all parties in interest in said 103,333 shares of stock of the Gold Bullion Mining & Development Company shall agree to whatsoever the committee may decide upon," which motion was carried. It was also moved and carried at said meeting that Thomas Maxwell be selected to represent the stockholders on such committee. Pursuant to this action of the stockholders of said company, Duvall and Sulzner agreed that the committee of arbitration should settle all matters regarding this stock, and Mr. Duvall selected Henry D. Gamble, one of the stockholders, as his representative, and Mr. Sulzner selected Harvey Miller, another stockholder and his attorney, to represent him, and subsequently these gentlemen and Mr. Maxwell, with the acquiescence and agreement of Messrs. Duvall and Sulzner, selected H. G. Moore, another stockholder and director of this company, and James G. Marks, as the other members of the board of arbitration. Just when this board was completed does not clearly appear; but on the afternoon of January 10th all the arbitrators, unless Mr. Marks be excepted, as to which there is considerable difference of opinion, and Mr. Duvall, Mr. Sulzner, Mr. Tebbetts, and others, met in Mr. Gamble's office in the Federal Building, Pittsburgh, and completed all preliminary arrangements respecting arbitration.

The arbitrators held several meetings, the first on January 22d, and concluded their labors and made up their award on January 26, 1906. The agreement of arbitration executed by the parties, and the award made pursuant thereto, are as follows:

"Memorandum of Agreement.

"Whereas disputes have arisen between William B. Duvall, Joseph F. Sulzner, J. C. Tebbetts, I. L. Courrier, M. D. Judah, and E. P. Cole, stockholders in the Gold Bullion Mining & Development Company, as to the ownership of shares of stock in said Gold Bullion Mining & Development Company, and whereas suit has been instituted in the court of common pleas No. 3 of Allegheny county, Pa., by E. P. Cole, Joseph F. Sulzner, William B. Duvall, and the Gold Bullion Mining & Development Company respecting a portion of the

stock of said company, and a suit instituted in the United States Circuit Court by William B. Duvall against Joseph Sulzner representing a portion of the stock of said company, and that certain other parties claim an interest in said stock.

"And, whereas, at the annual meeting of the stockholders held at the office of said company in the city of Pittsburgh, Pa., on the 9th day of January, 1906, it having been proposed and agreed by and between all of the parties to said disputes that the same be submitted to a committee of five as therein provided, to be selected to arbitrate and settle all matters in dispute concerning the same, which said resolution was unanimously adopted.

"Now, therefore, in pursuance of the verbal agreements and the said resolution above mentioned and in confirmation of the same, we do hereby agree to, and do submit all our rights and claims in, to, and concerning the stock of the Gold Bullion Mining & Development Company, and all disputes concerning the same, and do hereby select and appoint Thomas Maxwell, H. D. Gamble, Harvey A. Miller, G. H. Moore, and James G. Marks as a committee to arbitrate and adjust all said difference, disputes, and claims.

"Now, therefore, this agreement witnesseth:

"First. That the said parties hereto agree to submit their rights in and to the said stock to the Committee of arbitrators above named, and shall present to the said committee such evidence of their rights as may be relevant and proper.

"Second. That the said arbitrators, or a majority of them, acting as such committee or board, shall have the right and authority to hear and determine all matters in dispute between the parties hereto in and concerning the said stock, and shall set forth what portion, if any, of the said shares of stock is to be awarded to the various parties claiming a right or interest therein.

"Third. That the award of the said arbitrators shall be made in writing, and signed by the said arbitrators, or a majority of them, and a copy thereof delivered to each of the parties hereto, or mailed to their respective post-office addresses; and such award, when so made, shall be binding and conclusive upon the parties hereto without any right of action at law, or in equity, concerning the subject of this arbitration.

"Fourth. That the said William B. Duvall and the said E. P. Cole, in consideration of this agreement and by submitting their claims concerning the said stock to the said arbitrators, hereby settles and discontinues the said suits in the United States Circuit Court for the Western District of Pennsylvania, at No. 19 May term, 1906, and the said suit in the court of common pleas No. 3 of Allegheny county, Pa., at No. ——— November term, 1905, and agree to pay all costs therein accrued.

"Witness our hands and seals this 10th day of January, A. D. 1906.

"W. B. Duvall. [Seal.]
"Jos. F. Sulzner. [Seal.]
"J. C. Tebbetts. [Seal.]
"E. P. Cole. [Seal.]
"I. L. Courrier. [Seal.]
"M. D. Judah. [Seal.]
"By I. L. C.,
"By virtue of assignment.

"Witnesses."

"Award.

"We, the undersigned, being the arbitrators agreed upon by William B Duvall and Joseph F. Sulzner and others, by agreement dated January 10, 1906, to hear and determine the claims of the said parties in and to the ownership of 103,333 shares of the stock of the Gold Bullion Mining & Development Company, and to make an award concerning the same, and to set forth what parties are entitled to the said stock, or portions thereof, as set forth in said agreement, hereby certify that we have heard the claims of the said parties and such evidence as they desired to offer, and, upon due consideration thereof, hereby make our award pursuant to the said agreement and adjudge

and determine that the parties hereinafter named are entitled to the said stock in the portions set opposite their respective names; that is to say:

To H. G. Loupold, 5,000 shares	$ 5,000.
" Thomas Maxwell, 1,000 shares	1,000.
" G. H. Moore, 1,000 shares	1,000.
" W. J. Aber, 1,000 shares	1,000.
" Henry Hetzel, 25,000 shares	25,000.
" Piedro Pinelli, 2,500 shares	2,500.
" V. M. Reynolds, 500 shares	500.
" ——— Recker, 2,500 shares	2,500.
" L. T. Yoder, 1,250 shares	1,250.
" E. P. Cole, 500 shares	500.
" I. L. Currier, assignee of Judah, 500 shares	500.
" J. C. Tebbetts, 5,000 shares	5,000.
" Jos. F. Sulzner, 80,083 shares	80,083.
Total	$103,333.

"In witness whereof we have hereunto set our hands and seals this 26th day of January, 1906.

"Thomas Maxwell. [Seal.]
"G. H. Moore. [Seal.]
"Harvey A. Miller. [Seal.]"

At the time these meetings were held and the award made, Mr. Duvall and Mr. Tebbetts were both away; the former having left for New York on the evening of January 10th, and the latter for California the same day. When Mr. Duvall returned and learned what the action of the arbitrators had been, he was very much dissatisfied, and that dissatisfaction resulted in the preparation and filing of the bill in this case. This bill set forth more at length the history of the transaction than that given above, but substantially the same, and alleges that the amount of said stock awarded by the arbitrators to Joseph F. Sulzner, towit, 80,083 shares, "was rightfully, and is still rightfully, the property of your orator, William B. Duvall, except in so far as he may desire to use the same for the benefit and promotion of the said company." The averments of the bill respecting the action of the arbitrators are embraced in the twelfth and thirteenth clauses thereof, and are as follows:

"That notwithstanding this was their plain and known duty, they proceeded, while your orator, William B. Duvall, was in Mexico, and the said J. C. Tebbetts was in the state of California, to meet and decide the questions in dispute without notice to them and without hearing any evidence, at least in so far as the rights of your orators and the said J. C. Tebbetts or any of them were concerned, and against the written protest of one of the arbitrators, a copy of which said protest, marked 'Exhibit' B,' is hereto attached and made a part of this bill of complaint, and against his withdrawal and refusal to act as one of said arbitrators, attempted to determine the matters in dispute and made their finding and award in writing, a copy of which said finding and award, marked 'Exhibit C,' is hereto attached and also made a part of this bill of complaint.

"Thirteenth. That said attempted award and determination of the said committee of arbitration is illegal and invalid and not binding upon your orators, William B. Duvall and other parties to said agreement (Exhibit A), for the reason that the said committee of arbitration proceeded in entire disregard of your orator's, William B. Duvall's, rights, without such hearing as is provided by the agreement of submission, and without giving your orator, William B. Duvall, any opportunity to establish his right in said stock by evidence to that end and against the protest and withdrawal of one of the said arbitrators, and against the dissent of another of said arbitrators. And your orator, William B. Duvall, further avers that the majority of the said

committee of arbitration, so acting and attempting to pass upon the title of said stock and to decide the said controversy, did act throughout the whole of said proceedings with manifest unfairness, and with such partiality as to destroy the judicial character of said proceedings, and to render said arbitration invalid and illegal."

To this bill the defendants have filed a plea, setting up the agreement to arbitrate and the award made pursuant thereto, and also the former bill filed by Duvall v. Sulzner, at No. 19, of same term (no opinion written), to which the plaintiffs have filed a replication joining issue on the averments of the plea.

It may be added that at the time Duvall filed his bill at No. 19 May term of this court, E. P. Cole, one of the defendants, had also filed a bill in equity in the court of common pleas No. 3 of Allegheny county of ——— November term, 1905, for the recovery of a portion of said stock.

In the present bill the plaintiffs state that they are willing that the allotment of stock made by the arbitrators shall stand with the exception of that to said Sulzner, as to which the controversy here is confined. Only defendants Sulzner, Maxwell, Moore, Aber, Hetzel, and Yoder join in the plea. The defendant Pinella has never been served, and is without the jurisdiction of this court.

The real contention in this case is between Duvall and Sulzner. The Gold Bullion Mining & Development Company really has no vested interest, and whatever it may acquire it must acquire through Duvall. It is alleged that at the meeting of the stockholders on the 9th day of January, 1906, Duvall made a declaration, and repeated it, that whatever interest he had should go to the company; but, while he did make some statements of that character, it is not shown by the testimony that he ever made any absolute renunciation of his right to this stock, or any valid transfer of his equity therein to the company. He states in that bill, in paragraphs 5 and 6, that he set apart 125,000 shares of his stock to promote the company's capitalization and development, and, in paragraph 8, that he is holding this stock, in part at least, for the promotion of the interests of the said corporation, while in paragraph 10, as above quoted, he still claims the property as his own. In paragraph 14 he alleges that he has determined to use said stock to the best interest of the plaintiff company and to transfer the same to it as and when the same may become vested in him. In paragraph 3 of the prayer he asks that the 80,083 shares be adjudged the property of the Gold Bullion Mining & Development Company and be delivered to it, and in paragraph 4 asks that the said 80,083 shares of the capital stock of the said Gold Bullion Mining & Development Company may be decreed and declared to be the property of the Gold Bullion Mining & Development Company, subject to the sale of such part thereof as may be necessary to reimburse the said William B. Duvall for the costs and expenses of this litigation, etc. It will thus be seen that the development company has no interest other than what Duvall may see fit to confer upon it, and that it has no title except what it may get through him. Notwithstanding his present declarations, in the bill which he filed on the 6th day of January, Duvall expressly claimed title in himself, and prayed that a decree be made requiring the

whole block of stock to be retransferred to him. The declarations made by Duvall at the meeting on January 9th, as well as those contained in his present bill amount to nothing more than a declaration of intention on his part to use that stock, if he secures it, for the benefit of the company, and do not constitute such a valid assignment or transfer to the company as would warrant it in joining in this bill. The fact of the matter is that the company never did authorize its name to be used in connection with this bill, but after the bill was filed, and some time during the course of the litigation, it does appear that Duvall obtained the consent of some of the officers of the company at least to participate in the expense. However all this may be, the fact is that at the time the arbitration was held the company made no claim to any of this stock, and did not understand that it had any right to make such a claim. A good deal of stress has been laid upon the fact that the stockholders at that meeting elected one of their number to sit upon the arbitration board, and it is argued from that, that it was because of direct interest in this stock by the company that that election was had. But that is explained by the statement of several of the witnesses, to the effect that the company was suffering financially by reason of the dissension among its stockholders, and that at the time they were in need of financial aid, and that the object in having the company participate in the selection of arbitrators was to show the anxiety of the stockholders as a body in having the dissensions removed. Two of the arbitrators, Maxwell and Moore, were members of the board of directors of the development company; and two others, Miller and Gamble, were stockholders, so that, if the company had any claim on this stock or understood it had any right or title to any portion thereof, it would certainly have been declared and upheld by these gentlemen. So far as appears, also, the company has never taken any action indicating that it had any claim or title to this stock, or seeking to enforce any such claim. Sulzner is president of the company, and, if the other stockholders understood that the company itself had any right or title to this stock, or any portion thereof, they certainly would not refrain from taking some action looking towards the enforcement of such right. Altogether there is nothing shown in the testimony to establish any right in the development company to any notice of the arbitration, the lack of which notice is one of the grounds most vigorously urged against the validity of the arbitrators' award, although it is not alleged in the bill of complaint. The bill does allege lack of notice to Duvall and to Tebbetts; but it is sufficient to say concerning notice to Tebbetts that he admits in his testimony that he waived any notice, and he himself makes no complaint respecting it. As to Duvall, the testimony shows overwhelmingly and conclusively that he absolutely and repeatedly instructed the arbitrators to go ahead; that he had nothing further to say; that he had said all he wanted to, and for them to go ahead and dispose of the stock; that he did not care what disposition they made of it—he would be perfectly satisfied. It is alleged that these statements by Duvall were made prior to the completion of the board of arbitrators and prior to the execution of the agreement of submission by Sulzner, and this is probably the case so far as the execution of the agreement is concerned, but it is not the case so far as

the constitution of the board of arbitrators is concerned. All the arbitrators had been agreed upon and determined before the meeting in Gamble's office on January 10th, and, while there is some uncertainty as to whether Mr. Marks was present with the other arbitrators on that occasion, yet the statements then made by Duvall were made with full knowledge of who constituted the board of arbitration, and his instruction was for them to go ahead immediately and dispose of this matter, and his positive declaration was that he did not want to be heard; and it was not until he returned and found that the disposition made was not in accordance with his views that he thought of lack of notice to him as a ground of objection. Four of the members of the board of arbitrators being stockholders in the development company, and having been present at the various meetings when the difficulties between Duvall and Sulzner, and possibly others of the stockholders, were discussed, Duvall knew that they had heard in full his side of the case, and particularly at the meeting on January 9th, when he made several quite lengthy speeches, giving his position in regard to that stock, and informing every one fully of what his claim was. The claim he makes now that he ought to have had notice and been given an opportunity to be heard is an afterthought and without merit.

Tebbetts was present with him in Mr. Gamble's office on January 10th, and it was there and at that time that Tebbetts waived notice, and Duvall's declarations there were to the same effect, only stronger and more positive.

The averments of the bill that the arbitrators decided the question without hearing any evidence is really applicable only to the claims of Tebbetts and Duvall; but, even if they embraced the other claims, they are not supported by the testimony. No one but Duvall is claiming lack of notice, no one but Duvall is alleging lack of evidence, and no one but Duvall is questioning the entire correctness of the award of the arbitrators. All the parties, and it appears from the award that there were quite a number of them, who had or thought they had any claim upon any of this stock, appeared either in person or by attorney, or presented written orders from Duvall for the same, and no one has been shown to have been refused a hearing or to have lacked any notice. The testimony is that the arbitrators heard everybody and everything that was offered before them. As to the character of the evidence, however, there may be some question. The proceeding was not conducted as a proceeding at law, but was a common-law submission, and, as is usual in such cases, the hearings are not so strict and the rules of law and evidence not so much enforced as where the proceedings are conducted under court direction. Duvall evidently expected the arbitrators to act respecting his claim to this stock upon what they had heard from him outside of the meetings of the board of arbitration, in the meetings of the stockholders and officers of the company and elsewhere, and cannot complain that the arbitrators acted upon similar evidence in disposing of the claims of other parties. If he expected, and he unquestionably did, that the arbitrators would act upon that kind of evidence so far as his claim was concerned, he must not object that they did the same thing regarding other claims. In fact, it is hard to understand how the arbitrators would have been expected

to determine the questions before them simply upon representations made to them in their capacity as arbitrators, when, as we have seen, at least four of the five arbitrators had been thoroughly inoculated with the claims and demands of the various parties through the contentions and discussions which had arisen and occurred during the course of the meetings of the directors and stockholders of the company. The evidence perhaps was not of the character that we would prefer, and possibly not so satisfactory as it should have been, but no one is more responsible for that than Duvall himself, for the members of the board and their previous affiliations were all well known to him, and as has been stated, he evidently expected that they would arrive at their conclusion largely upon matters which had come to their knowledge prior to the time of their selection as arbitrators. All this, perhaps, is outside of the pleadings, as there is no allegation that the arbitrators decided the question without evidence, except as to Duvall's own claim and that of Tebbetts. The arbitrators heard evidence respecting the claims, and evidence of the kind and character that the parties evidently contemplated.

Another allegation of the bill is that the majority of the arbitrators acted throughout the whole proceedings with manifest unfairness, and with such partiality as to destroy the judicial character of said proceedings, etc. It might be sufficient in answer to this allegation of the bill to say that, since it fails to aver any participation or complicity therein on the part of Sulzner, it does not go far enough. "Partiality and some improper conduct of the arbitrators in making the award will not impeach it, unless the party benefited thereby be implicated in that misconduct." Hostetter v. City of Pittsburgh, 107 Pa. 419. In order to sustain such a bill and set aside an award, "it is essential to aver and prove that the party benefited by the award participated in the fraud charged; but evidence that the arbitrator was partial and unfair, and knowingly made an improper decision, is insufficient for that purpose, without evidence that the parties benefited colluded with the arbitrators or practiced a fraud to procure the award." Hartupee v. City of Pittsburgh et al., 131 Pa. 535, 19 Atl. 507. Now, the bill alleges no collusion or participation by Sulzner in any partial or unfair conduct on the part of the arbitrators, or any of them, if such there were; and consequently under these authorities much of the testimony that was taken in this case for the purpose of showing such misconduct and unfairness is incompetent and irrelevant. It may be that the arbitrators were partial, but, if so, what else was to be expected from their associations. Mr. Gamble, who was Duvall's special choice, objected to one of the arbitrators, but Mr. Duvall promptly advised him that he was acceptable to him, and the objection had to be withdrawn. Mr. Duvall knew that Mr. Miller, who for some time had been attorney for the development company, was the counsel of Mr. Sulzner and appeared for him in the former bill filed by Mr. Duvall. Not only that, but in the hearing on that bill, which was heard upon affidavits, Mr. Miller perhaps made the longest and strongest of all the affidavits in Sulzner's behalf, and Messrs. Maxwell and Moore also made affidavits for Sulzner in that case. "If, indeed, parties in controversy choose to waive the right of impartial trial, and purposely and avowed-

ly select as arbitrators persons having formed opinions on the subject-matter, or known to have partialities for and against the respective parties, the court, without commending, will not set aside the award merely because of the character of the arbitrators." Strong v. Strong, 9 Cush. (Mass.) 560. In this case two of the arbitrators themselves had claims on this stock, and by their own award are given 1,000 shares each, viz., Maxwell and Moore, and yet Duvall does not except to that. This only further shows the character and interest of the parties he selected to determine the questions at issue. Some of the testimony goes beyond the allegation of partiality and unfairness, but, since the bill does not aver any corruption, collusion, or fraud, it is unnecessary to go into that in detail. The five arbitrators remained together during all their sittings until it came to the last one, when their award was made up. What that award would be had been pretty definitely ascertained from their discussion at the previous meeting; but its actual determination was then laid over until they should gather together again. When they did have their final meeting, one of the arbitrators presented a written protest, couched in very general terms, and then withdrew. It is evident from that protest that he represented the interests of Mr. Duvall, and was not satisfied with what he apprehended would be the action of the board. Against such a contingency as this the agreement of submission specifically provides, for it only requires that the award shall be made by a majority of the board and that was done. Another member of the board was dissatisfied with its action, and refused to sign the award, but on the back of it entered his protest. His position seems to have been that the stock ought to have been distributed in accordance with the terms of the agreement for the deposit in escrow, according to which Mr. Duvall would have received no portion of it. It will thus be seen that four out of the five arbitrators thought Mr. Duvall was entitled to no part of this stock, while the fifth thought otherwise; but the withdrawal of one of those arbitrators and the protest of the other does not invalidate the award.

Under the pleadings, therefore, and the evidence adduced in support thereof, I am of the opinion that sufficient has not been shown to invalidate the award of the arbitrators, and that the defendants' plea must be sustained.

UNITED STATES v. KOPLIK.

(Circuit Court, S. D. New York. May 15, 1907.)

1. ARMY AND NAVY—OFFENSES BY CIVILIANS—RECEIVING PUBLIC PROPERTY IN PLEDGE—CONSTRUCTION OF STATUTE.

In that provision of Rev. St. § 5438 [U. S. Comp. St. 1901, p. 3674], which makes it a criminal offense if any one "knowingly" purchases or receives in pledge from any soldier clothes or other public property, such soldier not having the lawful right to pledge or sell the same, the word "knowingly" applies only to the question whether a person purchasing or receiving such property in pledge knew, or should have known from facts which put him on inquiry, that the person offering the same was a soldier.

2. SAME.

It is not a defense to a prosecution, under such statute, for receiving property in pledge from a soldier still in the service, that such property consisted of clothing which he had paid for out of his clothes allowance, or which had been charged against it.

On Indictment for Receiving in Pledge Soldiers' Clothing.

The defendant, Charles Koplik, was a member of a firm conducting a pawnbroking business in the city of New York. He was indicted under section 5438 of the Revised Statutes [U. S. Comp. St. 1901, p. 3674] for having at his place of business knowingly received in pledge, from a soldier stationed at Ft. Schuyler, N. Y., an olive drab overcoat, which the soldier did not have the right to pledge or sell. The transaction was admitted by the defendant, his version of the occurrence being: That the soldier came into the pawnbroking establishment, one Saturday afternoon, late in the day, and wished to borrow a sum of money upon an overcoat; that a loan was made to the extent of $3, upon which, according to the New York state statute, nine cents could be charged as interest, if the goods were redeemed within 30 days; that the soldier upon being asked if he would like to have extra care taken of his coat, which extra care it was testified was to pack it in a moth-proof chest, was told that the charge for such extra care would be a dollar. To this the soldier agreed, and a receipt was taken, No. 14, for the dollar paid for extra care. While the soldier was talking with a companion of his, a woman pawned a diamond ring, and within a few moments after, according to the defendant's testimony, the second soldier pawned his overcoat in a similar way. The defendant testified that an extra care ticket, No. 15, was given to the woman, who pawned the diamond ring, and an extra care ticket, No. 16, to the second soldier for his overcoat. Some of the witnesses for the defendant testified that the soldier said he was a discharged soldier, and would pay when he got his money from the government. The defendant testified that he remembered nothing of that conversation, while another witness for the defendant said that the soldiers promised to redeem the goods on pay day. The two soldiers testified that the overcoats were pawned as much as an hour and a half apart, that they did not remember the transaction about the diamond ring, and were positive that they said nothing about being discharged soldiers. It was undisputed that both soldiers were in uniform, and that the overcoats pawned were those which they were wearing.

Henry L. Stimson, U. S. Atty., and Francis W. Bird, Asst. U. S. Atty.

Clarence S. Houghton, for defendant.

CHATFIELD, District Judge (the facts having appeared by the testimony substantially as above), charged the jury as follows: The province of a juror is not a simple one. The decision upon questions of fact is not of itself easy, but, when these questions that are laid before you are involved with interpretations of law, the government asking the jury to try to assume what its ideas may be as to the aspect of a certain statute or certain law, while the defendant tries throughout the case to have the jury understand that the law is to be construed in a different way, which he claims the court will charge, when later the court takes a third position in explaining what its idea of the law is, and then the jury is called upon to remember and sift out these different questions as to what the statute means, and what the law is, and as to whether the defendant is to be treated from the standpoint of what this law, as a law, is intended to be, it seems to me entirely wrong to ask a jury to carry the tes-

timony in their minds, not having it to read, not having the law before them, and having none of these questions so that they can pass upon them as the attorneys who have worked up the case, and I, as judge, who must instruct on that law, can do and to apply this testimony to all of these various views of the statute. It is needlessly making the duty of the juror arduous to inject into the case such questions as whether a business man should be sent to prison. That is something that the jury need not worry about. As to questions of public policy, questions as to what situation the statute is called upon to meet, those are the points of view from which the jury is to look at the evidence in the case. But beyond that, if the jury have not confidence in the court, or if you have not the willingness and ability to pass upon the facts as the law is laid down, you should not try to correct the situation by the individual views of jurors. I say that because throughout the case I have tried to indicate that these matters should not be brought in to complicate. The jury must take the law as charged by the court. Much argument in this case has been directed to the different phases of life, as questions of fact. But the testimony of the witnesses upon the stand was comparatively short, and you will remember, in looking upon that testimony and weighing it, that this defendant, a man of good reputation, and a man presumed therefore to be of good character, comes here presumed to be innocent and with all the benefits of that good reputation. He is charged under an indictment with having done something which makes him responsible under this statute, and that evidence is presented to you, with the burden upon the government of satisfying you beyond a reasonable doubt that he did the act with which he is charged. Your province is to say whether you are satisfied beyond a reasonable doubt that a man with such a character, or with such a presumption, has been shown by the evidence to have committed the act, and on that you will base your verdict.

Now, as to the statute, we have had discussions enough so that you can presume that it is a comprehensive, a drastic, statute. You have seen the witnesses for the government, these recruits; you have been able to judge, from the manner of giving their testimony, what the facts were, what weight you will give their testimony. You have heard the testimony of the sergeant who gave his evidence after service in the army, not as a recruit. And under all of these circumstances you can see what the situation of the soldier is, when he attempts to pledge his clothing. And then, the statute forbids the pledging or selling by a soldier, or a sailor in the case of the navy, of the arms, the equipment, ammunition, the clothing, any other public property which he does not have the lawful right to pledge or sell.

You have heard read into the case a statute giving government officers the right to seize such public property. I charge you that that section refers as well to clothing which the soldier has paid for as to powder, cartridges, rifle, and these other articles which have only been handed to him for use. The authority under this section as to the right of an army officer to go in and seize this property wherever found is a civil right. The government has a right to take possession of what is the government's, and any person disputing that right must

prove it. When you come to a criminal case, the government still has the right to seize. It has the right to charge the men with the crime. It must then show the possession of the goods. It must show the circumstances by which the act is alleged to be brought within the criminal section, and if that is shown the defendant is then put upon his proof; the question being whether the charge is proved to the satisfaction of the jury beyond a reasonable doubt.

The section under which the defendant is charged speaks of this particular matter in the following language:

"Any person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, clothes or other public property [I have left out the other words that do not apply to this particular matter], such soldier not having the lawful right to pledge or sell the same."

As to that last clause, "not having the lawful right to pledge or sell," the word "knowledge" or "knowing" does not apply. Whether the soldier had a right is a question of fact. If the soldier did not have the right, then the property could not be legally sold, and if a person buys that property he buys it with the prospect of its being seized. He buys it running the chances of being shown to have had knowledge that he was purchasing it from a soldier, or under such circumstances that the word "knowledge" applies, and he takes his chances as to whether the person had the lawful right to pledge or sell the same. The word "knowing" applies only to the question as to whether the man who purchased and receives in pledge the property knew that the person offering it was a soldier. You see, a soldier might be sent to sell something that might have been condemned, and, having the lawful right to sell that, knowledge as to whether he was a soldier or not, if all the circumstances were understood, would have nothing to do with the case. But if he did not have the lawful right to sell (and I charge you these soldiers did not have, as a matter of law, any right to pledge or sell this clothing until their enlistment had been terminated by either court-martial or honorable discharge), if they did not have the right to sell, then the question comes down to the transaction with the person with whom they were dealing, and the sole question is whether he knew, or whether he acted with such disregard of the circumstances that he did not try to find out, whether the man was a soldier.

To convict the defendant, you must be satisfied as to this from the evidence beyond a reasonable doubt. Of course, there are two ways of looking at the matter to start with. It is possible for you to determine that the soldiers' story is true, and that the defendant knew that these men were soldiers. It is possible as well for you to determine that the defendant's story is true, and that he in good faith believed that they were discharged soldiers. Those are the two extremes. Whichever way you make up your mind, if you arrive at either one of those conclusions, that way your verdict will go. But if you should believe, as told by the soldiers, that they went in and offered their clothing to be pawned, that they said nothing as to whether they were discharged soldiers, or whether they said that they were discharged soldiers, and the defendant knew better, or, whatever you find as to the facts of that, if the defendant had reason, as a reasonable man, to know

that he was dealing with a soldier, or to make further inquiry, if he had no regard for whether the soldier had been discharged or not, if he disregarded taking the precautions a reasonable man would, so that he could be charged with knowing (if he had attempted to find out) that he was dealing with a soldier, then he is responsible under this statute.

You have heard the different conflicts of testimony; heard of these slips for extra care, one of them numbered a certain thousand and fourteen, and the other a certain thousand and sixteen, that were given, one side says, something like an hour apart or an hour and a half, and the other says between 5:00 and 5:15. The defendant explains the transaction that occurred between these two Nos., 14 and 16, relating to a diamond ring, and that these transactions were with reference to getting extra care for the overcoats, in relation to garments to be put away; the defendant thereby explaining, or attempting to explain, the fact that the numbers were but two apart.

You have heard the testimony of one soldier that Mr. Isidore Koplik (the witness, not the defendant) was not in the store so far as he remembered, and the other witness identifying Mr. Isidore Koplik; the statements that the soldiers came there on two different occasions as far as the pawning is concerned; and the different discrepancies as to the points in which the stories are not alike. You have heard the testimony by the defendant, who says that nothing was said about pay day or money to be paid to these men by the government, of Mr. Isidore Koplik, who testifies that they said they were discharged soldiers, and that they were to get their money from the government, and of the clerk, who says they stated that they would redeem the goods on pay day; the soldier witnesses saying there were men in the store, but not remembering the woman being there. And all these points you will remember and try to determine what in your opinion were the facts, of what facts you are persuaded beyond a reasonable doubt, and having determined those facts you will consider whether Mr. Koplik had knowledge that he was dealing with soldiers, or that he was so informed that the situation was such that he disregarded the duty which this statute places upon him and everybody else of acting as a reasonable man would in using the opportunities offered by the situation so as to know whether he is dealing with a soldier or not.

I think I have sufficiently charged you that good reputation is always to be considered; also, that the presumption of innocence goes with the defendant all the way through, and is to be considered by you in regarding the question, whether the burden of proof has been borne so as to satisfy you beyond a reasonable doubt. If you, from the demeanor of any of the witnesses or his testimony, have believed that he willfully and deliberately testified falsely as to any material matter, you may disregard such portion of that witness' testimony, or all of it, as you see fit, or give it such weight as you see fit.

Mr. Houghton: I will respectfully request the court to charge that the charge of $1 for extra care was not made for two or three weeks' care, but for the whole time.

The Court: The jury will remember the evidence as to what that was. There is no question in this case, gentlemen, as to the legality or

illegality of charging a dollar for storage. Whether the pawnbroker should be satisfied with nine cents interest on a loan that is conceded by all parties might be but a month in duration, that is a matter for the state law. The pawnbroker, as far as this case was concerned, was within his rights. The question as to the contradiction about the witnesses being asked if they wanted extra care, and the pawnbroker stating that they requested extra care, is merely a discrepancy in the testimony to be considered in finding out what happened. The pawnbroker, as far as this case is concerned, had a right to add that dollar, if it was assented to by the soldiers.

Mr. Houghton: I request the court to charge that the fact that Richards or Donahue, or either of them, may have been intoxicated, or partly intoxicated, at the time of the pawning of any clothing, should not prejudice the jury against the defendant.

The Court: It is evidence as to the whole situation both upon the question of their memory and the acts of the defendant.

Mr. Houghton: I further request that, if the jury find that the two coats in question were paid for by Richards and Donahue out of their clothes allowance, the jury should acquit.

The Court: I refuse to so charge.

Exception by Mr. Houghton.

Mr. Houghton: That if the jury find that the two coats in question were charged up by the government against Donahue and Rich- [illegible] they were their own property, and the jury should acquit.

The Court: I refuse to so charge.

Exception.

Mr. Houghton: If the jury believe that Donahue and Richards stated that they were discharged soldiers, Koplik was under no obligation to ask to see their discharge papers, and the jury should acquit.

The Court: I will charge that he was under no obligation to compel them to produce their discharge papers. The question as to how far a reasonable man would find out about the situation is one the jury will have to determine.

Exception.

Mr. Houghton: Further, the fact that Donahue and Richards were in uniform was not of itself notice to the defendant that they were in the service of the United States government.

The Court: I will charge that the fact that a man has on a uniform is not conclusive proof that he is actually at that time in the service. I refuse to charge whether it is notice except as I have already explained.

Exception.

Mr. Houghton: I will also ask your honor to charge that at the time of the arrest of this defendant he was not bound under any law of the United States to make any statement.

The Court: He was not bound, and it is proper to warn a man not to make a statement. What the man does should, of course, be considered by the jury in determining his frame of mind and knowledge of the situation, but it should not be held against him if he keeps quiet.

Mr. Houghton: I will further request the court to charge—I think you have already touched upon it, but I would like to urge my request—that the defendant must have known at the time that the soldier pledged the garment that he was a soldier of the United States.

The Court: I refuse to charge, except as I have already charged.

Exception.

Mr. Houghton: I further request the court to charge that the defendant must have known at the time the property was pledged that the property was public property.

The Court: No; I refuse to so charge.

Exception.

Mr. Houghton: I further request the court to charge that the defendant must have known at the time the pledge was made by the soldier that the soldier had no right to pledge them.

The Court: I refuse to so charge. The defendant took his chances on that.

Mr. Bird: I request that your honor charge that under the law the defendant has no right to accept more than 3 per cent. interest a month on any loan.

The Court: I so charge. If there are no further requests, the jury will retire.

The jury brought in a verdict of guilty, and a sentence of $1,000 fine was imposed, which was paid by the defendant.

In re LEVERTON. (1.)

(District Court, M. D. Pennsylvania. September 4, 1907.)

No. 897, in Bankruptcy.

BANKRUPTCY—STATE EXEMPTION—FRAUDULENT CONCEALMENT OF PROPERTY.

A bankrupt was a general merchant in a small town, carrying an average stock of about $5,000. Within three months prior to his bankruptcy he bought goods to the value of $11,000, which he did not pay for, in addition to those then on hand; and on his bankruptcy his stock invoiced at cost price less than $3,500. During such three months not more than $3,000 in money was accounted for, and no proper books showing the business transactions were found. *Held*, that under the law of Pennsylvania, having fraudulently concealed his property he forfeited his right to his $300 state exemption.

In Bankruptcy. On exceptions to refusal of John W. Codding, referee, to allow the bankrupt his $300 state exemption.

The report of the referee was as follows:

The trustee having filed with the referee a schedule of property designated and set apart, to be retained as exempt by the bankrupt, amounting to $299.75, exception is taken by creditors to the allowance of the exemption for the reason: (1) That the bankrupt fraudulently contracted the indebtedness due them. (2) That he has fraudulently concealed and disposed of certain of his goods, merchandise, and property, for the purpose of putting them beyond the reach of creditors. From the record and evidence taken in the case, it appears that Morris Leverton, at the time the petition in bankruptcy was filed, had been conducting a general mercantile business in Du-

shore, Pa., for about twelve years. The first six years he was in partnership with Mrs. Goldstein, a cousin, and the last six years by himself. Dushore has a population of about 1,000. During the time he was in business for himself, he carried a regular stock down to September or October, 1906, of some $5,000. The bankrupt is about 33 years of age, had apparently been successful in business, and until shortly prior to the bankruptcy proceedings had a good financial standing, and he seems to have been able at the close to get unusual and almost unlimited credit. The evidence does not show all the new goods that he purchased during the year 1906, but it does show substantially the new goods that he purchased and received during that year, which he did not pay for. The latter appears from the proofs of claims filed, the indebtedness set forth in his schedules, and the records of the freight and express offices at Dushore.

Of goods, for which claims have been proved, he purchased and received as follows:

Prior to August, 1906	$3,115 00
During August, "	1,572 75
During September, "	3,410 18
During October, "	5,985 63

The purchases for September and October were unusually large for him as appears from the number of shipments and packages which he received during these two months as compared with the corresponding months of 1905.

In September, 1906,	express,	38	shipments,	38	packages,	918 lbs.
	freight,	27	"	45	"	5762 "
In October, 1906,	express,	139	"	139	"	3795 "
	freight,	51	"	78	"	6900 "
						17,375
In September, 1905,	express,	4	shipments,	4	packages,	62 lbs.
	freight,	14	"	21	"	2620 "
In October, 1905,	express,	12	"	15	"	587½ "
	freight,	15	"	21	"	2650 "
In November, 1905,	express,	22	"	22	"	1362 "
	freight,	14	"	16	"	2910 "

In place therefore of the stock of $5,000 which he regularly carried Leverton had goods to the amount of $14,385.81 during the last two months of his business.

The petition in bankruptcy was filed October 30, 1906, and a receiver was appointed and took possession of the store November 1st; an adjudication being made November 10th following. When the bankrupt went out of business, there was 57 cents in the bank to his credit, and the stock of goods in his store, which was badly broken up, was appraised at $3,410.01. The appraisers knew the cost marks on his goods, and all new goods which were found were appraised at the cost price.

The total payments made by the bankrupt during the months of September and October were as follows:

Cash.	General expenses, running house, store etc.	$ 303 08
	Freight and express, estimated at	200 00
	Paid note at Bank	150 00
	Claims to have paid for gold stock	1,250 00
	Claims to have paid L. Paltrowitz	450 00
		$2,353 08
Checks		270 09
		$2,623 17

This amount, viz., $2,623.17, subtracted from the $14,385.81 of goods which he had in his possession during these two months, leaves $11,762.64 to be accounted for.

The bankrupt did all of his banking business at the First National Bank of Dushore; and his bank account for 1906 was as follows:

Balance in his favor, December 29, 1905		$ 781 24
Deposits.	January	414 13
	February	145 80
	March	1,060 55
	April	574 56
	May	892 66
	June	501 78
	July	414 77
	August	332 50
	September	70 00
	October	120 00
		$5.307 99
Checks from January to October		5.307 42
		$ 57

The last deposit in bank was October 5, 1906.

After deducting, therefore, all general expenses of house, store, advertising, freight, and express, note at First National Bank of Towanda, and what he claims to have paid for gold stock and to Paltrowitz, he should have either in goods or money $11,762.64. The goods left in the store as already stated were appraised at $3,410.01. But, stating this the most favorably to the bankrupt, suppose the goods amounted to $5,000. This deducted from $11,762.64 would leave $6,762.64 of assets entirely unaccounted for. The question is: What has become of it? This puts the matter as favorably to the bankrupt as possible, for it treats the gold stock and the Paltrowitz transactions as actual payments. But they were both disputed and of a suspicious nature. The goods sold to the Kaufmans, not deducting the 10 per cent. discount which he allowed them, amount to $1,490.13; and the goods sold on credit in September and October, according to the ledger, amount to $76.60, making $1,566.73 altogether, although the bankrupt reports no money in his schedules excepting $0.57.

Now, as to his books, bills, receipts and other papers: Two days before the receiver was appointed the bankrupt took these bills, and used them to make up a list of creditors, which he furnished his attorney. He testified that they were all left in the store. But Ira Cott, the receiver, and Charles Heverly, one of the appraisers, swear that they made a thorough search for books and papers, but found absolutely nothing. And the books when finally produced are very unsatisfactory, and the most important ones are not produced at all. It does not seem possible that a business of the character of this one could be carried on with books kept in the manner that the bankrupt alleges his books were kept. A most diligent search was made for the bills, and, after considerable delay, Henry Goodman, the trustee, produced 17 of them; and, strange to say, in every instance the goods on the bills produced have been returned to the shipper. This was no accident. It is hardly possible that there were no original bills outside of these 17, all of which cover goods that had been returned. There was evidence, also, that the bankrupt wholesaled goods to the Kaufmans at a discount of 10 per cent., when he himself received no such discount. These shipments were all made a short time before his failure, and on the face of the transaction he was a heavy loser. Nor have any reasons been assigned for this undue haste and large inadequacy of price. During the month of October, also, many goods were purchased by the bankrupt on a hurry-up order and immediately reshipped to one or the other Kaufman. Many of these goods were also ordered to be shipped by express, instead of freight, which was much more expensive. Unusual goods to carry in a small town, like silk petticoats, of peculiar sizes and of the best silk, were received, and claimed by him to have been left in the store, and yet the appraisers were unable to find them. On October 18th and October 27th he also received three seal jackets costing $40, $38.50, $29.50, respectively. And yet he is utterly unable to tell to whom he sold these jackets two months after they were purchased. There are many circumstances of this character of a

suspicious nature tending to show concealment of property. But enough have been given.

The bankrupt in his examination has been most unsatisfactory, evidencing a disposition to dodge, give evasive answers, and hide behind the statement, "I do not remember." And this concerning transactions of importance that any ordinary business man would have no trouble in recalling so soon afterwards. It is well settled that a bankrupt is to be allowed the same exemption as provided by the law of the state wherein he resides. But in Pennsylvania, if a debtor conceals his property for the purpose of defrauding his creditors, he forfeits his right of exemption. It was an enactment for the honest poor, and not for the roguish. Authorities to this effect are numerous.

The referee is therefore compelled to find that the bankrupt has concealed his assets for the purpose of defrauding his creditors, and that his exemption must be denied.

The bankrupt filed exceptions.

Rodney A. Mercur and William Maxwell, for the bankrupt.
J. C. Ingham, for creditors.

ARCHBALD, District Judge. The referee has refused to allow the bankrupt his $300 state exemption because of the fraudulent concealment of assets. There can be no question of the propriety of this action if the facts warrant it. In re Yost, 9 Am. Bankr. Rep. 153; In re Alex, 15 Am. Bankr. Rep. 450. The exemption given by the law is intended for the unfortunate, and not the dishonest, debtor. Strouse v. Becker, 38 Pa. 190, 80 Am. Dec. 474; Imhoff's Appeal, 119 Pa. 350, 13 Atl. 279. But the finding of fraud is challenged. And the question is whether the evidence justifies it. A careful consideration of the case satisfies me that it does, and that the referee was entirely right in the disposition made of it. The truth is, notwithstanding the contention of counsel, that the fraud is too glaring to be defended. A small trader, in a country town of about 1,000 inhabitants, enjoying fair credit, by extraordinary orders far beyond his needs and triple those of previous seasons, in the space of three short months, gets together, in small lots, from all over the country, some $11,000 worth of goods, in addition to those which he had on hand; and then, upon being pressed by creditors, and forced into bankruptcy, turns up with a mere fraction of the stock so secured, the rest having been disposed of in some unexplained way, with practically nothing to show for it. No books are produced to throw light upon the transaction, except some very minor and meager, not to say manufactured, ones; nor, if there were others, as is more than likely, is their disappearance accounted for. Left in the store, says the bankrupt, but the receiver was unable to find them, searching diligently, and that one or two have turned up since in the hands of a friendly trustee does not help the situation. A special cash sale, largely advertised, with extra clerks, conducted night and day, for over three weeks, from which no money is deposited in bank, and no merchandise creditors paid, is a part of the story; while large sales in bulk to convenient relatives at less than cost, and goods shipped away by night, on at least one and probably several occasions, are other features. There are also minor matters of more or less significance, such as expensive and unusual goods purchased and unaccounted for, which do not need to be specifically alluded to.

That the bankrupt is called upon to explain, there can be no question. In re Alex, 15 Am. Bankr. Rep. 450; Lesser v. Driesen, 2 Lack. Leg. N. (Pa.) 343. And he attempts to do so; but his explanation is utterly unsatisfactory, not to say lame and shifty. Payment of bills is claimed, but there are none worth mentioning for merchandise after August. Business and family expenses are also set up; but, even if the referee has cut these down beyond what might be, they are by no means vouched or to be allowed to the extent contended for. There is also an alleged purchase of gold stock by the bankrupt, which he claims to have paid $1,250 for, in cash, in October, to his cousin Harry Kaufman. But, aside from the certificate, which bears date in November, and notwithstanding that he took receipts for the payments, there is nothing but his own statement to substantiate it. And the purchase was at a time when he was selling his goods as fast as he could in order to get money, as he says, to meet the demands of creditors, of which he now wishes to make out that he was solicitous. Great stress is laid on the testimony of the bankrupt that the stock which he had at the close amounted to $8,000, and this enters into every showing that is sought to be made in his favor to which it is essential. But the idea that the depleted and broken up odds and ends which were found by the receiver had anywhere near that value is preposterous. According to the first appraisers, who seem to have known the cost marks and followed them as to new goods, there was but $3,400 worth, of which $432 was for cash register and fixtures, and this was still further reduced by the trustee's appraisement to $2,400; the amount realized at the sale being $2,282. The referee, out of abundant caution, allows $5,000, which is certainly liberal, and still finds nearly $7,000 worth of goods unaccounted for; nor is he out of the way in estimating the stock of the bankrupt before he got in his extraordinary purchases at another $5,000. It is said that the only evidence upon the subject is the statement of the bankrupt, who puts it at $3,000. But his usual line was from $5,000 to $6,000, and he admits that from January to August he was carrying the average, which warrants the conclusion that he had that quantity on hand at the close of that period. The importance of these amounts is manifest, particularly the latter; for it is only by putting the stock at $3,000 before the August, September, and October goods came in, and calling it $8,000, when the bankrupt went out of business, that counsel rely to figure him out of his dilemma. The thing that stares us in the face, after all has been said, is that within three months or less he got $11,000 worth of goods, in addition to what he had on hand, whether $3,000 or $5,000, making from $14,000 to $16,000 in all, of which $6,000 was received in October, when affairs were drawing to an end; by far the larger part also being shipped by express instead of freight, presumably by his direction, showing the anxiety to get them, as well as the disregard of expense in doing so. The question is what became of all this accumulation in the little time it was in his hands. Have the goods, he certainly did; and within the time mentioned, as the claims against him conclusively prove. Nor does it matter that some of them may have been ordered in the spring and summer. It is when he got them, and not when they were ordered, that counts in this reckoning. Neither

are we concerned with what he paid out, or what expenses he may have been under, before that. By no possibility could this come out of what he did not get till afterwards. It is of no consequence, therefore, that merchandise bills to the extent of $3,500, as vouched by his bank checks, were liquidated from January to August, going back to this date, as urged by counsel. It tells nothing as to what was done with the goods received from August to October to know what was paid out on merchandise or anything else up to that time.

Specifically stating, then, the case that is made out against the bankrupt, he is chargeable with the goods which he had and with those which came into his hands, worth from $14,000 to $16,000 at wholesale, to say nothing as to his profits upon them. On this he is entitled to credit for the value of the stock found in the store after he left it. And, assuming this to be as much as he had before the other goods were added to it, it leaves $11,000 or practically the amount of his extraordinary purchases. Out of this is to come the $270 deposited in bank and checked out during the contested period. And there was also a note of $150 at the First National Bank of Towanda which was taken care of. The general expenses of household and store are also to be allowed which—somewhat more than the referee—I have estimated at from $300 to $500. And freight and expressage were further paid to the amount of about $200. Sixty-six dollars and twenty cents worth of goods were also sold on credit, and not paid for; and $94.65 of others were returned, not having arrived until after the failure. If to this is added the $1,250 claimed to have been paid by the bankrupt for gold stock, which, upon any close consideration of the case, might not pass muster, and the $450, said to have been paid, through his wife, to Paltrowitz, his wife's relative, at Elmira, for borrowed money, which is open to even greater question, the total aggregate is only from $2,800 to $3,000, leaving a discrepancy, according to this, of over $8,000. The bankrupt's uncles, M. and B. Kaufman, to be sure, got a large amount of this—some 39 per cent. by weight, which is charged on the books, after allowing 10 per cent. discount, at $1,342, but, taking the weight, was probably three times that. But the Kaufmans paid cash for whatever they got, according to the story, so that it does not affect the outcome, the bankrupt being chargeable with the money or the goods, whichever way you look at it. The same is to be said of the cash taken in at the October sale, which is entered on the books at $2,291.17, the bankrupt thus from these two sources alone getting over $3,500 which he apparently holds onto. But without regard to this, upon the best showing which can be made, as already pointed out, some $8,000 worth of goods have disappeared—by which, it will be observed, I increase, instead of reduce, the referee's findings—as to which the only conclusion to draw is that the bankrupt has made away either with the goods themselves or the proceeds, which he withholds and conceals from his creditors. The exemption given by the law was never intended for any such character of debtor.

The exceptions are dismissed, and the report of the referee is confirmed.

In re LEVERTON. (2.)

(District Court, M. D. Pennsylvania. September 6, 1907.)

No. 897, in Bankruptcy.

BANKRUPTCY—ALLOWANCES TO TRUSTEE—REMOVAL FOR MISCONDUCT.

A trustee in bankruptcy removed for cause *held*, on his accounting, not entitled to allowance of personal expenses or commissions on the ground that, although residing at a distance of 75 miles from the property, he secured the appointment by soliciting claims to be sent to his attorney, and that he was guilty of willful misconduct in conniving with the bankrupt in concealing the books of the business, and favoring the bankrupt's relatives in the sale of the property.

In Bankruptcy. On report of John W. Codding, referee, sustaining exceptions to the account of Henry Goodman, trustee.

C. A. Van Wormer, for trustee.

J. C. Ingham, for creditors.

ARCHBALD, District Judge. The trustee, having been removed by the court for due cause, has filed his account, charging himself with $2,282, received from a sale of the bankrupt's goods, and taking credit for insurance, rent, watchman, expense of making appraisement, etc., amounting to $200.46, which the referee has allowed, and for personal expenses of $40.95, and commissions of $85.64, which he has refused; and the case is thereupon brought here by the trustee to review these rulings. The items in question are objected to by creditors, on the ground that the accountant has been unfaithful to his trust, having been not only overfriendly with the bankrupt, against whom there are charges of fraudulent concealment which he has failed to prosecute, but having so conducted the sale of the store stock, about the only other duty he had to perform, as to discourage some and favor other bidders, relatives of the bankrupt, by whom it was principally purchased. Both grounds of complaint are abundantly sustained by the evidence.

It was shown in the proceedings for the removal of the accountant that before the petition in bankruptcy was filed, but when it was plainly immanent, the accountant was furnished by the bankrupt with a list of his creditors, in order that he might go to them and effect a compromise of 50 cents on the dollar, which the bankrupt was prepared to offer, the accountant who was also a creditor being promised the whole of his claim for doing so, and that, when this fell through, the list was made use of to solicit and get claims into the hands of the accountant's attorney, by which the election might be controlled and the accountant chosen. Profession was indeed made to the other creditors, at the time of his election, of an intent to follow up the bankrupt, the meagerness of whose stock, after the extraordinary purchases made within a few months of his failure, called for rigid scrutiny and vigorous action. But nothing came of it. And, on the contrary, there is evidence that the accountant has sided, if not colluded, with the bankrupt since then. The books and papers, relating to the business of the bankrupt, for instance, are of the utmost importance upon the question of fraud or irregularity, and so far only a very meager part

of them have come out of hiding. The bankrupt says that he left everything of the kind in the store, but the receiver, after searching diligently, was not able to find them. That they were not there is plain. And yet first one, and then another of these books, or what purport to be such, after their existence had been established by other evidence, together with certain bills or invoices, turn up in the hands of the accountant, both he and the bankrupt having previously denied on more than one occasion that there were any. He says he got them in the store, and he endeavors to account for their previous nonproduction by the suggestion that they were in the hands of his attorney. They do not amount to much as they stand, either books or bills; those which would do so not being forthcoming. But such as they are, and whether genuine or fictitious, of which there is some question, the accountant must have got them from the bankrupt, with whom he is thus convicted of conniving and juggling with regard to them. In re Robert Lewin, 18 Am. Bankr. Rep. 72, 155 Fed. 500.

But even more serious than this is what occurred at the sale of the bankrupt's stock by the accountant. When it was about to take place, for instance, he refused to await the arrival of the train which was due in a few minutes, upon which bidders were expected and came, nor would he allow those who had gathered to go into the store and examine the goods until the hour for the sale had come, or within a few minutes of it. The stock, also, instead of being arranged so that the same class of goods, such as boots and shoes, hats and caps, underwear, trunks, clothing, or furnishings, would be together, were divided up into unusual and mixed sections, of which it was very difficult to get at the value. It is true that what purported to be lists were put in the hands of bidders, but no opportunity was given to test them, and, while other bidders had to take the chance of this, M. Kaufman, an uncle of the bankrupt, with whom the accountant was also on very friendly terms, in some unaccountable way seems to have become possessed of these lists in advance, by which (being also plainly favored in other ways by the accountant in his bidding) he was enabled to become the successful purchaser of nearly every section. As a part of the last one, also, consisting of odds and ends, there was included, according to the subsequent contention, but unknown to any one at the time except the accountant and Kaufman, a certificate for $5,000 of gold mining stock, which had been bought according to the bankrupt a few days before his failure for $1,250, in cash, of his cousin Harry Kaufman. This was scheduled by the bankrupt at $750, but was struck off with the rest of the section to M. Kaufman for $12. It is said that it is worthless, and that the purchaser is satisfied to return it; but that is not the question. It is the good faith of the accountant that is in issue, which is not helped out by anything ex post facto. It is also said that the fairness of the sale is shown by the amount realized, which was 80 per cent. of the appraisement, an unusual experience. But, if so, it was by no favor of the trustee, whose conduct was not calculated to conduce to it. And that considerably more could have been secured, if he had been at all anxious for it, is shown by the gains made, when a resale of one or two sections, which had been

struck off to Kaufman, was forced by the other bidders. It is further said that the referee refused to disturb the sale upon the very same exceptions as are now urged against it, and that this concludes the subject. But there is nothing to show upon what the judgment of the referee was then based, and it might have been out of consideration for the different purchasers, which would be another matter.

That the referee, under the circumstances, properly denied the accountant's claim for commissions, there can be no question. It is specifically provided by Bankr. Act July 1, 1898, c. 541, § 48c, 30 Stat. 558 [U. S. Comp. St. 1901, p. 3439], that "the court may in its discretion withhold all compensation from any trustee who has been removed for cause." But, without this, upon the general principles which prevail with regard to the administration of trusts, compensation is to be withheld where there is either fraud or willful misconduct. 28 Am. & Eng. Encycl. Law (2d Ed.) 1038.

Nor do the expenses of the accountant stand any better. Hanna v. Clark, 204 Pa. 145, 53 Atl. 757. These, in the present instance, are made up of railroad fares, hotel bills, etc., made necessary because the bankrupt's estate was at Dushore, while the accountant lived at Scranton, 75 miles distant. Had a trustee been selected from the vicinity, as should have been done, in the interest of economy, this expense would have been entirely obviated. And as the accountant, through the solicitation of claims, not to say interest in the bankrupt, pushed himself forward into the place, now that occasion has been found to remove him, he must bear the brunt of it.

The exceptions to the report of the referee are dismissed, and the report confirmed.

In re REID.

(District Court, E. D. Michigan, S. D. October, 1906.)

WITNESSES—PRIVILEGE AS TO PRODUCTION OF DOCUMENTS—TAX STATEMENTS.

Comp. Laws Mich. 1897, § 3846, which provides that property statements which are required to be made by property owners to the assessing officers shall be filed, and shall be used for no other purpose except the making of an assessment, and that "any officer or person who shall make or allow to be made, willfully or knowingly any other or wrongful use of such statement shall be liable to the person making such statement for all damages resulting, * * *" imposes an absolute prohibition upon the use of such statement for any other purpose as a matter of public policy, and an officer cannot be compelled to produce such a statement as evidence either in a state or federal court, even though no objection is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 779.]

In Bankruptcy. On question certified by Harlow P. Davock, referee.

D. A. L'Esperance and B. B. Selling, for creditors.

Frank E. Doremus, for Benjamin Guiney, city assessor.

SWAN, District Judge. In the course of an examination before the referee in the above cause, Benjamin Guiney, president of the board of assessors of the city of Detroit, was called as a witness for the Ameri-

can Window Glass Company, a creditor of the bankrupt, and was asked to produce a certain tax statement for the year 1904, filed by the bankrupt with the board of assessors of Detroit. Under the instructions of Mr. Doremus, assistant corporation counsel of Detroit, Mr. Guiney declined to produce said statement, basing the refusal upon the provisions of section 3846, Comp. Laws Mich. 1897, which is section 23 of the general tax law of Michigan. Section 19 of that law (Acts 1893, p. 362, No. 206) provides that:

"Every owner of property liable to taxation under the general provisions of this act, being of full age and sound mind, who is a resident of this state, shall make out and deliver to the supervisor or assessor on demand a sworn statement of all the property owned or held by him as follows." [Here follows the form and requisites of such statement.]

Section 23 (Comp. Laws 1897, § 3846), supra, provides that:

"All the statements herein required to be made and received by the supervisor or assessor shall be filed by him; * * * but no such statement shall be used for any other purpose except the making of an assessment for taxes as herein provided, or for enforcing the provisions of this act, and any officer or person who shall make or allow to be made, willfully or knowingly, any other or wrongful use of such statement shall be liable to the person making such statement for all damages resulting from such unauthorized or unlawful use of such statement."

No objection was made by the bankrupt to the production of the statement. This fact it is claimed by the creditor made its production the duty of the witness, and was a waiver by the bankrupt of the protection given by the statute. The argument is that the right conferred by the statute here involved is like that prohibiting disclosure by a physician of facts affecting his patient, which came to his knowledge in his professional relation, and were necessary to enable him to treat the patient. The analogy fails because of the difference in the statute involved in the case at bar and that which excludes the testimony of the physician. The patient, by failure to object to the disclosure against which the statute protects him, waives his statutory right. The privilege is the patient's, not the physician's. Lincoln v. City of Detroit, 101 Mich. 249, 59 N. W. 617. In this case the official having the custody of the statement he declined to produce is forbidden by the express terms of the statute "to make or allow to be made, willfully or knowingly, any other or unlawful use of any such statement" than that prescribed by the section, is made liable to an action for damages. The statute imposes the like liability upon any person who shall make such other use of the statement. This broad prohibition excludes the theory that the taxpayer's consent to the production or use of the statement authorizes the supervisor or assessor to produce or use it, except for the purposes designated in the statute. Neither the taxpayer nor the tax officer has any privilege under the act, but each has duties which he is bound to discharge. The former must "make out and deliver to the supervisor or assessor on demand a sworn statement," etc. The supervisor or assessor has three duties: (1) To file such statement. (2) To present it to the board of review "for the use of said board." (3) "After the assessment is reviewed," to deposit "all such statements in the office of the township or city clerk as the case may be," whose

duty it is to preserve them "until after the next assessment is made and completed, after which they may be destroyed on the order of the township or city council."

The purpose of the provisions of section 3846 is plainly to promote the collection from each taxpayer of his just share of state, county, and municipal taxes, and to that end to require from each property owner the full disclosure of all his taxable property under the state's pledge that the statement shall be kept inviolate, save to the officials for whose information and guidance it was made. To permit that information to become public would defeat the plain purpose of the statute by deterring the taxpayer from revealing what frequently could not be learned from any other source. Section 3843 makes it a misdemeanor, punishable by fine or imprisonment, or both, for the taxpayer to refuse to make "a true and correct statement" under oath, and thus seeks by its penalty for refusal and by making such statement an absolutely privileged communication to the state only to obtain and insure as far as possible a just basis for the apportionment of public burdens. To sanction the violation of that pledge by denying the taxpayer the protection of the statute would invite refusals to obey the law, evasions, and perjury, often injuriously affect the interests of the taxpayer, would obstruct the collection of taxes, and diminish the revenues of the state. The power of the Legislature to prevent these consequences is unquestionable. The wisdom and policy of the act must be conclusively assumed. Its meaning is unequivocal, and needs no construction. A like statute was sustained in Boske v. Comingore, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. Ed. 846. The reasoning of that case upholds the views above expressed. See, also, cases cited in 17 Am. & Eng. Encyc. of Law, p. 51, and notes, tit. "Privileged Communications." Apart from what has been said, it is clear, also, that the state statute (sections 3843, 3846) is a rule of evidence which the courts of the United States will enforce. Connecticut Life Ins. Co. v. Union Trust Co., 112 U. S. 254, 255, 5 Sup. Ct. 119, 28 L. Ed. 708. It would appear from the certificate of the referee that the production of the statement could not have been compelled for other reasons, but these need not be discussed.

It must be certified to the referee that the witness Guiney cannot lawfully produce the filed statement of the bankrupt in court, nor can he be compelled to produce the same.

A. D. BLOWERS & CO. v. CANADIAN PAC. RY. CO.

(Circuit Court, W. D. Washington, N. D. July 13, 1907.

No. 1,387.

1. CARRIERS—WRONGFUL DELIVERY—LIABILITY FOR CONVERSION.

A carrier or a warehouseman is liable in trover for the wrongful delivery of goods intrusted to it for shipment or storage; but such right of action may be waived by any action which ratifies the delivery, and thereby deprives the carrier or warehouseman of the right to recover over against the person to whom the delivery was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 361.]

2. SAME—RATIFICATION BY SHIPPER.

Plaintiff delivered to defendant railroad company a shipment of apples covered by bills of lading with drafts upon the consignee attached. Defendant delivered the apples without collecting the drafts, and on learning such fact plaintiff entered into correspondence with the consignee and obtained part payment and the consignee's acceptances for the remainder. *Held*, that the effect of such action was to ratify the delivery and pass title to the apples to the consignee, which precluded plaintiff from recovering from the defendant for conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 361.]

At Law. Trial to the court without a jury.

Jesse A. Frye, for plaintiff.
Thomas B. Hardin, for defendant.

WHITSON, District Judge. In this case a jury has been waived and it comes up for trial on an agreed statement of facts. In 1905 the plaintiff entered into a contract with J. E. Chipman for the sale and delivery of certain apples for shipment to Australia. The contract consisted of a letter stating the terms, written by Chipman on March 9th of that year, which was modified in one or two minor particulars by subsequent correspondence. The apples were shipped in various lots. Those shipments over which this controversy arose were carried by the Western Steam Navigation Company from Seattle to Vancouver on the steamer Ramona, and were consigned to Chipman at the last-named place. As shipments were made, drafts were drawn by plaintiff upon Chipman, with bills of lading attached. The shipping receipts contained these words: "Draft on bill of lading." The consignments were received by defendant at one of its docks in Vancouver, together with the shipping receipts, and were thereafter shipped to Australia on one of its steamers at the request of Chipman, with notice of and without the surrender of the bills of lading or the payment of the drafts. Plaintiff sues for conversion, on the ground that the defendant violated its duty in the premises as a common carrier and warehouseman.

A carrier is liable in trover for the wrongful delivery of goods intrusted to it for shipment, and the same rule applies to a warehouseman. 6 Cyc. pp. 468, 469; 28 Amer. & Eng. Encyc. p. 665; 15 Amer. & Eng. Encyc. pp. 1111, 1112. Judgment must go against defendant, therefore, unless something has occurred since its conversion of the property to excuse its dereliction. After the apples had been delivered to Chipman, it having come to the notice of the plaintiff, it entered into correspondence with him, and on November 22, 1905, through the Imperial Bank of Canada, it received part payment from him and took his acceptance on 35 days' time for the balance of the purchase price. This, it is alleged, was a waiver of the right to look to defendant for reimbursement, which is the sole question in the case.

In McSwegan et al. v. Pennsylvania R. R. Co., 40 N. Y. Supp. 51, cited by counsel for plaintiff, this significant language is found:

"It appears that on or about the 15th day of June the plaintiffs, upon learning that the electrical company had possession of the machinery, entered into correspondence by telegram and by letter with reference to the subject of payment; but in all the correspondence there is nothing which recognizes the wrongful delivery made by the defendant, and it relates merely to efforts to

secure payment for the machinery or a compliance with the terms upon which the original executory contract was made." Page 52.

Again (page 53):

"All that took place between the plaintiffs and the electrical company was matter of negotiation, which ended in nothing. It was not a ratification of the defendant's act. It was merely an effort to do the best thing they could under the situation of the machinery as it then was. That did not relieve the defendant from responsibility, nor condone the conversion. None of the cases hold that the simple demand for the goods or their value amounts to a ratification of a wrongful delivery."

The rule is well settled that such an unauthorized act may be ratified. 28 Amer. & Eng. Encyc. p. 739; 15 Amer. & Eng. Encyc. pp. 1111–1113; 5 Amer. & Eng. Encyc. pp. 230, 231. As to what constitutes a waiver or ratification depends upon the particular facts of each case. The transaction between these parties, analyzed to its ultimate, is this: The plaintiff, after having discovered that the apples had been wrongfully delivered to Chipman, had one of four remedies: (1) It could have relied upon the liability of the defendant, and ignored Chipman and his possession of the apples altogether. (2) It could have sued for the possession of the apples which had wrongfully come into Chipman's hands. (3) It could have sued Chipman for conversion. (4) It could have waived the tort and sued Chipman for the purchase price, or, perhaps, for the reasonable value. It did waive the tort by accepting part payment of the purchase price, taking what was in effect Chipman's note for the balance, and extending the time. The effect of this was to transfer the title of the apples to Chipman. After that transaction it could neither recover the apples nor sue for conversion, and its only remedy as against Chipman was to rely upon a sale which had become fully consummated. However the plaintiff should deal with the matter, in any event it was bound by the fact that a sale and delivery had been made, and that it must rely upon an executed contract. If, then, the plaintiff could not have asserted its right to possession as against the defendant, and if it could not sue Chipman for conversion, it cannot sue the defendant for the same thing, because it has ratified the wrongful act of the defendant by dealing with Chipman beyond the mere demand for payment, which has never been held to amount to ratification, for that is in the interest of both parties.

The authorities cited by plaintiff are cases which recognize the doctrine that there can be such a waiver as to relieve a shipper from liability; but in the particular instances such acts were not disclosed as did relieve from it. The acts here were all done prior to any claim being made against the defendant, which put it in a situation where it could not avail itself of any adequate remedy by way of protection. The plaintiff cannot put the defendant in a position which deprives it of a remedy for recouping its loss, and yet compel it to pay that loss. If, after the settlement made with Chipman, the defendant had sued him for possession or for the value of the apples, he could have successfully defended, upon the ground that he had made part payment, had given his note for the balance, and that the title thereby passed to him. Upon discovering the situation, plaintiff was put to its election; and it made that election, which precludes it from asserting that against the

defendant which it could not assert against Chipman. In other words, a defense good as between Chipman and plaintiff must be good as between plaintiff and defendant; for, if the plaintiff ratified the wrongful delivery by dealing with it as the lawful possession of Chipman, then it waived the right to recover of the defendant, for it can claim no greater liability against the defendant than against Chipman. The facts as stipulated by the parties constitute a ratification, which precludes a recovery in this action. Converse v. Railroad Co., 58 N. H. 521; Southern Ry. Co. v. Kinchen et al., 29 S. E. 816, 103 Ga. 186.

Defendant is entitled to a judgment of dismissal.

UNITED STATES v. BITTY.

(Circuit Court, S. D. New York. September 10, 1907.)

1. PROSTITUTION—NATURE AND ELEMENTS.

Prostitution is the act of permitting illicit intercourse for hire—an indiscriminate intercourse, or what is deemed public prostitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prostitution, § 1.]

2. ALIENS—IMMIGRATION STATUTE—IMPORTATION OF WOMAN FOR "OTHER IMMORAL PURPOSE."

In the provision of Immigration Act Feb. 29, 1907, c. 1134, § 3, 34 Stat. 899, making it a felony "to import * * * into the United States any alien woman or girl for the purpose of prostitution or for any other immoral purpose," the words "any other immoral purpose" must be construed with reference to the preceding word "prostitution," and to relate only to a like immoral purpose, and, so construed, cannot be held to include concubinage.

On Demurrer to Indictment.

Henry L. Stimson, U. S. Atty.

E. A. Alexander, for defendant.

HOUGH, District Judge. The indictment demurred to alleges that Bitty did "feloniously import into the United States of America from a foreign country, to wit, England, a certain alien woman * * * for an immoral purpose, * * * and it was the purpose of the said John Bitty, in bringing and importing the said alien into the United States as aforesaid, that she shall live with him as his concubine." The act under which this indictment is found, commonly known as the "Immigration Act of 1907" (Act February 29, 1907, c. 1134, § 3, 34 Stat. 899), declares that:

"Whosoever shall, directly or indirectly, import or attempt to import into the United States any alien woman or girl for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose any alien woman or girl within three years after she shall have entered the United States,"

—shall be deemed guilty of a felony, and may be punished up to five years' imprisonment and $5,000 fine.

The section just quoted, therefore, creates three distinct felonies, each punishable, viz.: (a) The importation of a woman for the pur-

pose of prostitution or for any other immoral purpose; (b) the holding of such woman in pursuance of such illegal importation; and (c) the maintenance, supporting, or harboring in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien woman within three years after she shall have entered the country.

In plain language, this defendant is charged with having either brought his mistress into the United States, or with having brought here a woman who, so far as his desires go, shall be his mistress, if she is not already. He is thus accused of the first offense enumerated in the section above quoted; and the indictment, therefore, must stand or fall upon an interpretation of the words "or for any other immoral purpose." I adopt the definition of prostitution given in Commonwealth v. Cook, 12 Metc. (Mass.) 93, at page 97; i. e.:

"The act of permitting illicit intercourse for hire—an indiscriminate intercourse, or what is deemed public prostitution."

It may be that, as the court remarked in the case cited, this defendant is guilty of open violation of the divine law and of grossly immoral acts, so that such a case is not "the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offense cognizable by the statute." It is, however, necessary to apply to this statute, as to any other, the ordinary rules of construction, concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.

It may be admitted that the immigration act of 1907 is in its general scheme remedial; and it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the Legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation, though the result be cruel or ridiculous. So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Representatives on immigration, made to the Fifty-Ninth Congress at its first session (No. 4,912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903, "so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up." This I take to mean that the words "or for any other immoral purpose" have been added to the word "prostitution," in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes. Upon general principles the added words must be understood as meaning "for any other like immoral purpose," so that the question becomes this: whether a man who brings his mistress into this country is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman of cohabiting with a man without ceremonial marriage, or consent and intent good

at common law. A discussion of the difference between this status and that of the prostitute would be both needless and nauseating. It suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class. Considering the section above quoted from a point of view perhaps more technical, it is, of course, highly penal, and to be given, in favor of the liberty of the citizen, the narrowest construction consistent with the plain significance of its words. Many other statutes for several hundred years have contained similar clauses, and, though it is certainly too late in the day to look with approval upon the doctrine that a statute making the "stealing of sheep or other cattle" a felony is too loosely expressed to warrant a conviction for stealing any other animal than a sheep (1 Black. Comm. 88), yet numerous cases can be cited, from Ex parte Hill, 3 C. & P. 225, holding that, under a statute making it a crime to maim "an ox, cow, heifer, sheep or other cattle," it was not an offense to commit a like act against a bull, to People v. Richards, 108 N. Y. 137, 15 N. E. 371, 2 Am. St. Rep. 373, holding that, under a statute making it burglary to break and enter "any shop, store, booth, tent, warehouse or other building," one who broke into and entered a tomb or mausoleum was guilty of no crime, all speaking in the same strain. Within the line of decisions, both ancient and modern, illustrated by the above citations, I do not think the words "other immoral purpose," when used as modifying the word "prostitution," can be held to include concubinage.

I am the more willing to arrive at this result from observing what would be the effect of a contrary holding as applied to the third offense created by the section under consideration:

"Whoever shall keep * * * in any house * * * for the purpose of prostitution, or for any other immoral purpose any alien woman * * * within three years after she shall have entered the United States,"

—shall be guilty of a felony. In other words, if the offense charged in this indictment be within the act, any man who keeps an alien mistress before she has been three years in this country becomes a felon, even though (so far as the language of the statute is concerned) he had no knowledge whatever of her lack of citizenship. The weapon thus put in the hands of degraded women is so dangerous as to justify great insistence upon the penal character of this section and some distrust of the remedial virtue contained therein.

It remains to be considered whether any function can be assigned to the words "other immoral purpose," under the construction of the statute above indicated. It appears to me that sufficient scope is given for their application by the fact that there are others besides the unfortunate women themselves who are concerned in the trade of prostitution. The procuress, thinly disguised as the keeper of an employment agency, and her female assistants, posing as servants, are figures too sadly familiar to the courts to need enumeration or description. It is to them and their kind that the general language of the act must be applied.

The demurrer is sustained.

UNITED STATES v. AMERICAN SURETY CO.

(Circuit Court, N. D. Illinois, E. D. September 13, 1907.)

No. 28,418.

POST OFFICE—LETTER CARRIERS—LIABILITY ON BOND.

A mail carrier and the surety on his bond, which is conditioned that the principal shall account for and pay over all property and money coming into his possession by virtue of his position, are liable to the United States for the full amount of money stolen by the carrier from a registered letter, notwithstanding the fact that by the postal regulations the United States limits its own liability for the loss of money contained in any single registered letter to $25.

On Demurrer to Plea.

Edwin W. Sims, U. S. Atty., and Seward S. Shirer, Asst. U. S. Atty.

Wm. E. O'Neill, for defendant.

SANBORN, District Judge.* This is an action brought by the plaintiff against the defendant as surety on the bond of one Charles W. Wells, a mail carrier employed in the post office in the city of Chicago. The bond is dated the 28th day of August, A. D. 1899, the condition of which is as follows:

"Now, if each of said persons for himself as principal shall faithfully perform all the duties and trusts imposed upon him as such letter carrier, either by the postal laws of the United States or the rules and regulations of the Post Office Department of the United States, and shall faithfully account for and pay over to the postmaster at Chicago, Illinois, all moneys which shall come into his hands as such letter carrier, and shall, upon the termination of his office, return to the proper officer all property of every kind and description which shall be in his possession as such letter carrier, then the above obligation shall be void as to each of such persons and to no other; otherwise, of force."

The breach of the bond as set forth in the declaration is as follows:

"That heretofore, to wit, on the 12th day of October, in the year of our Lord 1903, the said Charles W. Wells, at Chicago aforesaid, did steal a large sum of money, to wit, forty dollars, from out of a certain letter which had been intrusted to him, in such capacity as aforesaid, for delivery to Henry L. Hertz, collector of internal revenue at Chicago, Illinois, which said letter was a registered letter and then and there bore the following direction and address, to wit: Henry L. Hertz, Esquire, Collector Internal Revenue, Chicago, Illinois —and which said letter was stolen as aforesaid before it had been delivered to the person to whom it was directed, all in the violation of the postal laws of the United States, to wit, in violation of section 5467, Revised Statutes of the United States."

Upon the date on which the bond in this case was executed the United States, by virtue of the laws governing the Post Office Department and the regulations of said department pursuant thereto, did, on or about the 27th day of February, A. D. 1897, by section 889 of the postal regulations of the United States, limit its liability for the loss of any one piece of first-class registered matter to the sum of $10. Later, on or about the 26th day of May, A. D. 1902, while said bond remained in full force and effect, the Post Master General's Depart-

* Specially assigned.

ment promulgated an order under which the government of the United States increased its liability for the loss of any one piece of first-class registered matter to the sum of $25, providing, however, that the limit of the liability was never to extend beyond the actual loss; that is to say, when the government's liability was $10, all losses less than that were to be paid in full, and under the recent assumption of liability to the extent of $25 losses incurred by the loss of any one piece of first-class matter to be paid in full if the loss is less than $25. This action is brought for the sum of $40, being the amount stolen by the principal on the bond, Charles W. Wells.

The defendant has filed its plea in this cause, admitting its liability to the extent that the government has been damnified, to wit, the sum of $25, but denying its liability for any amount in excess of that sum. To this plea the United States has filed a general demurrer. The only question, therefore, presented to this court, is whether or not the liability of the surety on the bond is limited to the amount to which the assured has been damnified. The position of the defendant is that its obligation to the plaintiff is to indemnify it to the extent of its loss, but not beyond that sum.

There is no question in this case as to the defendant's shifting liability on its bond occasioned by changes in the regulations of the Post Office Department, so long as the government assumption of liability is within the amount fixed in the bond. The only question is whether the ordinary rule by which a bailee may recover from a wrongdoer, who has injured, destroyed, or converted the property bailed, to the full value of the property, applies to this case.

The reason why the bailee is entitled to recover full damages against one who converts the property is that he is bound to restore the property to the general owner or stand responsible to him for the full value. 4 Suth. Dam. § 1097, citing Harker v. Dement, 9 Gill, 7, 52 Am. Dec. 670; Warren v Kelley, 80 Me. 512, 532, 15 Atl. 49; Densmore v. Mathews, 58 Mich. 616, 26 N. W. 146; Hamilton v. Lau, 24 Neb. 59, 37 N. W. 688. I have examined these cases and find that they support the text. In this case I am inclined to think that, although the regulations limit the liability of the government to $25, yet, if the government recovers the full value of the package stolen, it will be liable for the balance if the Court of Claims has jurisdiction to allow a claim for such balance. The jurisdiction of the Court of Claims extends to all claims upon any contract, expressed or implied, with the government of the United States. Rev. St. § 1059 [U. S. Comp. St. 1901, p. 734]. In Emmons v. U. S. (C. C.) 42 Fed. 26, it is held that the United States is bound to refund to an entryman the price paid by him for public lands subsequently canceled as void. See, also, other instances of implied contracts. Solomon v. United States, 19 Wall. (U. S.) 17, 22 L. Ed. 46; United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; Merrain v. United States, 29 Ct. Cl. 250.

It seems to admit of no question that, if the government collects money from one person which is equitably due to another, an implied contract arises to restore or repay the money to the person so entitled. In an action on the bond by the government against Wells, the prin-

cipal, it seems clear that the measure of damages would be the amount stolen, or $40. The bond provides that it shall be of force unless Wells shall pay over all moneys intrusted to him as mail carrier. He having defaulted, the measure of damages, both against him and his surety, is $40, with interest, notwithstanding the liability of the government to the owner of the money is only $25. The conclusion here reached is supported by National Surety Company v. United States, 129 Fed. 70, 63 C. C. A. 512, and United States v. Griswold, 76 Pac. 596, 80 Pac. 317, in the Supreme Court of the territory of Arizona.

Judgment is therefore ordered in favor of the plaintiff for $40, with costs.

In re WILK.

(District Court, S. D. New York. August 29, 1907.)

1. CONTEMPT—VIOLATION OF ORDER OF COURT—NOTICE.
   If a person has actual knowledge of an order of court, he is liable for the consequences of violating it, although he has not been formally served with it.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 70.]

2. SAME—INTERFERENCE WITH RECEIVER IN BANKRUPTCY.
   On the filing of a petition in involuntary bankruptcy, an injunction was granted and a receiver appointed, who took possession of the bankrupt's stock of goods and placed a lock on the door. When his custodian went to the place the next day, respondent, who was a city marshal, had broken open the door and was about to seize goods under a writ of replevin. He was informed of the action of the bankruptcy court and that the property was in possession of its receiver, whose name was given, and was warned not to interfere with the same, but answered that he did not care for the United States court, and took and removed goods under his writ. *Held*, that he was guilty of contempt of the bankruptcy court, and a sentence of 60 days' imprisonment imposed as a punishment.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 163.]

In Bankruptcy. On motion to punish for contempt.

James, Schell & Elkus (James N. Rosenberg, of counsel), for the motion.

Maxwell R. Slutzkin, opposed.

HOLT, District Judge. This is a motion to punish Abraham Herman, a city marshal, for contempt. On August 8, 1907, a petition in involuntary bankruptcy was filed in this court against Harry Wilk, an application for an injunction and the appointment of a receiver was duly made, an injunction granted, and a receiver appointed. The receiver immediately qualified by giving a bond, which was duly approved. Immediately upon his qualification, about 1 o'clock p. m., he went to the place of business of the alleged bankrupt, 50 East Eighth street, took possession of the property there, consisting principally of ladies' cloaks and suits and unmanufactured cloth. He found a bookkeeper in charge of the place, informed him of his appointment as receiver, and the bookkeeper turned over the premises to him as receiver. The receiver remained there in possession that afternoon. Before leaving, he purchased a new lock, placed it upon the outside door, and left the premises locked. The next morning the receiver appointed Aaron

Brookheim as custodian of the property, gave him the keys, and sent him to take possession. When Mr. Brookheim arrived at the premises, he found that the door had been broken open, and that there were in the premises Abraham Herman, a city marshal, and four other men. He asked what they were doing, and Herman informed him that he was a city marshal, and that he was there to execute a writ of replevin. Brookheim then informed Herman that a petition in bankruptcy had been filed, an injunction order made, and a receiver appointed, that the receiver was Charles W. Littlefield, and that he came there on behalf of the receiver. He told Herman that the receiver had taken possession the day before, and had his lock put on the door, that Herman had no right to enter or interfere with the goods, and that he must not remove any of the goods. Herman said that he did not care for the United States court, and that he was going to take the goods away under his writ. Brookheim then asked, before any of the goods had been taken out, that he might make an inventory of them. Herman refused to permit him to do so. Thereupon Herman, with his men, removed the goods and took them to a storage warehouse. The writ of replevin called for piece goods. A portion of the goods taken away were manufactured goods.

The marshal's defense to this motion is, in substance, that, as no certified copy of the order of injunction and appointing the receiver was duly served upon him, he was not obliged to pay any attention to the information which was given to him that an officer of this court was in possession of the property. The rule is well settled that, if a person has actual knowledge of the existence of an order of court, he is liable to the consequences of violating it, even if he has not been formally served with it. High on Injunctions, § 1422, and cases there cited. In this case Herman was clearly and specifically notified that a receiver had been appointed the previous day, and the name of the receiver and full details of the entire transaction were given him. He could have ascertained in two minutes whether this information was true by calling up the clerk's office of this court on the telephone. His claim that he was not obliged to desist from interfering with the property in the custody of this court until he was formally served with a certified copy of the order simply shows that it was his deliberate intention to seize and remove the property, regardless of the rights of the receiver. It is well settled that the filing of a petition in bankruptcy is a caveat to all the world, and, in effect, is an attachment and an injunction. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In my opinion, the action of Herman is a clear case of contempt of this court.

An order will be entered, adjudging him in contempt, and directing, as a punishment for his contempt, that he be committed to the Tombs prison for 60 days. The order will further provide that all the goods taken be returned forthwith to the receiver. If, after their return, the receiver claims or suspects that all the goods taken have not been returned, it may be referred to Stanley W. Dexter, as special master, to take testimony and report whether any goods were removed which have not been returned, and, if so, what was their value, and who, if any one, should be held accountable for them.

GREAT NORTHERN RY. CO. v. UNITED STATES.

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

No. 2,603.

1. STATUTES—GENERAL REPEALING CLAUSE.
A clause generally repealing "all laws and parts of laws in conflict with" the act of which it is part repeals nothing that would not be equally repealed without it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 225.]

2. SAME—LATER ACT COVERING WHOLE SUBJECT OF PRIOR ONE.
The rule that a later act, covering the whole subject of a prior one and embracing new provisions, plainly showing that it was intended as a substitute, operates by implication to repeal the prior act, is subject to the qualification that where the later act expresses the extent to which it is intended to repeal prior laws, as by a clause repealing all laws and parts of laws in conflict therewith, it excludes any implication of a more extended repeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44. Statutes, § 229.
Repeal of statutes by implication, see note to First Nat. Bank of Butte v. Weidenbeck, 38 C. C. A. 136.]

3. SAME—RE-ENACTMENT WITH AMENDMENTS.
Statute law is not abrogated or annulled by mere re-enactment or repetition; and when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 241.]

4. CARRIERS—REBATES—SECTION 1 OF ELKINS ACT (32 STAT. 847) NOT WHOLLY REPEALED BY HEPBURN ACT (34 STAT. 584).
In so far as section 1 of the Elkins act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), provided for the punishment of acts of corporate carriers in knowingly offering, granting, or giving, as also the acts of corporate shippers in knowingly soliciting, accepting, or receiving, rebates, concessions, or discriminations from the legal rates and tariffs, it was not abrogated or repealed by the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 584), but was preserved and continued; and in so far as it provided for the punishment of such acts, when not knowingly done—assuming, but without deciding, that it did so provide—it was repealed.

5. STATUTES—CONGRESS CANNOT LIMIT MANNER IN WHICH ITS WILL SHALL BE MANIFESTED IN THE FUTURE.
While Congress may prescribe rules affecting the construction of after-legislation, which does not in terms, or by necessary implication, show that it is to be unaffected by them, these rules cannot be so framed as to defeat the plain intention of after-legislation, and, like other statutes, they cease to be effective when plainly or necessarily in conflict with a later manifestation of the legislative will.

6. SAME—REV. ST. § 13, CONSTRUED.
As applied to subsequent repealing acts which do not expressly, or by necessary implication, contravene its provisions, Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], prescribing the effect of a repealing act upon existing penalties, forfeitures, and liabilities, is effective and obligatory upon the courts; but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner they might choose.

7. SAME—INTENTION IS CONTROLLING, THOUGH RESTING ONLY IN NECESSARY IMPLICATION.

The intention of the Legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed; and, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 264.]

8. SAME—REPEAL BY IMPLICATION.

To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of a prior one, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 230.]

9. CARRIERS—REBATES—DISCRIMINATION—REV. ST. § 13, NOT SUPERSEDED BY SPECIAL SAVING CLAUSE IN HEPBURN ACT (34 STAT. 584).

The special saving clause in section 10 of the Hepburn act (Act June 29, 1906, c. 3591, 34 Stat. 595), does not mention the particular subject of the general saving clause in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], namely, the effect upon existing penalties, forfeitures, and liabilities of a repealing act, and can be accorded reasonable operation, consistently with the true intendment of its language and with the undisturbed operation of the general saving clause, by treating it as saving causes then pending in the courts of the United States from what, in its absence, and in the presence of the general saving clause, would be the effect upon them of the amendments provided for in that act. Consequently it does not by necessary implication supersede the general saving clause or impinge upon its field of operation.

(Syllabus by the Court.)

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

William R. Begg and Rome G. Brown (Charles S. Albert, on the brief), for plaintiff in error.

Charles C. Houpt, U. S. Atty. (Paul A. Ewart, Asst. U. S. Atty., on the brief), for defendant in error.

Thomas Wilson, H. S. Priest, and F. W. Lehmann, amici curiæ.

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

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment of conviction in a criminal case whereby the Great Northern Railway Company, a Minnesota corporation engaged as a common carrier in the transportation of property wholly by railroad from points in Minnesota to points in the state of Washington, was sentenced to pay a fine of $1,000 for each of 15 violations of section 1 of the act of February 19, 1903 (32 Stat. 847, c. 708 [U. S. Comp. St. Supp. 1905, p. 599]), known as the "Elkins Act," which declared, inter alia:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate com-

merce 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. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

These violations were charged in an indictment returned November 8, 1906, and, as was alleged therein and admitted upon the trial, were committed in the months of May, June, July, and August, 1905, and consisted in granting and giving to the W. P. Devereux Company, a shipper of oats and corn in car load shipments from Minneapolis, Minn., to points in the state of Washington, over the defendant's railroad, concessions of 15, 18, and 20 cents per 100 pounds from the legal rate of 50 cents per 100 pounds named in the tariffs applicable to such shipments, as published and filed with the Interstate Commerce Commission by the defendant. Intermediate the commission of the offense and the returning of the indictment, Congress passed Act June 29, 1906, c. 3591, 34 Stat. pp. 584, 838, known as the "Hepburn Act," and the chief objection interposed by the defendant to its prosecution and punishment was that section 1 of the Elkins act, against which it had offended, was repealed by the Hepburn act in a manner which left no provision of law for the prosecution and punishment of offenses against the repealed statute, save where prosecutions therefor were pending in the courts of the United States at the time of the repeal. The district court overruled the objection (151 Fed. 84), and it is now very earnestly and forcefully pressed upon our consideration.

Does the Hepburn act repeal the whole or any part of section 1 of the Elkins act?

The title of the Hepburn act, "An act to amend an act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," is so general that it gives no support to the claim of a repeal. Nor does that claim have any support in the general repealing clause in section 10, "All laws and parts of laws in conflict with the provisions of this act are hereby repealed," for it repeals nothing which would not be repealed equally without it. State v. Drexel (Neb.) 105 N. W. 174; State v. Yardley, 95 Tenn. 546, 558, 32 S. W. 481, 34 L. R. A. 656; Struthers v. People, 116 Ill. App. 481; Pierce v. Commercial Investment Co., 30 Wash. 272, 70 Pac. 496; District of Columbia v. Sisters of Visitation, 15 App. D. C. 300, 308. As said by Sutherland, Stat. Con. (2d Ed.) § 247:

"Subsequent legislation repeals previous inconsistent legislation, whether it expressly declares such repeal or not. In the nature of things it would be so, not only on the theory of intention, but because contradictions cannot stand together."

If there be a repeal, it is solely because section 2 of the Hepburn act declares that section 1 of the Elkins act "be amended so as to read as follows," and then reproduces it with some omissions and additions,

which is the same thing, in legal effect, as saying that the section is amended by striking out what is omitted and by inserting at designated places what is added. In the absence of a constitutional restriction—and there is none in the Constitution of the United States—the amendment of existing statutes may be effectually accomplished in either of these ways, and they have been employed interchangeably by Congress.

Generally speaking, where a statute is amended "so as to read as follows," or is re-enacted with changes, or is in terms repealed and simultaneously re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original, which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation. In Sutherland on Statutory Construction (2d Ed.) § 237, it is said of an amendment "so as to read as follows":

"The amendment operates to repeal all of the section amended not embraced in the amended form. The portions of the amended section which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule."

And in the succeeding section it is said of a simultaneous repeal and re-enactment:

"Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time. The intention manifested is the same as in an amendment enacted in the form noticed in the preceding section. Offices are not lost, corporate existence is not ended, inchoate statutory rights are not defeated, a statutory power is not taken away, nor pending proceedings or criminal charges affected by such repeal and re-enactment of the law on which they respectively depend."

The subject has been considered several times by the Supreme Court, and always with the same result. Steamship v. Joliffe, 2 Wall. 450, 458, 17 L. Ed. 805, involved the right of a port pilot to collect half pilotage fees for services proffered and declined, and during the pendency of the action the statute giving the right was in terms repealed and at the same time substantially re-enacted; the new act allowing half pilotage fees in the same circumstances as the original. The court held that the new act did not impair the right to fees which had arisen under the original, saying:

"The new act took effect simultaneously with the repeal of the first act. Its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429, to which we will refer again, related to a revisory and substituted act, which, it was said, was a new law in so far as it differed from the original, and in so far as it embraced portions of the original was a preservation of them. Bear Lake Irrigation Co. v. Garland, 164 U. S. 1, 11, 17 Sup. Ct. 7, 9, 41 L. Ed. 327, related to an act which expressly repealed and at the same time substantially re-enacted a prior one, and of this it was said:

"Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Steamship Co. v. Joliffe."

Holden v. Minnesota, 137 U. S. 483, 490, 494, 11 Sup. Ct. 143, 146, 147, 34 L. Ed. 734, was a criminal case involving the infliction of the death penalty. After the commission of the offense and before the indictment of the offender a statute was adopted which substantially re-enacted or repeated the provisions of the previous law relating to the mode of inflicting that penalty and to the issuing of the governor's warrant therefor. It also contained new provisions imposing solitary confinement after the issuance of the warrant and regulating the details of the execution, and in terms repealed all acts and parts of acts inconsistent with it. Responding to the contention that the previous law was thereby repealed, and that the new act could not be applied to prior offenses, the court, in addition to holding that the new provision for solitary confinement, although not in terms so written, was applicable only to future offenses, held that the previous law was not repealed, and in that connection said:

"These provisions were not repealed by the act of April 24, 1889 (Gen. Laws Minn. 1889, p. 66, c. 20). In respect to the first and second sections of that act, it is clear that they contain nothing of substance that was not in sections 11 and 12 of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent act merely because the latter re-enacts or repeats those provisions. As the act of 1889 repealed only such previous acts and parts of acts as were inconsistent with its provisions, it is inaccurate to say that that statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected."

And again:

"The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death, and the issuing by the Governor of the warrant of execution before the convict was hung, were, therefore, not repealed, although some of them were re-enacted or repeated in the statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added."

The rule announced in these cases was again recognized by the Supreme Court in Campbell v. California, 200 U. S. 87, 92, 26 Sup. Ct. 182, 50 L. Ed. 382, and was recently applied by us in Lamb v. Pow-

der River Live Stock Co., 65 C. C. A. 570, 132 Fed. 434, 67 L. R. A. 558. It has also been quite generally recognized and applied in the state courts. Instances of its application to civil statutes are shown in the following cases: Wright v. Oakley, 5 Metc. (Mass.) 400, 406; United Hebrew Benevolent Ass'n v. Benshimol, 130 Mass. 325; St. Louis v. Alexander, 23 Mo. 483, 509; Ely v. Holton, 15 N. Y. 595; Anding v. Levy, 57 Miss. 51, 59, 34 Am. Rep. 435; Fullerton v. Spring, 3 Wis. 667, 671; Glentz v. State, 38 Wis. 549; Burwell v. Tullis, 12 Minn. 572, 575 (Gil. 486); Gaston v. Merriam, 33 Minn. 271, 283, 22 N. W. 614; State ex rel. v. Baldwin, 45 Conn. 134, 144; People v. Board of Equalization, 20 Colo. 220, 231, 37 Pac. 964; Moore v. Kenockee Tp., 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; Capron v. Strout, 11 Nev. 304, 310; McMullen v. Guest, 6 Tex. 275. And instances of its application to criminal statutes are shown in the following: Commonwealth v. Herrick, 6 Cush. (Mass.) 465; State v. Gumber, 37 Wis. 298; State v. Wish, 15 Neb. 448, 19 N. W. 686; State v. Miller, 58 Ind. 399; Sage v. State, 127 Ind. 15, 26 N. E. 667; State v. Kates, 149 Ind. 46, 48 N. E. 365; State v. Herzog, 25 Minn. 490; State v. Prouty, 115 Iowa, 657, 662–665, 84 N. W. 670; State v. Williams, 117 N. C. 753, 23 S. E. 250; State v. Brewer, 22 La. Ann. 273; Territory v. Ruval (Ariz.) 84 Pac. 1096; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073. See, also, Bishop Stat. Cr. (3d Ed.) §§ 152a, 181.

Reference to the point in judgment in some of these cases will illustrate the extent of the rule which they recognize and apply. Commonwealth v. Herrick was a prosecution for the sale of spirituous liquor by retail, in violation of a statute which was amended, after the date of the offense, by striking out the word "spirituous" and inserting "intoxicating" in its stead. It was held, Chief Justice Shaw delivering the opinion, that, as the substituted word included all that was covered by the other, and more, the intent manifestly was, not to affect cases theretofore within the statute, but to bring another class within its operation, and that as to the latter it was a new law, but as to the former its continuity was not broken. State v. Gumber was a prosecution under a statute declaring that all "places of public resort, where intoxicating liquors are sold in violation of law, shall be shut up and abated as public nuisances upon conviction of the keeper thereof, who shall be punished" by a fine and imprisonment. Pending the prosecution the statute was expressly repealed, and at the same time was re-enacted without any provision for a fine or imprisonment. The court, after referring to the rule that the effect of the repeal of a statute and its re-enactment at the same time is to continue it in uninterrupted operation, and after observing, "And we cannot perceive that it makes any difference whether the statute be a civil or a penal one, for it is wholly a question of legislative intent, which is as manifest and clear in the one case as the other," held that upon the defendant's conviction his saloon could be closed up and abated as a public nuisance and the costs of the prosecution imposed upon him, but that no fine or imprisonment could be imposed, because the provision for that part of the original punishment had not been re-enacted, and therefore was repealed. State v. Wish was a prosecution for horse stealing

under a statute which, after the date of the offense, was expressly repealed and at the same time re-enacted with such changes in its phraseology that the maximum imprisonment was reduced from 15 years to 10 and the minimum from 3 years to 1. After referring to the rule that upon the unconditional repeal of a criminal statute the power to punish violations thereof is taken away, the court said:

"But does this rule apply when in fact the statute has not been repealed? There would seem to be a material difference between repealing a statute and leaving nothing in its place, and simply repealing it so far as to avoid an apparent conflict between the original and amended sections of the act. In the one case the power would be entirely gone, while in the other no instant of time had passed between the repeal of the old and the taking effect of the new. The repealing act re-enacts the provisions of the old statute in its very language in all respects, except in reducing the imprisonment. We hold, therefore, that where the re-enactment is in the words of the old statute, and was evidently intended to continue in force the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal."

State v. Miller was a prosecution for grand larceny; the property taken being a watch of the value of $23. Under section 19 of the act of 1852, in force at the date of the offense, grand larceny consisted in the stealing of personal goods of another of the value of $5 or upwards, and pending the prosecution the statute was by an amendatory act repeated in its original terms, save that the element of value was changed from $5 or upwards to $15 or upwards. The court held that the original section was not wholly repealed, saying:

"The amended statute in question is not inconsistent with the statute as it was before amendment, so far as it is applicable to the case under consideration. The only change made by the amendment was to fix the amount constituting grand larceny at $15, instead of $5. The law under both statutes made the stealing of $20 and upwards grand larceny. There has not been a moment, since the coming into force of the act of 1852, that the statute law of this state has not made the stealing of the amount charged in the indictment in this case grand larceny, and contained the same provisions as to the punishment thereof. It is clear to us that the lawmaking power never intended the repeal of the entire section 19, above mentioned, and that no rule of construction of statutes requires this court to hold that it is repealed."

In Sage v. State the accused was convicted as an accessory before the fact to the crime of murder in the first degree. At the date of the offense the statute read:

"Every person who shall aid or abet in the commission of any felony, or who shall counsel, encourage, hire, command, or otherwise procure such felony to be committed, shall be deemed an accessory before the fact, and may be tried and convicted in the same manner as if he were a principal, and either before or after the principal offender is convicted, and charged or indicted, and upon such conviction shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal."

It was thereafter re-enacted in an amendatory act with such changes in its phraseology that, while the elements of the crime and the punishment remained the same, the name given to the offense in the original statute was omitted, and some changes were made in the matter of the procedure or remedy. In sustaining the conviction, it was held that, though in a sense such an amendatory act supersedes the act which it

amends, it does not completely repeal or destroy it for all purposes; and it was added:

"Principle forbids the conclusion that an amendatory statute, defining an offense in substantially the same language as that employed in the statute it amends, takes away the right of the state to prosecute the offender and requires his unconditional discharge. It cannot be logically affirmed, where the same offense is defined in the same way by both the earlier and the later statute, that there is an interregnum in which there was no law defining the offense. The two acts interfuse and blend so fully and compactly that it is impossible that there can be an interval when there was no law. Between the two acts there is no period of intervening time in which no offense existed."

State v. Herzog was a prosecution under the following statute:

"If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent, or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without consent of his employer *or* master, any money or property of another which has come to his possession or is under his care *by virtue of such employment*, he shall be deemed to have committed larceny."

After the date of the offense the statute was amended so as to read as follows:

"If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any private person, or of any copartnership, except apprentices and other persons under the age of sixteen years, *or if any attorney at law, collector or other person who in any manner receives or collects money or any other property for the use of and belonging to another*, embezzles or fraudulently converts to his own use, or takes and secretes with intent to embezzle and convert to his own use, without the consent of his employer, master, *or the owner of the money or goods collected or received*, any money or property of another, *or which is partly the property of another and partly the property of such officer, agent, clerk, servant, attorney at law, collector, or other person*, which has come to his possession or under his care *in any manner whatsoever*, he shall be deemed to have committed larceny; *and in a prosecution for such crime, it shall be no defence that such officer, agent, clerk, servant, attorney at law or other person was entitled to a commission out of such money or property, as commission for collecting or receiving the same for and on behalf of the owner thereof: provided, that it shall be no embezzlement on the part of such agent, clerk, servant, attorney at law, collector, or other person to retain his reasonable collection fee on the collection.*"

For the purpose of showing in what respects the amended statute differed from the original, we have italicized those words of each not found in the other. In affirming the conviction of the accused, notwithstanding the changes in the law, it was pointed out that, save where the accused was entitled to a commission out of the money or property embezzled, etc., the amended statute covered in exactly the same way the offenses described in the original, and it was said that:

"With regard to the offenses described in the latter, in a case in which the defense spoken of does not exist, the law is wholly unaffected by the changes made by the former, and continues to be exactly what it was before the changes were made. As respects such offenses, the original section is not repealed, abrogated, changed, or amended, but simply preserved and continued; for there never has been a moment of time since its adoption when the rule of law announced by it did not exist. So long as this rule, which is ap-

plicable to a certain class of cases, remains unchanged, it is not at all important that the amendment effected by the amended section provides for and adds other classes of cases. The law as to the original offenses, save when the defense mentioned exists, is the same in every respect."

Territory v. Ruval was a prosecution for grand larceny under a statute which, after the date of the offense, was re-enacted in an amendatory act so as to enlarge the enumeration of property subject to that offense. The amendatory act also contained a clause in terms repealing all acts and parts of acts inconsistent with it. The property stolen, a gelding, was within the enumeration in both the original and the amendatory act, and the prosecution was sustained, because the original was neither inconsistent with nor repealed by the amendatory act, but was merely enlarged to include a class of cases not before within its operation.

In support of the contention that by its re-enactment, with modifications, section 1 of the Elkins act was entirely repealed, and hence no prosecution for prior violations of its inhibitions respecting rebates, concessions, and discriminations could be instituted thereafter "against either an individual or a corporation," counsel for the railway company rely upon such cases as Norris v. Crocker, 13 How. 429, 14 L. Ed. 210, United States v. Tynen, 11 Wall. 88, 20 L. Ed. 153, Murdock v. Memphis, 20 Wall. 590, 22 L. Ed. 429, United States v. Claflin, 97 U. S. 546, 24 L. Ed. 1082, 1085, Pana v. Bowler, 107 U. S. 529, 538, 2 Sup. Ct. 704, 27 L. Ed. 424, Tracy v. Tuffly, 134 U. S. 206, 229, 10 Sup. Ct. 527, 33 L. Ed. 879, and Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070, from which they deduce the conclusion that where a later act covers the whole subject of a prior one, and embraces new provisions plainly showing that it was intended as a substitute, it operates by implication, and without any repealing clause, as an unqualified repeal of the whole of the prior act. In our opinion there are two insuperable objections to this position: First, the repealing clause in the Hepburn act, "All laws and parts of laws in conflict with the provisions of this act are hereby repealed," expresses the extent to which it was intended to repeal prior laws, and excludes any implication of a more extended repeal. Henderson's Tobacco, 11 Wall. 652, 656, 20 L. Ed. 235; Holden v. Minnesota, 137 U. S. 483, 491, 11 Sup. Ct. 143, 34 L. Ed. 734; Patterson v. Tatum, 18 Fed. Cas. No. 10,830; Gaston v. Merriam, 33 Minn. 271, 283, 22 N. W. 614; Lewis v. Stout, 22 Wis. 234; People v. Huntley, 112 Mich. 569, 578, 71 N. W. 178. And, next, the cases relied upon do not hold that a revisory or substituted act, which literally or substantially re-enacts or repeats portions of the original, is, in respect of them, new legislation, rather than an affirmation and continuation of existing law; nor is there any reason to believe that they restrain or qualify the ruling in Steamship Co. v. Joliffe, Bear Lake Irrigation Co. v. Garland, and Holden v. Minnesota, supra. What they do hold—general expressions being read in the light of the questions necessary to be determined—is that a later act covering the whole subject of a prior one, and embracing new provisions plainly showing that it was intended as a substitute, supersedes the prior act, in the sense of embracing all thereof that was intended to be preserved, omitting what was not so intended,

and changing what was intended to be changed, and so prevents the two from being regarded as in any respect coexistent or cumulative enactments. In this there is nothing at all inconsistent with what otherwise is clear; that is, that the intention in such a case is to make a new law only in so far as the substituted act differs from the original. And such is plainly the necessary conclusion from what was said in Murdock v. Memphis, 20 Wall. 590, 617, 22 L. Ed. 429, one of the cases relied upon. The question there presented was one of the effect upon the twenty-fifth section of the judiciary act of September 24, 1789 (1 Stat. 85, c. 20), produced by the second section of the amendatory act of February 5, 1867 (14 Stat. 386, c. 28), which re-enacted or repeated the former, with some changes and omissions, but contained no repealing clause. Of this it was said:

"A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform. The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 has taken its place. What of the statute of 1789 is embraced in that of 1867 is, of course, the law now, and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved."

Norris v. Crocker turned entirely upon the question whether, in the absence of a repealing clause, an amendatory and supplementary act covering the whole subject of the original, adding new offenses and prescribing penalties, which were altogether new and more severe, for the offenses enumerated in the original, as well as for the new ones, repealed the original so far as related to the penalty. Of course, it was held that the provisions of the amendatory and supplementary act were repugnant to those of the original in respect of the penalty, and hence there was a repeal to that extent. United States v. Tynen was in principle much the same. An amendatory act, covering the whole subject of the original, and adding many new offenses, prescribed for each offense named therein as well those which were old as those which were new, a punishment which was different and more severe, in that its minimum was less, and its maximum greater, than that prescribed in the original. It was held that the two acts were repugnant in this respect, and that the amendatory one operated, without any repealing clause, to repeal the other. United States v. Claflin is so nearly like the two cases last mentioned that what has been said of them is also applicable to it. In each the amendatory act failed to re-enact or repeat enough of the original to cover the penalty or punishment for any prior offense, and so there was no occasion to consider or decide whether such portions of the original as were re-enacted or repeated should be regarded as new legislation or as an affirmation and continuance of the prior law. Pana v. Bowler and Tracy v. Tuffly decided

nothing having application here, other than that a later act, plainly intended to prescribe the only rules that are to govern in respect of the subject covered by a prior one, operates, without any repealing clause, to repeal any provision in that act omitted from the other. And Murphy v. Utter is also distinguishable from the cases which we regard as applicable and controlling, as well as from the one now before us. The situation presented in that case was, that a territorial legislature, whose acts were subject to approval, disapproval, or change by Congress, had attempted to repeal one of its prior acts, which in the meantime, had been re-enacted, with some changes, by Congress. No question was presented as to whether, as respected matters transpiring between the original enactment and the re-enactment, such provisions of the former as were repeated in the latter should be regarded as entirely new legislation or as speaking from the date of their original enactment, and the real controversy was as to whether the act of Congress, being paramount as well as later, superseded and took the place of the original territorial act in the sense of disenabling the territorial Legislature from subsequently repealing it. It was held that the original was thus superseded and supplanted, and that the office of loan commissioners, created by it and "continued by the act" of Congress, was not terminated by the subsequent territorial repealing act. When the entire opinion is carefully examined, it does not sustain the extensive repeal here claimed.

From this review of adjudged cases, as also from what is deemed the better reasoning, we think the conclusion necessarily follows that statute law is not abrogated or annulled by mere re-enactment or repetition, and that when, for purposes of enlargement, contraction, or otherwise, a statute is re-enacted or repeated with amendments, the amendatory act is to be regarded as an affirmation and continuation of the prior law, in so far as in substance and operation it is the same, and is to be regarded as new legislation only in so far as in substance or operation it differs from the prior law.

As much of section 1 of the Elkins act was re-enacted or repeated by the Hepburn act without any change in substance or operation, we hold that the section was not wholly repealed. And so it becomes necessary to consider whether there was any substantial change in that part of it upon which the prosecution and punishment of the offense here charged depend. For the purpose of illustrating such changes as were made the section is here reproduced, the omitted portions of the original being italicized, the new matter being shown in brackets, and the balance being common to both:

"That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corpora-

tion offending shall be subject to a fine [of] not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect 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* [thereof] 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* [thereof], or whereby any other advantage is given or discrimination is practiced. Every person or corporation [whether carrier or shipper] who shall [knowingly] offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. *In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party, other than the fine prescribed by law, imprisonment, wherever now prescribed as part of the penalty being hereby abolished*: [*Provided*, that any person, or any officer or director of any corporation subject to the provisions of this act, or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.] 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; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier [or shipper] acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier [or shipper] as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory *thereto* [thereof], or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

"[Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property from one state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or foreign country, who shall knowingly by employé, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company has knowingly received or accepted from any such common carrier any sum of money or other valuable con-

sideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received or accepted, or both, as the case may be.]"

Having regard to so much of the section as defines, and prescribes the punishment for, the offense charged in the present indictment, it is seen that the literal changes therein are four in number: First, the insertion of the words "whether carrier or shipper" in the clause specifying those against whom it is directed; second, the insertion of the word "knowingly" in the clause specifying the acts made punishable; third, the omission of the provision that no punishment other than the prescribed fine shall be imposed; and, fourth, the addition, by way of a proviso, of a provision that, when the offender is a person, he shall be liable to imprisonment, or both fine and imprisonment, in the discretion of the court. The first change is an immaterial one, because the language "every corporation or person who shall offer, grant or give, or solicit, accept or receive, any such rebates, concession or discrimination," as certainly includes both carriers and shippers without the inserted words as with them. As to the second change, we shall assume, but without so deciding, that the contention of counsel for the railway company, acceded to by counsel for the government, that the original definition of the offense included acts not knowingly done, and that the insertion of the word "knowingly" contracts the definition and excludes therefrom acts originally included, is correct. If so, the prior law is repealed in so far as the definition is contracted, and prior offenses falling within the repeal cannot now be prosecuted and punished, save as there may be some general or special saving clause applicable to them. The third and fourth changes are also immaterial here, because the punishment prescribed for corporate offenders, which was only a fine, is not affected by either. And another reason why the third change is immaterial here is that the omitted provision had reference to offenses the original punishment for which, where the offender was a person, included imprisonment, which was not true of the offense charged in this indictment. As to it the only punishment prescribed was a fine, the provision for which is repeated literally. The fourth change is, of course, inapplicable to prior offenses, punishable only by fine at the time of their commission; but whether the provision for imprisonment which it introduces, by way of a proviso, is so far separable from, and independent of, what is re-enacted or repeated, as to have no effect upon the punishment, by fine, of such prior offenses, where committed by persons (see Holden v. Minnesota, 137 U. S. 483, 494, 11 Sup. Ct. 143, 34 L. Ed. 734), need not be considered now, because, however that may be, it does not affect the punishment of corporate offenders.

The situation, therefore, is this: Acts of corporate carriers in knowingly offering, granting, or giving, as also acts of corporate shippers in knowingly soliciting, accepting, or receiving, rebates, concessions, or discriminations, are within both the original and the amended defini-

tion of the offense, and the punishment therefor is unchanged. As to them the prior law is not abrogated or repealed, but preserved and continued; and the liability of the offender to prosecution and punishment, whether the offense was committed before or after the amendatory act, is unaffected. But in so far as the original section embraces such acts, when not knowingly done, it is undoubtedly repealed. It is at this point that a question lying within narrow compass, but of more difficulty, is encountered. The indictment, unlike that set forth in the opinion delivered in the District Court, does not, in charging the granting and giving of concessions to the W. P. Devereux Company, use the word "knowingly," or any other term of equivalent import, and so does not state a case falling within the contracted definition of the offense and without the repeal. True, upon the trial it was admitted on behalf of the railway company that these concessions were granted and given by its direction and with its consent; but as the sufficiency of the indictment was challenged by a demurrer and by a motion in arrest of judgment, and as the admission just stated was made under a stipulation that it should not prejudice the right of the railway company to question the sufficiency of the indictment, the correctness of the rulings upon the demurrer and the motion in arrest of judgment must be determined independently of what occurred upon the trial. It therefore becomes necessary to inquire whether there is any general or special saving clause applicable to prior offenses falling without the contracted definition of the offense and within the repeal. This is the more difficult question.

That section 13 of the Revised Statutes [U. S. Comp. St. 1901, p. 6] is such a general saving clause, if not superseded by something in the Hepburn act, is not only plain, but fully conceded. It reads:

"Sec. 13. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

But it is urged on behalf of the railway company that this general saving clause is superseded, so far as concerns the Hepburn act, by section 10 of that act, which reads:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

It will be observed that the earlier and general statute seems to declare that it shall apply to all cases of repeal, unless the repealing act "expressly" provides that it shall have the effect of releasing or extinguishing penalties for prior offenses, and also that the later and special statute does not contain any such express provision. Because of this it is insisted on behalf of the government that the later act does not come within the qualifying clause of the general statute, and that it is not admissible to inquire whether the later act by necessary implication manifests an intention to release or extinguish penalties for prior offenses. Such would doubtless be the effect of the general statute, if

it were a constitutional provision; but, as it is not, the contention is made untenable by these well-settled propositions: First, Congress cannot thus limit or restrict the manner in which its power shall be exerted, or its intention manifested, in the future (Cooley's Const. Lim. [7th Ed.] 174; Bishop St. Cr. [3d Ed.] § 147; 2 Sutherland, St. Con. [2d Ed.] § 355; Bloomer v. Stolley, 3 Fed. Cas. 729, No. 1,559; Manigault v. Springs, 199 U. S. 473, 487, 26 Sup. Ct. 127, 50 L. Ed. 274; Kellogg v. Oshkosh, 14 Wis. 623, 628; Brightman v. Kirner, 22 Wis. 54, 60; Friend v. Levy [Ohio] 80 N. E. 1036; Wall v. State, 23 Ind. 150, 153; Davidson v. Witthaus, 106 App. Div. N. Y. 182, 185, 94 N. Y. Supp. 428; State v. County Court, 37 W. Va. 808, 811, 17 S. E. 379; Gilleland v. Schuyler, 9 Kan. 569, 580); second, the intention of the Legislature constitutes the law, and may be as effectually manifested by what is necessarily implied as by what is expressed (Telegraph Co. v. Eyser, 19 Wall. 419, 427, 22 L. Ed. 43; Ex parte Yarbrough, 110 U. S. 651, 658, 4 Sup. Ct. 152, 28 L. Ed. 274; McHenry v. Alford, 168 U. S. 651, 672, 18 Sup. Ct. 242, 42 L. Ed. 614); and, third, where there are conflicting manifestations of the legislative will, the last is controlling, even though it rests in necessary implication.

But it is said that, if the general statute be not effective as a limitation or restriction upon Congress, it is at least obligatory upon the courts as a rule of construction binding them to construe every subsequent repealing act, no matter what its necessary implication, as leaving penalties for prior offenses unaffected, unless it expressly provides that it shall have the effect of releasing or extinguishing them. This, however, is but saying that, though Congress is not bound by the general statute in the enactment of later repealing acts, the courts are bound to construe and give effect to them as if Congress were thus bound; in other words, that general statutory rules of construction may be so framed as to defeat the manifest intention of after legislation. We think that the statement of the proposition is its refutation. The intention of the Legislature, as before said, constitutes the law, and necessarily a later act, whatever its form, if only it be unaffected by any constitutional restriction and its meaning be plain, supersedes prior acts in conflict with it. Of course, the Legislature may prescribe rules affecting the construction of after-legislation, which does not, in terms or by necessary implication, show that it is to be unaffected by them; but they cannot be so framed as to defeat the plain intention of such legislation, and, like other statutes, they cease to be obligatory upon the courts when superseded by a later and conflicting manifestation of the legislative will. In short, our conclusion respecting the general statute is this: As applied to subsequent repealing acts, which do not, expressly or by necessary implication, contravene its provisions, it is effective and obligatory upon the courts, but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner they might choose. They could change or repeal it, or supersede it, in whole or in part, as to any particular repealing act. They could do any of these things expressly or by necessary implication; and any such change, repeal, or supersession, however made,

would be as obligatory upon the courts as would be the general statute, if it were unaffected by after legislation.

If, therefore, section 10 of the Hepburn act does not expressly or by necessary implication manifest an intention to release or extinguish penalties for prior offenses falling within the repeal, the general statute is very plainly applicable to their enforcement, and requires that the repealed law be treated as continuing in force for that purpose. United States v. Reisinger, 128 U. S. 398, 9 Sup. Ct. 398, 32 L. Ed. 480. Section 10 does not expressly mention penalties for prior offenses, or their remission or enforcement. Does it by necessary implication manifest an intention to release or extinguish them, or any of them? The argument advanced in support of an affirmative answer is this: That section contains both a repealing clause and a saving clause. Some purpose must be ascribed to the latter. It can have no other purpose than to prescribe the effect of the repealing portions of the act upon penalties for prior offenses. It declares that penalties for offenses for which prosecutions were then pending in the courts of the United States shall be saved; and by necessary implication, equally effectual, it declares that other penalties shall not be saved, but released or extinguished. If all of this were true of that section, doubtless the conclusion would follow that it impliedly supersedes or repeals, pro tanto, the general statute, which was presumptively in the mind of Congress. State v. Showers, 34 Kan. 269, 8 Pac. 474. The argument, however, treats section 10 as if it read literally or substantially as follows:

"All laws and parts of laws in conflict with the provisions of this act are hereby repealed, but such repeal shall not release or extinguish any penalty for any offense heretofore committed against such law for which a criminal prosecution is now pending in any court of the United States, and what is repealed shall be treated as still remaining in force for the purpose of sustaining any such pending prosecution for the enforcement of such a penalty."

In fact, it reads in this way:

"Sec. 10. That all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

Thus the special saving clause, although immediately following a repealing clause, does not in terms refer to a repeal, to penalties for prior offenses, to the remission or enforcement of any of them, or to pending causes for their enforcement, but to "the amendments herein provided for," to "causes now pending in courts of the United States," and to their continued prosecution "in the manner heretofore provided by law." Of course, "amendments" is broad enough to cover the partial repeal of section 1 of the Elkins act, for that was effected through an amendment; and what is said about "causes now pending in courts of the United States" and their continued prosecution is also broad enough to cover the enforcement of penalties for prior offenses embraced in criminal causes then pending in those courts. But does this language plainly or necessarily refer to the effect of the repeal upon the enforcement of penalties for prior offenses? We say plainly or necessarily, because, to establish a supersession or repeal of a statute

by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject of the first, employs language broad enough to cover some part or all of it; for, as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes cannot stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the first expresses a settled policy in legislation. Wood v. United States, 16 Pet. 342, 362, 10 L. Ed. 987; United States v. Gear, 3 How. 120, 131, 11 L. Ed. 523, 538; Frost v. Wenie, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; United States v. Healey, 160 U. S. 136, 146, 16 Sup. Ct. 247, 40 L. Ed. 369; Rosecrans v. United States, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. Ed. 708; United States v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130; McChord v. Louisville & Nashville R. R. Co., 183 U. S. 483, 500, 22 Sup. Ct. 165, 46 L. Ed. 289. Or, as the same thing is at times differently expressed, a statute couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation. We shall refer briefly to two of the cases just cited, each dealing with a conflict literally more pronounced than that now before us.

United States v. Gear arose under the public land laws. The policy of Congress to reserve from disposition under other laws public lands containing lead mines had long been expressed in Act March 3, 1807, c. 49, § 5, 2 Stat. 449, when Act June 26, 1834, c. 76, § 4, 44 Stat. 687, establishing new land districts, directed the President to cause to be offered for sale "all the lands lying in said land districts." Thus there was presented the question whether or not the later act superseded the other, there being lands of both classes in those districts; and of this the court said:

"The rule is that a perpetual statute (which all statutes are unless limited to a particular time), until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus, in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first; each performing its distinct functions within the sphere as Congress designed they should do."

United States v. Greathouse arose under the laws relating to the prosecution of claims against the United States. Section 1069 of the Revised Statutes [U. S. Comp. St. 1901, p. 740] provided that such claims should be barred unless the petition was filed within six years after the claim first accrued, but contained an excepting clause in favor of married women and others, including persons beyond the seas, who were permitted to sue within three years after the disability ceased. In 1887 Congress passed an act (Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. S. 1901, p. 753]) relating to the prosecution of such

claims, which, in a proviso to its first section, declared that "no suit against the government of the United States shall be allowed under this act unless the same shall be brought within six years after the right accrued for which the claim is made," but contained no excepting clause in favor of married women or others. That act also declared all acts and parts of acts in conflict with it repealed. Greathouse was beyond the seas from 1886 to 1889, when his claim accrued, and until 1894, when his suit was commenced. In answer to the government's contention that the excepting clause in section 1069 was displaced by the later act the court held:

"The act of 1887 only superseded such previous legislation as was inconsistent with its provisions. It is true that, if that act be literally construed, there is some ground for holding that Congress intended by the proviso of section 1 to cover the whole subject of the limitation of suits against the government, in whatever court instituted. But we cannot suppose that it was intended to strike down the exceptions made in section 1069 of the Revised Statutes in favor of 'the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued.' Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repaled only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. Frost v. Wenie, 157 U. S. 46, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; United States v. Healey, 160 U. S. 136, 147, 16 Sup. Ct. 247, 40 L. Ed. 369. In conformity with this principle we must adjudge that the above proviso of section 1069 of the Revised Statutes is still in force, because not absolutely inconsistent with the last proviso of the act of 1887; consequently, that the claim of a person who was beyond the seas at the time the claim accrued is not barred until three years shall have expired after such disability is removed without suit against the government. Although the act of 1887 prescribes the limitation for suits 'under this [that] act,' without making any exception in favor of persons under disability, it should be interpreted as if the proviso in section 1069 of the Revised Statutes were added to section 1 of that act. We could not hold otherwise without deciding, in effect, that the limitation of six years applied to claims accruing to married women and infants during their respective disabilities, as well as to the claims of idiots, lunatics, and insane persons. We are unwilling to hold that Congress intended any such result."

Can reasonable purpose and operation be accorded to the special saving clause without impinging upon the purpose and operation of the general statute? If so, it is quite plain that the broad language of the former does not necessarily relate to the particular subject of the latter, and, therefore does not by necessary implication manifest an intention to supersede or repeal it. When we consider that the special saving clause was part of the Hepburn bill from the time of its introduction in the House of Representatives, and that the provision amending section 1 of the Elkins act did not become part of the bill until after it had passed the House of Representatives and was pending in the Senate, it is difficult to believe that the former has particular reference to the effect of the partial repeal wrought by the latter. And, when we consider that any ground which could have been reasonably advanced for enforcing the repealed law against offenders who were then indicted would have been equally applicable to others who, within the period prescribed by the statute of limitations, had offended in like manner, but were as yet unindicted, and also the marked contrast between the

explicit and appropriate terms of the general statute, which was presumptively in the mind of Congress, and the altogether different terms of the special saving clause, it is difficult to believe that the latter has any reference to the particular subject of the former, namely, the effect of a repealing act upon the enforcement of penalties, forfeitures, and liabilities incurred under the law repealed.

We turn, therefore, to the other provisions of the Hepburn act, in the light of which the special saving clause must be read, to ascertain whether or not they indicate that it has another purpose and field of operation, more consonant with reason and with its different language. That act fills 12 pages of the Statutes at Large and comprises 11 sections. Its purpose is that of perfecting the existing law regulatory of interstate commerce, and this is done by eliminating or changing old provisions deemed unsatisfactory, and by adding supplementary or auxiliary provisions intended to give greater strength and efficiency to the law. These changes all fall within the general category of amendments, but they differ widely in subject and operation. Some operate to repeal portions of the prior law imposing penalties, forfeitures, or liabilities, and therefore come within the explicit terms of the general saving clause (Rev. St. § 13). Others have more immediate relation to proceedings in the courts of the United States; and still others have immediate relation to proceedings before the Interstate Commerce Commission. Within the first class is the partial repeal of section 1 of the Elkins act, resulting from the insertion of the word "knowingly"; within the second are several of the changes in section 16 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3165]), notably those relating to the procedure in the Circuit Courts upon petitions for the enforcement of orders of the Interstate Commerce Commission and that removing the pecuniary limitation upon the right of appeal to the Supreme Court in such cases; and within the third are the change in section 14, some of the changes in section 15, and the change in the opening paragraph of section 16. If proper regard be had to the subject and operation of these varied changes, and also to the settled operation of the general saving clause, with which Congress was presumptively familiar, it is reasonably plain, as we think, that the special saving clause, although speaking of the amendments collectively, is directed against such of them only as, in its absence, would affect causes then pending in the courts of the United States, and is intended merely to secure the continued prosecution, in the manner theretofore provided, of such pending causes as otherwise would be affected. In the presence of the general saving clause, pending causes for the enforcement of penalties, forfeitures, or liabilities would not be affected by the repeal of portions of the prior law imposing them; nor would pending causes in the courts be affected by the changes having immediate relation to proceedings before the Interstate Commerce Commission. Thus far, therefore, there was no occasion for a special saving clause in favor of causes then pending in the courts of the United States. But the changes having immediate relation to proceedings in those courts altered the situation; for they, if not restrained, would affect both pending and future causes. 2 Sutherland, St. Con. (2d Ed.) § 674; Railway Company v. Grant, 98 U. S.

398, 25 L. Ed. 231; Campbell v. Iron Mountain Silver Mining Co, 83 Fed. 643, 27 C. C. A. 646. Here, then, was occasion for a special saving clause, and the language of section 10 appears to have been well chosen to meet it. True, in the absence of the general saving clause, that language would be broad enough to also cover part of the ground covered by it—that is, to save such penalties, forfeitures, and liabilities as would be enforced by the continued prosecution of pending causes; but that is not a controlling guide to its meaning, in the presence of the general saving clause, for not only is the true intendment of language often dependent upon the circumstances in which it is used, but the state of the law when a statute is enacted is always an important factor in its interpretation. As before indicated, the special saving clause does not contain any term or expression which bears directly upon the effect of the repealing portions of the act upon existing penalties, forfeitures, and liabilities; nor does it contain anything which was not reasonably appropriate to the occasion, if Congress, mindful of the existence of the general saving clause and satisfied to leave it in undisturbed operation, was solicitous merely that the amendments bearing directly upon the jurisdiction and procedure of the courts of the United States should not affect causes then pending therein. In these circumstances we are persuaded that the special saving clause can be accorded reasonable purpose and operation by treating it as intended only to save such causes from what, in its absence and in the presence of the general saving clause, would be the effect of the amendments upon them; and we accordingly hold that, rightly interpreted, it does not cover any part of the particular subject of the general saving clause, and, therefore, does not by necessary implication manifest an intention to release or extinguish penalties, forfeitures, and liabilities for the enforcement of which no cause was then pending.

It follows that there was no error in the rulings of the District Court, and its judgment is affirmed.

MEMPHIS KEELEY INSTITUTE et al. v. LESLIE E. KEELEY CO.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1907.)

No. 1,619.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—RIGHT TO PROTECTION—MISREPRESENTATION BY PLAINTIFF—EVIDENCE.

Evidence considered, and *held* to establish the contention that the complainant, which was the manufacturer and proprietor of a secret remedy which it sold and used for the treatment and cure of the opium, liquor, and tobacco habits, and which it claimed and represented to the public as having as its chief and most valuable ingredient chloride of gold or "double chloride of gold," was chargeable with fraudulent misrepresentations, in that such remedy did not contain any gold or chloride of gold.

[Ed. Note.—Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. SAME—EFFECT—FRAUDULENT REPRESENTATIONS.

The proprietor of a medicine or remedy made in accordance with a secret formula, which knowingly makes false and fraudulent representations as to the ingredients of such remedy to the public through its advertisements and labels, cannot maintain a suit in equity to protect its

business of selling or administering such remedy from invasion and injury by another.

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

3. SAME—PLEADING.

That a complainant comes into a court of equity with unclean hands, in that he is chargeable with fraudulent misrepresentations to the public in respect to the subject-matter of the suit, is not, strictly speaking, a defense, and need not be pleaded, but, upon such fact appearing, it will be given effect by the court in the interest of the public by refusing to grant relief to the complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 103.]

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

For former opinion, see 144 Fed. 628.

C. W. Metcalf, for appellants.

T. E. Barry, for appellee.

Before SEVERENS and RICHARDS, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. This is the second appeal of this case. The first appeal was dismissed, and the opinion then delivered is reported in 144 Fed. 628. A reading thereof will disclose the ground of the dismissal and the nature of the controversy involved in the case. In brief, the first appeal was dismissed because the decree appealed from was not final. It was a partial dismissal of the bill. It did not dismiss the bill entirely, but only one branch of the controversy raised by it, and that a subordinate one. On the return of the cause to the lower court, it disposed of the whole controversy by a final decree. It receded from the position taken on the former hearing that the contracts between the appellee and the appellant Memphis Keeley Institute had been abandoned and rescinded before suit brought, because of which said partial dismissal of the bill, to wit, in so far as it sought a cancellation of said contracts, was made, and granted appellee the full relief which it sought. It enjoined the appellants from claiming that they had a right to, and were, in fact, administering Keeley remedies at the Memphis Keeley Institute, and adjudged a cancellation of said contracts and delivery up to appellee of the Keeley remedies in possession of the appellants on their being reimbursed the price paid for same. It is from this decree that this appeal is taken.

The main ground upon which appellants claim that the decree of the lower court should be reversed is that the appellee did not come into that court with clean hands, and therefore was not entitled to the relief it sought and that was granted to it. The position that it did not so come into court is undertaken to be maintained in this way. The business in which the appellee is engaged, to wit, administering, and selling to be administered, what are known as "Keeley remedies" for the opium, liquor, and tobacco habits and neurasthenia, and which was sought to be, and by the decree is, protected from injury and invasion by appellants, has been built up and is being maintained by

certain fraudulent misrepresentations. This position was urged on the lower court, and it was claimed that because of it the bill should be dismissed. But it refused to so hold and, as stated, granted appellee full relief. This it did for two reasons: One was that the evidence did not establish the position that appellee's business had been built up and was being maintained by any such misrepresentations. The other was that, even if it did, that fact was not against appellee's right to relief. We will dispose of these two reasons in the order stated. The alleged fraudulent misrepresentations relied on are quite numerous. The main one is that gold is the principal ingredient and effective agent in said remedies. We will limit our consideration to this alleged fraudulent misrepresentation, because we are constrained to hold that the claim of appellants in regard thereto is made good by the evidence.

It is not disputed that appellee represents to the public that gold is the principal ingredient and effective agent in its remedies. So distinct, repeated, and emphatic has been and is its representation to this effect that it must be held that its business has been built up and is being maintained by this representation. The name which it has given its remedies, and by which they are known, is the "Double Chloride of Gold Cure." There is no such substance as the "Double Chloride of Gold." There is a chloride of gold and a chloride of sodium. The claim was that these two substances were ingredients of the remedies, and to voice the claim the short form, of "Double Chloride of Gold" was adopted. It was intended to designate that the remedies contained the two chlorides of gold and sodium. This name is printed upon the labels on the bottles containing the remedies, and is used in the circulars and other means used to advertise the business. The remedy for neurasthenia is called "Gold Neurotine." To emphasize the claim as to the existence of gold in the remedies and its importance, the prominent portion of the lettering on the labels on the bottles is in gold. They contain a picture of the globe with a belt around it encircled by the words, "We belt the world," and on the belt are these words, "Gold cure for opium habit, gold cure for drunkenness, gold cure for neurasthenia, gold cure for tobacco habit"—all in gold. The labels contain this statement, to wit:

"Gold is especially beneficial in its action on the mental forces. It gives the patient courage, hope, and renewed will power; and is the only medical agent that will effectually and forever relieve all craving or necessity for alcohol in any form. The remedy can in no way act injuriously on the patient."

And users are cautioned to break the bottle when empty to prevent its re-use for the sale of "spurious Gold Cure Mixtures."

In a circular or pamphlet issued by the appellee, under the name of Dr. Leslie E. Keeley, it is said:

"There is some criticism regarding my method of cure. The principal drug I use in the cure of drunkenness, the chloride of gold and sodium, or the double chloride of gold, is known throughout civilization."

Again:

"I come now to speak of my discovery of the Double Chloride of Gold in the treatment of the disease—the specific cure for drunkenness or alcoholism.

The pathology of the disease being understood, the indications for the gold remedies is a rational one, and not empirical. The action of gold as a medicine is primarily upon the higher cerebral nerve centers, the very seat of diseased will, and of the mania for strong drink."

Again:

"The Keeley treatment consists of remedies and solutions (with the Double Chloride of Gold as a basis)."

And again:

"Many remedies have been proposed and tried with some good results and many vexatious failures, but the most effective agent yet employed is gold."

In a pamphlet so issued entitled, "A Keeley Cure Catechism," amongst others, are the following questions and answers, to wit:

"Q. What is his remedy?

"A. With the Chloride of Gold and Sodium (the Double Chloride of Gold as a basis) he has compounded the best reconstructive nerve tonic in existence.

"Q. But does he not heal all alike?

"A. No, to quote his own words, 'the principal drug I use in the cure of drunkenness is the Double Chloride of Gold.'"

In a pamphlet so issued entitled, "Neurasthenia or Nerve Exhaustion; Its Treatment and Cure," is this statement:

"For the condition of the system, reason, as well as science, would indicate a remedy which will have a direct and positive effect upon the nerve centers. Such an agent is found in the Double Chloride of Gold. The remarkable therapeutical virtues of gold have long been known, but its scientific and accurate application has not been understood by the profession and hence its disuse. By the special method of preparation employed by Dr. Leslie E. Keeley, the Double Chloride of Gold has become the great ethical agent which, acting promptly upon the nerve centers, gives to the worn out and diseased system renewed health, activity, and life."

The sole question at issue in regard to this representation is as to whether it is a misrepresentation and fraudulent; i. e., intended to mislead and deceive the public. If it is untrue and known to be so, the rest follows.

The record contains positive evidence to the effect that it is untrue and known to be so. It contains no affirmative evidence that the representation is true. The appellee has contented itself with the position that the appellants have failed to make good that it is a fraudulent misrepresentation. And the case hangs here on the correctness of this position. That positive evidence consists of the testimony of a former partner of Dr. Leslie E. Keeley, and, according to his testimony, the originator jointly with Dr. Keeley of the remedies and the business, and of an analytical chemist, to whom certain bottles purporting to contain the remedies were submitted for analysis, pending this litigation. The witness first referred to is named Frederick B. Hargraves. Before his connection with Dr. Keeley, he had been a preacher in the Wesleyan Methodist Church in England, and afterwards in the Presbyterian Church, and then a lawyer. At the time when that connection began, he was state lecturer for the Illinois State Temperance League, and when he gave his testimony his occupation was that of a traveling salesman. In the spring of 1880, when both he and

Dr. Keeley were living in Dwight, Ill., each noticed independently of the other a suggestion in the same newspaper as to a remedy for the cure of drunkenness. In talking about a mutual friend who was addicted to drunkenness, this common knowledge became known to each. Subsequently Dr. Keeley told him that he had used the remedy and gotten good results from it. Hargraves doubted it, and the doctor said the matter could be easily demonstrated—that he would get Pat Conafry, a well known saloon keeper at Dwight, to take the remedy and test it, as Pat would take anything he asked him to take. The doctor fixed up a bottle, and gave it to Conafry, and in a few days he lost his desire for liquor, and could not drink any at the end of about a week. He made strong efforts to drink again, and one Sunday got a drink to stick and became gloriously drunk, and would not take any more medicine. The test, however, was sufficient for Hargraves, and that was the origin, as he terms it, of the "cure business." At first Dr. Keeley refused to become known in the matter, but shortly afterwards the medicine was used with good result on one Major John P. Campbell, of Lexington, Ky., then residing at Dwight, and thereupon the three, Keeley, Hargraves, and Campbell, embarked in the business under the firm name of "Leslie E. Keeley, M. D." Not long after this Campbell went out of the business, and on June 1, 1881, a partnership, with the same firm name, was formed between Keeley, Hargraves, and three others, to wit, John R. Oughton, a drug clerk, one Major C. J. Judd, and Father James Halpin, a Catholic priest, all living at Dwight; the interest of Keeley being three-tenths, and of Hargraves two-tenths, and the remaining five-tenths being divided amongst the other three. The partnership was evidenced by written articles. Dr. Keeley was the dominating spirit of the firm. He had general control of the business, the determination of the duties to be performed by the working partners, being all the others except Halpin, the fixing of their wages, and the power if any partner violated the terms of the agreement, or failed to perform his duties properly, or to conduct himself in a gentlemanly or becoming manner, to terminate his connection with the business. He, however, did not push himself to the front otherwise than in the firm name. He would say:

"I am the big spider in the back office. Always throw a little mystery around me; keep me in the background."

Oughton prepared the remedies and Hargraves was the correspondent and literary man—the advertiser—or, as he styled himself, the general publicity man. He designed the bottles, got up the labels, and prepared the literature by which the remedies and business was advertised. He wrote the partnership agreement. He continued his connection with the business until March, 1886, when he was forced to sell out because of a severe criticism of Judd for something he had done.

This history of the business, and Hargraves' connection therewith, is gathered from his testimony, and, so far as the nature of the last partnership is concerned, is confirmed by a copy of the articles filed as an exhibit. His testimony also covered the subject as to whether there was any gold in the remedies used in the business. He testified

that he knew the formula by which those remedies were prepared, and that they contained no gold whatever. As bearing on that subject are the following facts testified to by him: Whilst he, Keeley, and Campbell were running the business, they treated a sewing machine agent named Dalliba, at Bloomington, Ill., for the liquor habit, probably the third patient; the other two being Conafry and Campbell. For the first time they administered to him chloride of gold and sodium in form of pills, except once when it was administered in powdered shape. They did not know especially what effect gold would have, and they used it as an experiment. The remedy they had was a tonic remedy, and was only a sobering up process. They had to have something better than that as a specific for the liquor habit. The gold remedy came near killing the patient, and they had to stop it. It was never used afterwards. They hit on a remedy that did all that they expected the gold to do, and was a far more valuable specific for drunkenness than gold, and they used it in its place. Keeley often said to Hargraves, "What a lucky thing we happened to hit upon that drug," as it saved further experiment, and was not dangerous. The remedy, however, has always been called the "Double Chloride of Gold Cure," as they had intended to use gold at the start.

It seems that the medical profession regard gold in certain forms to be beneficial to mental forces, and it is sometimes prescribed for that purpose. It was not used to any extent as a medicine at that time, but has been used more since. They regarded it as an awfully good name, and Keeley hated to part with it. He claimed that it was an effective name to use—impressive. They reconciled themselves to its use on the idea that there is gold in everything—gold in mud—a trace of gold. Keeley would say: "There is a trace of gold any way in it, and that is enough." They kept up the fiction as to gold by having three or four drams of chloride of gold and sodium in the safe, and showing them to visitors coming to look over the laboratory as samples of the gold and sodium used in the remedies. They were constantly assailed by persons claiming that there was no gold in the remedies. To meet this criticism, one S. T. K. Prime, living near Dwight, who claimed that people generally did not believe there was any gold in them, at their instance came to their laboratory and picked two bottles from the stock prepared for shipment and carried them to Prof. Marriner, a celebrated analytical chemist at Chicago, for analysis. Before Prime did this, Oughton fixed up two bottles with gold in them, and put them in a row that was half full of bottles. They were the last two bottles in the row, and naturally Prime selected those two bottles, as they were the nearest to him and came first to his hand. Of course, Prof. Marriner found gold in the mixture submitted to him, and they obtained a certificate from Prime as to his having selected the bottles from those in the laboratory prepared for shipment, and one from Marriner as to the result of his analysis, and circulated them in the course of the business.

The analytical chemist, whose testimony was introduced in support of the position as to the lack of gold in the Keeley remedies, is Dr. William Krauss, a resident of Memphis, Tenn., where appellants reside and carry on business. He is a physician also, a graduate of

the Baltimore College of Pharmacy, has taught chemistry at the Memphis Medical College, and has been the official chemist of the Tennessee Pharmaceutical Association. He testified that he analyzed the mixtures in some five or six bottles, purporting to contain Keeley remedies brought to him by the appellant C. B. James, president of the appellant Memphis Keeley Institute and the active litigant on appellants' side in this litigation, a portion of them shortly after the bringing of the suit, which was November 1902, and the rest about a year later, and that none of them contained any gold. He gave in detail the analysis that he made so that it is capable of being determined whether it was properly made. The bottles, when brought to him, were sealed and labeled. They were intact, and bore no evidence of having been tampered with. He described the bottles and their labels, and they correspond to the description of those containing the regular Keeley remedies. The bottles, with their remaining contents, were filed as exhibits in the cause. In the course of his testimony he was asked and answered as follows, to wit:

"Q. Then, doctor, you know there is no gold in the Keeley remedies by reason of the tests which you made?

"A. I am absolutely certain as to that. Absolutely certain that there is no gold in the Keeley remedies."

As bearing on the genuineness of said bottles so placed in Dr. Krauss' hands for analysis, Dr. Samuel Morrow, physician in charge at the institute of appellants, formerly a physician on appellee's staff at Dwight, and in the employ of various Keeley Institutes throughout the country, testified that on September 30 and October 16, 1901, shortly after appellee gave notice to appellants that it would not furnish any more Keeley remedies, except for patients in line, it made shipments thereof to the appellant Memphis Keeley Institute, invoices of which were exhibited, that the appellant C. B. James reserved out of these shipments a package of each kind of remedy for analysis, and locked them in a desk, properly sealed and labeled as they arrived there, and that he afterwards saw him remove these bottles from the desk and heard him say that he was going to take them to Dr. Krauss for analysis. The appellant C. B. James did not testify in the case at all, and hence gave no testimony touching the genuineness of the bottles which he furnished Dr. Krauss for analysis.

Such, then, is the positive and direct evidence in the record tending to show that appellee's remedies contain no gold. The evidence of neither of those witnesses is contradicted in any particular, nor has any affirmative evidence been introduced tending to show that said remedies do contain gold. As stated, appellee's position here is simply that this positive and direct testimony comes short of establishing that said remedies do not contain gold.

It undertakes to meet Dr. Krauss' testimony by the claim that there is no evidence that the remedies which he analyzed were genuine Keeley remedies. This evidence is lacking, it is urged, because the appellant C. B. James did not take the stand and testify that the bottles which he furnished Dr. Krauss were genuine Keeley remedies; i. e., part of the remedies which his institute had received from the appellee. This is to be accounted for only on the ground that said appel-

lant did not want to commit perjury or admit that they were not genuine. According to appellee, said appellant was bad and mean enough to commit perjury, but did not have courage to do so. But can it be truly said that evidence is lacking that said remedies so analyzed were genuine? We think not. Dr. Krauss testified that he got the bottles from said appellant, and that they were sealed, intact, and bore no evidence of having been tampered with.

Dr. Morrow testified that said appellant took out of a shipment of remedies by appellee certain bottles for analysis, locked them in a desk properly sealed and labeled as they had arrived and afterwards took them therefrom, saying that he was going to deliver them to Dr. Krauss for analysis. It is true that between the time of putting the bottles in the desk and taking them out again, or after taking them out, appellant may have substituted spurious remedies. But there is no evidence that he did, and, in the absence of such evidence, the presumption of fair dealing must be permitted to negative the idea that there was any substitution. The mere fact that said appellant did not testify that there had been no substitution cannot be twisted into evidence that there had been substitution. It is a weakening circumstance, but it can be given no such effect as this. That appellants had genuine Keeley remedies which they might have turned over to Dr. Krauss for analysis is charged in the bill, and part of the relief sought therein was a delivery of them up to appellee on reimbursement being made of the price paid for them.

Then, as to Hargraves' testimony, the only way in which it is met is by the claim that it is unreasonable to believe that he knew the formula by which the Keeley remedies were made. The basis of this claim as to unreasonableness is that Hargraves was neither a physician nor a chemist; that he was the speechmaker and literary man of the concern, and no part of his duties related to compounding remedies; that, if the secret of the formula was known to each of the partners, there would be nothing to prevent either from going into the business on his own account upon the dissolution of the copartnership, and compounding the remedy and treating patients under the Keeley remedies; and that Dr. Keeley was the important man and controlling and dominant factor in the concern. We fail to see anything in any of these circumstances to render Hargraves' knowledge of the formula so unreasonable as to require one to hold his sworn statement that he did know the formula to be untrue. The partnership agreement itself would seem to indicate that he knew it, for it is expressly provided therein that:

"Each member of the firm shall jealously guard all information pertaining to the compounding of said remedies and their constituent parts and elements, and shall under no consideration divulge any information whatever concerning their manufacture to any one whatever."

But Hargraves' testimony is not confined to telling what the formula contained. It tells of tricks resorted to in order to make the public believe that the remedies contained gold, when, in fact, they did not. In the trick played upon Prime and Prof. Marriner, Oughton, president of the appellee since February 21, 1900, when Dr. Keeley died, was the prominent figure. He testified as a witness in the case, yet

he was not asked about nor did he testify in regard to this matter. If such tricks were resorted to, they can be accounted for on no other basis than that the remedies did not contain gold. If they had contained gold, they would not have been resorted to. Criticism of Hargraves' testimony, at various points, has been indulged in. We cannot enlarge this opinion to take them up in detail. We have considered them carefully, and find nothing in them to lead us to discredit his testimony. The most that can be said against his testimony is that he was probably a willing, and, possibly, a revengeful witness.

But this is not all the evidence in support of the position that the Keeley remedies contain no gold. There is a circumstance which, if a consideration of the testimony of Hargraves and Krauss left one in a state of doubt on the subject, is sufficient to drive one to the conclusion that this position is correct. Said Oughton, appellee's president, who has done all the chemical work in preparing the remedies in question, and who knows the formula, was put on the stand by appellants. He was asked in regard to the Keeley treatment as to whether it contained gold, and he refused to answer. An extract from his testimony is in these words:

"Q. 164. Is there any gold in this treatment?
"A. I refuse to answer.
"Q. 165. We insist that you do answer.
"A. I still refuse.
"Q. 166. We notify you then that at the hearing we shall insist that there is no gold in the treatment. Do you still refuse to answer?
"A. I still refuse."

It is hard to account for this refusal upon any other basis than that the remedies do not contain gold. It cannot be accounted for on the ground that the formula is a secret, and it was not to be expected that the secret would be disclosed. But, if there is gold in the remedies, in so far the formula is not a secret. For over a quarter of a century appellee has claimed to the public, and emphasized its claim, that its remedies contain gold. An answer to this question would not open up the rest of the formula or the extent of the gold it contained, for so far the formula was a secret. But as to whether there was any gold at all there was no secret as to that if there was gold there. The silence of appellee's president when asked this question must therefore be construed against it.

This brings us to the other reason, why the lower court refused to give any effect to the position that appellee's business had been built up and was being maintained by fraudulent misrepresentations. It was that, even if this was true, it was not against appellee's right to relief. But, before considering just how this was attempted to be made out, it is to be noted that this court has heretofore held that a court of equity should not protect against injury or invasion a business of selling a medicine which has been built up and is being maintained by fraudulent misrepresentations as to its ingredients, and this on the ground that a suitor in equity should come into court with clean hands. This it did in the case of Fig Syrup Co. v. Stearns, 73 Fed. 812, 20 C. C. A. 22, 33 L. R. A. 56. That was a suit by a manufacturer of a liquid laxative medicine, to which he gave the name

"Syrup of Figs" or "Fig Syrup," to enjoin another from interfering with his business by unfair competition. It was held that it was not entitled to the injunction because it falsely and fraudulently represented to the public that the juice of the fig was the important medicinal agent in the composition of the medicine, when, in fact, just a suspicion of fig juice was put into it not for the purpose of affecting its medicinal character or even its flavor, but merely to give a weak support to the statement that the article sold was syrup of figs, and the laxative agent in it was senna. This was so held notwithstanding there was much evidence introduced showing that it was a very useful medicine and prescribed by physicians of high standing. Judge Taft said:

"This is a fraud upon the public. It is true, it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit."

The case was subsequently approved and followed by the Supreme Court in the case of Worden v. California Fig Syrup Co., 187 U. S. 519, 23 Sup. Ct. 161, 47 L. Ed. 282.

The case we have here comes clearly within the holding in these two cases. The ground upon which the lower court held that the fact that appellee's business may have been built up and grown out of fraudulent misrepresentations to the public was not in the way of its right to the relief it sought was substantially this: A dismissal of the bill for that reason would aid the appellants in practicing the very same fraud upon the public that it is claimed that appellee is practicing, and would therefore put the court in an inconsistent position. The way in which it was thought that such a dismissal would have this effect was that it would amount to an adjudication that the appellant Memphis Keeley Institute had a valid subsisting contract with appellee, and thereby enable it to obtain remedies from appellee to administer to patients. But such a dismissal could not possibly have any such effect. It would not be an adjudication as to the rights of the parties as between themselves. It would be a direct refusal to make any such adjudication. And a court of equity will not aid a plaintiff who comes before it with unclean hands, even though by not doing so it deprives itself of the opportunity to prevent the defendant from doing the unclean thing, and thus may be said to indirectly aid the defendant in so doing. In the Fig Syrup Case the defendant was taking plaintiff's business by unfair competition, and was practicing the very same fraud on the public, because of which the court refused to aid plaintiff, yet the court did not stop him from so doing by granting plaintiff injunctive relief, but turned the plaintiff out of court.

Counsel for appellee cites and relies on a number of cases which hold that a court of equity will not turn out of court an unclean man, or a man who has done an unclean thing which has no relation to the thing which it is sought to have protected by its decree. But such decisions have no application here. The uncleanness here has to do with the very thing which the court is asked to protect and prevent from injury and invasion by appellants. The appellee claims to have

the right to administer and to sell for administration, in the state of Tennessee, its Keeley remedies, and that appellants are injuring that right and invading its business by asserting that it has the right to and is in fact administering such remedies at the Memphis Institute, and asks the court to protect its right and business from such injury and invasion by enjoining appellants from so claiming, canceling the contracts, and requiring a delivery up of the remedies held by appellant. But that business—the very thing which the court is asked to protect—is, as we have held, unclean in the particular stated. Hence it is a clear case within the rule that a court of equity will not aid one who comes before it with unclean hands.

It should be noted, however, though it is not relied on either by the lower court or by appellee's counsel here, that the fact in regard to appellee's fraudulent misrepresentations, as we have adjudged it, was not set up by appellants in their answer as a defense to the suit. This presents the question whether, in the absence of its having been so presented, any effect can be given to it. It seems to be well settled that such a matter need not be pleaded as a defense to the suit. If it appears from the record, it will be given effect notwithstanding it has not been pleaded. The theory upon which this is done is that in reality it is not a matter of defense. It is given effect to, not on defendant's account, but because of the public. As said by the Supreme Court of Tennessee in the case of Simmons Med. Co. v. Drug Co., 93 Tenn. 99, 23 S. W. 169:

"It is not strictly speaking a defense at all, but rather an interposition by the court to discourage fraud and wrong upon the public."

The following decisions lend support to and uphold this doctrine: Fetridge v. Wells, 13 How. Prac. (N. Y.) 385; Cardoze v. Swift, 113 Mass. 250; Dunham v. Presby, 120 Mass. 285; Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Teoli v. Nordrill, 23 R. I. 87, 49 Atl. 489; Mass. Nat. Bank v. Shine, 163 N. Y. 360, 57 N. E. 611.

In view of the holding that we have made as to this matter, it is not necessary that we consider any other question raised and discussed on the appeal.

We feel constrained, therefore, to adjudge that the decree of the lower court be reversed, and the cause remanded thereto, with directions to dismiss the bill.

CENTRAL OF GEORGIA RY. CO. v. McLENDON et al.

(Circuit Court, N. D. Georgia. August 31, 1907.)

INJUNCTION—RESTRAINING ORDER—DISCRETION—NOTICE.

A temporary restraining order will not be granted ex parte to restrain the putting into effect of a railroad rate established by a state commission under authority given by the Constitution and laws of the state after due notice and a hearing, when the commission's order by its terms was not to take effect for nearly three months after its adoption, and no application for a restraining order was made until within two days of the expiration of such time.

In Equity. Bill for injunction.

T. M. Cunningham and Mr. Steiner, for complainants.

SHELBY, Circuit Judge. The maximum rate per mile for passengers charged by the complainant company is three cents. The Georgia Railroad Commission reduced the rate to 2½ cents as to intrastate passengers. This bill is filed to enjoin, vacate, and annul the order of the Commission on the ground that it violates the provisions of the fifth and fourteenth amendments of the Constitution relating to due process and the equal protection of the laws. The case is not now before me on its merits, nor is the motion for an injunction pendente lite now before me for decision. It is not intended to intimate any opinion on questions not yet reached. The bill is presented to me to obtain an order setting the motion and prayer for an injunction pendente lite down for hearing and directing notice to be given to the defendants. An order to that effect will be made.

I am also asked to grant a temporary restraining order enjoining the operation and enforcement of the rate established by the Georgia Railroad Commission till the hearing of the motion for the injunction pendente lite. The following is the statute authorizing such action:

"Temporary Restraining Orders.—Whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge." Rev. St. § 718 [U. S. Comp. St. 1901, p. 580].

The granting of such temporary restraining order, like the granting of an injunction, is within the sound judicial discretion of the court. No universal rule can be announced to govern court or judge in all cases, but each case must be decided on its own facts. The Constitution and laws of Georgia confer on the Railroad Commission the authority to reduce intrastate passenger rates. It made the order in question June 7, 1907, after notice to the complainant railroad company and after hearing evidence. The order provided that it should not go into effect till September 2, 1907. This delay gave the complainant company 2 months and 26 days in which to apply for an injunction before the rate prescribed became effective. The bill was not presented till yesterday, August 30, 1907, only two days—and one of them Sunday—before the rate prescribed was to take effect. The defendants have had no notice that the application for the temporary restraining order would be made. If resort to the court had been made within a reasonable time after the fixing of the rate on June 7, 1907, there would have been no occasion for asking for an ex parte restraining order. The motion for an injunction pendente lite, if made within a reasonable time after the action of the Railroad Commission, could have been heard contradictorily after a timely notice to the defendants, before the Commission's order became effective. The Georgia Railroad Commissioners are officers charged with the performance of duties. The order or

finding fixing the lower rate as reasonable recites that it was made "after a careful, tedious, and painstaking consideration of the evidence and argument of the complainant and respondents, and a laborious investigation of the subject." There is at least a prima facie presumption that it acted in good faith in fixing the rate, and that it is not confiscatory. It is, of course, well settled that the action of the Commission is subject to judicial review, but there is no presumption to begin with that it is invalid. On this ex parte hearing, there is nothing before me on the question of fact as to whether the rate fixed by the Commission is confiscatory or not, except the action of the Commission in fixing the lower rate and the sworn bill of the complainant, which contains figures and estimates which sustain the complainant's contentions. The bill alone is pitted against the Commission's decision. The case is presented in this attitude on the eve of the rates taking effect, when it could have been presented to the court at a time when no injunctive order without notice and a hearing of both sides would have been necessary.

For the purpose of this motion, considering the time at which it is made and the circumstances I have mentioned, I cannot hold that the affidavits attached to the bill outweigh the prima facie presumption that the action of the Georgia Railroad Commission is valid.

I am of opinion that the motion for a temporary restraining order should be overruled; and it is so ordered.

KELSEY HEATING CO. v. JAMES SPEAR STOVE & HEATING CO.

(Circuit Court, E. D. Pennsylvania. August 31, 1907.)

No. 32. April Term, 1905.

1. PATENTS—INVENTIVE ADVANCE—APPROVAL BY PATENT OFFICE.
   Where none of the devices relied upon by the defendants is a direct anticipation of the patented combination in suit—none having all of its features, and those which are made use of in some not being of exactly the same character, or put together in exactly the same way—although the inventive advance shown may not be large, the Patent Office having put the seal of its approval upon the invention, it will not be set aside.

2. SAME—INVENTION—APPROPRIATION BY DEFENDANT OF ESSENTIAL FEATURES.
   Where the defendants, instead of devising something for themselves, or taking up with some of the many forms open to them, have been so attracted by the complainants' device as to appropriate all its essential features, which they have copied slavishly, even to the name under which it is sold, affirming, as they thus do, in the most pronounced way possible to its superior merits and their own inability to do better, they cannot well complain if the inventive originality which is claimed for it is held to sufficiently appear.

3. PATENTS—INFRINGEMENT—CHANGE OF FORM.
   The mere splitting up or multiplying of parts of a patented structure, the functions remaining the same, does not avoid infringement.
   [Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 377.]

4. SAME—CONSTRUCTION OF CLAIMS—USE OF REFERENCE LETTERS.
   The use in a claim of a patent of letters of reference to the drawings does not necessarily limit the inventor to the exact form or configuration

of parts which is thus portrayed and described, without regard to possible equivalents. It may or it may not, according to circumstances. It is, after all, a matter of construction, in which, while a reference by letters to the drawings and specifications may be regarded, as a rule, as involving a greater particularity of description than without them, the real scope of the invention is nevertheless to be considered and given due weight. No doubt there are cases when, by reason of the limitations imposed by the prior art, it is necessary, in order to distinguish and save the invention, to confine it to a certain form or arrangement of parts, which the use of reference letters may serve to do; but, where no such necessity exists, the patent is to be taken as a whole, and effect given to the invention as it is there disclosed and claimed, in which the reference to the drawings merely goes in with the rest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 243.]

5. SAME.

In a patent for a combination of elements in a hot-air furnace having vertical flues, with flanges on the upper end for supporting the crown sheet, the fact that, as shown in the drawings and referred to by letters in the claims, such flanges are on the outside of the flue, does not limit the inventor to such form, where it is not an essential feature of the invention, and their transfer to the interior of the flue, where they perform the same function, is a change of form merely, which does not avoid infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 243.]

6. SAME—HOT-AIR FURNACE.

The Kelsey patent, No. 476,230, for a hot-air furnace, while for a combination of old elements, and not of broad scope, was not anticipated and discloses invention; also *held* infringed.

In Equity. Suit for infringement of letters patent No. 476,230 for a hot-air furnace issued to W. W. Kelsey May 31, 1892. Also charging unfair competition. On final hearing.

Howard P. Denison, for complainants.

Charles H. Howson (Charles Howson, of counsel), for defendants.

ARCHBALD, District Judge.[1] The patent in suit is for a hot-air furnace; the claim relied on being as follows:

"5. The combustion-chamber, C, composed of the bottom plate, a, provided with the flanges, a', a', and apertures, the shell, e, and flues, f, f, seated on said bottom plate, said flues being formed with the shoulders, f', the crown-sheet, g, resting on said shoulders, and the rods, l, extending through the aforesaid flues and tying thereto the aforesaid bottom plate and crown-sheet, substantially as described and shown."

The defendants challenge the validity of the invention on the ground of the want of both novelty and invention; or, if that is not sustained, they contend that it is so narrowed and limited by the prior art, as well as by the terms of the patent, that they do not infringe upon it.

According to the specifications, the invention is said to consist "in an improved construction of the combustion-chamber, having air-flues extending vertically through it and tie-rods extending longitudinally through said flues and tying thereto the bottom plate and crown-sheet of the combustion-chamber, said arrangement protecting the tie-rods from soot and rust and obviating obstructions in cleaning the interior of the combustion-chamber."

[1] Specially assigned.

Further explaining this by reference to the accompanying diagrams, it is said:

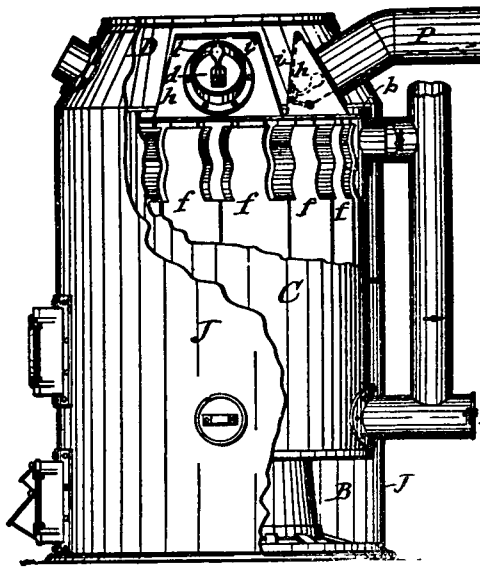


Fig. 1

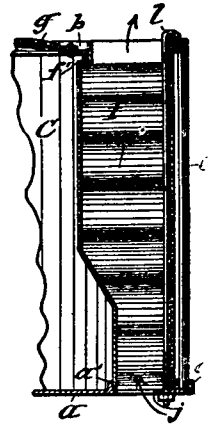


Fig. 2

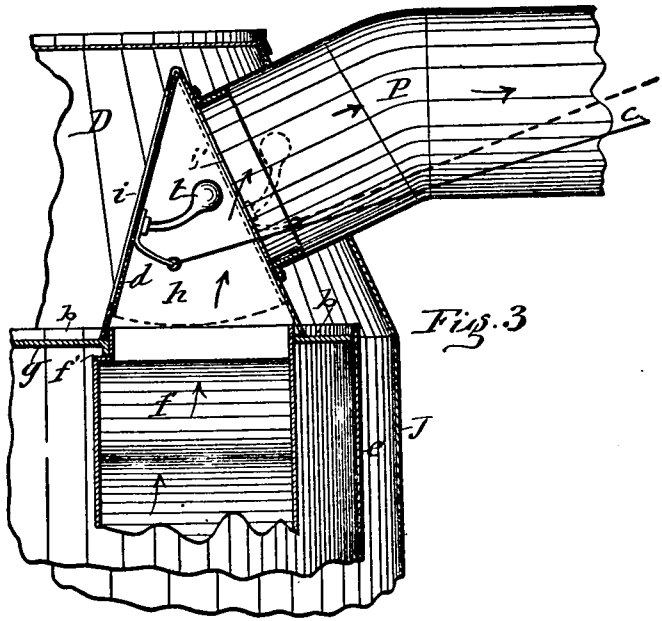


Fig. 3

"The combustion-chamber is composed of the bottom plate, a, provided with apertures, from which extend the flues, f, f, f, which are mounted on said bottom plate and held in place by flanges, a', a', on the plate and embracing the bases of the flues, as shown in Fig. 2 of the drawing. Upon the bottom plate is seated the shell, e, which is likewise held in place by a circumferential flange a' on said plate. The flues, f, f, are formed with the shoulders, f', a short distance from the upper ends thereof, and upon said shoulders rests the crown-sheet, g, which is also provided with openings, through which the upper ends of the flues, f, f, protrude. Said flues extend above the crown-sheet and terminate within the dome, D, and the shell, e, also extends above the crown-sheet, and thereby forms upon the top of the combustion-chamber a bed, b, for sand, which serves to pack all the joints on the crown-sheet. The bottom plate, a, and crown-sheet, g, are tied to the air-flues, f, f, by means of rods, l, which extend longitudinally through the interior of the air-flues and pass with their lower ends through ears, j, on the bottom plate and are provided with nuts under said ears, as shown in Fig. 2 of the drawings. The upper ends of the rods are bent outward and made to bear on the crown-sheet. Said rods are thus protected from soot and rust and obviate obstructions in cleaning the interior of the combustion-chamber."

A careful consideration of the prior art discloses nothing which negatives the novelty of the device so described and claimed. It is true that the different elements of it are not new. There is no novelty for instance in a combustion-chamber made up of top and bottom plates, with an encasing shell or jacket, and vertical flues with apertures above and below, extending through it. This is to be found in the Winchester (1869), the Bonnell (1871), the Guettermann (1877), the Godley (1886), and the earlier Kelsey (1889) furnaces, in the last three of which also the flues are held in place by flanges on the bottom plate over which they fit; while in the Guettermann, the Jaques (1878), the Godley, and the Kelsey the flues are provided with shoulders to support the top plate, these shoulders in the Jaques and the Kelsey being external and the flues protruding up through the top plate. In the Jaques, also, the space between the raised edge of the top plate and the projecting ends of the flues is utilized as a bed to be packed with sand or cement so as to make gas-tight joints, a feature, which so far as it enters into the case in hand, is thus not new. Neither is there anything novel in tie-rods, fastening together upper and lower plates; which are shown in the Bryent (1847), the Tillman (1872), the Hemmich (1875), the Boynton (1876), the Guettermann, the Godley, and the Heim (1888). In all of these, moreover, they are located in hot-air flues, or away from the space given up to fire and smoke, and in the Tillman, also, the advantage of having them so removed and protected against the action of the products of combustion is expressly claimed. It may be that the Tillman is a somewhat different type of furnace or heater, but tie-rods are tie-rods, wherever they are, and the novelty of locating them away from the reach of fire and smoke cannot be maintained upon any such supposed distinction.

As already intimated, however, in none of the devices mentioned is a direct anticipation of the present combination to be found. None has all its features, and in none are those, which are made use of, of exactly the same character or put together in just the same way. The most that can be said is that there is a similarity of type; but it does not go far. It is said that no inventive advance is shown, and it must be confessed that it is not large. But the Patent Office, whether the

Tillman patent was before it or not, has put the seal of its approval upon the invention, and it is not to be lightly set aside. The defendants also, prompted as it is charged by a former employé, instead of devising something for themselves, or taking up with one of the other many forms open to them, have been so attracted by the complainants' heater as to appropriate all its essential features, which they have copied slavishly, even to the name—"warm-air generator"—under which it is sold. Affirming as they thus do, in the most pronounced way possible, to its superior merits and their own inability to do better, they cannot well complain if the inventive originality which is claimed for it is held to sufficiently appear.

Nor is the question of infringement doubtful. As just stated, except in one small particular, the heater which the defendants were putting out at the time the bill was filed was a complete copy of that of the complainants. Since then a slight change has been made, the rods which tie together the top and bottom plates, against the ends of the flues, instead of being integral, and extending the full length of the flues, are divided up, and two short bolts substituted, which tie to lugs at either end. But the mere splitting up or multiplying of parts, the function remaining the same, does not escape infringement, and that is the case here. The rods still serve as effectively as ever to draw the top and bottom plates against the ends of the flues, tying the structure firmly together which is the point in view; and they are still located within the air flues as before, being thereby protected against soot and rust and leaving the conbustion-chamber unobstructed for cleaning. The equivalence of the two constructions is so complete and the attempted evasion so manifest that it would be a reflection upon ordinary intelligence to have it succeed.

But another distinction is sought to be made. Both in the form of heater just considered, as well as the one which the defendants were apprehended in making at the time of filing the bill, the upper ends of the flues are provided with interior shoulders for the crown plate to rest upon, the same as in the Guettermann furnace, not to say others; while in the complainants' heater they are on the outside, the ends of the flues protruding above them, and affording opportunity for a cement or sand pack, to tighten the joints, as in the Jaques. But, so far as the claim in suit is concerned, the sand pack is an extraneous incident, which being specially provided for in the fourth claim is not to be implied here. Boyer v. Keller Tool Co., 127 Fed. 130, 62 C. C. A. 244. It is said, however, that the inventor has expressly declared for an exterior shoulder by the reference letter by which it is designated in the claim. The flues are not described, as it is pointed out, as provided generally with shoulders on which the crown sheet is to rest, which would permit of either kind; but as being formed "with the shoulder, f," the drawings of the patent, as well as the specifications where this reference is explained, being thus written into the claim. But the use of a reference letter in this way does not necessarily limit the inventor to the exact form or configuration of parts which is thus portrayed and described, without regard to possible equivalents thereto. It may, or it may not, according to circumstances, as the authorities abundantly show. Reed v. Chase (C. C.) 25 Fed. 94; Delemater

v. Heath, 58 Fed. 414, 7 C. C. A. 279; Campbell Printing Press v. Marden (C. C.) 64 Fed. 782; McCormick Harvesting Machine Co. v. Aultman, 69 Fed. 371, 393, 16 C. C. A. 259; Muller v. Tool Co., 77 Fed. 621, 23 C. C. A. 357; Sprinkler Co. v. Koehler, 82 Fed. 428, 431, 27 C. C. A. 200; Ross Mfg. Co. v. Randall, 104 Fed. 355, 43 C. C. A. 578; National Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 715, 45 C. C. A. 544. Nor are the cases which are sometimes cited to the contrary (Weir v. Morden, 125 U. S. 98, 8 Sup. Ct. 869, 31 L. Ed. 645; Hendy v. Miners' Iron Works, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207; Lehigh Valley R. R. v. Kearney, 158 U. S. 461, 469, 5 Sup. Ct. 871, 39 L. Ed. 1055), to be differently understood. It is after all a matter of construction, in which, while a reference by letters to the drawings and specifications may be regarded, as a rule, as involving a greater particularity of description than without, the real scope of the invention is nevertheless to be considered and given due weight. No doubt there are cases where, by reason of the limitations imposed by the prior art, it is necessary, in order to distinguish and save the invention, to confine it to a certain form or arrangement of parts, which the use of reference letters may effectively serve to do. But where no such necessity exists, the patent is to be taken as a whole, and effect given to the invention as it is there disclosed and claimed, in which the reference to the drawings merely goes in with the rest.

In the present instance, outside of allowing the ends of the flues to protrude above the crown plate so as to provide a bed for the cement or sand pack—which, as already stated, is a mere incident, if, indeed, it at all enters into the form of device in suit—it is of no concern whether the shoulders are outside or inside, the invention consisting in the improved construction of the combustion-chamber and the manner of assembling its different parts. Nor is any limit in this respect imposed by the prior art. The modification from exterior to interior shoulders is one of form, pure and simple, and not of substance, serving no useful purpose, and effecting no change in results. The defendants may thereby forego the opportunity for a sand pack on top of the crown sheet, but the surrender of an incidental and unclaimed advantage in this way, the essential features of the invention being retained, will not enable them to escape. It is their own concern if they have not got all the good out of the device that they might.

The case having been thus disposed of in favor of the complainants, upon the question of infringement, it is not necessary to consider the charge of unfair competition which is also made, nor whether it is consistent with the rest.

Let a decree we drawn, in the usual form, sustaining the patent and finding infringement, with costs.

GORMLEY & JEFFERY TIRE CO. v. PENNSYLVANIA RUBBER CO.

(Circuit Court, W. D. Pennsylvania. September 9, 1907.)

No. 5, May Term, 1905.

PATENTS—INFRINGEMENT—WHEEL TIRES.

The Jeffery patents, Nos. 454,115, 466,565, 558,956, and 523,314, each for a wheel tire, and covering improvements in pneumatic tires, construed, and *held* not infringed.

In Equity. On final hearing.

Ernest Hopkinson (Livingston Gifford, of counsel), for complainant.

Christy & Christy (George H. Christy and J. C. Sturgeon, of counsel), for respondent.

BUFFINGTON, Circuit Judge. This is a bill in equity, brought by the Gormley & Jeffery Tire Company against the Pennsylvania Rubber Company, charging infringement by it, in the manufacture of pneumatic rubber tires for automobiles, of four patents granted to Thomas B. Jeffery and now owned by complainant. The first patent is No. 454,115, issued July 16, 1891, for a wheel tire, claims 1, 2, 3, 4, 5, and 6 of which are alleged to be infringed. The respondent contends the patent is invalid and denies infringement. All the patents here involved antedated the automobile art and contemplated use on bicycles. In pneumatic wheels for vehicles there is an inner inflatable elastic tube. This in turn is protected against external injury and internal overinflation by a flexible outer sheath. The patents all concern the engagement of such external sheath to the tire of the vehicle. This particular one recognized the prior conjoint use of these two devices as follows:

"This invention is designed to provide improved means for protecting a rubber wheel tire, and is particularly designed and adapted for an inflation-tire; that is to say, a tire having a core composed of an elastically-expansible tube, which is inflated by air or gas and distended thereby to some extent, the air or gas being under such tension that but for a restraining or inclosing sheath such core would be liable to burst."

As the patentee does not specifically aver what his "improved means" or particular invention was, we turn to the description of his device for light in that regard. Now a study of such description and the claims based thereon satisfies us that the improvement which Jeffery disclosed was a double or intermeshing hook connection of sheath and tire edges. Thus he says, "The rim, A, is provided with hooked edges, a', a'," and the figure referred to shows hooks on the rim, doubled back, U-shaped, on the tire, so as to form recesses and permit engagement in such recesses of corresponding hook point on the hooks of the sheath. For these provision is made: "The tire-sheath, C, is provided with correspondingly hooked edges, C', C'." In the specification alone the word "hook," or "hooked," is found some 17 times, and other than double-hooked connection no other method is stated or suggested. If the patentee or his device contemplated the use of any other means or form of engagement, he did not disclose it to the public. The only variation suggested was the minor detail of making the hooks bend in or out. "On some accounts," says the patentee, "the hooks on

the rim are preferably turned outward, chiefly because the center of the body or inflatable core, B, is thereby rendered free from the irregularity which the hooks form when they are turned inward. On the other hand, the liability of the sheath-hooks to be pulled out from the rim-hooks by the expansive tendency of the core when inflated is somewhat less when the hooks are turned inward; but practically the two methods are about equally desirable. In either case it should be observed that the hook is open toward the axis, and it is preferably approximately in the direction of a tangent to the inflatable core, so that the expansible tendency of the core will tend to draw the hooks into close engagement." This combination of sheath and tire in the various modifications of this double-hook engagement constitutes the claims in question and the hooks on both, in some form, are elements of every claim, of which the first, for brevity's sake, will serve to illustrate, viz.:

"In combination with the rim having recesses open toward the axis of the wheel, the tire sheath having its edges reversed and engaged in such recesses, and the elastic expansible core between the rim and sheath, substantially as set forth."

Now, in the light of this specification, we are clear the respondent's tire does not infringe. The respondent uses other means to hold its tire in place, and its method is not disclosed or suggested in the patent in suit. If the disclosure of that patent comprised all the instruction the tire maker of to-day possessed, it is evident the art would not teach the method followed by both respondent and complainant in the manufacture of a modern automobile tire. The patentee showed a hook pure and simple. His hook was such that the hooked edges of the rim "may be turned inward or outward." His are genuine hooks, so shaped that, by virtue of the form and use of their recesses, increase of disruptive force, whether the hook or the rim is bent outward or inward, lessens the possibility of detachment of the interlocked edges. On the other hand, if the edge of respondent's rim is turned outward, no pneumatic connection can be made with a sheath, showing that the connections used in the two methods are essentially different. Respondent's device has no hook open towards the axis, nor one in the direction of a tangent to the inflatable core. While air pressure increases the adhesion of its engaging surfaces, yet its method of doing it is not the process of increasing engagement by the catch ends of the patentee's hooks mutually interlocked in holding recesses. In our judgment it would be a miscarriage of the patent system to so construe this Jeffrey patent with its specific form of hook connection as to make it cover respondent's device, which is so different from the hook of the patent that even the complainant who owns that patent uses the same method, and not the hooked engagement of the patent. Indeed, to so construe it would be to retard, not to stimulate, inventive advance.

The second patent is No. 558,956, issued April 28, 1896, for a wheel tire, claims 5 and 10 of which are alleged to be infringed. Respondent defends on the ground of noninfringement. We are of opinion the defense is sustained. The subject-matter of this patent, its late date in the art, and the close differentiations required to obtain the narrowly

limited claims in question, indicate the patent was restricted to a comparatively narrow field of improvement. The specification states:

"This invention relates to tires having inflatable cores; and it consists in the character and construction of the inclosing sheath and the mode of securing the same to the rim."

The character and construction of the proposed sheath are specifically shown. No novelty was suggested in the rim. Its construction for the broader type of the device is:

"The rim is a hollow rim made in a familiar manner from tubing, * * * having the outer side transversely concave to form a seat for the tire."

A special form is suggested:

"For the purpose of adapting it to receive my improved tire, the rim is preferably formed with the peripheral channels, a', a', in the outer or concave wall; but these are not essential to my invention, considered in its broadest phase. Their use, when present, will appear from the further description."

The lateral portions of the sheath the patentee made of folded canvas or other web, joined at the folded edges to thread or rubber of sufficient thickness to stand wear and "sufficient elastic flexibility to adapt it to yield with the core, and having also tensile elasticity, so that the sheath which comprises it as the middle section is transversely extensible to a slight degree." The purpose of this extensibility was to adapt the sheath for use with either an inflatable or a a nonextensible core. At the outer end of the folded canvas hooks or buttons were placed, and in the rim at corresponding distances were put engaging eyelet holes or button; "said eyelet-holes or buttonholes being formed in the channels, a', when the rim is made with such channels." When the core is inflated, "its tension being exerted in all directions tends to draw the hooks securely into the respective holes in the rim and effectually prevents dislodgment." Of this button connection, which the patentee evidently regarded as the substantial feature, "in the character and construction of the inclosing sheath and the mode of securing the same to the rim," he says:

"The use of the buttons or hooks, in lieu of any continuous fastening, affords the advantage of detachability for short distances without detaching the entire edge or even any large section of the edge, and, as compared with familiar devices, such as continuous lacing, it affords a similar advantage that the fastening need not even be relaxed or slackened anywhere except at a point where it is desired to completely detach in order to get full access to the core."

To make the fastening still more secure, the patentee suggested an additional element, which, it will be noted, forms an element in the claims here in controversy. It is thus described:

"It is not a necessity that the lateral pieces, C''—that is, the canvas or web sides—terminate at their lines of reinforcement or attachment to the rim, and, on the contrary, one or both of them might be extended farther under the inflatable core, so as to rest between said core and the rim and form a lining for the seat of the core in the rim; and such extension adapts the sheath to be held more firmly in its place by the inflation of the core, and such inflation, holding the inwardly-extended edges of the sheath firmly seated between the core and the rim, keeps the beads formed by the cord, c''—an alternative construction of a strengthening cord placed in the folded edges of the web—in the

grooves or channels, a', of the rim, and makes them assist materially in holding the sheath from spreading when the core is inflated."

The limited side type is described in claim 2, which reads as follows:

"The rim and an inflatable core, combined with an envelop or sheath for the core, parted under the core and fastened to the rim at two peripheral lines, one on each side of the plane or parting, and detachable from the rim at one of the said lines of fastening, said sheath having its lateral portions flexible, but not laterally extensible, and its middle portion, including the thread, elastically extensible, substantially as set forth."

And the extended side in claim 5, which is for:

"The rim and an inflatable core combined with an envelop comprising a tread of cushioning substance and lateral portions composed of textile fabric which are joined to the rim at two peripheral lines, and extend inwardly from said lines underneath the core between the same and the rim in the plane of the pressure radial with respect to the wheel, which is experienced by the tread and exerted by the inflation of the core, whereby the tension of the air in the core due to inflation and to the pressure of the load operates on said inwardly-extending fabric portions of the sheath to hold them seated in the rim, substantially as set forth."

And in claim 10, which is for:

"In combination with the rim having peripheral grooves in the tire-seat, the inflatable core and envelop for the same rifted at the inner side to admit the core and permit its removal, and comprising a tread of cushioning substance, and lateral portions which are provided respectively with beads adapted to engage the grooves of the rim, and extending inward from said beads to the rift, whereby the inflation of the core presses such inwardly-extending marginal portions of the sheath against the rim between the planes of the beads, substantially as set forth."

In the respondent's device, however, the sheath ends with its two peripheral side connections with the rim. No theory or ingenious contention can change that fact; and fact, not theory, is the test of infringement. Accordingly we hold respondent does not infringe.

The third patent is No. 466,565, issued January 5, 1892, for a wheel tire, claim 7 of which is alleged to be infringed. The defense is noninfringement. We think the defense is sustained. The patent requires no detailed discussion. It is a device for fastening a tire sheath to a rim by means of hooks, five different modifications of which are shown in the drawings. The element of the seventh claim, "the endless seamless tire-sheath of rubber or like cushioning substance circumferentially rifted at the inner side and joined to both edges of the rim, * * * substantially as set forth," is the hook connection of the specification. The respondent, using no hooks to make its connection, does not infringe.

The fourth patent is No. 523,314, issued July 17, 1894, for a wheel tire, of which claims 1, 2, and 3 are alleged to be infringed. The defense is noninfringement. As pertinent to the present case the patent was for a tire provided with an auxiliary wedging device. This consists of a circular ribbed ring, preferably of soft rubber, cemented to the inner periphery of the tube. "The use of the ring, D, as a base for the core, is a convenient means for rendering the compression or 'fullness' of the core uniform throughout its circumference; said core and ring being secured together and cemented before they are

put into the sheath, and the 'fullness' being in that manner easily distributed equally." The function of these parts is described as follows:

"If the tire cavity is directly inflated, the air pressure produced therein will tend to seat the ring, D, in the rift of the tire, and force its rib, D', thereinto, * * * and when the tire is collapsed, so that it may be readily squeezed together, such manipulation will withdraw the ring and its rib, D', from the rift, and permit the tire to be disengaged readily from the ring."

This ring, it will be noted, is an element of each of the claims in question. Now the respondent has neither ring nor rib on its core, but is alleged to infringe by the use of small butterfly bolts placed at four quadrant points on the rim. Such bolt consists of a piece of stiff metal about two inches long, with upbent sides. It is clamped to the rim by a rigidly fixed bolt and nut, with a set screw, and serves to keep the sheath in place on the rim, should the core become deflated. The bolt is not affected by either tire inflation or deflation. It is thus clear that its function and structure are wholly diverse from the ringed rib of complainant's patent, and perform a wholly different function.

Holding, as we do, that no infringement of any of the patents is shown, this bill will be dismissed on presentation of a decree.

INTERNATIONAL TEXT-BOOK CO. v. INHABITANTS OF CITY OF AUBURN.

(Circuit Court, D. Maine. September 3, 1907.)

No. 611.

COMMERCE—INTERSTATE COMMERCE—VALIDITY OF MUNICIPAL REGULATION.

A city ordinance merely providing that "no person shall distribute in any public street or from any buildings handbills, cards, circulars or papers of any description except newspapers," reasonably construed and enforced by the officers as a police regulation only, to protect people on the streets from annoyance, is not unlawful as an interference with interstate commerce as against a concern doing business in another state and desiring to distribute on the public streets circulars advertising such business.

[Ed. Note.—State laws interfering with interstate commerce, see note to McCanna & Fraser Co. v. Citizens' Trust & Surety Co., 24 C. C. A. 21.]

In Equity. On motion for preliminary injunction.

D. C. Harrington and Emery G. Wilson, for complainant.
Geo. C. Wing, Jr., for defendant.

PUTNAM, Circuit Judge. This is a motion for an interlocutory injunction. The complainant was incorporated in Pennsylvania, and is engaged in conducting a system of instruction by correspondence, which involves among other things the distribution of text-books and various educational outfits from Scranton, in that state, to points in that state and other states. The complainant claims that this is interstate commerce, a definition which may well be doubted. We may well question whether the mere occupation of giving instruction can

be commerce, and whether, therefore, as the main purpose must be classified as noncommercial, the incidents thereof must not also be classified in the same way.

The bill complains of an ordinance of the city of Auburn in the following terms:

"No person shall distribute in any public street, or from any buildings, handbills, cards, circulars, or papers of any description except newspapers."

This ordinance clearly is not intended to interfere with any fair method of soliciting the purchase of merchandise involved in interstate commerce which decisions of the Supreme Court protect, but rather with annoying methods of incumbering the streets, and of interfering with persons traveling therein. The words "from any buildings" are clearly to be held as relating to the distribution of circulars from a building into the public streets, and the whole ordinance must be construed to be of the character which we have described.

The affidavits show that, on an application of the agent of the complainant to the city marshal of Auburn, the latter put on the ordinance a fair construction, to the effect that the complainant must not stop people on the street for the purpose of forcing on them its circulars, and the agent was told by him that such was the only interference the complainant would suffer. It is true that the marshal forbade the agent from handing circulars to people in any way; but, taking the whole conversation together, it is evident that everything said related to a general distribution of such things. There is nothing to show that the ordinance intended to interfere with the distribution of circulars to people asking for them either on the streets or at any office of the complainant, or their distribution in an orderly manner essential to the right of solicitation which the Supreme Court has declared to be a proper incident of interstate commerce.

Moreover, there is nothing to show that any discrimination whatever against the complainant corporation, or against nonresidents, was attempted or intended. Under these circumstances, the case as presented to us shows only an attempt on the part of the city of Auburn to exercise its police powers for the purpose of regulating its streets and protecting from annoyance persons traveling thereon.

The motion for an interlocutory injunction is denied.

In re KETTERER MFG. CO.

(District Court, M. D. Pennsylvania. August 23, 1907.)

No. 964, in Bankruptcy.

BANKRUPTCY—ELECTION OF TRUSTEE—VALIDITY.

Exceptions to the election of a trustee in bankruptcy, which was approved by the referee, overruled, where the election was by a large majority of the creditors in number and amount of claims, and the only substantial objection was that it was brought about by a conspiracy between the attorney representing a majority of the creditors and a former officer of the bankrupt corporation to secure control of the property, but the trustee chosen was apparently a competent and disinterested person.

In Bankruptcy. On certificate from J. R. Vandersloot, referee.

Sidney E. Smith and C. E. Ehrehart, for exceptions.
C. J. Delone, opposed.

ARCHBALD, District Judge. There have been three elections of a trustee in this case. One the referee set aside, another was set aside by the court, and the third, having been approved by the referee, comes up now upon exceptions. Sixty-five claims which had been allowed by the referee were voted at the last meeting of creditors, of which 49 aggregating some $18,000, were cast for R. L. Ehrhart, and 16, aggregating $7,786, for Paul Winebrenner. Mr. Ehrhart being declared elected. Of those voting for Mr. Ehrhart, 33, however, were excepted to, leaving 16 that were not, which together amount to but $1,550; so that, if the exceptions are sustained, the election must be declared invalid, neither party commanding the requisite majority. But the objections to some of the principal claims[1] are so obviously without substance that by no possibility can they prevail. And these added to those as to which there is no question, without stopping to consider others, gives such a decided preponderance in favor of the trustee now selected—25 in number, and over $16,000 in amount—that, unless it is made plain that the selection will be prejudicial to the best interests of those concerned, there should be no further delay in confirming it.

It is charged that Mr. Ehrhart is chosen by means of claims represented by Mr. Delone which have come to him through a circular letter sent out by Mr. Hopkins in which they were solicited; he and Mr. Hopkins having conspired together, as it is said, to secure the control of the company's property, the estate, if judiciously administered, being sufficient to pay all creditors and leave something over for stockholders. No doubt Mr. Delone and Mr. Hopkins are acting together; and it must be confessed that Mr. Hopkins' management of the affairs of the company which brought about its present difficulties is seriously discredited. It is also true that, after Mr. Hopkins was deposed, he was instrumental in having a bill filed against the company by which it was put into the hands of a friendly receiver in the state courts, which forced the present proceedings in bankruptcy. And in the issues made in this court between the majority and minority stockholders the court, being compelled to elect, has so far felt called upon to favor the majority. But in the selection of a trustee the law makes paramount the wishes of creditors, within certain limits, and Mr. Hopkins certainly enjoys the confidence of a decided majority of these, proved and unproved, whatever may be the case among his fellow stockholders. The trustee now chosen also is an apparently competent and indifferent party, who has been approved by the referee who is better advised with regard to the local conditions than the court can

[1] Such as Sullivan & Sons, $2,259.18, Edward Stinson Manufacturing Company, $1,074.97, Hoopes Bros. & Darlington, $1,561.34, H. N. Gitt, $2,002, James H. Cranwell, $2,802.52, J. Gibson McIlvaine Company, $1,325.35, E. R. Merrill Spring Company, $2,386.60, Union Forging Company, $646.02, and C. J. Delone, $750.

be. It is said that he is a client of Mr. Delone, and will be influenced by him; but that is an undue assumption. It is also objected that the claims represented by Mr. Delone, by which the election was carried, were improperly solicited, as before stated. But enough to elect were in Mr. Delone's hands before the proceedings in bankruptcy were instituted. The only other thing is the charge of conspiracy between Mr. Delone and Mr. Hopkins and that the trustee is chosen to represent them. But that he will lend himself to anything which will favor one side more than another is hardly likely, particularly after this warning; and, if he should, the court is open to redress it.

The objections are therefore overruled, and the action of the referee approving the election is confirmed.

MINNEAPOLIS ST. RY. CO. v. CITY OF MINNEAPOLIS.

(Circuit Court, D. Minnesota, Fourth Division. August 24, 1907.)

1. INJUNCTION—POWERS OF COURT—RESTRAINING PUBLICATION OF ORDINANCE.
The general rule that a court of equity will not restrain the enforcement of an ordinance or other legislative act until it has been fully completed so far as legislative action can go does not apply to an ordinance which has been finally passed by a city council and approved by the mayor, and nothing remains to be done to render it immediately effective except its publication, which is merely a ministerial act, and in such a case upon a proper showing made the court has power to enjoin the publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 154.]

2. STREET RAILROADS—STATUTE GOVERNING INCORPORATION—MINNESOTA STATUTE.
Gen. St. Minn. 1866, c. 34, relates to the formation of corporations. Title 1 provides generally for corporations which are or may be authorized to exercise the power of eminent domain, and specifies certain public service corporations, such as those formed for the construction of railways, canals, and works of like character. Title 2 provides for all other corporations for pecuniary profit, all those specified therein being for the conducting of purely private enterprises. *Held* that, while street railroad companies are not specifically mentioned under either title, the nature of their business is such as to render them quasi public corporations, which might properly be authorized to exercise the power of eminent domain and to bring them within the generic term "railways," and that a street railroad company organized under said chapter came within the provisions of and derived its powers from title 1, having the right as therein provided to fix the term of its corporate existence at fifty years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 22.]

3. SAME—CONTRACT WITH CITY—EFFECT OF CHANGE OF MOTIVE POWER.
A city ordinance granting a franchise to a street railroad company and accepted by the company reserved the right to the city council after five years to fix just and reasonable fares provided they should not be reduced below five cents per passenger on any continuous line. It provided for the use of animal or pneumatic power on the company's lines, but permitted it to connect with other lines using power "similar to that authorized to be used on street railways by the city council," subject to the restriction that it should not allow locomotives or ordinary railroad cars to be run over its tracks unless with the consent of the council. *Held*, that the fact that after a number of years the company changed its motive

power to electricity, with the consent of the council, did not terminate the contract made by the ordinance so as to give the city the right to reduce fares below five cents in violation of its provisions.

4. SAME—EFFECT OF SUBSEQUENT CONTRACTS.

A provision in a contract between a city and a street railroad company that the city should not reduce fares below five cents was not abrogated by a subsequent contract providing that "in the construction, maintenance and operation" of its lines the company should be subject to all present or future ordinances of the city.

In Equity.

M. D. Munn, N. M. Thygeson, and M. B. Koon, for complainant.
Frank Healy and Lancaster & McGee, for defendant.

LOCHREN, District Judge (orally). This is certainly a very important case, involving, as it does, the rights of this corporation which has constructed, operated and managed all the street railways in this city for so long, and affecting also the public interests, the rights of the people who are the patrons of this road, and from necessity have to pay for the accommodations which they receive from the road.

It is claimed on the part of the complainant that it is a corporation formed under title 1 of chapter 34 of the General Statutes of the state for 1866; its articles having been executed on the 23d day of June, 1873, and fixing the date of the commencement of its existence as of July 1st of that year, and of its continuance as 50 years from that time. It claims to have been such a corporation as might have been organized, and that it was organized, under that title, and that it still continues, as that term of 50 years has not expired. It also claims that some two years later, on July 9, 1875, by an ordinance passed by the city of Minneapolis allowing this corporation to practically maintain and operate a street railway upon the streets and avenues of the city, and providing, among other things, that the street car company might charge fares to the extent of five cents for each passenger, and that the city council after five years might regulate the rates of fare, but should not reduce the fare below five cents, that the city is under a valid contract obligation not to reduce the rate of fares below five cents. It is perhaps unnecessary to discuss what the effect of that reserved power in the city council was. It is certain that it is prohibited by that contract in its power to lower fares below the sum of five cents during the life of that contract. The case is submitted on bill and answer, and, there being no contest in respect to any matters of fact, it is admitted that the complainant company went on under that ordinance and constructed a system of street railway in this city, the motive power being animal power at that time, that being one of the kinds of power that was mentioned in the ordinance to which I have referred, and that it has gone on from that time to this operating the system of railway upon the streets of the city which have been designated for that purpose from time to time by the city council, and that in 1889 and 1890, by consent of the council, and in accordance with ordinances passed by the council, and accepted by the company, it was first agreed to establish upon certain designated streets of the city cable lines to be operated under a change in the charter, respecting motive power, and that these afterwards were changed to

electric lines, there being prior to that an ordinance providing for the occupation of one street for experiments as to the efficiency of electricity as a motive power; that following this ordinance, and especially the ordinance of September 19, 1890, the whole system has been changed so far as the motive power is concerned to the use of electricity as a motive power, but complainant claims that there has been no change in the provision of the ordinance I am speaking of, of 1875, the contract provision in that ordinance, with respect to fares from that time to the present, and it is complained that on the 9th of February of the present year the city council passed an ordinance reducing the amount of fare which the complainant was entitled to collect from passengers by providing that it should issue 6 tickets for 25 cents, each of those tickets representing a full fare, and that the effect of this ordinance is to impair the obligation of the contract entered into between the complainant and the defendant on the 9th of July, 1875, by the ordinance that I have referred to, and that one probable, immediate result would be the danger of annoyances to the servants of the company, the conductors and others on street cars, by reason of citizens claiming under this last ordinance the right to have these tickets, 6 for 25 cents, which, if refused by the conductors, would lead to disputes and altercations, and tend to the prejudice of the business, and at any rate to the disturbance of the company in carrying on its business, and that the company would also be liable to numerous actions which might be brought—not only such actions as might be brought by the city, but suits brought by all passengers upon the railway system who were refused this reduction of fare. Therefore a court of equity should step in and relieve the complainant from this danger, and to that end it would be entitled to have the city, and city officials, enjoined from attempting to enforce this ordinance on the ground that it would impair the obligation of said contract.

The first objection made by the defendant is that this action is premature, and that there is no such ordinance as the alleged ordinance of February 9, 1907, in force, and therefore the complainant is in no danger from that ordinance, because it has not been published as required by the city charter to be published before it can be in force; that it is still in the same condition that it would be if it was not fully enacted by the city council—that is, that it remains an uncompleted act—and that courts will not ordinarily attempt by injunction to tie the hands of legislative bodies or those that are invested with legislative powers while they have not completed the legislative act which is complained of. I think that that position is true as a general rule. There may be exceptions to it, but I think they are very few and not to be extended. It is fair to presume that while a matter is still in the hands of the Legislature or the city council, or anybody having the power of legislation, the presumption the courts ought to entertain is that before it leaves their hands, before it is completed, right and justice will be done, and that it would be improper to attempt to harass such body by any injunction, and such writ would not ordinarily be issued under those circumstances. Therefore the question is whether, under the facts in this case, this is a completed ordinance and one

which menaces the complainant in the complainant's present situation, although it has not been published.

It seems to me to be completed. It has gone through all the steps which the council would take in the passage and enactment of an ordinance. Of course, it is not necessary that I should attempt to rehearse what those would be from the introduction of the proposed ordinance in the body by some of its members, passing through the different readings and references to committees and reports and amendments, and everything of that kind, until its final passage on a vote of yeas and nays; but it appears to me, in fact, that this ordinance has passed through all those steps, and that it is an ordinance passel by the council, transmitted to the mayor, and which has received his signature, he having the right, and it being his duty, to sign it if he approves of it, and if he does not approve of it to return it to the council that passed it with his objections, when there would remain legislative action to be taken; that is, the vote by which it was passed would be reconsidered and the objections made by the mayor would receive consideration from the council, and they could act upon it as to them seemed right and proper, with the right, of course, to reject the ordinance at that stage, or, if they deemed it should be passed, to pass it over the veto of the mayor, if it received the requisite number of votes for that purpose. It had passed through that stage. There was nothing further in the way of performance of any legislative function, it seems to me, to be done in respect to that ordinance. It is a completed ordinance. If it is constitutional, it is then a valid ordinance, although the operation of it is suspended until the publication, which would give notice to every person of the fact that such an ordinance was passed and is in existence. It seems to me this does not differ at all from what would be the case if an ordinance was passed, as acts of the Legislature are frequently passed, to take effect at a subsequent time. They are complete as far as legislative action can go at the time of the passage. There is no legislative action to be taken between that time and the time they go into effect; and there is no legislative action in this case, it seems to me, between the time when this ordinance was signed and approved by the mayor, the last legislative action in connection with it, and the time when it shall be, if it ever happens, published. That is merely a ministerial act, the publication of it, which I think, according to the provisions of the city charter, and the general law in relation to villages and cities, would devolve upon the clerk perhaps to pass the proper copy of it to the printer, and the printer to print it. The action of the clerk would not be legislative. The action of the printer would not. It would not be legislative at all, and it is not interfering, therefore, with legislative functions to grant an injunction at the present time and to enjoin the publication of it, because that is an act which puts it in force and puts the complainant in danger of it, which would be liable to bring upon the complainant the strenuous demands of persons who would become passengers upon the street cars for conformity with the ordinance, and liable to bring about disturbance if those demands were not complied with, and liable to bring, also, some kind of suits on the part of the city for the purpose of compelling the complainant to comply with it.

And therefore I hold that this suit is not prematurely brought, and that it is proper to restrain the publication of the ordinance, it having passed the legislative state. I do not know of any such case. None has been cited upon the argument, although the argument has been unusually full and able. There has no case been cited that I remember of that involved the question at all. I do not know of any case, except, perhaps, a suit that was commenced in the state of North Dakota in the federal court by the Northern Pacific Railway Company against the Board of Railway and Warehouse Commissioners, if that is the proper title to that body in that state, I am not sure, but it has the same functions as that board has in this state of fixing rates, and by the act constituting that board and empowering it to act it is required, when it fixes rates, to publish them in a certain paper, and they are to go into effect, if my recollection serves me, at a certain time after such publication has been completed. In that case the action was commenced by the Northern Pacific Railway Company against the Board of Railway and Warehouse Commissioners, if that is the proper title, and also against the publisher of the newspapers, and perhaps other state officials, to restrain them from attempting to put the order of that commission into force and from publishing the order, and a restraining order was issued in the order to show cause why a temporary injunction should not be granted. My information is that that matter was settled and did not go really any further, so there was no adjudication in the case as to whether that was proper practice or not; but it was the practice then adopted. I think there was an arrangement made by which the Railroad and Warehouse Commission made some changes in the rates so that the railroad company agreed to them and the litigation did not go on.

This brings me to consider the principal questions in the case. It is contended on the part of the complainant, as I have said, that it is a corporation of the character mentioned, and that its duration is for 50 years; that it was organized under title 1, c. 34, of the General Statutes of 1866. This question is important whether it was organized under title 1 or some other title of chapter 34 of the General Statutes, because, if it was organized under title 1, then it still continues under the organization that was formed by its articles, and still continues such corporation at this time, as title 1 allows corporations formed under that title to be formed for the period of 50 years. It requires the articles of incorporation to state the date of commencement and the time of the continuance of the corporation, and in its articles the complainant in this case did state the time of its commencement to be the 1st of July, 1873, and the date of its continuance to be 50 years. It is claimed on the part of the defendant that it was not organized under title 1, and could not be, that it was a street railway, and that there was no provision that such a corporation might be formed under that title for that purpose, the purpose of establishing and conducting and operating a street railway; but that it was a corporation which might be organized under title 2 of chapter 34, and that, in determining whether it was under one title or the other, the recitals in the articles of incorporation would not be conclusive, but that it should be determined by what was stated in the articles as to the objects of the

corporation and the purpose for which it was formed. In that respect I apprehend that the statement of counsel for defendant as to what would determine the character of such corporations is correct, and therefore we will have to look into that statute and consider the character of this corporation to determine whether it was such a one as could have been formed under the provisions of title 1 of that chapter.

There are in that chapter five titles under which corporations could be formed. Title 5 relates to cemetery corporations. Title 4 relates to religious corporations. Those could not be considered, of course. Title 3 relates to corporations that are formed not for pecuniary profit, such as colleges and cemeteries and lyceums and societies, either legal, medical, or scientific. It certainly does not come under that. It could not have been formed under title 3. Title 1 relates to corporations that are authorized, or may be authorized, to exercise the right of eminent domain. That is the general heading of the title. Title 2 relates to corporations that are formed for pecuniary profit, other than those that are allowed to be formed under title 1. In looking through this title and the description of corporations that may be formed under it, it seems they are all for the purpose of conducting private enterprises. Mining, smelting, manufacturing, lumbering, agricultural, mechanical, and chemical businesses are the kinds that are mentioned specifically. Each one of those kinds of business is a private business in which the public has no concern. They are entirely for the purpose—

Judge Lancaster: Does your honor have in mind the amendments, or just 1866?

The Court: I was referring to the law as it stood when this corporation was formed, the law of 1866. Now, this is a corporation which evidently is not formed simply for the purposes of private gain. It is not a private business. It is a quasi public corporation, a corporation formed for the performance of public service wholly. Its entire business is the carriage of passengers for hire, and it is obliged to carry every one who offers himself to be carried. Its duties are public. It is a corporation of the character that is ordinarily empowered to exercise the right of eminent domain, which is one of the highest powers of the sovereignty, the power to take private property for a public use. Therefore a corporation can only exercise that power when the right to exercise it is delegated by the sovereign, and then only for a public use. It is only where the corporation is a public service corporation, a quasi public corporation, that it can be authorized by the Legislature, by the sovereign, or invested with the exercise of that power. Now, there is no such corporation, no such business as that, included in title 2 of chapter 34 of the General Statutes of 1866, and I feel therefore compelled to hold that this corporation could not have been formed under that title, for it is not at all of the character of the businesses that are named for which corporations may be formed, and, even although that title might be extended to kinds of business that are not particularly named, they would have to be corporations of a similar character in order to come under it. This is not of similar character to come under it, and therefore, if it was not a corporation formed under title 1, its business was not such

as would allow its promoters to form a corporation under title 2, and they would have no authority under the Statutes of 1866 to form a corporation at all.

The question, therefore, is narrowed to the consideration of whether the business that these promoters proposed by the articles of incorporation to engage in was such as would permit of incorporation under title 1. If it was not, then it was not a corporation. Title 1 in its heading states it to refer to corporations authorized to exercise the power of eminent domain. Then it specifies "railways, canals, and slack water navigation, either in lakes or rivers," and some other kinds, perhaps, but all evidently public service corporations, quasi public corporations, corporations which under the laws it has been always understood might be invested with the right to exercise the power of eminent domain for public use. As I said before, a street railway is a corporation of that character. It is a quasi public corporation. Its duties are to render public service. Now, it is true that street railways, by that name, are not mentioned in title 1. Railways are mentioned as the very first kind of business that is named in the title. It also includes "any other public improvement," any association formed for the purpose of carrying on the work of public improvement; but it seems to me that the title of "railways," without more, covers the case of street railways. In other words, that "railways" is a generic title which covers all kinds of railways. A railway is a way which is made for the movement of cars, or something of that character, upon tracks that are laid down either on the street or somewhere else. They are not propelled as ordinary vehicles, such as wagons and carriages, are on the highways generally, but require for their operation that tracks be expressly formed to be moved upon, and a street railway is of that character. Therefore, it is distinctly a railway. Now, there is nothing in that statute which would indicate that street railways were not included in it. They are railways. They perform public functions. It is proper to invest them with the power to exercise the right and power of eminent domain. There is no reason in the world why they should be omitted. It is true, as stated by Judge Mitchell in some of the cases, that, where the word "railway" is used in statutes, it usually refers to commercial railways. I do not think there was anything in his statement (because he was usually pretty careful) that it was universally so, and that there were no exceptions, because, if he had made that statement, he would be incorrect. I think it is true that the statutes to which he refers are usually statutes enacted for the purpose of regulating commercial railways and their use in the state. Such statutes have provided that such railroads shall have signs at crossings of streets and highways, and that they shall give notice of the passing of trains by ringing the bell or sounding the whistle, and also, perhaps, that in respect to couplers they should use none except those that couple automatically by impact for the safety of the employés employed in the operation of the railroad. Now, all those provisions would have nothing to do with street cars, and, where there was such a provision in a statute, is is easy to see that street cars were not intended or meant. The same may be said of the act of the Legislature abolishing what is known among lawyers as the "fellow servant

rule" as a defense in the case of injury to employés upon a railroad. That would have no application to a street railroad, because the dangers to which employés are subject on an ordinary commercial railroad do not occur in the case of a street railroad. There is another kind of railroad that has been established and used in this state to some extent, which is entirely a private railroad, which could not exercise the power of eminent domain, and would not be entitled to. No one would be entitled to be incorporated for the purpose of running such a railroad, although it might be done by a corporation that was formed under title 2 for carrying on the lumber business; but it is well known that men engaged in lumbering in this state have private railroads running for some distance, some miles, for the purpose of moving their logs and getting them to mills or to the streams where they may be floated, and it is very possible that, although those railroads are not formed under any charters, they are or may be owned by corporate bodies. A good many of these regulations would apply to them, such as the regulations requiring signs if such a railroad should be run across a public highway, or before a locomotive should pass a highway there should be warning given by ringing the bell or sounding the whistle, or something of that kind; and the Supreme Court of the state have held that the law abolishing the fellow servant rule does apply to this kind of railroads, although they are not mentioned at all in the act, the act mentioning only railways. So it is not true that where railways alone, without more, are mentioned in the statute, it always refers to a commercial railway, and I see no reason why it should not, as it is used in title 1, c. 34, include street railways, as well.

Now, section 13 of that act, and sections following, provide for the procedure, notice, and use of the power of eminent domain. No; that is not true. Section 13 provides in respect to what property matters it may be exercised; that is, to obtain the right of way over and across any lands needed for the construction of any railway, telegraph, and the necessary sites and grounds for depots, shops, or other buildings requisite for the purpose. Now, it may be true that a street car company which confines its tracks entirely to the streets, as it properly ought to, and ought to be expected to do, would not need the exercise of the power of eminent domain for the purpose of obtaining a right of way, if it obtained that right of way from the city council, but it would or might need the exercise of the power of eminent domain for many other purposes, such as obtaining sites for shops and for other buildings necessary for the conduct of the business. Now, even in the old days when this was a horse railroad here in Minneapolis, it was necessary to use buildings. The street car company could not get along if confined to its right of way entirely. It would have to have some place to put up its cars at night; and, when it was run by animal power, to house its animals and feed them. There would be no opportunity to do this if they had to keep the animals upon the streets. It would not be expected. And where the corporation has the authority to exercise the power of eminent domain it may exercise it in a case where it might be convenient, although it might get along without. It would also, besides having to get a place to house its cars and its animals, need to have shops for the purpose of repairing its cars

from the result of the natural wear and tear and breakage which must happen to such things, and, as a matter of fact, it is well known to the old residents that the street car company did at a very early day obtain such ground, not by the exercise of the power of eminent domain, but by purchase. For instance, when this line was first established, I know that it obtained down in my neighborhood a block of land upon which was formerly the residence of Caleb D. Dorr, down between Thirteenth and Fourteenth Avenues Southeast, and upon that established barns and stables and places to house cars, and at a later day it obtained on the east side—I am a great deal more familiar with that than upon the west side—it obtained a block of land from Farnham & Lovejoy somewhere about Second Avenue North between Third and Fourth streets, using that whole block. Perhaps that was done after they changed to electricity. My recollection of its use was as a storage place for electric cars. It would necessarily be obliged to have storage places for cars when not in use in a portion of the nighttime. There is generally a time somewhere between midnight and morning when the cars are not in use, and when they would be an obstruction and nuisance if allowed to stand upon the streets, and the city would not permit this; or that they should be allowed to stand upon the streets when they were not in use in the day or nighttime either. Consequently there would have to be some place provided for keeping them during those times; and also, as I said before, for the location of shops, for repairs at least, and it seems to me that it would be entirely proper to obtain through the power of eminent domain, if it could not be done by purchase, shops for the building of cars, although that would not be absolutely necessary, as cars might be purchased from other persons who built cars, but it would be a proper exercise of the power of such a corporation to build its own cars, and proper for them to obtain, by the exercise of the power of eminent domain if necessary, the proper site for building those cars. I will therefore conclude that this corporation which attempted, so far as the incorporators were concerned, to be organized under title 1, c. 34, Laws 1866, was so organized under that title.

Then the question comes whether the contract made between the city and the complainant, the street car company, as to fares still continues in force; and I understand it to be admitted by counsel for defendant that there was such a contract made by virtue of the ordinance of July 9, 1875, and that that contract was valid and enforceable and binding upon the parties during its existence, the claim on the part of the counsel being that it ceased to exist in 1903, when, as they claim, the charter of the street car company ceased also to exist, having, as he thought, been organized under title 2 of chapter 34 with the limitation of 30 years, but under my holding that it is yet a corporation, and that the charter privileges inured to the company as a contract by virtue of that grant, the power to make the contract being given, if not by the charter, by the act of March 4, 1879 (Sp. Laws 1879, p. 410, c. 299), which validated in terms that contract.

It is claimed, also, on the part of the defendant, that this was only a company authorized to establish and operate street cars run by the motive power which is mentioned in that contract, either animal

or pneumatic power, and that, when it ceased to use that power, it ceased to be the same corporation, that it gave up its corporate rights, or its contract rights under that ordinance by ceasing to use that particular kind of power. My conclusion is different from my reading of the contract. There is no doubt that at the time this contract was entered into and this ordinance was passed and accepted by the street car company it was understood that the street car service to be established under it would be one in which the cars would be propelled by animal power. It was provided it should be either by animal or pneumatic power. I think the statement of Judge Koon is true that pneumatic power was something that was somewhat fanciful at the time; that it had not been tried for such purpose. I never knew of its being tried for a purpose of that kind. I do not understand how such a power could be made applicable to the propulsion of a street car. Pneumatic power is something that is done by compressed air; but how it can be compressed and applied to such a use I do not understand. Still this contract does seem to contemplate that such power may be used. It does contain provisions which shows it was contemplated, and also that they might change the kind of power to be used, for it says:

"No propelling power or machinery of any sort should be used after it should prove to be a public nuisance."

This provision follows immediately after the words that provide for the use of such power. Then it provides, also, that the street car company should connect with other street car companies, but they shall permit no locomotive, freight, or passenger car, such as are usually run over the general railways of the state for the transportation of freight and passengers, to be used unless authorized by the city council. It contemplates that even those may be used if authorized by the city council, "and that the said Minneapolis Street Railway Company, and any other street railway company which the council may charter under section 3 of this ordinance shall each allow the other to connect with and jointly use such portions of the track belonging to each as the convenience of the traveling public may require, upon such equitable terms as may be agreed upon" between the parties. There is some provision that they shall only allow cars from other tracks to come on their railway track that are propelled by such power as the council—

Judge Koon: It is the earlier part of section 4 judge. "Said company may connect with any other railway upon which power is used similar to that authorized to be used on street railways by the city council." It is just above where you commenced to read.

The Court: That is it. It does not confine them to cars that are run by animal and locomotive power, but to such as may be authorized to be used on street railways by the city council. It contemplates that the city council may authorize different kinds of power to be used. I need not refer to the provisions of this ordinance in respect to the rates of fare. It has been discussed so much and is so well understood by counsel and anybody listening to the argument here. The provision is, in short, that the street railway company may

fix the rate of fare, the rates that shall be paid for fare, but shall not charge more than five cents for each passenger. It also provides that the city council may, at the expiration of five years, and at terms of five years thereafter, fix the fare so that such sum shall be just and reasonable, providing it shall not reduce the fare below five cents over any one continuous line.

Now, that contract, as was said, was validated by the acts of the Legislature of 1879, and counsel for defendant admits that it was a valid contract, and as long as the corporation of the complaint continues, so far as it has not been changed by the parties, the ordinance of 1878 may properly be considered as to the power to be used, as it authorized the construction of a single railroad commencing at the intersection of Nicollet avenue and Thirty-First street, and thence on First Avenue South, and thence from First Avenue South to Grant street, thence from Grant street to Nicollet avenue, thence on Nicollet avenue to the southern limits of the city, with all turnouts, switches, and other appurtenances which may be convenient and necessary to operate such line of railway by animal, steam, or other power, so that, notwithstanding the ordinance of 1875, the council assumed the power under that to authorize the use of other power upon specific portions of the street railway. Of course, in this particular ordinance it reserved the right to prohibit the use of steam on any part of that line which it deemed would subserve the public good by such prohibition, and that was also one of the ordinances which was validated by the act of March 4, 1879. My construction of that contract is, so far as the power is concerned, that the street railway agreed to use either animal or pneumatic power in the running of the railway, but there was nothing in that contract which would prohibit both parties to that contract, the street railway and the city together, from changing that provision, and, if they should find that some other power was desirable to be used instead of either horse or pneumatic power, from agreeing that such power should replace the old power and be used instead. In other words, there is nothing in that contract that makes it different from other contracts, or which prohibits the parties to the contract, if they both agree, from changing it in any respect. The parties to the contract might change it by mutual agreement; but one party alone could not change it, of course, without the consent of the other.

Perhaps the only remaining proposition is whether this contract was changed by consent of the parties by the ordinance of September 19, 1890, which ordinance was accepted by the street car company, and which contained very many provisions which I need not refer to, because it is only claimed that this portion of the contract fixing the fare was changed by the eighth section of that ordinance, and which provided that:

"In the construction, maintenance and operation of said lines of railway said Minneapolis Street Railway Company, its successors and assigns, shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An ordinance authorizing and regulating the street railways in the city of Minneapolis, passed July 9, 1875, and approved July 17, 1875, as the same has been amended and is now in force' [that is, the original ordinance] and all other ordinances of said city now in force, or hereafter adopted, so far as is applicable."

Now, it does not seem to me that this touches the rates of fare at all. It says "in respect to construction"—that is not fare. "Maintenance"—that is not fare. "And operation." That is, how the cars shall be run and what shall be done in respect to that by the street railway company. The company shall be bound by the provisions of this original ordinance and other ordinances amendatory thereof, and all other ordinances of said city "now in force, or hereafter adopted, so far as applicable." Now, that is true. So far as relates to construction, maintenance, and operation of these lines, the street car company is, by the provisions of this ordinance, and its acceptance of this ordinance, bound, and it is subject to all these things; but there is nothing in this that would bind it to that change as to fares nor permit the council to make such change, nor agree to be bound by any change that the council might thereafter make with reference to the right of the street railroad company to collect fares. That in the original ordinance is a distinct provision. It comes under section 8 of the original ordinance, and is a separate provision in respect to fares and the right of the company to collect fares. This provision in section 8 of this ordinance of September 19, 1890, has no reference to fare at all, but has reference to other subjects, and it certainly is a rule which the most vague ideas of equity would consider necessary to be applied, that there should be no forced construction of language of that kind used to broaden it and extend it to subjects which, apparently, were not by the parties intended to be included under it. It must be plain that both parties would understand naturally the scope and meaning of a provision of that kind, as not referring to fares, and the language must be such that the court could say that the parties must have understood that it did cover the subject of fares, or else it does not cover that subject. If there were other ordinances which were proper to be referred to in such a way relating to the construction, maintenance, or operation of the road, entirely different from a matter of fares, and this general statement that ordinances in the future might be passed relating to the same subject, and, so far as applicable, would be binding upon the company, but would not by any reasonable or fair or honest construction be held to include the provision of this original contract in respect to fares. That was too important a matter.

It seems to me that the general rule laid down by the Supreme Court of the United States in that Detroit case which has been cited on both sides is very clear on that subject. So in some other of the cases that have been cited. I think that the general and fair understanding applied to contracts would exclude any such thought as that the idea of the subject of fares was contemplated by anything stated in that section. Therefore I shall hold that that section does not, and did not, authorize the city of Minneapolis on the 9th of February last, or now, or at any time, to change or legislate upon the question of what reduced fares the complainant was entitled to collect for its compensation for the carriage of passengers upon its cars.

The result of all this is that I think the injunction must issue as prayed for in the complaint. I have gone over the subject as far as seems necessary.

In re SOUTHERN PAC. CO. et al.

(Circuit Court, N. D. California. August 12, 1907.)

No. 14,269.

1. ARBITRATION AND AWARD—CONSTRUCTION OF ARBITRATION AGREEMENT—SCOPE OF QUESTIONS SUBMITTED.

An agreement for arbitration between a railroad company and the Order of Railway Telegraphers, under Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], providing for arbitration of differences between interstate carriers and their employés, provided for the submission, among others, of the question "whether members of the order of railroad telegraphers in the employ of the employer shall legislate for train dispatchers respecting rates of pay and hours of service or otherwise." *Held*, that such question was not limited to an inquiry as to whether the train dispatchers in the service of the employer had authorized the order or its committee to represent them in the arbitration proceedings, which was merely a matter of agency, but that it covered the broader question, as to whether they should be represented generally in their negotiations and dealings with the employer in respect to rates of pay and hours of service by the body of its employés who were members of the order, or should be separately represented, and that the board of arbitration properly admitted evidence offered by the employer to show the nature of their duties, and that their relation to the employer and to its service to the public was different from that of ordinary telegraphers.

2. SAME—ARBITRATION OF LABOR DISPUTES—FEDERAL STATUTE.

An arbitration of differences between an interstate carrier and its employés, under Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], is essentially a common-law arbitration, and rests solely on the written agreement of arbitration entered into by the parties, which limits and determines, not only the rights of the parties thereto, but also the extent of the powers of the arbitrators, and it is to be construed in accordance with the rules governing the construction of contracts, rather than those applicable to pleadings.

3. SAME—CONSTRUCTION OF AGREEMENT.

A written contract inter partes, as an agreement for arbitration stating the questions to be submitted and determined, must primarily be interpreted by its language taken in its ordinary and accepted meaning, and, if that language is plain and unambiguous in itself, there is no room for construction, but it will be held to mean precisely what its terms imply. It is only when the language is susceptible of more than one construction that the intent or understanding of the parties may be inquired into, or that evidence of the surrounding circumstances may be resorted to.

4. SAME—SCOPE OF QUESTIONS SUBMITTED.

An agreement for arbitration, under Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], between a railroad company and the Order of Railroad Telegraphers whose members employed by the company were working under a schedule agreed to between the parties fixing rates of pay and hours of service, which submitted as one of the questions to be arbitrated "the question of eliminating from the operation of the schedule certain important agencies where the duties of soliciting traffic are paramount," is not ambiguous in respect to such question, which is clearly limited by terms to "agencies where the duties of soliciting traffic are paramount," and cannot be broadened by construction to authorize the board of arbitrators to consider and determine whether the schedule shall apply generally to "station agents whose regular duties do not include telegraphic work and whose annual earnings * * * equal or exceed" a certain sum.

5. SAME—ENTRY OF JUDGMENT ON AWARD.

In an arbitration proceeding to settle differences between an interstate carrier and its employés, under Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. 1901, p. 3205], which provides in section 4 for a hearing by the Circuit Court on exceptions to the award, and also for an appeal from the court's decision within 10 days, judgment on the award cannot be entered by the court until after the appeal has been determined, or until after the time for taking an appeal has expired.

On Exceptions to Award of Arbitrators.

A. A. Moore, Stanley Moore, and O. D. Richardson, for Southern Pacific Co.

Herman G. Walker, for the Order of Railroad Telegraphers.

VAN FLEET, District Judge. This is a proceeding in arbitration between the above-named parties, had in pursuance of the provisions of an act of Congress entitled "An act concerning carriers engaged in interstate commerce and their employés," approved June 1, 1898 (chapter 370, 30 Stat. 424, et seq. [U. S. Comp. St. 1901, p. 3205]), commonly called the "Erdman Act." The proceeding was initiated by a formal contract or agreement entered into between the parties at the city of San Francisco on the 14th day of February, 1907, providing for a board of arbitration to be appointed in conformity with the act to hear and determine the controversy, and which contract, with other matters not necessary to recite, sets forth in exact and precise terms the questions or issues to be submitted to such board. In this contract, as in the act, the railroad company is designated and referred to as the "employer" and the order of telegraphers as the "employés"; and, for convenience, those designations will be hereafter employed in this opinion.

The contract provides that there shall be submitted to the board of arbitration therein provided for four several questions or issues, as constituting the subject of inquiry and adjudication, and those issues are thus stated:

"The questions submitted to arbitration are: (a) Whether members of the Order of Railroad Telegraphers in the employ of the employer shall legislate for train dispatchers respecting rates of pay and hours of service, or otherwise. (b) The question of reduction of hours of service on Sundays for employés. (c) The question of percentage and general increase in salaries of employés. (d) The question of eliminating from the operation of the schedule certain important agencies where the duties of soliciting traffic are paramount."

Upon these issues a hearing was had and a large amount of evidence taken, covering over 1,500 pages in typewriting and a great volume of exhibits, and the board thereafter, in due time, answering the questions propounded in the order in which they are above set forth, found and awarded:

"(a) That the members of the Order of Railroad Telegraphers in the employ of the employer shall not legislate for train dispatchers regarding rates of pay and hours of service or otherwise.

"(b) That the regular hours of service on Sundays shall be one-half the regular hours of labor on other days, provided that at any station, where it is impracticable or inconvenient for the employer to arrange the service so as to reduce Sunday labor to one-half time, he may arrange to give the employés

leave of absence and full pay for 26 days per annum, at such time or times as will cause the employer and the public the least inconvenience.

"(c) That the percentage of general increase in salaries of employés shall be seven and one-half (7½) per cent., and that the apportionment of this general increase among divisions and subdivisions of the employer's lines shall be such as may be mutually agreed upon by the employer and the Order of Railroad Telegraphers.

"(d) That the appointment of station agents whose regular duties do not include telegraphic work, and whose annual earnings in the form or salaries and commissions equal or exceed $1,300, shall not be controlled by the schedule or agreement between the employer and the Order of Railroad Telegraphers."

The act provides (section 3, subd. 2):

"That the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the Circuit Court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record."

In accordance with that provision, the record therein designated, duly certified as required by the act, was filed in the clerk's office of this court on April 6, 1907.

The act further provides (section 4, par. 1):

"The award being filed in the clerk's office of a Circuit Court of the United States, as hereinbefore provided, shall go into practical operation and judgment shall be entered thereon accordingly at the expiration of ten days from such filing unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation and judgment be entered accordingly when such exceptions shall have been finally disposed of, either by said court or on appeal therefrom."

In pursuance of this last provision, the employés, through their counsel, on April 16, 1907, filed in this court exceptions to the finding and award of the board of arbitration made in response to issues A and D. The specifications against finding A are that the award is contrary to law, that it is not supported by the evidence, and that the board erred in the admission of any evidence under said issue, except evidence as to train dispatchers in the employ of the employer being members of the order of employés, and evidence as to the authority given by a majority of the train dispatchers to employés to represent them in legislating with employer respecting rates of pay, hours of service, and otherwise, as stated in said clause A. The specifications against finding D are that the award is contrary to law; that it is not supported by the evidence; that the board erred in admitting evidence pertaining to matters outside of and not responsive to the questions submitted under said issue; and, lastly, that the finding is not responsive to the question submitted by the agreement of arbitration, but attempts to decide questions which were never submitted for decision, and thereby the board exceeded its jurisdiction. Subsequently, on April 22d, the employés served and filed a notice of motion that they would apply for the "entry of judgment of said court on awards made by said arbitrators on the respective questions submitted to said board of arbitration under clauses B and C of said agreement of submission,

and that the said judgment, so far as the same may apply to the said awards under said clauses B and C, respectively, may take effect and be in force from and after the 17th day of April, 1907." This motion and the exceptions above noted were thereafter heard by the court and submitted together, and present the questions to be determined herein.

1. The record discloses that the controversy involved in the arbitration grew out of antecedent negotiations had between the parties, the employés represented by their "General Committee" and the employer by certain of its officers, in an effort to bring about certain modifications in the schedule or agreement designated "Rules and Regulations of Pay of Telegraphers," then in force between the parties, commonly referred to as the "Schedule of 1902," the date of its adoption. These negotiations, which had been in progress for several weeks without the ability to come to a complete adjustment of differences, finally culminated in the agreement of arbitration which forms the basis of the proceeding. On the hearing before the board of arbitration, the employés took the initiative, and in submitting their case as to issue A, above stated, they introduced evidence showing that the train dispatchers in the service of the employer on the system involved, a majority of whom were members of the employés' order, had, by a vote of about two-thirds, authorized the general committee of the employés to represent and "legislate" for them in negotiations "in securing a new contract with the Southern Pacific Company." These authorizations were in writing in the form of letters and telegrams, and, while varying slightly in phraseology, were all of the same general import. They also introduced evidence tending to show the nature of the duties of train dispatchers, their status as employés, and the general mode of performing their service; and also showed that, under the existing schedule, the employés had, for a period of some eight years, been representing and legislating for the dispatchers in all negotiations of the kind. The employer did not attempt to rebut the evidence as to the fact that the dispatchers had given the employés authority to act for them, but was permitted on its part, over the objection of employés, to introduce evidence, largely expert or opinion in character, tending to show that a train dispatcher is an entirely different functionary from a telegrapher or "operator" so-called; that, while the dispatcher may be an operator, he is not necessarily such, his duties being very dissimilar in character, largely administrative, and of much greater importance, not only to his employer in carrying on the service, but to the safety and convenience of the public; that he stands in a different relation to his employer, as well in fact as in law, representing him in the discharge of his duties as an alter ego or vice principal in his relations with other employés; and, finally, that the feature of the schedule in force permitting the employés' order to legislate for the dispatchers as to rules of employment and rates of wages had been found to work very unsatisfactorily and injuriously to the service, and was a rule which did not obtain on the lines of any other general system.

The objection urged by the employés to the action of the board under this issue, and the only point made under their exceptions thereto, is that all the evidence thus admitted in behalf of the employer,

so far as it affected that particular issue, was wholly irrelevant and incompetent, and outside the issue; that the sole question involved in that issue, when properly construed, was whether the employés had been duly authorized by the train dispatchers to "legislate" for them respecting rates of pay, etc., and to represent them in the arbitration proceeding; that the moment such authorization was made to appear by the evidence the inquiry under this issue was closed, and the board was without authority to go further, but was bound to find the issue in the affirmative. But manifestly the language of that issue will not support this construction. It may be conceded that the contention is correct as to the merely incidental right of the employés to represent the dispatchers before the board of arbitration. That was purely a question of agency, and the dispatchers had a right perhaps to delegate it to any one they saw fit, regardless of the wishes of the employer. In fact, while some objection appears to have been made by the employer before the board of arbitration, it was overruled, and is not now being insisted upon. But the question whether the order "shall legislate for train dispatchers respecting rates of pay, hours of service, or otherwise" involves more than a mere question of agency, where the will and desire of the party conferring the power is alone to be considered. The language of the question is in the future tense, and very clearly involves a question of principle or policy affecting the relations of the parties and the methods of conducting the dealings of the employer with its dispatchers; whether, in other words, it shall for the future be permitted to deal with them directly, or shall be subject to the control of a third party, in establishing the rules, regulations, and rates of pay that shall obtain in their service. This was a question in which both parties to the controversy were at least equally interested, and one upon which it was very evidently the purpose of the framers that both parties should be heard. Had it been the purpose to submit the simple inquiry whether the employés had been empowered by the dispatchers, the issue, if put at all, would doubtless have been framed very differently; but, moreover, it would be convicting both parties to the controversy of a piece of idle folly to hold that they intended to submit to arbitration a mere question of fact so easily ascertainable. It is not contended that the character of the evidence was improper, if it was admissible at all, nor that it was not sufficient to sustain the finding, if the board's interpretation of the issue was the proper one. I am satisfied that the construction adopted by the board as to the nature of the question was correct, and that the exception cannot be allowed.

2. The only ground of exception to finding D which I deem it necessary to notice is whether the facts found thereby are within the issues submitted by the agreement. A difference arose between counsel of the respective parties in the hearing before the arbitrators, as to the meaning of question D as stated in the agreement, and as to the scope of the inquiry thereunder. The employés were confining their investigation purely to the literal terms of the question by inquiring as to the number and location of stations or agencies where the paramount duty of the agent was that of soliciting traffic. The employer objected that this was unduly restricting the inquiry un-

der that issue; that its real meaning, and the question intended to be thereby submitted, was as to the elimination from the operation of the schedule and the rule of seniority therein provided of stations or agencies, termed "starred stations," where the business of the company was such that the other duties of the agent were more important than telegraphing, where it was necessary to employ as agents men apt in business methods, familiar with traffic conditions, able successfully to solicit and gain business, superintend the men under their charge, look after the operation of freight and warehouses, handle and sell tickets of all kinds, and transact other commercial business—stations, in other words, where such qualities in the agent were of more essential consideration than his ability as an operator. And it was urged that, if the issue had been misunderstood, it should be amended or cleared up; and the board was requested to make a ruling for the guidance of the parties as to its interpretation of the question. The employés took the ground that there could be no misapprehension of the meaning of the question, that it was to be interpreted by its terms and the inquiry restricted, as therein specified, to agencies where the chief or paramount duty of the agent was soliciting traffic; and they objected to any amendment or any such construction thereof, as suggested by the employer, as being equally without the power of the board. After some considerable argument the board requested the parties each to file in writing his interpretation of the question for their information, and that it would then determine its meaning. This request was complied with by the employer, but the employés declined, upon the ground that they regarded the language of the issue as free from ambiguity, and preferred to stand upon its terms.

Thereupon the arbitrators, by a majority vote, ruled, in effect, that, while they could not amend the language of the question, it should be construed substantially as covering the ground contended for by the employer; and they permitted the evidence to take that scope. This action and the finding, made in response to the issue as thus construed, forms the basis of the exception to that feature of the award; the employés contending that the construction thus put upon the issue was wholly unwarranted and the finding thereunder not responsive to the question submitted, but entirely outside the issue and void. The employer contends, on the other hand, that the construction of the issue was fairly deducible from the terms of the agreement, but, if not, that it was perfectly competent for the board, in determining what the parties intended, to look to the negotiations leading up to the agreement, and that, viewed in the light of those negotiations, the ruling of the board was right, and its finding entirely responsive to the issue submitted. At the outset it may be remarked, in response to certain suggestions made at the argument, that the proceeding has its inception in and rests solely upon the agreement of arbitration entered into between the parties; that it is by the terms of that instrument, when properly construed, that not only the rights of the parties thereto, but the extent of the powers of the arbitrators thereunder, are to be limited and determined. The act puts the arbitration proceedings therein provided for in no different category in this respect than the ordinary common-law arbitration. Moreover,

while the proceeding is judicial in character, the relation of the parties is purely a contractual one, and in no respect, other perhaps than in the application of the rules of evidence, does the proceeding partake of the nature of a civil action. Therefore the rules of construction and interpretation applicable to contracts rather than those applicable to pleadings obtain. Nor is there anything in the act indicating, as suggested by one of the parties, that its provisions, either as to the requirements of the agreement for arbitration or the proceedings thereunder, are to be tested by any different or more liberal rules of construction than those applicable to other contracts or proceedings of a similar nature.

We are therefore to have resort, in determining the purpose of the parties under this agreement, to those usual and well-established canons of construction applicable to contracts generally; and, applying those principles, I am satisfied that, taking the language of the contract alone, the finding made in response to question D is not responsive to the issue thereby submitted. One of the cardinal rules for the interpretation of an instrument inter partes is that primarily it must be interpreted by its language, taken in its ordinary and accepted meaning, and, if that language is plain and unambiguous in itself, there is no room for construction, but it will be held to mean precisely what its terms imply. Very obviously this rule was violated in the construction placed by the arbitrators upon this feature of the agreement. The question related solely to agencies "where the duties of soliciting traffic are paramount." Nothing could well be plainer than this language. It is in no sense ambiguous, and there is nothing in itself nor elsewhere in the contract to indicate that it was employed in any technical sense, or otherwise than according to its ordinary import. It referred, neither directly nor by implication, to the character of agencies described in the finding, and the finding says nothing about the character of agencies referred to in the question. Counsel for the employer urge that the finding need not follow the precise terms as to descriptive words employed in the question, that it is sufficient if the finding involve in substance the issue submitted, and that every intendment is to be indulged that the award is responsive to the submission. This is perfectly true, but it does not mean that the ordinary rules of construction may be set aside nor the plain import of language ignored, nor that the contract may be given an interpretation it will not bear, merely because in the judgment of the board it did not cover all that the parties should have included in it.

Counsel also insist that the terms of the contract must be construed with reference to the circumstances and the spirit in which they were understood by the parties at the time when they were employed, and, for this purpose, the antecedent negotiations and respective claims of the parties may be looked to. The general rule in this regard is that if the language of a particular clause or feature of a contract is plain, explicit, and unambiguous, not involving an absurdity on its face, and not repugnant to the context, the meaning of that language cannot be controverted or affected by evidence either of the surrounding circumstances or of the understanding of the parties. What the court is to ascertain is, not what the parties may have meant or in-

tended, but what is the meaning of the words they have used. It is only when the language is susceptible of more than one construction that the intent may be inquired into. Springsteen v. Sanson, 32 N. Y. 703; Johnson v. N. W. Ins. Co., 39 Wis. 87; Maryland v. Railroad Co., 89 U. S. (22 Wall.) 105, 22 L. Ed. 713. In the last case, quoting from Lord Denman in Aspdin v. Austin, 5 Adol. & El. 671, it is said:

"'Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on and the service in fact be continued during three years, and yet neither party be willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have even imperfectly expressed themselves, and another to add to the instruments all such covenants as upon a full consideration the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written. The latter adds to the obligation by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application.'"

But, if we were to resort to the negotiations in this instance, we should not be aided. The particular feature of those negotiations upon which counsel rely as showing the real inquiry intended to be submitted under question D is a letter written by the employer to the general committee of the employés' order, dated January 17, 1907, and with other correspondence and matter relating to the negotiations, included in what is referred to in the record as the "Blue Book." In this letter the employer stated the reservations it desired at that time to make in the existing schedule, substantially as it now claims they were intended to be covered by question D; and it is insisted that the question is to be interpreted in the light of this letter. But the fallacy of this is apparent when it is noted that this letter was written nearly a month prior to the execution by the parties of the agreement of arbitration, and there is absolutely nothing in the so-called "Blue Book" or elsewhere in the record to show, on the one hand, that the employés ever accepted the suggestions made in that letter, or, on the other, to negative the very strong inference to be deduced from its executing the agreement in its present form, that the employer entirely abandoned the terms of its proposition made in the letter and acceded with open eyes to the terms as stated in the contract. The presumption, in the absence of fraud or mistake, is, of course, that the contract expresses the stipulations in the terms in which both parties understood them. This being the state of the record, there is nothing in the prior negotiations which can be looked to in aid of the interpretation of the question. But, moreover, counsel for the employer have very conclusively answered their present contention against themselves. Very early in the taking of testimony before the board this "Blue Book" was offered in evidence by counsel for the employés for the purpose, among others, as stated by him at the time, of throwing light upon this very question of the construc-

tion to be put upon question D; the "Blue Book" constituting, as he suggested, the basis of the negotiations leading up to the contract. But the offer was strenuously objected to by the employer for any purpose; one counsel urging:

"That any prior negotiations between the employer and employé would shed no light on this controversy. It would tend to cloud the issue. Therefore it is immaterial. The rule of law is that an offer to compromise or prior negotiations are not admissible in evidence at all. In other words, the court goes right to the merits of the present transaction. For the purpose of eliminating such matters, I think the board should not consider any prior offers or counter offers on the part of the employer or the employé."

And another of counsel used this language:

"The fundamental error lies in counsel's statement that these antecedent negotiations are the basis of this arbitration. He said that and he said it quite heatedly, and that is the time when I wanted to ask him a question. The antecedent negotiations are not the basis of this arbitration. Your honorable body is called together under an act of Congress. The act has specified that the questions to be submitted to the board shall, with a good deal of formality, be stated as the basic matter invoking the jurisdiction of a board. That has been done. We have now here before us, in conformity to the act, a statement in writing of the matters that are in issue between us. The antecedent negotiation is just as much shunted and pretermitted by the filing of the statement of the matters in issue between us under the interstate commerce act as the antecedent matters are between two private litigating parties when one of them files a complaint and the other files an answer. It is then put in issue. It is an error fundamental to say that the basis of this matter is anything antecedent to the signing and filing of the agreement to arbitrate. That is the only limit to your jurisdiction. It not only limits, but it delimits it. Your jurisdiction is as broad as the matter set forth in the articles. It is no broader. You are a body sitting here to determine law and fact. You are a court. The learned gentleman says you cannot determine these matters in issue between us without resorting to the antecedent negotiations. That is error. If you cannot determine it without resorting to illegal and incompetent evidence, that is a practical difficulty in the way, which sometimes—but rarely—happens. The law of convenience does not govern in judicial matters. There could be a case where a party would be practically cut off by the laws of evidence of the state from proving a case. That is a practical difficulty. He says they cannot be determined without resorting to these writings, these printed matters, these negotiations, these offers upon the one side and upon the other side, to determine it. I submit, with all gravity, that you can only find what the issues are between us by an inspection of the four questions stated in the articles of agreement."

And one of the very reasons urged at the time by counsel for employer in support of their attitude as above stated was that there was nothing to show what the parties had in mind at the time of signing the agreement but the instrument itself. As a result, the offered evidence was excluded and the board refused to consider it. At the argument before the court a question arose between counsel as to whether this "Blue Book" was not subsequently put in evidence; counsel for employer insisting that it had been. But the record does not show that it was, and the book, while found among the papers, unlike all other exhibits, bears no file or identification mark. For the reasons stated, however, it is immaterial to determine whether the evidence was before the board for its consideration or not.

It would be difficult, I think, to state the rule as applicable to this case more forcibly than counsel for employer have thus put it; and

I am satisfied therefrom that the construction placed by the board on question D was unwarranted, and that its finding thereunder was outside the issues submitted by the parties. The facts therein found, not being within the issues, the finding must be held nugatory and not binding upon either party. Bogan v. Daughdrill, 51 Ala. 312; Richardson v. Payne, 55 Ga. 167; Gordon v. Tucker, 6 Me. 247; McBride v. Hogan, 1 Wend. (N. Y.) 326; Bullock v. Bergman, 46 Md. 270.

3. As to the motion for judgment on findings B and C, it is at least doubtful if, under this act, a judgment can be had on part of the award when a part is set aside; and it is likewise doubtful, independently of the act, whether under the general rules applicable to proceedings of this character the issues submitted here are not so interdependent and inseparably a part of one controversy that they must all stand or fall together. But, if I am correct in my reading of the act, the motion is premature, and those questions not now before the court. As we have seen above, the act provides that, where exceptions are filed to the award, it shall go into effect, "and judgment be entered accordingly when such exceptions shall have been finally disposed of, either by said circuit court or on appeal therefrom." The same section further provides:

"At the expiration of ten days from the decision of the Circuit Court upon exceptions taken to said award, as aforesaid, judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the Circuit Court of Appeals. * * * The determination of said Circuit Court of Appeals upon said questions shall be final, and being certified by the clerk thereof to said Circuit Court, judgment pursuant thereto shall thereupon be entered by said Circuit Court."

From these provisions, it would seem that it is not contemplated by the act, where exceptions are urged against the award, that judgment shall be entered by the Circuit Court until the expiration of 10 days after the decision on the exceptions. If no appeal has then been taken from such decision, judgment shall be entered, either putting into effect or setting aside the award as the circumstances may warrant. If within the 10 days, however, an appeal be taken, then the entry of judgment must await the determination of such appeal, when final judgment may be entered pursuant thereto. Very evidently the act does not warrant a piecemeal judgment such as contemplated by the motion; but one final judgment, which shall be determinative of the whole matter.

Having in view the very commendable object aimed at by the act, I regret much the necessity of reaching a conclusion the result of which, if sustained, will be partially, if not entirely, to set at large the differences between the parties out of which the controversy arises. The evident purpose of the law was to afford a ready, summary, and speedy method of amicably adjusting labor disputes arising between the class of employers and employés to which it applies; and, the case being a pioneer thereunder, a more satisfactory result of its operation would have been desirable. There are certain features of the act, however, which, although doubtless intended to add to the simplicity of the procedure provided therein, are calculated to result, as in

this case, in making cumbersome and burdensome its operation, and to largely negative and defeat the object of a speedy determination of a controversy. As noted above, the entire record—papers, testimony, and exhibits—consisting in this case of something over 3,000 pages, is treated as a bill of exceptions for the purpose of review in this court. This would not be so objectionable in itself if there was any requirement at the hands of the excepting party of presenting a specification of the errors relied upon in some such form as would definitely point out the objections involved in the exceptions. In this instance, the exceptions filed were in the most general terms, with no attempt therein or in the brief of counsel to point out the particular page, or even the volume in which any obnoxious evidence or ruling was to be found. As a result, the evidence upon all the issues being intermingled, the court has been put to the necessity of searching through the entire record at the expense of much valuable time, and the great and unnecessary delay of its conclusion. This result could be avoided, either by providing, as in other instances, for a bill of exceptions presenting only the specific errors relied upon, or by a provision requiring the party excepting to the award to file such a specification of errors as would serve to point more particularly the rulings complained of.

For the reasons above stated, the exceptions to finding A will be overruled, the exception to finding D will be sustained, and the motion for judgment will be denied. Let an order be entered to that effect.

ULMAN v. IAEGER'S ADM'R et al.

ROSS v. ULMAN et al.

(Circuit Court, S. D. West Virginia. August 15, 1907.)

1. EQUITY—CROSS-BILL—SUIT BETWEEN TENANTS IN COMMON.
While a cross-bill cannot be maintained in a suit after it has been settled, a tenant in common who has been impleaded in a suit between the co-tenants to establish the interest of each and obtain partition, and whose interest is admitted by the pleadings, cannot be deprived of the right to file a cross-bill therein at any time it may become necessary to protect his interest in the property by a settlement between his co-tenants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 465.]

2. SAME—BRINGING IN NEW PARTIES BY CROSS-BILL.
New parties may be brought in by a cross-bill which seeks affirmative relief, and is not merely defensive, when they are necessary to the granting of such relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 467.]

3. COURTS—JURISDICTION OF FEDERAL COURTS—ANCILLARY PROCEEDINGS.
A resident of the District of Columbia, although not a citizen of a state within the constitutional provision giving the federal courts cognizance of suits between citizens of different states, may maintain a cross bill in a suit in such a court for relief which is ancillary to that sought in the original suit; the citizenship of the parties in such case being immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 891.

Supplementary and ancillary proceedings and relief, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.]

In Equity. On demurrers by Alfred J. Ulman, the Crozer Land Association, and the Pocahontas Coal & Coke Company to the cross-bill of Samuel Ross.

At August rules, 1889, in the circuit court of McDowell county, W. Va., Alfred J. Ulman filed his bill against William R. Iaeger, William G. W. Iaeger, Lindon Kent, S. C. Neal, Enoch Totten, Henry S. Parmalee, trustee, Charles Benjamin Wilkenson, Charles P. Jenney, trustee, and Charles C. Harrison, and at September rules following he filed an amended bill against the same parties and one Elias Adler, in which he alleges, substantially, that on the 24th day of December, 1872, the defendant William R. Iaeger was the owner of a tract of 150,000 acres of land, known as the "Robert Pollard survey," chiefly situate, lying, and being in the county of McDowell, W. Va.; that the said William R. Iaeger on that day sold and conveyed to him, as tenant in common, one undivided fourth thereof by a deed of record in said McDowell county; that the land was entered upon the assessor's books in the name of himself and the said W. R. Iaeger in the year 1873, and returned delinquent in their names for the nonpayment of taxes for that year, and, not having been redeemed, was sold and purchased by the state; that at the April term, 1881, of the circuit court of McDowell county, H. C. Auvil, commissioner of school lands for said county, filed his petition against said 150,000 acres, asking a sale thereof for the benefit of the school fund of the state; that prior to this time he, the said plaintiff, had conveyed by deed to Lindon Kent, S. C. Neal, and Enoch Totten one-fifth undivided of his one-fourth undivided interest in said land, and to said proceeding instituted he, the plaintiff, William R. Iaeger, Kent, Totten, and Neal were made parties, and such proceedings were had therein that something over 7,000 acres of said land were sold by said commissioner of school lands and these sales were confirmed; that pending said proceeding the said plaintiff and William R. Iaeger filed their joint petition in said proceeding, asking to redeem said land, and also their joint petition to remove the cause to the federal Circuit Court, and further took and obtained an appeal to the Supreme Court of Appeals from the orders entered; that the federal court remanded said matter to the state court, and the Supreme Court dismissed said cause; that on the 8th day of February, 1883, the said W. R. Iaeger conveyed the equity of redemption in his three-fourths undivided interest in said tract of 150,000 acres of land to the defendant William G. W. Iaeger, his father, and, after various other proceedings had, the school commissioner, H. C. Auvil, sold said 150,000 acre tract of land for the taxes due thereon, which sale at the May term, 1887, was confirmed, and subsequently said commissioner Auvil conveyed said land to W. G. W. Iaeger alone; that such sale and conveyance to Iaeger alone was made without the knowledge or consent of plaintiff, and had only been discovered by him, plaintiff, a short while before bringing this suit; that on the 23d day of April, 1888, the said defendant, W. G. W. Iaeger, by a deed, conveyed the whole of said tract of land to Henry S. Parmalee, in trust to secure Charles Benjamin Wilkenson $16,000, and on March 26, 1889, he made another conveyance of the whole of said tract to the defendant Charles P. Jenney, trustee, to secure Charles C. Harrison $60,000; that he, the plaintiff, purchased his one-fourth interest from the said William R. Iaeger originally through Elias Adler; that said William R. Iaeger on April 3, 1874, conveyed said one-fourth undivided interest to said Adler, who was simply a trustee for plaintiff, he, the plaintiff, having paid the purchase money, and that said Adler on July 30, 1881, conveyed to him said undivided fourth, and that by this purchase and this conveyance the said W. R. Iaeger was first, and the said W. G. W. Iaeger subsequently became, tenant in common with him in said tract of land, and that all proceedings had in the redemption of said land were conducted by the said Iaeger on behalf of themselves and as co-tenant and agents of plaintiff and by his authority; that the said W. G. W. Iaeger repeatedly importuned plaintiff to buy his said interest, and plaintiff had no knowledge of his purpose to take from the commissioner of school lands a conveyance of the whole title thereto.

The plaintiff then charges that the purchase of said land by W. G. W. Iaeger from Commissioner Auvil inured to the benefit of himself and the said Iaeger, and had the effect to restore and reinstate the title to the 150,000 acres in them; that the deed of trust executed thereon by W. G. W. Iaeger to secure Wilkenson the sum of $16,000 had been paid off, and that the deed of trust executed by him to secure Harrison $60,000 was a sham, fraud, and device; that said Harrison never loaned to said Iaeger said sum of $60,000, but only a small part thereof, and that both of said trusts were taken in fraud of plaintiff's rights, with full knowledge of such rights and interest; that the same constitute clouds upon his title and interest in the said tract of land.

And the prayer of the bills are, substantially, that these clouds be removed; that the purchase from Auvil, commissioner, by W. G. W. Iaeger, be held to have been made for the benefit of himself and the plaintiff; that partition of the land be made, and that an accounting be had between said W. G. W. Iaeger and plaintiff on account of taxes and expenses incurred in perfecting the title.

To this cause the defendant William G. W. Iaeger in 1889 appeared and filed his petition, alleging, among other things, that the suit was wholly between citizens of different states; that each adverse party was a citizen of a different state; that the plaintiff Alfred J. Ulman was a citizen of the state of Maryland; that he, W. G. W. Iaeger, was a citizen of the state of New York; that the defendants Charles P. Jenney and S. C. Neal were citizens of the state of Virginia, Elias Adler of Maryland, Parmalee, Wilkenson, and Harrison of Pennsylvania, Lindon, Kent, and Totten of the District of Columbia, but neither had any interest in the suit and were improperly made defendants therein; that W. R. Iaeger was a citizen of the state of West Virginia, but had not any interest in the suit and was improperly made a party thereto, or, at least, could be considered only a formal party, and upon this petition, against the protest of plaintiff, the cause was removed to this federal court. During the course of the proceeding—whether in the state court before removal or after is not very clear, for portions of the records in both courts have become lost or mislaid—W. G. W. Iaeger filed his answer and also a cross-bill. By this answer and cross-bill, it was made apparent that new and additional parties were required because of various interests held by them, and plaintiff was required by order of court to file an amended bill, making, among others, Samuel Ross a party defendant because it appeared that while Ulman, the plaintiff, pending a suit, had conveyed to Totten, Kent, and Neal one undivided fifth of his undivided fourth interest, and that Totten and Kent, by subsequent deed, had conveyed back to Iaeger, that, on the other hand, Neal had conveyed his interest amounting to one-eightieth share to said Ross on November 14, 1889. This amended bill was filed on June 10, 1900, and to it Ross filed his answer, setting up his title to said one-eightieth interest, and asking that in any partition which might be made his said interest should be fully recognized and protected.

On the 3d day of July, 1906, this defendant, Samuel Ross, filed his cross-bill, in which he alleges himself to be a citizen of the District of Columbia, against the said Alfred J. Ulman, a citizen of Maryland, the Kanawha Banking & Trust Company, administrator d. b. n. c. t. a. of W. G. W. Iaeger, deceased, a West Virginia corporation, W. R. Iaeger, Martha G. Iaeger, citizens of West Virginia, Edwin Meyers and Anna I. Meyers, citizens of Pennsylvania, Samuel A. Crozer, John P. Crozer, and Mary Crozer Page, trustees of the Crozer Land Association, citizens of Pennsylvania, the Crozer Land Association, a Pennsylvania corporation, the Bouvier-Iaeger Coal & Land Company, a West Virginia corporation, the Ulman-Iaeger Coal & Land Company, a West Virginia corporation, and the Pocahontas Coal & Coke Company, a West Virginia corporation. In this cross-bill Ross sets forth the purpose and objects of the original bill substantially as above set forth, and that by subsequent proceedings and compromises had in the original cause all questions had been substantially settled and all relief obtained, save and except the partition between Ulman and his alienees and Iaeger and his alienees; that Ulman pending the suit had granted to Totten, Kent, and Neal one-fourth of his (Ulman's) undivided fourth interest; that Totten and Kent had conveyed their interest

by later deeds back to Iaeger, while Neal conveyed his interest of one-eightieth to him (Ross) on November 14, 1889; that Ulman admitted his (Ross') interest; that a controversy over the boundary lines had arisen between the parties to the suit and the trustees of the Flat Top Coal & Land Association, which had resulted in an ejectment suit and a compromise thereof, by reason of which suit partition could not be proceeded with, and that, for this reason, complainant had waited until the determination and compromise thereof to file his cross-bill; that Ulman in 1894 conveyed to John P. Crozer his interest in parts of the land, as shown by his deed exhibited; that W. G. W. Iaeger and Ulman in October, 1901, had conveyed to the Pocahontas Coal & Coke Company all the lands lying south of Tug river, and Ulman, Iaeger's administrators, and devisees subsequently had conveyed all their remaining interest to the Pocahontas Coal & Coke Company, but that all these conveyances excepted all lands and interest previously conveyed by the grantors Ulman and Iaeger, and that the grantees purchased with full knowledge of the rights of said Ross; that Crozer and the Pocahontas Coal & Coke Company both held school tax titles to certain parts or parcels included in said original tract, and these school tax sales were void, because the Pocahontas and Crozer Companies were in possession as tenants in common with said Ross, and both were largely indebted to him for coal and timber cut from the lands so owned by them in common; that a receiver in the ejectment suit appointed at the instance of Iaeger and Ulman had collected $166,000 which he had distributed to these tenants in common of said Ross, who had received his share, as well as theirs, and had not accounted to him for his part thereof. Ross then alleges that he was at all times ready and willing to pay his portion of the tax on said lands, that he has offered to do so from time to time, but could never get any account thereof from his co-tenants Ulman and Iaeger.

The cross-bill then further alleges conveyances by Iaeger and Ulman to the Ulman-Iaeger Coal & Land Company and to the Bouvier-Iaeger Coal & Land Company of portions of said land, and the prayer of the cross-bill is that since the complicated claims of title had been compromised and settled, that Ross have his one-eightieth interest set off to him by partition, and that he have also an accounting as to the coal and timber taken pending the suit by his co-tenants and of his share of the royalties received by them from the receiver and for general relief. To this cross-bill the Crozer Land Association and its trustees and the Pocahontas Coal & Coke Company and the defendant Alfred J. Ulman filed their several demurrers, and it is these demurrers that I am now called upon to determine.

As stated, a very considerable portion of the original papers in the cause have been lost or mislaid, but the plaintiff, Ross, by order entered on March 7, 1907, was permitted to file in the case a new transcript of the record of the original cause, as found in the circuit court of McDowell county.

Payne & Payne, Bates & Warren, and J. J. Darlington, for Ross.

Brown, Jackson & Knight and Holt & Duncan, for Pocahontas Coal & Coke Co.

Rucker, Anderson, Strother & Hughes, for the Crozer Land Association and its trustees.

George E. Price, for Ulman.

DAYTON, District Judge (after stating the facts as above). The grounds assigned for these demurrers have been reduced and condensed with remarkable clearness and brevity by learned counsel in a brief filed for the Pocahontas Coal & Coke Company, into these four propositions: First, a cross-bill may not be predicated upon a settled controversy; second, a cross-bill may not be used for the purpose of introducing new and indispensable parties; third, an original bill may not be filed in the guise of a cross-bill; and, fourth, if the present bill is to be treated as an original bill, this court has no jurisdiction, be-

cause it is not a controversy between citizens of different states, but a controversy between a citizen of the District of Columbia and citizens of certain states.

Taking up and considering these propositions in their order, it may be admitted at once that the first, as an abstract proposition, is both sound and self-evident. There can be no cross-bill without an original bill. When the original controversy has been settled and dismissed, this dismissal carries with it the dismissal of the cross-bill, unless affirmative collateral relief be asked for, and the fact that an original bill has once existed, but does so no longer, can give no ground for filing a cross-bill which would be in effect only an original bill or bill of review. See Story's Eq. Pl. §§ 398, 399, and note. It is therefore beyond peradventure true that a cross-bill cannot be filed in a controversy that has been settled. But how and when is a controversy "settled"? After suit in equity has been instituted in which a number have independent interests and are parties, can two or three of these parties make a compromise in pais, not ratified nor confirmed by the court, and thereby "settle" the controversy, and destroy the rights of others? Apply this proposition to the facts in this case. Ross alleges in his cross-bill that he purchased and took valid title to the one-eightieth part of this 150,000 acres of land; that Ulman instituted the original suit to clear its title and partition it among the tenants holding the same in common; that he, Ross, was recognized as such tenant in common by the principal defendant, W. G. W. Iaeger, and, upon the allegations contained in his answer, this court required the plaintiff Ulman to amend his bills, and make him, Ross, as such co-tenant, a party, which he did, admitting his right. Under such circumstances, can Ulman and Iaeger, by any number of private arrangements, compromises, or settlements, dispose of the case or controversy so as to deprive Ross of his independent right to have his rights determined, his interest ascertained and set off to him, not at the will of the other parties, but by the court of equity before whose bar he has been brought for the purpose? To allow them to do so would be to make equity a minister of wrong and oppression, instead of justice and good conscience. To allow them to do so would enable a tenant in common to consummate in equity an ouster of his co-tenant in common, a thing which equity condemns and suffers to be accomplished in pais only under extraordinary circumstances. In a case decided by the Supreme Court of Appeals of this state so recently as May 22, 1907—Reed v. Bachman, 57 S. E. 769 (advance sheets August 10, 1907)—in a very full, clear, and able opinion Judge Brannon has reviewed the duties and obligations existing between co-tenants in common and the legal rules governing this relation. Among other things, he says:

"We have seen from the law quoted above that the possession of one joint tenant is the possession of another, and that no mere silent possession by one for any length of time will alone divest the right of a brother tenant. That brother tenant may be in any part of this earth distant from the land, and he may repose in silence and confidence that his fellow's occupation will not destroy his right. He may assume this and sleep in composure. It is for the occupying tenant to let him know that he claims in hostility. The burden of showing this rests on him. Diligence is not required of the absent brother. Where there is a deed procured by fraud or mistake, for instance, diligence

after notice is required, and suit must soon be brought; but not so as to joint tenants. That brother is put by the law under no duty of inquiry or diligence. If he chooses to let a co-tenant retain possession and take the profits, he can do so. He is guilty of no negligence if he does not inquire. He may sleep in restful confidence of the good faith of his co-tenant under the law of co-tenancy. A co-tenant cannot lose his right by mere silence. That does not show acquiescence in loss of his estate."

If this be true, how much stronger must become the security of such tenant when his co-tenants have impleaded him in a court of equity, admitting his right and asking that his interest be ascertained in severalty, and how impossible after thus impleading him is it for them, by private agreements, conveyances, compromises, and "settlements" between themselves, to wrest this security, this vested right, from him. Again, it is the very touchstone of equity jurisprudence that, having taken jurisdiction, it will administer plenary justice to all parties, who may have interests in the subject-matter according to their right. No controversy is ever "settled" or ended in that court until all such rights and interests are fixed and determined by its decree, and this is true regardless of the time and delay involved in its doing so. A court of equity recognizes neither laches nor limitation in its own administration. I am therefore constrained to hold this first ground of demurrer untenable.

The second proposition, that a cross-bill may not be used for the purpose of introducing new and indispensable parties, I am not so ready to concede to be sound as an abstract principle of equity practice. It is based upon the ruling in Shields v. Barrow, 17 How. 130, 15 L. Ed. 158. This ruling has been much discussed by the courts, and quite a conflict has arisen as to it. In Brandon v. Prime, 14 Blatchf. 371, Fed. Cas. No. 1810, it is said:

"Opposed to all this, there is the remark of Mr. Justice Curtis in Shields v. Barrow, 17 How. 130, 15 L. Ed. 158, and the reason given by him in support of it, to the effect that new parties cannot in any case properly be added by cross-bill, without citing any authority for it, and books and cases that have followed that remark without citing any other authority. That precise question was not involved in that case, but the mere dictum of such a judge of such a court would ordinarily be followed, specially by lower courts. An examination of his reasoning shows that he made the suggestion without much examination probably, and his reasoning does not cover the whole ground as to all classes of cases. The modes of procedure he suggests would probably be ample in all cases of cross-bills brought for discovery in aid of a defense merely to the original bill, but not in cases of those brought for relief as well as defense, where new parties would be necessary to the relief sought."

In McComb v. C., St. L. & N. O. R. Co. (C. C.) 7 Fed. 426–427, it is held:

"It is proper for the defendant in a bill in equity, who files a cross-bill, to make defendants of parties not parties to the original bill, where they are necessary to complete relief"—citing Brandon v. Prime, supra.

In Mercantile Trust Co. v. A. & P. R. Co. (C. C.) 70 Fed. 518, the proposition is discussed fully, the remark of Mr. Justice Curtis is determined to be mere dictum, applicable only to cross-bills seeking discovery and not affirmative relief, and it is held that new parties can be introduced in cross-bills.

Hogg, in his able work of Equity Procedure (volume 1, p. 262, § 198), says:

"It is settled that, where a cross-bill is filed as a mere defense to the original bill, persons not parties to the original bill cannot be made parties to the cross-bill; but, if the cross-bill seeks affirmative relief, and shows that persons not parties to the original are necessary parties to the cross-bill, and the ends of justice require it, such persons should be made parties to the cross-bill."

This statement of the law is fully sustained, so far as the practice in West Virginia is concerned, by the case of Kanawha Lodge v. Swann, 37 W. Va. 176, 16 S. E. 462, where Judge Lucas reviews the two prior cases, apparently to the contrary, of McMullen v. Egan, 21 W. Va. 250, and W. Va., O. & O. L. Co. v. Vinal, 14 W. Va. 682, and overrules them in effect. On the contrary in Virginia, Derbyshire v. Jones, 94 Va. 140, 26 S. E. 416, would seem to hold to the opposite view, though not decisive.

A careful examination of these and other authorities cited by Mr. Hogg and in 5 Rose's Notes, p. 450, leads me to conclude that the second proposition of demurrants, that new parties cannot be made in any case, by cross-bills, is not sound, but that Mr. Hogg has correctly stated the true rule in the paragraph above cited.

But, if this were not so, in this case the proposition would not be tenable for another reason. The new parties introduced by this cross-bill are merely pendente lite vendees of the parties to the original bill. They are not indispensable parties. They not only purchased pending the suit, but also after formal notice of lis pendens had been entered of record in McDowell county. Under such circumstances, they can have no other or different rights than their vendors the original parties had, and it was not incumbent on Ross to make them parties at all to his cross-bill. If, therefore, he has brought them in and enabled them to have opportunity to defend independent of their vendors, they cannot complain.

In view of what I have already said, it is not necessary for me to consider the third proposition, that "an original bill may not be filed in the guise of a cross-bill," further than to say that, while absolutely sound as an abstract proposition, it is nevertheless wholly inapplicable to the facts and conditions existing in this case as set forth in the cross-bill. Counsel say:

"The litigation was compromised and settled, but the cause was permitted to sleep upon the docket for many years."

Well, be it so, who compromised and who "settled," and with whom and who permitted the cause to sleep? Was it not Ross' co-tenants who compromised and settled out of court, with themselves alone, and who let the cause sleep? And do they want equity to give them credit for their own acts in this particular, to the injury and deprivation of the rights of their co-tenant? Judge Brannon in Reed v. Bachman, supra, has so clearly shown that laches and negligence cannot be relied on in any event between tenants in common, and has so fully cited the authorities that I deem it unnecessary to pursue the question further.

We now come to the consideration of the fourth proposition, to the effect that, if the present bill is to be treated as an original bill, this court has no jurisdiction, because it is not a controversy between citizens of different states, but a controversy between a citizen of the District of Columbia and citizens of certain states. This must be admitted without a moment's hesitation. It is well settled that a resident of the District of Columbia is not "a citizen of a state" within the constitutional provision giving federal courts cognizance of controversies between citizens of different states. Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049. While this is true, it is equally well settled that in suits not original, but ancillary, to litigation already pending in a Circuit Court of the United States, the citizenship of the parties is wholly immaterial. Freeman v. Howe, 24 How. 460, 16 L. Ed. 749; Railroad Co. v. Chamberlain, 6 Wall. 748, 18 L. Ed. 859; Railroad Co. v. Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; First Nat. Bank v. Salem Mills Co. (C. C.) 31 Fed. 580. These cases hold necessarily a cross-bill to be such an ancillary proceeding. It is therefore clear that this fourth proposition, while absolutely sound in the abstract, can have no application in this case, for the simple reason that Ross' cross-bill can under no view of the case be considered an original bill, but, on the contrary, nothing more than an ancillary one, seeking enforcement of the equitable rights which he alleges are set forth and admitted in the bills filed in the original cause. There can be no question now as to this court's jurisdiction of the original controversy. It was brought in the state court by Ulman against not Ross, but his vendor, Neal, who by Iaeger's petition to remove was alleged to be a citizen of Virginia, and this allegation has never been denied. He having, after suit brought, conveyed his interest to Ross, this court, at the instance of Iaeger and by reason of the allegations of his answer, required Ulman to amend and make Ross a party. Ross filed his answer promptly, and asked that, in any partition that should be made, his one-eightieth share should be allotted to him. He now files this cross-bill to enforce this right, alleging the delay to have been occasioned by the pendency of litigation to settle title, which at last had ended. These allegations I must, upon demurrer, hold to be true, and, so regarding them, I cannot question this court's jurisdiction of the original cause nor Ross' right, regardless of his citizenship, to file this cross-bill; and the demurrer thereto must be overruled.

In re KUFFLER.

(District Court, E. D. New York. August 9, 1907.)

1. BANKRUPTOY—REFUSAL OF DISCHARGE—EFFECT IN SECOND PROCEEDING.

The refusal of a discharge to a bankrupt renders the issue as to his right to a discharge from debts provable in that proceeding res judicata, and he is not entitled to retry it in a second proceeding, even though the enforcement of such debts may have become barred by limitation; the bar of the statute being available to him as a defense when it is sought to enforce the debts or prove them in the second proceeding, but not on an application for a discharge.

2. SAME—REDUCTION OF DEBT TO JUDGMENT.

The fact that a debt proved in bankruptcy proceedings in which the debtor was refused a discharge was afterward reduced to judgment does not create a new debt in such sense that the bankrupt may retry the question of his right to a discharge therefrom in a second bankruptcy proceeding instituted by him.

In Bankruptcy. On motion to stay the bankrupt from applying for a discharge from certain debts.

See 153 Fed. 667.

Benjamin Tuska, for creditors.

Saul S. Myers, for bankrupt.

CHATFIELD, District Judge. The bankrupt, Adolph Kuffler, instituted a voluntary proceeding in the Southern District of New York on May 15, 1899, in which certain claims against him by Hinsdale, Smith & Co. and by Joseph Mayer's Sons were scheduled in his list of debts. After a considerable period of litigation, objections to his discharge having been filed by these creditors, his application for such discharge was dismissed for want of prosecution on the 12th day of October, 1903, and, with reference to these debts, this decision made the questions arising within the scope of that decision res adjudicata as to the bankrupt. An appeal was taken from this decision. The bankrupt petitioned for a review of this order, and this petition was dismissed by the Circuit Court of Appeals for this circuit. A motion for reargument was also denied; and upon the 18th day of December, 1905, the said bankrupt filed a voluntary petition in bankruptcy in the Eastern District of New York, upon which an adjudication was entered. Subsequently an application was made to this court to vacate and set aside this adjudication of December 18, 1905, and to dismiss the bankruptcy proceedings, with a stay of further prosecution by the bankrupt of said proceedings. An order to this effect was entered on the 19th of February, 1906, and from this order an appeal was taken to the United States Circuit Court of Appeals for the Second Circuit. This appeal was decided upon the 7th of January, 1907. 151 Fed. 12, 80 C. C. A. 508. The Circuit Court of Appeals reversed the order of dismissal of February 19, 1906, without prejudice to an application by the creditors, such as was suggested in the opinion. This suggestion is as follows:

"It is the right of an insolvent debtor who may have acquired property and incurred debts subsequent to an adjudication of bankruptcy to prosecute a second proceeding to obtain his discharge. The effect of an order like the one under review would be to deprive him of that right"—the court in its opinion having previously said that "some debts are scheduled in the second proceeding which were not provable in the first."

With reference to the debts and assets scheduled in both proceedings, the court in its opinion says:

"Where the same debts and the same assets are scheduled in the two proceedings, one being commenced subsequent to the termination of the other, it is manifest that the last proceeding is merely an attempt to evade the former one. To permit it would be to sanction a fraud upon the court. As this court said in Re Fiegenbaum, 121 Fed. 69, 57 C. C. A. 409: 'Not only should the court of bankruptcy protect the creditors from an attempt to retry an is-

sue already tried and determined between the same parties, but the court, for its own protection, should arrest, in limine, so flagrant an attempt to circumvent its decrees.'"

The meaning of the Circuit Court of Appeals decision is apparently that the bankrupt, if insolvent, may apply for a discharge from debts acquired subsequently to the first proceeding, and any debts incurred previous to the former proceeding, but not provable therein, provided these debts are such as can be discharged in bankruptcy.

Under this decision, the matters relating to the debts with relation to which a discharge was refused in the first proceeding are res adjudicata as against the bankrupt in so far as the issues involved in the original proceeding affect these claims. The bankrupt has attempted to bring in many questions concerning the original claims and his reasons for being unable to prevent the denial of a discharge in the first proceeding. These are all immaterial so far as the question of a discharge upon the grounds of the original application are concerned.

The bankrupt, as has been decided by the Circuit Court of Appeals, may prosecute the present proceeding with reference to debts not affected by the original proceeding; that is, he may prosecute a proceeding in bankruptcy with reference to any claims, in so far as the issues relating to those claims are outside of those rendered res adjudicata by the order of October 12, 1903. The bankrupt in the present proceeding attempts to take the claims of Hinsdale, Smith & Co. and Joseph Mayer's Sons out of the scope of the former decision, and to free these claims from the question of res adjudicata, by setting up the proposition that these claims have since the original application become unenforceable through the accrual to the bankrupt of a defense under the statute of limitations of the state of New York, and, by the further argument, that these claims have been reduced to judgment in the state court, and thereby merged in new debts provable in the new proceeding. It therefore remains to be considered whether the previous bankruptcy proceeding, or the dismissal of the application for a discharge upon these debts, would prevent the statute of limitations from running. This is a question to be determined by the referee in the present proceeding, and cannot be disposed of upon a motion like the one now before the court, to stay the bankrupt from obtaining a discharge on the grounds already considered in the prior bankruptcy proceeding.

It would seem, therefore, that (inasmuch as the bankrupt was refused a discharge) section 14b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 500 [U. S. Comp. St. 1901, p. 3427]), prohibiting a second application within six years after a prior discharge, is not applicable, and under the decision of the Circuit Court of Appeals, the bankrupt may prosecute the present proceeding with reference to any matters not res adjudicata, and as to any claims not provable in the original proceeding, or not themselves rendered res adjudicata, so far as the present application for a discharge is concerned.

In so far as the claim of the statute of limitations may be a defense, it would be a ground for a motion to expunge the claims before the referee, and would be an answer to any suit upon these claims. The

bankrupt therefore, if insisting upon the defense of the statute of limitations, is not in a position to ask for a discharge in bankruptcy from the claims against which he alleges that the defense exists. He is precluded by the decision in the former proceeding from asking for a discharge from these claims upon the grounds previously adjudicated in the former proceeding, and the motion of the creditors Hinsdale, Smith & Co. and Joseph Mayer's Sons should be granted in so far as they ask for a stay against the bankrupt from applying for a discharge with respect to their claims. With reference to these claims, the bankrupt must be left to his ordinary remedies, and to any defenses which he can substantiate to actions brought upon these claims. The present proceedings may be prosecuted by him with reference to the debts not included in the first proceeding or rendered res adjudicata therein, as above set forth. If, however, the claims have since been merged into judgments, and thus taken out of the six-year statute of limitations, it must first be determined whether thereby a new debt has been created. It may be admitted that the judgment is a new debt in so far as it wipes out the old debt upon the simple cause of action, and would defeat the effect of a previous discharge, if the creditor elected and were allowed to obtain the judgment in preference to claiming his rights under the old bankruptcy proceeding. Bradford v. Rice, 102 Mass. 472, 3 Am. Rep. 483. But it does not follow that, where a discharge has been refused, a prosecution to judgment will create a debt upon which a new petition in bankruptcy can be founded. This would defeat the very object of the section. Bankr. Act 1898, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, § 14b, subd. 5 [U. S. Comp. St. Supp. 1905, p. 684].

As to the further contention that, upon an application for discharge, the effect of a discharge cannot be considered, but merely the bankrupt's right thereto (In re Claff [D. C.] 111 Fed. 506; In re Thomas [D. C.] 92 Fed. 912; In re Rhutassel [D. C.] 96 Fed. 597), it is considered that the objection is without force upon this motion.

The discharge is from "all provable debts except the debts therein specifically excepted" (section 17, Bankr. Act 1898), and the debts in question herein are provable and will be discharged, especially as they have been included in the present schedules, unless excepted from the discharge in terms; that is, "specifically" named as excepted.

The cases cited by the bankrupt, and referred to, supra, hold simply that if a debt is not provable (that is, not such a debt as can be discharged) that fact is to be determined when the discharge is set up as a defense to their enforcement, and not upon the application for the discharge itself. But these cases are not authority for the proposition that provable debts, not intended to be discharged, should not be specifically excepted from the order of discharge.

The motion to stay the bankrupt from applying for a discharge upon the debts of Hinsdale, Smith & Co. and Joseph Mayer's Sons will be granted.

CITY OF SACRAMENTO v. SOUTHERN PAC. CO. et al.

(Circuit Court, N. D. California. September 3, 1907.)

No. 14,006.

INJUNCTION—PRELIMINARY INJUNCTION—RIGHT IN GENERAL.

Where an answer not only puts in issue all the material averments of the bill, but fully negatives its equity, whatever the rights of the parties may ultimately be found to be on final hearing, the complainant is not entitled to a preliminary injunction, except it appear either that irreparable injury will result from its denial or that some special or peculiar circumstances exist to warrant a departure from the rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 319.]

In Equity. On motion for preliminary injunction.

R. Platnauer and A. A. De Ligne, for complainant.
Devlin & Devlin, for defendants.

VAN FLEET, District Judge. An attentive examination of the pleadings and the affidavits used at the hearing, in the light of the very full and thorough presentation of the matter by counsel for both sides, discloses no fact to take the case out of the general and well-settled rule that when, as here, the sworn answer fully and positively, in unequivocal terms, denies all the material allegations of the bill on which the complainant's asserted equity rests, a preliminary injunction will be denied, or, if previously granted, will be dissolved. High on Injunctions, §§ 698, 1505; Home Insurance Co. v. Nobles (C. C.) 63 Fed. 642; St. Louis, K. C. & C. Ry. Co. v. Dewees (C. C.) 23 Fed. 691.

The bill seeks to enjoin the defendants from proceeding with the construction of a certain platform or structure in course of erection by them at the commencement of the suit, on a strip of ground near the river front of the complainant, particularly described, and alleged to be a part of Front street, one of the public streets of the municipality, and which structure it is alleged is of a character to constitute an obstruction to the free use of said street and as such a public nuisance; and it is asked that the defendants be required to remove such obstruction and be perpetually enjoined from digging into, tearing up, or otherwise interfering with any portion of the premises in dispute. The verified answer of the defendants not only denies categorically that the strip involved is a part of Front street, or that said street is being in any manner obstructed by them, but sets up affirmatively that the disputed premises is wholly outside the limits of Front street, or any other street in the city, and lies between the west line of said Front street and the east bank of the Sacramento river (which defines the boundary of the city on the west), and constitute a part of the levee system of said city on its water front; and it is alleged that defendants and their predecessors in interest have, for more than 30 years, under the sanction of franchises and ordinances duly granted and passed by the authorities of the city and a confirmatory act of the Legislature of the state (all of which are set out and alleged to be still in full force and effect), occupied and had possession of the

premises in dispute, with other portions of said water front and levee, for general railroad and shipping or transportation purposes, with right to erect thereon railroad tracks, wharves, sheds, platforms, and other structures appropriate for the purpose; that no objection has ever been interposed by complainant to such use, nor has it ever raised any question as to the validity of said franchises or ordinances or the rights claimed thereunder by defendants prior to the commencement of the suit. But it is alleged that, to the contrary, the complainant has permitted defendants and their predecessors in interest to rest upon the existence of the said ordinances and franchises, and to expend large sums of money in the construction and maintenance of such railroad tracks, sheds, platforms, and other structures hereinbefore referred to, and that complainant is in equity and good conscience now estopped to maintain the present action, or to assert that the ordinances referred to are not in full force and effect, or in any way to interfere with or enjoin the defendants from exercising the rights granted and secured to them by the terms thereof.

It thus appears that the answer not only puts in issue all the material averments of the bill, but fully negatives its equity; and it is therefore obvious, under the rule above stated, that whatever the ultimate rights of the parties may, upon a final hearing of the suit, be found to be, the plaintiff is not entitled to a preliminary injunction, except it appear either that irreparable injury will result or that some special or peculiar circumstances exist to warrant a departure from the rule. No such circumstances are disclosed, nor is there anything to indicate that any material injury whatsoever, not already accrued, will result to the complainant's interests from the alleged acts of the defendants. In fact, there is no serious question made by complainant as to any damage that is to result from defendants' use of the premises pending the action; its principal contentions being as to the validity or limitations of the ordinances under which defendants claim, and as to whether, in fact, the property involved is a part of the public street. But these are questions which, while involved in the final determination of the case, may not properly be discussed at this time, since they cannot be determined upon this motion. Ryan v. Williams (C. C.) 100 Fed. 177.

All that is to be determined here is the question as to the complainant's right, in the present state of the pleadings and under the facts presented at the hearing, to have the defendants' threatened acts restrained pending final determination; and it is clear from the showing made that complainant is not entitled to that relief.

For these reasons, the motion for an injunction pendente lite will be denied, and the temporary restraining order heretofore granted by the state court on the filing of the bill therein will be dissolved. An order will be entered accordingly.

END OF CASES IN VOL. 155.